IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU, GEORGE)

CASE NO: **1708/2017**

In the matter between:

IMVUSA TRADING 1581 BK	Plaintiff
And	
OUDTSHOORN MUNICIPALITY	Defendant
And	
RONNIE (MB) LOTTERING	1st Third Party
FRANCOIS HUMAN	2nd Third Party
O BEZUIDENHOUT	3rd Third Party
LIONEL PRINS	4th Third Party
ANGELINE LAKAY	5thThird Party
EVA GXOWA	6th Third Party

Coram:	Erasmus J
Date of Hearing:	7 September, 13, 14, 20 October & 9 November 2021
Date of Judgment:	20 October 2022

JUDGMENT

(handed down electronically, via email)

ERASMUS, J

Introduction

[1] This case is indicative of what happens when an institution is captured and controlled by persons with their own, selfish objectives to the detriment of the broader community that they are supposed to serve. A municipality got captured by officials and politicians who utilized the budget of the institution as their own piggy bank.

[2] In the main action the Plaintiff ("Imvusa") claimed from the Defendant ("the Municipality") an amount of R4 352 481.73[1] plus interest and costs for services rendered during 2014/2015, namely the repair of potholes. There is also a counterclaim from the Municipality against Imvusa and claims from the Municipality against six Third Parties. The claims against the first four Third Parties, all former officials of the Municipality, are brought in terms of section 32 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("the MFMA"), which creates what can be termed a "*statutory delict*" in respect of irregular expenses made by a municipal official. The claims against the 5th and 6th Third Parties are brought on the basis that, broadly speaking, the Court should "*pierce the corporate veil*" and hold them accountable for the conduct of Imvusa.

[3] In the counter-claim, the Municipality claims that Imvusa has been unjustly enriched at its expense as it paid far more for the service than it should have. The Municipality's counter-claim is for R3 975 896.08.

[4] Before the hearing of the matter the second third party passed away and the defendant failed to join the executor of the estate, no relief was therefore sought against the second third party. The first and fourth third party did not participate in the proceedings and the only third party, other than the fifth and the sixth third parties who are also the members of the plaintiff, who participated was the third third party, Bezuidenhout.

[1] In Imvusa's heads the amount is reduced to R3 752 481.73. A payment of R600 000.00 was deducted.

The Facts

[5] The underlying facts in this matter are mostly common cause. During or around the beginning of August 2014, Imvusa was engaged by the then Acting Mayor and Municipal Manager discussing a proposal that it should repair potholes in Oudtshoorn town and surrounds. Imvusa was appointed and it was called an "*empowerment project*" and "*mayoral project*". Which of the parties made the first approach is unclear, but nothing turns on it.

[6] Angeline Lekay ("Ms. Lekay") (the fifth third party) and Eva Gxowa ("Ms. Gxowa") (the sixth third party) are the members of the plaintiff. Ms. Lekay served as a councillor of the defendant municipality from 1995 to 2007. She further sat as a former executive deputy mayor for a substantial period. She has a fair understanding of the basic principles of public procurement law. I pause to note that she readily conceded that the Service Level Agreements ("SLA") in this matter was invalid, having regard to the evidence that emerged.

[7] The municipality entered into two different SLA with the plaintiff. The first SLA was signed by the late Mr. Human, in his capacity as the acting municipal manager, on 13 August 2014. In terms of this agreement the plaintiff was appointed to repair potholes for the period 1 August 2014 to 31 October 2014. The second SLA was signed by Mr. Lionel Prins ("Mr. Prins"), supported by a deviation approved by the then Acting Municipal Manager, Mr Ronnie Lottering ("Mr. Lottering") on 13 November 2014 to perform similar services for the period 1 November 2014 up to 31 May 2015. The plaintiff relied solely on the second SLA in this action.

[8] It is important to note that the last time that the municipal council appointed Mr. Lottering as Acting Municipal Manager expired at the end of June 2013. No appointment for Mr. Lottering in terms of the Local Government: Municipal Systems Act, 32 of 2000 was properly done. Mr. Lottering then in turn appointed Mr. Prins for one day being 13 November 2014 in order for the second SLA to be signed.

[9] I ruled previously that both the purported deviation and the SLA were invalid as no due process was followed, and it is apparent from the evidence that at least Mr. Lottering and Mr. Prins was aware of the unlawful conduct. It was therefore not unsurprising that in the evidence it emerged that almost a year after the event attempts were made to regularize the appointment of Mr. Prins through a decision by the then acting municipal manager, Mr. Lottering. The approval of the deviation was then backdated to June 2014.

