

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: 1376/22

In the matter between:

TLJ SECURITY SERVICES

Applicant

and

TSWAING LOCAL MUNICIPALITY

Respondent

REASONS FOR THE ORDER/JUDGEMENT

DIBETSO-BODIBE AJ

[1] "... a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of Constitutional Law."¹

¹ Fedsure Life Assurance LTD and Others v Greater Johannesburg Transitional Metropolitan Council (CCT7/98) [1998] ZACC 17 (14 October 1998) (Fedsure) at para 56

- [2] "... the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."²
- [3] "... failure by a statutory body to comply with the provisions that are prescribed for the validity of a specified transaction renders the transaction unlawful and ultra vires (beyond one's legal power) and as such failure cannot be remedied by estoppel, as that would validate a transaction which is unlawful and ultra vires."³
- [4] On 31 August 2023, the application for default judgement in this matter was dismissed based on the fact that, no organ of State may enter into an oral agreement for procurement of goods and services outside of government prescripts. Pursuant to that order, the Applicant filed an application for written reasons for the order granted. I therefore provide the reasons hereunder.
- [5] In its heads of argument the Applicant, TJJ Security Service (TJJ), states that the parties entered into a verbal or oral agreement for a period of five (05) months whereby TJJ had to provide professional close protection services to then Acting Municipal Manager, Mr Itumeleng Jonas, and physical protection services on the properties and/or movable assets and/or building belonging to the Respondent, Tswaing Local Municipality (the Municipality).
- [6] The terms of the agreement according to the Particulars of Claim are that: -
- [6.1] TJJ would provide security services to the sites belonging to the Municipality by availing a number of security guards per shift;
- [6.2] The amount of fees per security guard for rendering the said services on each site will amount to R14 375.00 per guard.

² Fedsure at para 58

³ Merifon (Pty) Limited v Greater Letaba Municipality and Another (CCT159/21) [2022] ZACC 25 (4 July 2022) (Merifon CCT) at para 15

- [6.3] The agreement date was 15 August 2021, but the provision of security services had already commenced on 01 August 2021, fourteen days before the effective date of the agreement. The contract was to endure for a period of five (05) months effective from 01 August 2021 to 31 December 2021.
- [6.4] On 14 December 2021, the Municipality terminated the contract via e-mail and TJL demanded payment of R3 744 974.99 for services rendered for a period of five (05) months.
- [7] Subsequently, TJL sued the Municipality per Summons dated 13 June 2022 and the Municipality failed to file the Notice of Intention to Defend the suit; hence the application for default judgement which I dismissed on 31 August 2023.
- [8] It is worth noting that on 16 August 2021, a day after the agreement date and fifteen days after the security services had already commenced, TJL, received an appointment letter authored by the Acting Municipal Manager headed **“Confirmation Letter of Appointment to Provide Professional Security Services – Physical Guarding Security on Behalf of Tswaing Local Municipality,”** and it states thus-

“Name of the Bidder – TLJ (*sic*) Security Services CC

Services Category – Physical Guarding Services

The Tswaing Local Municipality hereby wish to confirm that TJL Security Services CC is appointed by the municipality to render professional services for the period of five (05) months in rendering physical guarding services starting from the 1 August 2021 until 31 December 2021.

It is against this background that the Company has demonstrated professional conduct and excellent services by safely guarding the

assets of the municipality without any form of compromising security and providing the municipality with a risk assessment report of all sites identified to be safely guarded to enable the institution to prepare for the worse scenarios should any unforeseeable events occurred.

Should you require any information in this regard, please contact the Office of the Acting Municipal Manager or Acting Chief Financial Officer.”

[9] TJL contends in its heads of argument that the applicant indeed entered into a verbal agreement with the Municipality, which agreement was later confirmed by way of a letter dated 16 August 2021 and that the author of the appointment letter was ‘writing as an accounting officer on behalf of the respondent as he was the Acting Municipality (sic) Manager, with all the powers and authority vested in him, did confirmed (sic) the said agreement of Security Services rendered by the applicant’. Further that the mere fact that the agreement to render security services towards the respondent was concluded verbally, does not invalidate the agreement between the parties herein.

[10] The parties entered into an oral agreement for TJL to provide security services for the Municipality for a period of five (05) months. The procurement of goods and services are government by section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which provides that when an organ of state in the national, provincial or local sphere of government ..., contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.⁴

[11] The Local Government: Municipal Finance Management Act no 56 of 2003 (the MFMA) is the legislation that is directed, in part, towards the effective implementation of the precepts in Section 217(1) of the Constitution. Part I of Chapter 11 (Section 110 – 119) of the MFMA regulates supply chain

⁴ Section 217(1) of the Constitution

management by municipalities and municipal entities. Section 111 requires each municipality and municipal entity to have and implement a supply chain management policy to give effect to the provisions enlisted under Part I. Section 112 which echoes the provisions of Section 217 of the Constitution stipulates that the supply management policy must be fair equitable, transparent, competitive, transparent and cost-effective.

