REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022/002958

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

…… ..21/09/2022…
SIGNATURE **DATE**

In the matter between:

INZALO ENTERPRISE MANAGEMENT SYSTEMS (PTY) LTD	**Applicant**
and	
MOGALE CITY LOCAL MUNICIPALITY	**First Respondent**
MAKHOSANA MSEZANA N.O	**Second Respondent**
MAKHOSANA MSEZANA	**Third Respondent**

In re:

INZALO ENTERPRISE MANAGEMENT SYSTEMS (PTY) LTD	***Applicant***
and	
MOGALE CITY LOCAL MUNICIPLAITY	***First Respondent***

MUNICIPAL MANAGER ***Second Respondent***

JUDGMENT

MANOIM J:

[1] This is an application to place the respondents in contempt of an order given by Molahlehi J on 14 June 2022. This case centres on a tender that the Mogale City Council put out for the provision of a financial management system. The contract was to last for three years. The system is referred to as the Municipal Standard Charter of Accounts (MSCOA) and has to be compliant with regulations that govern local authority accounting. The tender was apparently not awarded because it was considered unsuccessful and was then re-advertised again with the same result. However, one firm, Solvem was then appointed as the service provider. It remains unclear to this day as to how it was appointed, by what process, and by whom for the Municipality.

[2] The applicant in these proceedings, Inzalo was amongst the firms that tendered. When Inzalo learnt that the contract had been awarded outside of the tender process, it brought an urgent application to challenge it. Molahlehi J who heard the matter as an urgent application gave an interim order in which he interdicted the implementation of the decision to appoint the service provider (referred to in the order as the impugned decision) and then interdicted the appointed service provider from continuing to work on the financial system pending a review to be brought by Inzalo. In the interim as well the Municipality was required to provide a list of documents to Inzalo and to indicate what process had been followed to appoint it. At that time Inzalo did not know the name of the appointed service provider nor if more than one firm had been appointed. For this reason, the firm is simply referred to in the order as the "appointed service provider/s". However, since this order was granted, it has emerged that a single service provider was appointed, a firm known as Solvem.

[3] The Municipality applied for leave to appeal the Molahlehi J decision but was refused. At the time of the hearing of this contempt application the Municipality

stated it intended to petition the Supreme Court of Appeal. It has since done so.

[4] Inzalo then brought this contempt application on 26 August 2022. The central contention is that the Municipality has done nothing to implement the Molahlehi J order. I will not repeat the terms of the whole order as it is lengthy. The order is in the form of an interim interdict pending Inzalo bringing internal remedies in terms of the Municipal regulations and thereafter a review. The conduct sought to be interdicted can be summarised as follows:

a. The first part of the order is to interdict the Municipality and the appointed service provider (now known to be Solvem) from further implementing the latter's award as service provider for the MSCOA system. (Paragraph 2 of the order).

b. The second part of the order requires the Municipality to provide information to the applicant, inter alia the record of decision, and proof that it has complied with its various regulatory obligations (paragraph 4)

c. The final part (paragraph 5) requires information in the event that the appointment had been made following some process other than the tender process.

[5] At the time I heard this application the Municipality has not complied with any of these obligations. The applicant contends that for this reason the Municipality and its Manager, the second respondent, are in contempt of court and should be ordered to show cause why a warrant should not be issued for the arrest and committal of the municipal manager and, in the alternative, for both respondents jointly and severally to pay a fine of R 250 000. This more punitive aspect of the relief was later ameliorated after the hearing at my request. The amended draft order omits the committal aspect but still provides for the respondents to show cause why they should not be fined an amount of R 250 000 to be paid to the applicant.

[6] The Municipality contends that it can justify its non-compliance with the order. In brief it puts up the following explanation. It is not certain how Solvem got appointed. Extraordinary as this claim might sound, the Municipality says it was

the Acting accounting officer, a Ms Diale, who allegedly made the appointment on 29 April 2022. Solvem commenced work on 1 May 2022, and it is alleged has been rendering services since then. Diale and another employee, whose involvement is not made clear, were put on special leave following a special council meeting on 18 May 2022.

[7] Since then, the Municipality has also obtained two Anton Piller awards against Diale; one in the High Court in Pretoria and the other in the High Court in Polokwane. But it does not yet know what fruits this process will yield. This is because the Anton Piller process requires the sheriffs to hand over the seized documents to an independent attorney to assess the documents before they can be given to the Municipality. That process remained incomplete at the time of the hearing. The Municipality states further it can find no other documents of the kind sought on its premises although it claims it searched for them. Accordingly, it contends it has been impossible to comply with the documentary part of the order.