[10] The third third party, Ms. Bezuidenhout, confirmed in her evidence that the appointment of the plaintiff must have been backdated by Mr. Lottering as she was requested, during 2015 to complete the application for the deviation as it was then needed by the Auditor-General. She was also requested to complete similar deviations, all of which will be backdated in an attempt to deceive the Auditor-General.

[11] As a result of this contrived agreement the municipality paid an amount of R19 747 637.61 for the pothole project. An amount of R11 205 148.55 was paid directly to the plaintiff and the rest paid to suppliers of material used for the project. If one have regard to the price per square meter charged, the plaintiff claimed for the repair of 56 477m² of potholes. The plaintiff now claims an amount over and above the amount the defendant already paid. This is a claim in relation to the last amount of work done during 2015.

[12] Although Ms. Lekay and Ms. Gxowa were the controlling minds of the plaintiff, they had very little idea of the exact amount of work done and the calculations thereof. It is apparent that very little control from them was exercised in the process of the work done. According to them representatives of the municipality would inform them where the work should be performed and they merely executed. The municipal officials will take the measurements and they would then be paid at a rate per square meter. They also charged for additional charges, inter alia, the transport of workers for which the

municipality paid. Although the company was registered for VAT and they charged it, this was not included in the quote.

[13] They concede that they made a profit, on the work done, but it was less than what they anticipated.

[14] The last amount which is the subject of this claim by the plaintiff was submitted mid-2015. It remains unpaid. At the time of the submission of the claim the municipality was in debt to the tune of approximately R110m and placed under administration. A process was put in place to negotiate the payment of the debt over an extended period.

[15] Mr. Allen Paulse was appointed as the acting municipal manager from January 2016. He also had knowledge of the municipality's affairs as he dealt with the consequences of the maladministration that preceded his appointment. His evidence was that during the period 2014 two 2015 the municipality was captured by officials including Lottering, Prins, Human and Bezuidenhout. The Auditor-General. provided a report dated 30 October 2015 and the Western Cape government a forensic report during February 2016. Both these reports indicated that the deviation and the SLA with the plaintiff was invalid and therefore no payments were made. The municipality took the view that there was no need to seek the invalidation of the service level agreements as they were already threats of litigation and the invalidity would be raised as a defence to any litigation instituted by the plaintiff.

[16] Mr. Elroy McKay is a qualified engineer who worked for the municipality from March 2015 for a period of three years. He has extensive experience in the field of civil engineering. He did a cost comparison between what was paid by the municipality and what a fair price would have been had a competitive process be followed. For purposes of this exercise he used the figures relating to another company that had an agreement with municipality. He came to the conclusion that the prices charged by the plaintiff was highly inflated and had a proper process being followed the municipality would have paid R7 885 244.68 less.

[17] Mr. Ladouce gave extensive evidence about the municipalities supply chain management policy relating to urgent procurement, emergency procurement and/or unsolicited bids. In the instant matter they were many transgressions of the existing policy. Attempts were also made on 27 July 2015 to backdate the deviations and, although he was at all relevant times the supply chain manager of the municipality, he was not involved in the appointment of the plaintiff's for the portal project. He informed the acting chief financial officer, Mr. Human of his concerns but he was largely ignored. He also felt intimidated as he had to serve a six-month suspension on a previous occasion for raising irregular activities.

The Regulatory Framework In Respect of the Deviation and the Service Level Agreements (SLA).

[18] The main principles of government procurement law are set out in the Constitution. Section 217 provides as follows:

> "(1) When an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of State or institutions referred to in that subsection from implementing a procurement policy providing for –
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[19] At the local government level, the SCM aspects of procurement law are largely governed by chapter 11, part 1 of the MFMA and the SCM Regulations[2] and the

[2] Municipal Supply Chain Management Regulations GenN 868 of 2005 GG 27636 of 30 May 2005 ("SCM Regulations").

Municipality's SCM policy, which each municipality must have and implement in order to give effect to the MFMA.[3]

[20] As indicated above, in the instant matter, there was simply no compliance with the regulatory framework but rather a total disregard thereto. When there is a patently unlawful decision, such as the deviation and the SLAs in the present instance, leading to patently unlawful contracts, the Court cannot allow the decision / contracts to stand.

