



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

NOT REPORTABLE

Case No.: 3619/2023

In the matter between:

MANDELA BAY DEVELOPMENT AGENCY	First Applicant
GLENDANNE PERUMAL	Second Applicant
PINKY KONDLO	Third Applicant
MXOLISIS MOOLMAN	Fourth Applicant
VUYANI GALEN DYANTYI	Fifth Applicant
KHWEZI GIDEON NTSHANYANA	Sixth Applicant
and	
NELSON MANDELA BAY MUNICIPALITY	Respondent

JUDGMENT

EKSTEEN J:

[1] This matter (the application) was initially launched as an urgent application, in which the first applicant, the Mandela Bay Development Agency¹ (MBDA), and the second to sixth applicants sought an order:

¹ Erroneously cited in the application as the Nelson Mandela Bay Development Agency.

- '2. [D]eclaring that the Current Board of the First Applicant (being the Second to Sixth Applicants) validly constitutes the Board of the First Applicant and may continue to so act until lawfully removed from the Board, whether in terms of Section 93G of the Municipal Finance Management Act or otherwise.

3. That the Respondent Municipality be directed to transfer, forthwith, the quarterly amounts due to the First Applicant as provided for in the Service Level Agreement concluded between the First Applicant and the Respondent Municipality, including all transfers due at the date of this order.'

[2] The underlying dispute giving rise to the application arose from the displeasure of the respondent, the Nelson Mandela Bay Municipality (the municipality), at the appointment of Mr Anele Qaba as the chief executive officer (CEO) of the MBDA. The municipality has launched a separate application (the review) to review and set aside the appointment. The review was enrolled and argued simultaneously with the application. They are factually interrelated and the municipality has referred, in the application, to its founding affidavit in the review, and incorporated it by reference in its answering papers. I shall refer to this affidavit herein, only to the extent necessary, however, it is convenient in this judgment to deal separately with the application to which I shall confine myself herein.

Background

[3] It was common cause on the papers, and in argument, that the MBDA was established by the municipality as a private company,² wholly owned and controlled by it, in terms of s 86C of the Local Government: Municipal Systems Act³ (the Systems

² The Service Delivery Agreement records that MBDA was in fact established by the municipality in 2003 as an association not for gain, in terms of s 21 of the 1973 Companies Act. The 1973 Companies Act was repealed and replaced by the Companies Act, 71 of 2008. The MBDA is a company as defined in the 2008 Companies Act and is a 'non-profit company'. The 2008 Companies Act further created a new category of companies, being 'state owned companies', which includes companies owned by a municipality. No argument has been addressed to me in respect of these developments and I shall assume, for purposes of this judgment, as the parties have, that the provisions of Chapter 8A of the Systems Act apply.

³ Act 32 of 2000

Act). Its principal object was to assist the municipality in its service delivery objectives and it has entered into a 'Service Delivery Agreement' (SDA) with the municipality to give effect thereto. As I have said, in June 2023, the MBDA appointed Mr Qaba as its CEO. The appointment was, to put it at its lowest, controversial. On 28 June 2023, National Treasury addressed the city manager of the municipality in respect of the appointment. It recorded that Mr Qaba, who had previously been employed as the Executive Director: Economic Development, Tourism and Agriculture in the municipality had been suspended, during June 2022, due to allegations of gross misconduct relating to supply chain management processes. The council of the municipality had resolved on 21 June 2022 that he be suspended pending the finalisation of an investigation into allegations of financial misconduct. However, no disciplinary processes were instituted and, on 28 February 2023, the municipality and Mr Qaba signed a settlement agreement in terms of which Mr Qaba vacated his office in exchange for a monetary remuneration equivalent to the remaining sixteen months of his contract of employment. Mr Qaba was paid R3 million.

[4] Against this background, Treasury questioned the legality of Mr Qaba's appointment as the CEO of the MBDA and demanded further information relating to the process from the municipality. They advised the municipality to suspend Mr Qaba's appointment as CEO of the MBDA and cautioned it to consider their advice 'to avoid any form of penalty as it relates to the withholding of conditional grants allocated in terms of the Division of Revenue Act'.

[5] Treasury persisted in its stance and declined to transfer the funds due to the municipality. On 9 August 2023, the Minister of Finance (the Minister) addressed the mayor in respect of a number of matters of alleged maladministration in the municipality, including the appointment of Mr Qaba. In respect of Mr Qaba he recorded:

'I am grossly concerned about the integrity of the City's decision to appoint Mr Qaba as the CEO of MBDA within less than four months of being paid R3 million through a settlement agreement. ...