[8] It must be noted that the Municipality does not contend that the award was lawful. Mr Botha who appeared for it stated in no uncertain terms that he concedes the process was irregular. This concession may indeed render some of the document requests otiose. After all, if the triad of tender committees had never been established to award the contract to Solvem then asking for that which does not exist seems pointless. That said however, the lack of any positive response from the Municipality to the situation in which it finds itself is a matter of concern. If its current officials are groping in the dark to find the answers they need to say so and why. This it has not done and only in response to this application has it given some, but wholly unsatisfactory explanation.

[9] On behalf of the second respondent the argument was that he has only recently taken up office (on 9 May 2022) and thus after Diale had appointed Solvem. He claims for this reason he is not in a position, as at this time, to provide further information.

[10] What the respondents have now offered is to bring an application for self-review of the impugned decision within 15 days of receipt of the Diale documents from the Sherriff. I have annexed this undertaking as “X1” to the order I have granted.

[11] More controversial is its response to the interdict from continuing to make use of the services of Solvem. Here there is a dispute of facts which I cannot easily resolve. At the time the Molahlehi J order was obtained, Inzalo did not yet know the identity of the appointed provider. Now in this application that firm has been identified as Solvem. It is common cause that the process of integrating a new MsCOA supplier is not a straightforward matter of installing a new software package. The process requires integration although neither party explains how long this may take. What is not clear from the facts is who is providing the current service, Solvem or the prior supplier, whose name is not known to me. In the original application the Municipality said the following:

> "*31.3 The most devastating consequence will be that the first respondent's ability to collect rates and taxes due to it, will come to a standstill. I can state as a fact that the first respondent's contract with its previous service provider came to an end and that the previous provider is still only involved in a temporary transitional process. If the present newly appointed service provider does not carry on with the performance of its obligations without interruption, the first respondent will not be able to send out accounts in respect of rates and taxes. No accounts means no payments and without its income the first respondent will come to a standstill.*

[12] Inzalo suggests that the problem is easily resolved, and the previous provider can continue to provide the service. The Municipality allege that the contract has expired. Inzalo argues that a deviation can be obtained to extend the contract. But Inzalo is not in a position to make these recommendations. It does not know whether this solution is either feasible technically or whether the previous provider is willing to do so, and if so, at what price for its services.

[13] The Municipality paints a grave picture of any disruption to the status quo. The solution suggested by Inzalo, it contends, would sever the financial artery of the municipality. Accounts could not be rendered to ratepayers with consequences of its income. This is the reason the Municipality wishes to both appeal the Molahlehi J decision, and, it now says, to bring about a self-review of the type contemplated in *Gijima*. In that case the Constitutional Court held that an organ

of state may seek the review of its own decision in terms of the principle of legality.[1]

[14] In respect of the petition to appeal it *inter alia* seeks a structural remedy of the type granted by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC).

[15] The Municipality relies on getting a form of structural relief both as the basis for its appeal to the SCA should it succeed with its petition and as relief in the proposed self-review. In *Allpay* the court held in relation to the correction of invalidity that a just and equitable order must be made and then explained how this is arrived at:

> *"This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity — in this case the setting-aside of the contract between SASSA and Cash Paymaster — but also in relation to the effect of the order on future procurement and social-security matters.*
>
> *The primacy of the public interest in procurement and social-security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range."*[2]

[16] In following this judgment, I have eschewed following a one dimensional approach. It is impossible for me on these papers to decide the dispute over

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[1] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paragraph 41.

[2] *AllPay* paragraphs 32-3.

the ongoing service provision. The most I can decide is that the consequences for the Municipality and the public, of further interdicting the operations of the Solvem are so massively consequential that prudence dictates that I accept the Municipality's' version. But there is also another reason for doing so. Solvem was not a party to the original application (admittedly for understandable reasons) and is not a party to the present one, although it should have been given the nature of the relief in 2.5 of the order which imposes obligations on it.

[17] I am thus not able to grant this relief nor to conclude that based on the papers that the Municipality is in wilful default until further facts are made known. However, I am less inclined to be sympathetic to the Municipality's failure to give reasons as was required in terms of paragraphs 4 and 5 of the Molahlehi J order. Even if the Municipality is genuinely in the dark, as it claims it is, it could still nevertheless have taken steps to give reasons to say so. This is part of its obligations as a public body to be transparent in terms of the Constitution. It is not a private contracting party hedging its bets. Here I find the Municipality in certain respects is prima facie in contempt of the Molahlehi J order and must show cause why it should not be sanctioned for non-compliance.