[21] It is also important to note that plaintiff through Lekay and Gxowa, given the background must've known that the project could not be awarded to them absent a competitive bidding process. Lekay is a former council member and executive Deputy Mayor of the municipality.. From her evidence she indicated knowledge of the processes to be followed. The SLA and the quote provided by the plaintiff without an operational plan and the scope of works is clearly indicative of the deficiencies provided. No wonder that claims for example transport of workers and VAT was paid without it being included in the quote.

[22] Insofar as it relates to the deviation it transpired during the course of evidence presented by the third third party, Miss Bezuidenhout that the deviation was neither approved nor submitted prior to the conclusion of the SLAs. The pothole deviations were presented to her long after the expenditure had already been incurred. This was done together with other supposed deviations to cover up the actions of the capturers. In any event even if the deviation was not aimed at a cover-up it would still have violated the principle of procurement in a fair, equitable, transparent, competitive and cost-effective manner. There was further no need to appoint a service provider urgently, through supposed it deviation, where a similar contractor already existed in the system, appointed through a public procurement process.

[3] See section 111 of the MFMA.

The Plaintiff's Claim in the Alternative

[23] The plaintiff now, in the alternative, relies on either estoppel and unjustified enrichment on the part of the municipality to sustain the claim. The claim on estoppel cannot be sustained as it is settled law. The Supreme Court of appeal held in *Eastern Cape Provincial Government and others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA):

> "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."

[24] There, the Supreme Court of Appeal refused to invoke estoppel to uphold a contract that was awarded without involving a tender board (as the law required). The same applies in the present instance.

[25] Insofar as it relates to the enrichment, the court having found that the SLA is unlawful and invalid, Section 172(1)(a) provides that a Court must declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency and may make any order that is just and equitable. The court therefore as a discretion to ameliorate the consequences of the invalidity by retaining certain rights and obligations under the contract, provided that no profit is made.

[26] The exercise of the Court's discretion in the present context has been considered by the Constitutional Court on a number of occasions.[4]

[27] The principles applicable to the exercise of the Court's discretion can be summarised as follows:

[27.1.] A Court deciding a Constitutional issue has a wide remedial power under section 172(1)(b) of the Constitution. That is "*any order which is just and equitable*", bound only by considerations of justice and equity.[5]

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[4] The latest of which is *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019* (4) SA 331 (CC).
[5] Electoral Commission v Mhlope & Others 2016 (5) SA 1 (CC) [132]; State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) [54], Buffalo City Metro Municipality v ASLA Construction

[27.2.] The default position is the "*corrective principle*" which is that the consequences of such invalidity must be reversed – in procurement matters, is as to set aside the implicated contracts.[6] This is a logical consequence flowing from invalid and rescinded contracts and enrichment law generally.[7]

[27.3.] This corrective principle can be departed from for reasons of justice and equity.

[27.4.] Delay[8] is a factor, whilst another is the prejudice, that the affected parties may suffer if the corrective principle is applied.[9]

[27.5.] A further relevant factor is the extent to which the service provider is guilty of blameworthy conduct. Such conduct includes, but is not limited to, the service provider's complicity in, for e.g. any wrongdoing affecting the tender award.

[27.6.] It is relevant that a service provider turned a blind eye to possible malfeasance without making proper enquiry.

[27.7.] Innocence would be a factor in favour of departing from the corrective principle.[10]

[28] In my view there is room to grant the plaintiff the relief on the basis of the just and equitable principle on the facts of this matter. As indicated above in the instant matter there was a complete disregard for the ordinary public procurement principles coupled with clear political interference and unlawful conduct. The evidence is that the plaintiff in any event made a profit albeit not to the extent expected. The claim for enrichment was also not specifically pleaded and proven. The evidence of McKay was that, had proper procurement processes been followed they would have been a saving in excess of the amount claimed. The amount charged by the plaintiff was in any event exorbitant and far higher than existing market rates.

(Pty) Ltd 2019 (4) SA 331 (CC) [54], [105]; Govan Mbeki Municipality v New Integrated Solutions (Pty) Ltd (121/2020) 2021 ZASCA 7 April 2021 [59] – [63].

[6] Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Services Agency & Others (2) 2014 (1) SA 604 (CC).

[7] Allpay (2) [30].

[8] A factor applied in Gijima and Buffalo City.

[9] See the illuminating judgment in Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others [2020] ZAWCHC 164 (20 November 2020), Rogers J. Where it is pointed out that prejudice and delay operate "in tandem as factors potentially justifying a departure from the corrective principle".