I emphasise the concern I have over the governance that the Board of Directors of Mandela Bay Development Entity has with implementing material irregular decisions that contravene statutory prescripts, as well as not obtaining approval of the municipal Council when required.

The fact that the Board of Directors failed to consult Council is a clear indication that they have failed to execute their fiduciary duties and therefore I advise your Council to consider taking appropriate steps against them which may include possible dissolution, subject to due processes.’

[6] The Minister concluded the letter with a directive as follows:

- ‘a. the appointment of Mr Qaba must be reviewed considering the settlement agreement of an amount of R3 million which must be recovered personally from Mr Qaba by the municipality: and
- b. I will be prepared to transfer the funds to the City as soon as possible on condition that the municipal Council furnishes me with a resolution of commitment to resolve the above serious matters of concern and to ensure good governance practices when dealing with such matters. The resolution must also commit not to transfer any funds to the entity until the appointment of the CEO is rectified.’⁴

[7] The municipality heeded the Minister’s threats and, on 22 August 2023, the contentious resolution, that lies at the heart of the application, was taken at a council meeting in the following terms:

‘That the Minister of National Treasury be advised that the Council on 22 August 2023 resolved, in respect of his requirements set out in his letter of 9 August 2023, that the Municipality will:

⁴ The funds referred to by the Minister relate to the balance of the city’s equitable share of revenue to which it is entitled in terms of s 227(1)(a) of the Constitution, as confirmed by a further letter from the Minister to the executive mayor dated 12 September 2023.

- (i) seek to review and set aside the appointment of Mr A Qaba as CEO of the MBDA;
- (ii) take steps to remove the board of the MBDA on the basis of the unsatisfactory performance of its members;
- (iii) ...'

[8] This set in chain a lengthy sequence of correspondence. The following morning, the city manager of the municipality conveyed the resolution to Ms Perumal, the second applicant, as chairperson of the board of the MBDA, and to Mr Qaba in writing. She added:

- '2. In the light of these resolutions referred to herein above, and in the best interests of the NMBM, this serves to instruct you that neither the MBDA Board nor the CEO of the MBDA may make or take any further decisions on behalf of the MBDA, whether of a binding nature or not, pending the implementation of the above resolutions.
- 3. Should any decision be taken contrary to the above instruction which has a financial implication, such finances shall be recovered from the person/s responsible for taking such decision.'

[9] Mr Qaba responded forthwith and protested that the communication lacked legal legitimacy as it ought to have been written by the mayor and therefore, so he contended, the instructions were unlawful. This raised the ire of the city manager, who responded on 24 August 2023, in writing. She again referred to the resolution and then proceeded:

- '2. You are therefore hereby advised, that as a result of the Council resolution, the tenure of the members of the board of the MBDA, has expired, as at the date of the Council resolution, being 22 August 2023.

3. You are further reminded that the Board of the MBDA, as a municipal entity, is appointed by Council, hence the removal of the board is the prerogative of Council. In terms of Section 93G, of the Municipal Systems Act, which states as follows: ...
4. It is my fiduciary duty as an accounting officer, as I hereby do, as there is no Board of Directors of the MBDA no action can be taken by the former Board Members on behalf of the Municipal Entity. Any costs incurred due to such actions will be for their personal account as the Municipality has to ensure adherence to Section 32 of the MFMA.⁵

[10] On 25 August, Peyper Attorneys, acting on behalf of the MBDA, addressed the executive mayor with reference to the letters from the city manager on 23 and 24 August 2023. They declared that a dispute had arisen between the municipality and the MBDA in respect of their decision to appoint Mr Anele Qaba, and the municipality's authority, or lack thereof, to dissolve the board of the MBDA. They invited the municipality to agree to an engagement between the parties, alternatively, through a suitable intermediary acceptable to both parties. They also urged the municipality not to enforce their resolutions, which had been unilaterally taken, as they perceived them to be unlawful.