[18] In respect of the other information sought, I am willing to give some latitude to the finalisation of the Anton Piller process in the manner suggested in the proposed draft order made by the Municipality at my request. This will mean that compliance with this undertaking is a factor that a court hearing the *rule nisi* may take into account for the purpose of determining whether the respondents have discharged their prima facie contempt of the Molahlehi J order. The terms of the undertaking are set out in Annexure X to the order.

[19] The relief I have decided upon is an amalgam of the relief offered by both parties in their draft orders submitted to me at the end of the hearing. The relief recognises the Municipality's difficulties whilst at the same time not letting them off the hook entirely.

Costs

[20] The fact that I have not found the Municipality in wilful default in every respect at this stage does not mean that they get a free pass. The failure to make some

attempt to give reasons, to communicate with the applicant about its difficulties and to be pro-active about self-review deserves censure in the form of a punitive costs order. I am therefore awarding the applicant costs on an attorney client scale.

ORDER:-

[21] In the result it is ordered and declared that:

1. The Applicant's non-compliance with any of the forms and procedures and prescribed time periods provided for in the Uniform Rules is hereby condoned and the forms and procedures and prescribed time periods provided for in the Uniform Rules are dispensed with and that this application be heard, determined, and disposed of as an urgent application in accordance with the provisions of Uniform Rule 6(12).

2. The First Respondent ("**the Municipality**") and Second Respondent ("**the Municipal Manager**") are in wilful and deliberate contempt of order 4 and 5 of this court as granted by the Honourable Justice Molahlehi on 14 June 2022 under case number 2022/2958, set out on Case lines from 000-1 to 000-7 ("**the Molahlehi Court Order**").

    2.1. The Municipality and the Municipal Manager are ordered and directed to immediately deliver to the Applicant within 7 (seven) days of this court order:

        2.1.1. The Municipality's written reasons for the Impugned Decision together with the items stipulated in prayer 4 and where applicable 5 of the Molahlehi J Court Order; and

        2.1.2. In the event that the Municipality is unable to deliver any of the items stipulated in prayer 4 and 5 of the Molahlehi J Court Order, then in such event the Municipal Manager is ordered and directed to deliver together with the written reasons by the Second Respondent as aforesaid a duly

sworn and commissioned affidavit setting out the reasons why such items have not been delivered to the Applicant.

3. A *rule nisi* is hereby issued calling upon all persons with a legitimate interest to show cause, if any, on a date to be arranged with the Registrar why the following orders should not be made final: -

    3.1. That the First Respondent and/or the Second Respondent and/or the Third Respondent, jointly and severally, the one paying the other to be absolved, be ordered to pay a fine in the amount of R250,000 to the Applicant;

    3.2. For purposes prayer 3.1 above, it is hereby ordered and directed that the Applicant is granted leave to file a supplementary affidavit setting out any further facts within 30 days of granting this court order.

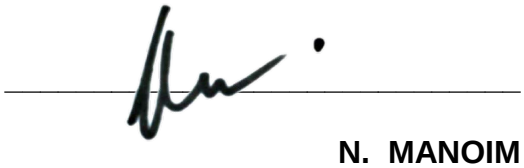
    3.3. Further, for the purpose of prayer 3 above, the First and Second respondent may file an affidavit to demonstrate their compliance with the undertaking given by them set out in Annexure X hereto.

4. The First Respondent is to pay the costs of this contempt of court application, such costs to be taxed on the attorney client scale, including the cost of counsel.

Annexure X

1. The first respondent is ordered to, within 15 days after receipt of the documents and other material from the Sheriff of the High Court, Polokwane and the Sheriff of the High Court, Pretoria seized by them as a result of the Anton Piller orders executed by them, launch an application for the self-review of its impugned decision referred to in prayer 3.1 of the notice of motion.

2. The Sheriff of the High Court, Polokwane and the Sheriff of the High Court, Pretoria are directed to deliver to the first respondent the documents and other material seized by them as a result of the Anton Piller orders executed by them within 10 days after this order is e-mailed to them.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 07 September 2022

Date of judgment: 21 September 2022

Counsel for the Applicant: WH Pocock

Instructed by Di Siena Attorneys

Counsel for the Respondents: J.J. Botha and J.P. Slabbert

Instructed by: Smith Van Der Watt Incorporated