IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

	DELETE WHICHEVER IS NOT APPLICABLE
(1)	REPORTABLE: (YES)/NO
(2)	OF INTEREST TO OTHER JUDGES: (YES)/NO
(3)	REVISED
	DATE: 10 August 2016
	SIGNATURE: Jansen

21/9/16

CASE NO.: 16611/2010

In the matter between:

PUBLIC INVESTMENT CORPORATION LIMITED ~~Appellant~~ Plaintiff

and

LOCAL MUNICIPALITY OF MADIBENG ~~Respondent~~ Defendant

JUDGMENT

JANSEN J

[1] The plaintiff, in its particulars of claim, relied on three zero coupon stock certificates issued by the local Municipality of Madibeng (or rather its predecessor-in-title the Brits Town Council). The plaintiff is the Public Investment Corporation Ltd, a juristic person established as a company in terms of the provisions of section 2 of the Public Investment Corporation Act 23 of 2004, (the successor-in-title of the Public Investment Commissioners established in terms of the Public Investment Commissioners Act 45 of 1984).

[2] It is nowhere pleaded in respect of which loans the defendant issued the zero coupon stock certificates.

[3] In its plea, the defendant pleads, as a special plea, that the plaintiff's claims had prescribed. Within the body of its plea (not as a special plea) the defendant pleaded that it had not duly been authorised to issue the zero coupon certificates. The zero coupon certificates, so the defendant pleads, were issued in contravention of the Local Government Ordinance 17 of 1939 ("**the Ordinance**") and the defendant further pleads that it was not in law duly authorised to issue the zero coupon bonds to the plaintiff.

[4] The defendant further pleads that: —

- At all material times, and in particular, on 11 January 1994, when the zero coupon certificates were issued, the defendant was a municipality to which the Ordinance applied;

- the zero coupon certificates upon which the plaintiff relies, purport to have been issued in terms of section 52 of the Ordinance;

- the issuing of the zero coupon certificates to the plaintiff amounted to raising a loan;

- in terms of section 52(1)(a) and (b) of the Ordinance, the defendant could only raise a loan for purpose of defraying expenditure in the execution of its powers; or repaying an existing loan; or to finance temporarily loan expenditure or expenditure on revenue account incurred in anticipation of receipt of revenue estimated in terms of section 58 and from which the expenditure would have been defrayed;

- in terms of section 52(2) of the Ordinance, the defendant could only raise a loan contemplated in section 52(1) with the prior written approval of the Administrator appointed in terms of section 68 of the Union of South Africa Act, 1909;

- the loans allegedly raised by the issuing of the certificates were not raised for any of the purposes contemplated in section 52(1) of the Ordinance and were not raised with the prior written approval of the Administrator. The Administrator could not have validly and lawfully approved the raising of the loans in view of the fact that the purpose of such loans would in any event have been unlawful;

- the defendant further pleaded that were it to be held that the Administrator did give written approval, such approval would have been *ultra vires* due to the fact that the purpose for which the loans were purportedly raised is not a purpose for which the Administrator could in law have validly and lawfully approve such certificates;

- hence the raising of the loans by the issue of the zero coupon certificates was accordingly *ultra vires*, did not and could not have created a valid and lawful obligation capable of giving rise to any of the claims upon which the plaintiff relies in these proceedings;

- there is, accordingly, no valid debt owing by the defendant to the plaintiff due to the fact that the basis of the plaintiff's claims is invalid and of no force and effect in law for the reasons stated above.

[5] It was further pleaded that in terms of section 52(3) of the Ordinance, when a loan contemplated in section 52(1)(a) of the Ordinance is raised, for example, by the issue of zero coupon certificates, the provisions of the Johannesburg Municipality Borrowing Powers Ordinance 3 of 1903 ("**the Johannesburg Ordinance**") shall apply *mutatis mutandi.* The defendant pleads that the issue of the zero coupon certificates breaches sections 5, 6, 7, 8, 22, 25, 29, 39 and 53 thereof and the format prescribed by sections 9 and 20 of the Johannesburg Ordinance.