[11] Although there was no reply in writing to the letter, there appears to have been some communication between the municipality and the board that yielded an initial inclination to engage. However, it did not materialise. Hence, Peyper Attorneys again addressed the executive mayor, on 30 August 2023, in which they noted, with regret, that 'the meeting scheduled for this past Tuesday, at the instance of the municipality, did not materialize.' They emphasised the commitment of the MBDA to engage with the municipality in order to resolve the disputes and they proposed the appointment of an intermediary to facilitate dialogue between the parties. They emphasised that the failure to resolve the matter would have a material impact on the work of the MBDA, who has an obligation to approve the annual financial statements by 31 August 2023.

⁵ 'MFMA' is a reference to the Municipal Finance Management Act, 56 of 2003.

[12] Again, there was no reply to the letter. Thus, on 31 August 2023, Peyper Attorneys directed a further letter to the executive mayor in which they reiterated the call for engagement between the entities, and their proposal for the appointment of an intermediary. They also called upon the municipality to release the funds that had previously been earmarked for the MBDA so that they could continue to meet their operational expenses.

[13] A further letter followed, on 5 September 2023, from Peyper Attorneys to the executive mayor, in which they expressed their regret that the municipality had 'chosen not to respond to the invitation made by ... the MBDA to engage an intermediary to assist the parties in resolving their disputes'. They also recorded:

'Self-evidently, by not placing our client in funds the municipality is in breach of the specific terms of the SDA ...

The municipality, without justification, has persisted in its breach of its obligations to our client by continuing to withhold payment of the funds to it ...

8. Our client has a clear right in terms of the SDA that the municipality release the funds allocated to it ...
9. We have thus been instructed to demand from you, as we hereby do, that the funds allocated to our client be released by the municipality to it by no later than **12h00 on Wednesday 6 September 2023**, failing which our client will be obliged to approach the High Court for appropriate relief.'

[14] When the ultimatum was not heeded Peyper Attorneys transmitted a final letter of demand to the executive mayor, on 13 September 2023, and recorded that the municipality's lack of response, together with its unjustifiable breach of the SDA, had left the MBDA with no other option but to approach the High Court on an urgent basis. This

final demand ultimately elicited a terse response from the acting city manager explaining that:

‘The Council resolution and national treasury letter prevents NMBM from transferring funds and/or approving expenditure by the MBDA. This can only be done once Council gives a way forward on the matter.’

The city manager did not explain what she meant by ‘a way forward’ nor did she provide any indication of when they were likely to show the way.

[15] In the interim, on 15 September 2023, the review was commenced by service on the MBDA and Mr Qaba. Ms Perumal, deposing to the founding affidavit in the application, explained that the MBDA did not proceed forthwith with the application and that they had sought to resolve the matter amicably before proceeding to litigation. The endeavours to resolve the matter amicably have not been challenged.

Legal relationship between the municipality and the MBDA.

[16] As I have said, it was common cause on the papers and at the hearing that the MBDA was established in terms of s 86C of the Systems Act. The section entitles a municipality to establish a private company, controlled by it, and, if it does so, it is required to comply with the Companies Act⁶, and any other law relating to companies, save where a conflict arises between the Systems Act and such other legislation.⁷

[17] A private company, thus established, is a municipal entity under the effective control of a parent municipality, being the municipality. The parent municipality is empowered to exercise any shareholder, statutory, contractual or any other rights and powers it may have in respect of the MBDA in order to ensure that it is managed responsibly and transparently.⁸ It is obliged to ensure that the annual performance objectives are established by agreement⁹ and it must monitor, and annually review, the

⁶ Act 71 of 2008.

⁷ Section 86C(iii).

⁸ Section 93A(c).

⁹ Section 93B(b).

performance of the MBDA. The municipality is empowered to liquidate, or disestablish the MBDA,¹⁰ or to terminate the SDA.¹¹ However, it must allow the board of directors and the chief executive officer to fulfil their responsibilities¹² and it is required to establish and maintain clear channels of communication between itself and the MBDA.¹³ In this regard, the official lines of communication between the MBDA and the municipality exists between the chairperson of the board of directors and the executive mayor of the municipality.¹⁴ The directors of the MBDA are appointed by the municipality,¹⁵ but the chief executive officer is appointed by the directors of the board.¹⁶ The municipality may also remove, or recall, a director appointed or nominated by it on certain circumscribed grounds which are recorded in s 93G of the Systems Act.