[10] See Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa [2018] ZASCA 167; 2020 (1) SA 76 (SCA).

The Municipalities Enrichment Claim

[29] It is common cause that the claim against the second, fifth and sixth and third parties was not proven and can therefore not be sustained.

[30] To the claim against Lottering, Bezuidenhout and Prins, the claim was based on section 32 of the MFMA which provides as follows (my underlining and irrelevant parts excised):

> **"32 Unauthorised, irregular or fruitless and wasteful expenditure**
>
> (1) Without limiting liability in terms of the common law or other legislation-
>
> (a) ....
>
> (b) the accounting officer is liable for unauthorised expenditure[11] deliberately or negligently incurred by the accounting officer, subject to subsection (3);
>
> (c) any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure[12], is liable for that expenditure; or

[11] Defined in s 1 of the MFMA as follows:
"'unauthorised expenditure', in relation to a municipality, means any expenditure incurred by a municipality otherwise than in accordance with section 15 or 11 (3), and includes- (a) overspending of the total amount appropriated in the municipality's approved budget;
(b) overspending of the total amount appropriated for a vote in the approved budget;
(c) expenditure from a vote unrelated to the department or functional area covered by the vote;
(d) expenditure of money appropriated for a specific purpose, otherwise than for that specific purpose;
(e) spending of an allocation referred to in paragraph (b), (c) or (d) of the definition of 'allocation' otherwise than in accordance with any conditions of the allocation; or
(f) a grant by the municipality otherwise than in accordance with this Act;"

[12] Defined in s 1 of the MFMA as follows:
"'irregular expenditure', in relation to a municipality or municipal entity, means-
(a) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of this Act, and which has not been condoned in terms of section 170;
(b) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act;
(c) expenditure incurred by a municipality in contravention of, or that is not in accordance with, a requirement of the Public Office-Bearers Act, 1998 (Act 20 of 1998); or
(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality's by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-law,"

(d) any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure[13] is liable for that expenditure.

(2) A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure-

(a) in the case of unauthorised expenditure, is-

(i) authorised in an adjustments budget; or

(ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council."

[31] The first third party, Lottering, in his capacity as the acting accounting officer, deliberately committed unauthorized and irregular expenditure without having regard to the budget. He attempted to cover up his misdeeds by backdating the deviation. The fourth third-party, Prins, was purportedly appointed for the one day of the signing of the second service level agreement. The documentation was vague and incomplete. He made no inquiries as to the regularity of his actions. They did not participate in the hearing of this matter and clearly is liable for the unauthorized and irregular expenditure. Mckay's evidence indicate the overspending as R7 885 244.68 – for which Lottering and Prins is liable.

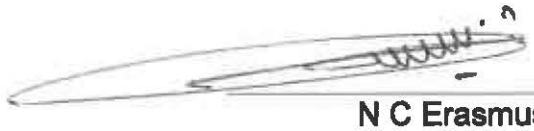
[32] The only third-party that opposed the claim against them was the third third-party, Bezuidenhout. Having regard to her evidence and that of Ladouce as to the atmosphere and working conditions at the time of the capture of the municipality, I am of the view that her reliance on the duress that she suffered at the hands of the seniors must be taken into account when considering a liability. And therefore no order should

[13] Defined in s 1 of the MFMA as follows:
"'fruitless and wasteful expenditure' means expenditure that was made in vain and would have been avoided had reasonable care been exercised;"

be made against her. Prins was only involved in the second SLA and therefore the mentioned expenditure should be limited to that period. The plaintiff provided services and the enrichment claim against them was not proven.

[33] Consequently I am of the view that the following order should be made

(1) The plaintiff's contractual claim is dismissed with costs.
(2) The plaintiff's enrichment claim is dismissed with costs.
(3) The claim against the third third-party Bezuidenhout is dismissed with no order as to costs.
(4) The Municipality's enrichment claims against the plaintiff is dismissed with no order as to costs.
(5) Absolution of the instance is granted in respect of the Municipality's claims against Human, Lekay and Gxowa as the 2nd, 5th and 6th Third Parties with no order as to costs.
(6) Lottering, as the 1st Third Party is ordered to be liable, under section 32 of the MFMA, to the Municipality in the amount of R7 885 244.68, with no order as to costs.
(7) Prins, as the 4th Third Party is ordered to be liable, under section 32 of the MFMA, to the Municipality in the amount of R1.18 million, with no order as to costs.



N C Erasmus
Judge of the High Court

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