[6] In its replication the plaintiff pleads that the loans or transactions giving rise to the litigation were not regulated by the Ordinance nor was section 52 or

any other provisions thereof applicable to the loans, alternatively if they were, the defendant was represented by a duly authorised representative further, alternatively, the defendant is estopped from denying the authority giving rise to the loan agreements and/or transactions.

[7] The defendant also counterclaimed for repayment of the amounts it had paid in terms of the coupons on the basis of unlawful enrichment of the plaintiff (the *condictio indebiti)*, and, *inter alia*, relied on such payments to demonstrate that prescription had been interrupted.

[8] Confusion seemed to reign in the defendant's mind as it conflated a loan with the security for a loan (*in casu* being a zero coupon certificate). However, this is an argument for another day.

[9] A mere two days before the trial, the defendant served a Rule 31(4) notice on the plaintiff seeking a separation of issues – namely that the issue of the validity and enforceability of the zero coupon certificates be heard separately. This was initially opposed by the plaintiff but, given the time limit available for the hearing and the fact that the plaintiff had not sought a special trail date, it was decided, with the assistance of the court, in order to utilise the limited days available properly, to hear the issue of the validity and enforceability of the zero interest certificates first and to separate it from the other issues.

[10] The parties were afforded the opportunity to prepare and answer a proper Rule 33(4) application and heads of argument in respect thereof. The court understood that the matter could be argued with reference to the voluminous discovery bundles without hearing oral evidence, and that the affidavits to be filed in the Rule 33(4) application would serve as a guide to the relevant discovered documents for the court's convenience.

[11] The remainder of the issues in the trial was postponed *sine die*.

[12] It was agreed and accepted by the court that any evidence required would be in the form of affidavit evidence and that the defendant bore the onus regarding the validity issue.

[13] It should also be borne in mind that in order to establish upon which litigant the onus rests to prove the invalidity/validity of the certificates, the pleadings have to be analysed. The question is whether the issue of the certificates is merely *prima facie* proof of their validity, and whether the defendant's onus to prove the invalidity of the zero coupon certificates was a full onus or only one of rebuttal.

[14] For example, in respect of a patent issued in terms of the Patents Act 57 of 1978, it is stated that a patent will be regarded as *prima facie* valid, but nonetheless the party attacking its validity bears the onus to prove it. The same principle applies to a registered trade mark registered in terms of the Trade Marks Act 194 of 1993.

[15] It is trite that a court may not give judgment or make a ruling in respect of matters which are not before it as was held by a full bench. In the judgment of ***Mamela Taxi Rank (Pty) Ltd v Mamela Taxi Association and Others*** **(CA 155/2010) [2010] ZAECMHC 31 (28 October 2010)**, the court at paragraph [**23**], held: —

> ***"A trial or legal proceedings can only be fair if, inter alia, the persons against whom the order is made are parties to the litigation, the material issues are adequately canvassed in the papers, ventilated by the evidence and addressed during argument by the parties to the litigation."'*** (Emphasis added)

[16] In ***Kouesa v Minister of Home Affairs, Namibia and Others*** **1996 (4) SA 965 (NmS)** the Namibian Court of Appeal held at 973I–974A: —

> ***"It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants neither in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel."*** (Emphasis added)

[17] The principle has now been endorsed by the Supreme Court of Appeal in ***National Director of Public Prosecutions v Zuma (Mbeki and others***

***intervening)* 2009 (2) SA 277 (SCA)** and confirmed in ***Ekurhuleni Municipality v Dada NO and others* [2009] 3 All SA 379 (SCA).** At pages 287–288 (paragraph 15), Harms DP in ***Zuma** supra* stated: —

> *"...in exercising the judicial function judges are themselves constrained by the law. ... ... This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; ... ..."*

[18] The essence of the ***Zuma*** matter is therefore that a court cannot make a finding on an issue which was never raised in, e.g. argument.

[19] The relevance of section 48A of the Ordinance has now pertinently been raised by the defendant and the plaintiff is fully aware thereof and had ample opportunity to respond thereto in written or oral argument. This section is dealt with below and has an important impact on the validity or otherwise of the zero coupon certificates.

[20] Once this is the case, the court may take the section into consideration and reach a conclusion. It often happens that a party overlooks a section of an Act and only argues it at a hearing of a matter. Should the point seem meritorious, the manner in which a fair trial is guaranteed is by allowing the other party an opportunity to prepare and deliver oral or written arguments in respect thereof. This will ensure that no trial by ambush takes place. As

stated, the plaintiff, *in casu*, was given ample time to deliver written and oral argument on the point.