[18] As I have outlined earlier, the municipality is required to comply with the provisions of the Companies Act, or any other legislation applicable to companies, unless there is a conflict between the Systems Act and such other legislation. Section 93G circumscribes the grounds upon which directors may be removed or recalled by the municipality. Unlike a private commercial company, where shareholders may remove directors at will, without providing reasons for doing so, the municipality may only do so for the reasons set out in s 93G of the Systems Act. The Systems Act does not lay down the procedure to be followed in doing so. The process for the removal of directors is circumscribed in s 71 of the Companies Act. I shall revert to this issue.

The declaratory relief claimed.

[19] The municipality challenged the *locus standi* of the second to sixth respondents, who have at all material times been the board of directors of the MBDA, to bring the application, either personally or on behalf of the MBDA. Ms Perumal had annexed to her papers a resolution taken by the second to sixth respondents on 12 September 2023

¹⁰ Section 93B(b).

¹¹ Section 93B(c).

¹² Section 93A(b).

¹³ Section 93A(c).

¹⁴ Section 93D(2)(a).

¹⁵ Section 93E.

¹⁶ Section 93J.

authorising them to bring the application on behalf of the MBDA as the foundation for their authority.¹⁷ However, the municipality contended that the second to sixth respondents did not have the authority, on 12 September 2023, to convene a meeting of directors or to vote on the resolution. They argued that the second to sixth respondents had been removed as directors of the MBDA by their resolution of 22 August 2023. The letters of 23 August 2023 and 24 August 2023 from the city manager, so the argument developed, constituted the implementation of the resolution to remove them as directors. They reasoned that the resolution stands in law and in fact and, in the absence of a review to set it aside, second to sixth respondents cannot appropriate for themselves the position of board members.

[20] The argument cannot be sustained. As explained earlier, s 93A of the Systems Act empowers the municipality to exercise any shareholders, statutory or contractual rights and powers it may have in order to ensure that the MBDA is managed responsibly. In this case, it places no reliance on any contractual rights. The statutory right advanced emerges from s 93G(a) which empowers the municipality to remove or recall a director if the performance of the director is unsatisfactory. Section 93G, as I have said, circumscribes the grounds upon which a director may be removed, but the municipality is still required to comply with the provisions of the Companies Act. Under s 71(1) of the Companies Act¹⁸, the shareholders may remove a director by majority vote, subject to compliance with s 71(2), which leaves little doubt as to the process. It provides:

‘Before the shareholders of a company may consider a resolution contemplated in subsection (1) –

- (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

¹⁷ In the founding affidavit in the application the second respondent had annexed a resolution taken by the board of the MBDA in support of her authority to act on behalf of the MBDA. In error, the incorrect resolution had been annexed, being a resolution to oppose the review. The matter was rectified in reply where the correct resolution taken at a meeting of the board on 12 September was annexed. It is, accordingly, not necessary to address the content of the resolution any further.

¹⁸ Section 71(1) provides for the shareholders to remove a director by majority vote, subject to s 71 (2).

- (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.'

[21] Section 71(2) does not detract from the validity of the resolution taken on 22 August 2023. The highwater mark of the resolution was that the municipality would take steps to remove the board of the MBDA on the basis of unsatisfactory performance. It was no more than the commitment that the Minister had asked for. The resolution postulated due process, as circumscribed in s 71(2) of the Companies Act, and identified the grounds upon which the proposed resolution would be advanced. It did not amount to a removal of the directors as the implementation of the resolution required notice to be given to the directors of the intended removal and the grounds contended for. The information was necessary to enable the directors to respond, as envisaged in s 71(2)(b). The municipality must first afford the directors a reasonable opportunity to make a representation to them before they can put the proposal to the vote. Thus, the municipality is correct that the resolution taken on 22 August 2023 stands in law and in fact. But it has no effect, until and unless it has been implemented, and no steps have been taken pursuant to s 71 of the Companies Act.¹⁹ I can detect no inconsistency between s 93G of the Systems Act and s 71 of the Companies Act so as to exclude the application of the latter.

[22] Mr Ronaasen, on behalf of the municipality, argued that s 71(1) does not require of shareholders to provide reasons and that it is explicit that the power to remove directors prevail over any provision to the contrary in the company's memorandum of incorporation, the rules of the company, or an agreement between the shareholder, the company and the directors. The reasoning does not advance the debate in this case, because a resolution which has the effect of removing the directors may not be put to the vote until the shareholders have complied with ss 71(2). Accordingly, there has

¹⁹ See *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 72 – 75; and *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* 2018 (1) SA 311 (WCC) para 53.

been no removal of the directors. It is not necessary in this matter to determine whether the argument could be sustained in the case of a municipality exercising a statutory power, in terms of s 93G of the Systems Act. I express no view on this issue.

