

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO:01/2014

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE <u>14.6.2018</u> SIGNATURE <u>[Signature]</u>	

In the matter between:

MERIFON (PTY) LTD

PLAINTIFF

And

GREATER LETABA MUNICIPALITY

1ST DEFENDANT

HOUSING DEVELOPMENT AGENCY

2ND DEFENDANT

JUDGEMENT

SEMENYA J:

1. Plaintiff launched an application for leave to amend paragraph 5 of the particulars of claim and replication in terms of Rule 28 (4) of the Uniform Rules of Court. The defendant has, in terms of Rule 28(3), delivered a notice of objection to the plaintiff's notice to amend. The parties shall, for convenience, be referred to as in the main action.
2. The contents of paragraph 5 of the particulars of claim, which are relevant for the purposes of this judgement, and which the applicant seek to amend are as follows:

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"On or about 7 March 2013 and at or near Polokwane, alternatively Modjadjiskloof, the plaintiff as represented by Mr Mangena and the first defendant as represented by its municipal manager, Ms T G Mashaba (Mashaba), properly authorized as pleaded hereinafter, entered into a written agreement ("the agreement). The express terms of the agreement, are, inter alia the following:

3. It is not necessary to state the terms and conditions of the agreement in that part of the envisaged amendment is that they be delete. It would however appear from the nature of the proposed amendment that the need to amend the plaintiff's particulars of claim and replication was necessitated by the allegations made in the first defendant's plea, in which the validity of the alleged contract between the plaintiff and Mashaba is denied. It is alleged that Mashaba lacked authority to enter into the contract with the plaintiff in that she failed to observe the provisions of the Local Government: Municipal Finance Management Act, 56 of 2003 (MFMA).

4. The plaintiff seeks to amend the particulars of claim by inserting the following highlighted phrases to paragraph 5 of the particulars of claim:

*"On or about 7 March 2013 and at or near Polokwane, alternatively, Modjadjiskloof, the plaintiff as represented by Mr Mangena and First Defendant as represented by its Municipal Manager, Ms T G Mashaba, properly authorized, alternatively acting with ostensible authority , further alternatively, **acting with the usual authority of a Municipal Manager**, entered into a written Agreement (the agreement). The express terms of the Agreement, that are relevant hereof, are inter alia, the following:"*

6. The proposed amendment to the plaintiff's replication is to be effected as follows:

"By inserting the following paragraphs after paragraph 3

3.A

At all relevant times Ms T G Mashaba (Mashaba) in her capacity as the first Defendant's Municipal Manager:

3.A1 Was the accounting officer of the first Defendant, as provided for in section 60 of the MFMA:

3.A2. Was part of the top management of the First Defendant, as provided for in section 77 of the MFMA.

3.B

As accounting officer of the First Defendant, Ms Mashaba was, further, responsible for the implementation of the First Defendant's approved budget, as provided for in Section 69 of the MFMA.

3.C

In the premises, and insofar as it may be found that Ms Mashaba did not have actual authority to represent the First Defendant in concluding the agreement with the Plaintiff, the position of Ms Mashaba, as Municipal Manager of the First Defendant, lead to an appearance that she was authorized to act on behalf of the First Defendant and, as a result Ms Mashaba had ostensible authority to present the first Defendant in concluding the agreement with the plaintiff.

3.D

In the alternative and the event of the Honourable Court finding that Ms Mashaba did not have any authority to represent the First Defendant, being it actual or ostensible, the plaintiff pleads as follows:

3. D .1 *At all relevant times the First Respondent represented through its conduct, in appointing Ma Mashaba as Municipal Manager, that Ms Mashaba was duly authorized, inter alia, to conclude contracts on behalf of the First Defendant. The First Defendant, further:*

3. D. 1. 1 *Allowed Mashaba to sign **Annexure "POC1"** to the amended particulars of claim, under circumstances where she was not "properly authorized" to do so;*

3. D. 1. 2 Gave Mashaba defective and / or ineffective authority to sign **Annexure "POC1"** to particulars of claim;

3. D. 1. 3 Allowed Mashaba to sign Annexure "POC1" to the particulars of claim under circumstances where, according to the First Respondent, the agreement is illegal and null and void due to non-compliance with the First Respondent's internal procedures, to which the Plaintiff was not privy.

3. D .2 The First Defendant's acts and/or omissions, as aforesaid, were negligent, as the First Defendant should have reasonably foreseen that third parties would accept that Mashaba was duly authorized to represent the First Defendant, in concluding agreements, specifically **Annexure "POC1"** to the particulars of claim on behalf of the First Defendant.

3. D. 3 Acting on the belief that Mashaba was duly authorized to represent the First Defendant the Plaintiff was induced, to its detriment, to enter in to the agreement.

3. D. 4 In the premises, the first Defendant is estopped from denying that Mashaba was not authorized to represent the concluding the agreement, attached to the particulars of claim as **Annexure "POC1"**.

7. In its objection, the first defendant state that the municipal manager requires proper authority as opposed to ostensible or actual authority to conclude a legally enforceable contract on behalf of the municipality. It is further stated that in the absence of this proper

authority, the proposed amended particulars fail to disclose the cause of action and are therefore excipiable.

8. With regard to the proposed amendment to the replication, the objection raised by the first defendant is that the plaintiff intends to rely on estoppel. The first defendant alleges that estoppel cannot assist the plaintiff in that the municipal manager's failure to act in conformity with the prescribed Act and Regulations rendered the contract illegal. It is stated in the objection that estoppel cannot legalize a contract entered into illegally.