[21] Two further points of substance were raised by the parties. The plaintiff argued that where a contract, for example, is based on a statutory illegality, it is held to be void *ab initio*. It referred to the case of ***Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A)** where Metro Cash and Carry was carrying on the business of a general dealer without a certificate of registration and licence. In that case, section 3 of Ordinance 15 of 1953 provided that: —

> *"**No person shall carry on a business unless he is in possession of a certificate of registration and a licence issued to him in terms of this ordinance.**"*

[22] The Court at p 188 A – B held that: —

> *"**It is a principle of our law that a thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition operates to nullify the act: Schierhout v Minister of Justice 1926 AD 99 at 109. If therefore on a true construction of s 3 the contracts in question are rendered illegal, it can make no real difference in point of law what the other objects of the ordinance are. They are then void ab initio and a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not.**"*

[23] That case differs from the current one in that in this matter a "licence", to use the analogy, was issued in this matter but is stated to be defective. Hence, the zero coupon certificates were issued due to administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000.

[24] The plaintiff, on the other hand, argued that in circumstances where an administrative act is stated to be unlawful, a proper application for the review of the relevant administrative action should be brought. It referred to the matter of ***MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*** **(CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014)** at paragraph [64] where the Constitutional Court held as follows: —

> ***"Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective***

decision, so that the court can properly consider its effects on those subject to it."

[25] In developing this principle, the Constitutional Court at paragraph [**102**], held that: —

> ***"In the present case, the Supreme Court of Appeal relied on this passage in concluding that the Department was not entitled simply to ignore the approval.*** [1] ***And rightly. In doing so, the Court acted in accordance with the stature Oudekraal has acquired over the last decade. It has been consistently applied by the Supreme Court of Appeal*** [2] ***as well as by this Court.***[3] ***The underlying principle, that public officials may not take the law into their own hands when seeking to override conduct with which they disagree, has also been given effect in three cases involving schools' policies on admission of learners."***

[26] The Constitutional Court summarised the principle at paragraph [**105**] as follows: —

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[1] ***MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute*** **2014 (3) SA 219 (SCA)** at para *20*.

[2] As pointed out by the defendant in its heads of argument - in ***Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others*** **[2008] ZASCA 28; 2008 (4) SA 43 (SCA)** at para 14, the Court, applied ***Oudekraal***, and held that acts performed on the basis of the validity of a prior act are themselves invalid when the first decision is set aside. At para 13 the Court rejected an argument, allegedly in reliance on ***Oudekraal***, that the later (second) act could remain valid despite the setting aside of the first. ***Norgold Investments (Pty) Ltd v Minister of Minerals and Energy of the Republic of South Africa and Others*** **[2011] ZASCA 49; [2011] 3 All SA 610 (SCA)** at para 46.

[3] The defendant furthermore referred to ***Camps Bay Ratepayers' Association and Another v Harrison and Another*** **[2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC)** (***Camps Bay***) at para 62 and ***Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*** **[2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC)** (***Bengwenyama Minerals***). At para 85. In ***Njongi v MEC, Department of Welfare, Eastern Cape*** **[2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC)** at paras 44-5, the Court held that until an act is found to be unlawful it is presumed to be valid as *omnia praesumuntur rite esse acta*, and agreed that only a court of law can determine whether an administrative act alleged to be "void" is lawful.

> ***"The approval communicated to Kirland was therefore, despite its vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat. This approach does not insulate unconstitutional administrative action from scrutiny. It merely requires government to set about undoing it in the proper way. That is still open to government."***

[27] It is unnecessary for purposes of the present to deal with these interesting issues. Section 48A of the Ordinance allows the council to invest revenue in stock, funds and securities as contemplated in section 33 of the Johannesburg Ordinance. Section 53 of the said Ordinance, raised in the defendant's plea, unambiguously provides the complete answer to the defendant's point on authority. It provides as follows: —