[23] To summarise, the council of the municipality resolved to take steps to remove the directors of the MBDA, but it has not done so. The city manager misconceived the effect of the resolution, which has resulted in the erroneous perception that the directors were removed by the delivery of her letters dated 23 and 24 August 2023. In the result, they are the board and I am satisfied that they were entitled to convene the meeting on 12 September 2023, and to vote on the resolution to authorise the institution of the application.

[24] However, the municipality's challenge to the *locus standi* of the third to sixth respondents is not limited to their representation of the MBDA. Ms Perumal deposed to the founding affidavit in the application. She cited the third to sixth respondents in their personal capacity and their capacity as directors, but she did not say that she was deposing to the affidavit on behalf of the third to sixth respondents. For these reasons it was argued that they are not before court.

[25] This argument, too, cannot be sustained. Each of the third to sixth respondents made a confirmatory affidavit in which they confirm, as correct, the citation of themselves in their personal and representative capacities. For reasons which I have already set out, they are, as a matter of law, directors of the MBDA and their purported removal directly affects their interests in their personal capacity. The second applicant did not require authority from the third to sixth applicants to depose to an affidavit on their behalf.²⁰

[26] What is in issue, is whether Peyper Attorneys were authorised to institute the application on behalf of the third to sixth respondents. Rule 7 of the Uniform Rules of Court provides that a power of attorney establishing the authority to act on behalf of a

²⁰ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624F-H; and *Firstrand Bank Ltd v Fillis and Another* 2010 (6) SA 565 (ECP) at para 13.

litigant need no longer be filed as a matter of course. If their authority is to be challenged, in terms of rule 7, they would be required to satisfy the court that they are properly authorised to act on behalf of the litigant concerned. Until they have done so, they would be precluded from acting further. The authority of Peyper Attorneys to institute the proceedings on behalf of the third to sixth respondents has not been challenged.²¹ Thus, I am satisfied that the first to sixth respondents have *locus standi*, both as directors of MBD and in their personal capacities to bring the application.

The direction to pay.

[27] The application for an interdict to direct payment in terms of the SDA is resisted on two grounds. First, clause 20.3.2 of the SDA provides:

‘20.3 An event of default by the NMBM shall occur if:

20.3.1 ...

20.3.2 the NMBM fails to pay any amount due by it in terms of this Agreement on the due date for payment thereof and the NMBM persists in such failure to pay for a period of 14 (fourteen) Business Days after delivery by the Service Provider to the NMBM of written notice requiring it to pay such amounts.’

[28] The municipality contended that the MBDA had failed to give it the contractually required fourteen days’ notice requiring it to pay. In any event, the municipality argued that, had it received such notice, it would have disputed its obligation to pay and the MBDA would have been obliged, as they still are, to refer the dispute to arbitration in terms of clause 18 of the SDA. Thus, the municipality reasoned that the court does not have jurisdiction to decide the matter.

²¹ A challenge was made to the authority of Peyper Attorneys in the review on 28 September 2023. It was not pursued and I shall accept, accordingly, that they did satisfy the court of their authority.

[29] The contractual notice may be easily disposed of. I have referred earlier to the correspondence by Peyer Attorneys to the executive mayor, on 5 September 2023, wherein they recorded that the municipality was in breach of its contractual obligations by failing to place the MBDA in funds and they demanded payment thereof.²² Admittedly, the letter demanded payment by 6 September 2023, however, they did not take action before 24 October 2023, being more than fourteen business days after the demand. Thus, I consider that an event of default, as envisaged in clause 20.3.2 has been established.

[30] I turn to the arbitration clause. An agreement to arbitrate does not deprive a court of its jurisdiction over the dispute. An arbitration agreement is not an automatic bar to court proceedings and a party cannot file an exception to a claim brought in a court of law on the ground that the issue must be tried by an arbitrator.²³ When a party institutes court proceedings, despite the arbitration agreement, a defendant may, by a special dilatory plea, ask for a stay of the proceedings, pending the final determination of the dispute by an arbitrator.²⁴ The party resisting the stay of court proceedings bears the onus, which will not be easily discharged, of convincing the court that, owing to exceptional circumstances, the stay should be refused.²⁵

[31] However, if a party seeks to rely on an arbitration clause to found such a dilatory plea it is required to allege and to prove that the arbitration clause or agreement is applicable to the dispute between the parties²⁶ and that all the preconditions contained in the agreement for commencing arbitration have been complied with.²⁷

²² The material portions are quoted in para 13 and 14 of this judgment.