9. Rule 28 (1) provides as follows:

"Amendments to pleadings and documents

(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any pleadings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2). An objection to the proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(3). If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend."

7. As a starting point, I am satisfied that the plaintiff and the first defendant have both complied with the requirement of Rule 28 as quoted above. It remains to be determined whether the proposed amendment of the particulars of claim and replication would, if

allowed, be excipiable on the ground that they fail to disclose a cause of action as submitted by counsel for the first defendant.

10. In **First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 at 965 C-D** it was stated that for an exception to succeed, the excipient has to show that the pleading is excipiable on every interpretation that can reasonably be attached to it.

11. Counsel for the first defendant argued that the plaintiff intends to rely on the impression allegedly created by the Municipal Manager. He submitted that a municipality, as an organ of State, creates an impression to every person it deals with in the following three manners:

- a). By words which are in a Statute;
- b). By knowledge that is common to the public;
- c). That whoever deals with an organ of State is expected to know the Acts and Regulations applicable that organ, in this case the municipality.

12. Counsel for the first defendant argued that it is the municipality that must create an impression and not the Municipal Manager. It was submitted that the court can take judicial cognizance that everyone knows the law, inclusive of the plaintiff. Counsel argued that it was incumbent of the plaintiff in this case to satisfy itself that the Municipal Manager has complied with the statutory requirements as laid down in the MFMA and that she has the so-called **proper authority** before it entered into the relevant contract.- (my own emphasis).

13. On the issue of proper authority, counsel for the plaintiff argued that the notion of actual and ostensible/apparent authority has recently been recognized and applied by the Constitutional Court in **Makate v Vodacom Ltd 2016 (4) SA 121 (CC) (Makate)**, in which the case of **Hely-Hutchinson CA v Brayhead Ltd and Another [1968 1 QB 549 (CA) (Hely-Hutchinson CA at 583 A)G** was referred to with approval.

14. I note that at paragraph 45 of **Makate**, the court stated the following:

"[45] Actual authority and ostensible or apparent authority are the opposite side of the same coin. If an agent wishes to perform a juristic act on behalf of the principal, the agent requires authority to do so, for the act to bind its principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority."

15. I am further aware that at paragraph [68], the Constitutional Court held that the applicant (Makate) established that Mr Geissler (the agent), had ostensible authority to bind Vodacom.

16. On counsel for the first defendant's contention that it is the municipality or the Municipal Manager who must create the impression, counsel for the plaintiff referred the court to the

case of **Manana v King Sabata Dalindyebi Municipality 2010 JDR 1423 SCA**. At paragraph [13] of this judgment the court stated that:

"The constitutional structure of government is separated into three spheres: the national sphere, the provincial sphere and the local sphere. The local sphere of the government consists of 'municipalities', which must be established for the whole of the territory of the Republic. The executive authority of the municipality does not vest in its municipal manager (or any other of its employees). Its executive authority is constitutionally vested in its municipal council."

At [16] the court held that:

"A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to perform the particular function itself."

17. I am in agreement with counsel for the plaintiff that the issue would be whether the world would conclude that a person holding a position of a Municipal Manager, such as Mashaba in the present case, who comes into the meeting and during negotiations signs certain documents, has the required authority to do so. The submission made by counsel for the first defendant with regard to what should create the municipality's impression to the public is found to be without merits. Counsel for the plaintiff submitted that the plaintiff's

application for an amendment should be allowed to give it an opportunity to present evidence to prove that Mashaba created the impression that she has the required authority to act on behalf of the municipality.

18. With regard to the issue of estoppel, I agree with the plaintiff's counsel that the court should allow the amendment and leave it to the trial court to decide whether the plaintiff should succeed on this ground or not. I am of the view that the same applies with regard to the plaintiff's of reliance on ostensible/apparent authority. In any event, it is not for this court in the instant application to rule on the merits of the particulars of claim and the replication or the defences raised by the parties.

19. In accordance with **Makate** above at paragraph [49], the trial court would have to determine whether the plaintiff proved the following requirement of estoppel:

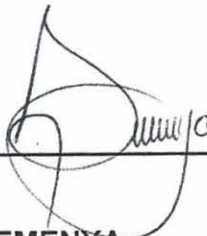
- a). a representation made in words or by conduct, including silence or inaction;
- b). That the representation must have been made by the principal to the person who raises estoppel (the representee);
- c). the principal must reasonably have expected that her conduct may mislead the representee; and
- d). the representee must reasonably have acted on the representation to his own prejudice.

21. I therefore find that the fact that the plaintiff wishes to amend its particulars of claim so as to rely on actual or ostensible authority cannot render the particulars of claim excipiable on the ground that they fail to disclose a cause of action.

22. Counsel for the plaintiff contended that the first defendant's proposition is incorrect and that the court should award the plaintiff costs which must include cost of two counsels. I have decided to allow the amendment of the plaintiff's particulars of claim which will have the effect that the matter may go on trial. I will therefore make no cost order.

23. In the premise I make the following order:

- i). The plaintiff is authorized to amend its particulars of claim and replication as prayed for;
- ii). Costs to be costs in the cause.



M.V SEMENYA

JUGDE OFTHE HIGH COURT; LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : ADV: DA SILVA SC

INSTRUCTED BY : PW BECKER INC

FOR THE DEFENDANT : ADV: ROSSOUW SC

INSTRUCTED BY : MOHALE INC

DATE OF HEARING : 16 MAY 2018

DATE OF JUDGEMENT : 14 JUNE 2018