> ***"A person in good faith applying for any stock on the issue thereof or purchasing taking or holding stock once issued or advancing money in good faith to the Council for on the security of the stock issued or to be issued shall not be concerned to enquire or to take notice whether the creation or issue thereof was or was not authorised under the issuing or borrowing powers of the Council or otherwise in accordance with any Ordinance relating to such borrowing powers or whether or not the Council or any meeting thereof was properly constituted or convened or whether or not the proceedings at any meeting of the Council were legal and valid or regular or whether or***

not the conditions of issue were valid or have been duly observed or to see to any application of any moneys raised by the stock. A certificate of stock valid as to form once issued purporting to be by or on behalf of the Council to a person taking the same in good faith and for good consideration shall be legal and valid for all purposes in the hands of such person and anyone taking from or through him notwithstanding any defect informality or illegality in the creation or issue of any of the stock in respect of which such certificate is or purports to be issued or tin the making or issue of such certificate or that the amount of stock authorised or resolved on has been or will be exceeded or that such certificate is a duplicate or repetition of any certificate previously issued." (Emphasis added)

[28] Once this is so, then the defendant possessed the requisite authority to issue the zero coupon certificates and the defendant's plea has no merit.

[29] I pause to deal with the "certificate of stock valid as to form once issued" contained in section 53.

[30] It was argued on behalf of the defendant that the zero coupon certificates had to con ply with the form set out in the Schedule to the Johannesburg Ordinance. Sections 9 and 20 of the Ordinance provide that the zero coupon certificates for inscribed stock and stock to bearer shall be in the form set out in said Schedule. The prescribed wording for both stock differs from that contained in the zero coupon certificates relied upon by the plaintiff.

The wording of the form for the inscribed stock certificate reads as follows: -

"This is to certify that _____ is the proprietor of _____ pounds of Johannesburg Municipal Stock subject to Ordinance No ___of 1903 relating thereto and to the conditions of issue."

[31] Whereas the wording of the form of the bearer stock certificates reads that: -

"This is to certify that the Bearer of this certificate is entitled to ____ pounds of Johannesburg Municipal Stock with interest thereon at the rate of _____ per cent per annum subject to Ordinance No. ____ of 1903 relating thereto and to the conditions of issue.

The Coupons attached to this Certificate are payable at _____

When the Coupons are exhausted this Certificate will be exchanged on presentation at _____for a new certificate with fresh Coupons attached..."

[32] It was further argued that the zero coupon certificates could not be described as stocks contemplated in section 6 of the Johannesburg Ordinance.

[33] In this regard, the matter of ***AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC)*** makes it clear that the

true test is whether the purpose which the administrative actions were intended to serve, have substantially been achieved.

[34] Given that the import of the wording of the zero coupon certificates is no different to the wording set out above, one can safely state that the purpose of the administrative action has substantially been achieved and that there has been due compliance with the prescripts regarding the form of the certificate of stock. This argument hence also founders.

[35] Regarding the plea of estoppel raised by the plaintiff, the law is clear that as far as a defence of estoppel is concerned, it cannot apply when it is utilised to perpetuate affairs prohibited by the law as was held in ***Land and Agricultural Development Bank v Panama Properties 2014 (2) SA 545 (GJ).***

[36] This principle was endorsed in clear terms in the matter of ***City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA)*** at paragraph 16: -

"There are formidable obstacles to the plaintiff's reliance upon the doctrinal device of estoppel. Assuming in the plaintiff's favour that all of the requirements for its successful invocation have been established, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) at 411H-412B), for to do so

would be to compel the defendant to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality (Hoisain v Town Clerk, Wynberg 1916 AD 236)."

Conclusion

[37] It is held that the zero coupon certificates issued by the defendant are valid and that the defence of the defendant is without merit and a mere dilatory defence.

[38] That this is the case is further borne out by the fact that the defendant's council, as can be seen from the discovered documents, such as its financial statements and various resolutions, acknowledged its indebtedness towards the plaintiff on many occasions.

Punitive Costs

[39] A punitive costs order was sought against the defendant, given the fact that it knew that the point of authority was without merit, and a mere delaying tactic. The court agrees with this contention.

Order

1. The separate issue regarding the alleged invalidity of the zero coupon certificates is dismissed with a punitive costs order, such order to include the costs of two counsel.

JANSEN J
JUDGE OF THE HIGH COURT

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