²³ *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D); [1980] 1 All SA 239 (D).

²⁴ *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C); [1977] 4 All SA 733 (C); and *G K Breed (Bethlehem)(Edms) Bpk v Martin Harris & Seuns (OVS)(Edms) Bpk* 1984 (2) SA 66 (O).

²⁵ *Delfante and Another v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C); [1992] 3 All SA 968 (C); and *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP).

²⁶ *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A); *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A).

²⁷ *Santam Insurance Ltd v Cave t/a The Entertainers and The Record Box* 1986 (2) SA 48 (A) and *Amler's Precedents of Pleadings* (9th ed) p. 44.

[32] Accordingly, it is necessary to have regard first to the provisions of the SDA. Part X of the SDA sets out the dispute resolution procedures and clause 17.1 provides:

'Save as otherwise provided in this Agreement, should a deadlock or dispute of whatever nature arise in connection with this Agreement or any rights or obligations of the Parties thereunder, then the Parties shall meet as soon as reasonably possible after such deadlock or dispute arises. Such meeting shall take place on 7 (seven) days written notice from either Party, at the Service Provider's registered office. The Parties shall use their best endeavours to settle the dispute and negotiations shall be conducted in good faith.

17.1.1 If the Parties are unable to resolve the deadlock or dispute ... within 14 (fourteen) days after the commencement of the negotiations referred to in clause 17.1, then the deadlock or dispute shall:

17.1.2 if it is an Operational Dispute, first be subject to mediation between the parties.

17.2.2 If an Operation Dispute, that concerns a matter referred to in Clause 18.1 to 18.3 below,²⁸ remains unresolved after a bona fide mediation process concluded under the auspices of an independent and accredited mediator, it shall be resolved by way of Arbitration in terms of Clause 18 of this agreement.²⁹

[33] The material portion of the arbitration agreement, for purposes of this judgment, then provides:

'In respect of Disputes which arise in regard to:

....

18.2 the carrying into effect of (the agreement);

....

²⁸ The arbitration clause.

²⁹ An 'operational dispute' is defined in the SDA as a dispute which has the potential for stultifying the service delivery obligations of the NMBM and service provider if it is not expeditiously resolved.

shall be submitted to and decided by arbitration, provided that it has first been through the negotiation process in terms of clause 17.1, where applicable ...'

[34] The negotiation process set out in clause 17.1 of the SDA is a precondition for the commencement of arbitration. Where a dispute is an operational dispute, as the current dispute appears to be, mediation constitutes a further precondition to the commencement of arbitration. The municipality was obliged to establish and maintain clear channels of communication with the MBDA³⁰ and the official line of communication between them exists between Ms Perumal, as chair of the board, and the executive mayor.³¹ As I have outlined earlier, from 25 August 2023 until 13 September 2023, Peyper Attorneys, on behalf of MBDA and Ms Perumal, consistently sought such a negotiation process and the intervention of an intermediary. The municipality continually rebuffed their approaches and frustrated all attempts to satisfy the preconditions for arbitration.³²

[35] Thus, to summarise, first the MBDA has established an event of default and their compliance with clause 20.3.2 of the SDA. Second, the existence of an arbitration clause does not deprive the court of jurisdiction. Third, the municipality has not only failed to establish that the preconditions for the commencement of arbitration had been met, but the evidence demonstrates a refusal to participate in the process prescribed for arbitration with the effect that it has not been possible for the MBDA to proceed to arbitration. Accordingly, the challenge to the jurisdiction of the court must fail.

Non-joinder

[36] The municipality contended, in any event, that the relief sought cannot be granted without the Minister being joined as party to the litigation. It is not contentious that a third party who has, or may have a direct and substantial interest in any order that

³⁰ Section 93A(c) of the Systems Act.

³¹ Section 93D(2)(a) of the Systems Act.

³² The approaches by Peyper Attorneys in this regard referred to the Intergovernmental Relations Framework Act, 13 of 2005. It is not necessary for purposes of this application to decide on the applicability of the Act to the current dispute as the Systems Act and the SDA provide for their own process.

the court might make in proceedings, or if such an order cannot be sustained, or carried into effect, without prejudicing that party, he is a necessary party and must be joined in the proceedings, unless the court is satisfied that such a person has waived his right to be joined.³³ When a person is a necessary party the court will not deal with the issue without a joinder being affected, and no question of discretion or convenience arises.³⁴ However, not every kind of interest qualifies as a direct and substantial interest.

[37] In *Pheko Nkabinde J* emphasised:

‘The test for joinder requires that a litigant have a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts.’³⁵

[38] The interest must be a legal interest in the proceedings and not merely a financial interest.³⁶ Thus, in *Sheshe v Vereeniging Municipality*³⁷ it was held that the lessor who sought to evict a lessee was not required to join any sublessee, even though they may be in occupation of the property, because the sublessee had no legally enforceable right in terms of the contract between the lessor and the lessee which was the subject matter of the litigation.³⁸ Their right of recourse lay against the lessee, as sublessor. The principle is further illustrated in *Amalgamated Engineering Union* where the court employed two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the party would have *locus standi* to claim relief concerning the same subject matter.³⁹ The second was to examine

³³ See, for example: *Absa Bank Ltd v Naude NO and Others* 2016 (6) SA 540 (SCA); *Morudi and Others v NC Housing Services and Development Co Ltd and Others* 2019 (2) BCLR 261 (CC); and *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC).

³⁴ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 165-171.

³⁵ *Pheko* para 56.

³⁶ *Hartland Implemente (Edms) Bpk v Enal Eiendomme Bk en Andere* 2002 (3) SA 653 (NC) at 663E-H.

³⁷ 1951 (3) SA 661 (A) at 667A.

³⁸ Since the Constitution a sublessee, in residential property, has a constitutional right as developed in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

³⁹ p. 661.

whether a situation could arise in which, because the third party had not been joined, any order that the court might make would not be *res judicata* against him, entitling him to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.⁴⁰

[39] In respect of the first of these tests, the subject matter of the litigation in the interdict application is the SDA. The Minister is not a party to the SDA and obtained no legally enforceable rights under the SDA. He is in a similar position to a sublessee in *Sheshe*, having an indirect interest. In respect of the second, the question arises whether the Minister would be entitled to approach a court again concerning the same subject matter, being the payment of money due under the SDA, or the removal of the directors of the MBDA. The relationship which exists between the municipality and the MBDA is statutory.⁴¹ The MBDA is a municipal entity and the municipality appoints and removes directors in terms of the statutory provisions discussed earlier. The Minister does not derive any rights under the Systems Act in this regard.

[40] The municipality reasoned that the Minister is a necessary party in respect of the interdictory relief because he wrote to them on 9 August 2023 and laid down a condition for the transfer of funds to them.⁴² The funds fall due to the municipality in terms of the Constitution in order to provide basic services and to perform the functions allocated to municipalities.⁴³ There is no legal relationship between the Minister and the MBDA. The only identifiable ground upon which the Minister could have withheld part of the municipality's equitable share, to which it becomes entitled under s 214(1)(a) of the Constitution, would have been in terms of s 38 of the MFMA. Section 38 permits the withholding of such funds when there has been a 'serious' or 'persistent' breach of measures established in terms of s 216(1) of the Constitution.⁴⁴ The municipality has not identified any such measures, nor has it alleged that any such measures have been

⁴⁰ p. 660-661.

⁴¹ The Systems Act.

⁴² Paragraph 6 of the judgment.

⁴³ Section 227(1)(a) of the Constitution. See fn 4.

⁴⁴ Measures prescribed by national legislation to ensure transparency and expenditure control in each sphere of government.

breached. Any recourse that the Minister may have pursuant to his letter, seems to me to be against the municipality. The municipality has contracted with the MBDA to deliver services on their behalf and it has undertaken to the MBDA to pay the approved budgets to them in quarterly disbursements. They have failed to do so, and that is the subject matter of the litigation. Accordingly, the interest that the Minister may have is not a direct and substantial interest so as to make him a necessary party.

Urgency

[41] As I have said, the application was launched as a matter of urgency on 24 October 2023. In the notice of motion, the municipality was afforded until 3 November 2023 to file answering affidavits. An extension of the period was subsequently agreed upon between the parties, and the application was postponed as it was deemed desirable that it be heard simultaneously with the review. In the answering affidavit the municipality took issue with the urgency of the matter and contended firstly, that the MBDA had failed to make out a proper case for urgency as envisaged in rule 6(12)(b) of the Uniform Rules of Court and, secondly, that any urgency which existed was self-created.

[42] By the time that the matter was argued three full sets of affidavits had been filed and all the material issues had been fully aired. It seems to me that little purpose exists to now refrain from hearing the application. While Mr Ronaasen did not abandon the argument in respect of urgency, he, fairly in my view, did not present any argument in respect of the issue.

[43] The MBDA contended that the municipality had neglected or refused to affect the quarterly transfers which were due in terms of the SDA on 1 July 2023 and again 1 October 2023. They referred to the various written demands and requests made by Peyper Attorneys, which yielded no results, and contended that the municipality was acting unlawfully.

[44] Ms Perumal said that this had had severe financial consequences for the MBDA which had incurred expenses exceeding R13 million since July 2023. She proceeded to explain that the MBDA would run out of money in the near future and would be unable to cover their monthly and quarterly expenses. This, she said, would be catastrophic to the MBDA and result in a default on their obligations to staff, and other entities, and they may be compelled to utilise funds that had been allocated to specific projects in order to fund their ongoing expenses. All of this, she explained, would have far-reaching consequences for service delivery relating to many projects that the MBDA currently pursues in the interests of the city. Reflecting on these averments she contended that the urgency in the application was self-evident.

[45] Mr Ronaasen, in his heads of argument, contended that nothing was said of why the MBDA could not be afforded substantial redress at a hearing in due course,⁴⁵ including an arbitration in terms of the SDA.

[46] I have dealt earlier with the arbitration clause in the SDA and the municipality's extended frustration of the preconditions for arbitration. The inevitable delays that occur in litigation in the ordinary course are notorious. The finalisation of such litigation could take many months, with the probable collapse of the MBDA, with detrimental consequences to the service delivery of the municipality, as explained by Ms Perumal.

[47] I turn to the alleged delay in launching the application. An applicant who first seeks compliance from the respondent before lodging an application cannot be said to be dilatory in bringing the application, nor is urgency self-created thereby.⁴⁶ The MBDA, acting through Peyer Attorneys, made every endeavour to resolve the matter by the utilization of channels of communication prescribed in the Systems Act until the municipality, finally, on 20 September 2023, responded categorically that no payments would be made. The negotiations sought was, as adumbrated earlier, a prerequisite for

⁴⁵ As required by rule 6(12)(b) of the Uniform Rules of Court.

⁴⁶ See, for example: *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) at 94C-D.

the arbitration provided for in the SDA. I do not think that the conduct of the MBDA during this period can be criticised.

[48] However, the municipality contended that the delay from 13 September 2023, when Peyper Attorneys threatened an urgent application unless a positive response was received, to 24 October 2023 remained unexplained. Factually, however, the review was served on the MBDA on 15 September 2023. The founding papers in the review amount to nearly 250 pages and it included a considerable volume of legal arguments which impacted directly on the issues which arise in the application. Self-evidently, the applicants could not be criticised for first giving consideration to the first meaningful engagement from the municipality before launching an urgent application. On 28 September 2023, the municipality challenged the authority of Peyper Attorneys to act in the review, which have caused an inevitable delay in proceedings. For reasons which I have set out earlier, the application remained urgent and to the extent that the affidavit may fall short of the standard set in rule 6(12)(b), the non-compliance with the rule must, on the facts of the present case, be condoned.⁴⁷

[49] In the result, I make the following order:

1. The current board of the first applicant, the Mandela Bay Development Agency, being the second to sixth applicants, are declared to be the lawful board of the first applicant and may continue to act as such until lawfully removed from the board, whether in terms of s 93G of the Local Government: Municipal Systems Act, or otherwise.
2. The respondent, the Nelson Mandela Bay Municipality, is ordered to transfer, forthwith, the quarterly amounts due to the Mandela Bay Development Agency, as provided for in the Service Delivery Agreement concluded between them, including all transfers due at the date of this order.

⁴⁷ Rule 27(3) of the Uniform Rules of Court.

3. The respondent is ordered to pay the costs occasioned by the application including the costs of two counsel, where so utilised.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv R Buchanan SC

Instructed by: Peyper Attorneys
c/o Struwig Jaftha-Potgieter Attorneys
Gqeberha

For Respondent: Adv O Ronaasen SC

Instructed by: Kuban Chetty Inc
Gqeberha

Date Heard: 22 February 2024

Date Delivered: 19 March 2024