[12] Section 65(2)(i) of the MFMA imposes a duty on the Municipality's accounting officer, and in this case, the Acting Municipal Manager, to take all responsible steps to ensure that the supply chain management policy is implemented in a way that is fair, equitable, transparent, competitive and cost-effective. The ultimate goal of the supply management policy is to promote compliance with the relevant provision of the MFMA and ultimately Section 217 of the Constitution. Whether or not in the present case, the Municipality has a supply chain management policy in place in compliance with the provisions of Section 111 of the MFMA is not relevant, as the internal prescripts are not the subject of interrogation. Suffice to state that an important foundation of our constitutional democracy is the doctrine of legality, a subset of the rule of law, and that the exercise of public power must strictly comply with ordained prescripts. Failure to observe this contravenes the doctrine of legality. No organ of state or public official may act contrary to or beyond the scope of their powers as laid down in the law.

[13] The application for default judgement is for the payment of R3 744 974.99 for services provided as alluded above. Regulation 12(1)(d) of the MFMA regulations provides that a supply management policy must provide for the procurement of goods and services by way of competitive bidding process for procurement above a transaction value of R200 000.00. This regulation was obviously intended to apply to such a contract. In other words, the security services were supposed to have been subjected to a public tender, failure which renders the contract null and void and therefore invalid.

- [14] In **Municipal Manager: Qaukeni and Others v FV General Trading CC**⁵ “The Supreme Court of Appeal said “... this Court set aside a contract concluded in secret in breach of provincial procurement procedure, holding that such a contract was entirely subversive of a credible tender procedure and that it would deprive the public of the benefit of an open competitive process. If contracts were permitted to be concluded... without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.”
- [15] In the appointment letter, TJJ is termed “bidder”, and from the reading of the letter it is apparent that TJJ had previously been appointed to procure security services for the Municipality. As the parties had entered into a verbal contract, TJJ cannot be a bidder as a bidder is an external service provider, who participated in a duly advertised tender in accordance with the supply chain management policy.
- [16] TJJ’s contention that the appointment letter was written by the Acting Municipal Manager on behalf the Municipality with all the powers and authority vested in him, and that the mere fact the agreement was concluded verbally does not render the contract invalid, cannot advance its case given the peremptory nature of the supply chain management prescripts. To sum it all, even if the contract was approved by the municipal council, such council resolution would not assist to advance the case of TJJ.
- [17] This is so, given the provisions of Section 19 of the MFMA headed ‘Capital projects’ which provides:
- ‘(1) A municipality may spend money on a capital project only if-
- (a) the money for the project, ... has been appropriated in the capital budget...
 - (b) the project, including the total cost, has been approved by council,
 - (c) ...

⁵ Qaukeni (324/2008) [2009] ZASCA 66 (29 May 2009) at para 15

(d) the sources of funding have been considered, are available and have not been committed for other purposes’

[18] The purpose of Section 19 is to prevent municipalities from spending money on capital projects which have not been budgeted for and to promote good governance within the local sphere of government. This ensures that transparency, accountability, fiscal financial discipline are fostered. The procurement of security services, in my view, constitutes a capital project as contemplated in section 19.

[19] The parties entered into an oral agreement contrary to the provisions of Section 116 of the MFMA headed ‘Contracts and contract management’ which provides that a contract or agreement procured through the supply chain management system of a municipality or municipal entity **must** be in writing and stipulate the terms and conditions of the contract or agreement. Plainly, TJJ cannot therefore rely on this oral agreement for the payment of the services procured. It is of no coincidence that the agreement is flawed with contradictory terms and conditions concerning the agreement date (15 August 2021), the commencement date (01 August 2021), and the date of the confirmation/appointment letter (16 August 2021). This is so, as the agreement was concluded in total disregard of the MFMA and the Supply Chain Management Policy.

[20] Although the Supreme Court of Appeal in **City of Tshwane v RPM Bricks Proprietary Ltd**⁶ dealt with the principle of estoppel, the court outlined the relevant principles of legality which are worth mentioning in the present case. In distinguishing between two categories, a distinction which according to the court is not always truly discerned, the court stated thus:-

“[11] I am referring to the distinction between an act beyond or in excess of the legal powers of public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other.

⁶ RPM Bricks (177/2006) [2007] ZASCA 28 (27 March 2007)

- [12] In the second category, persons contracting in good faith with the statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangement or formalities have been satisfied, but are entitled to assume that all the necessary arrangement or formalities have indeed been complied with. Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements of formalities were not complied with.
- [13] As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied because that would give validity to a transaction by estoppel which is unlawful and therefore ultra vires.”
- [21] The parties in the present case entered into an oral agreement for the procurement of security services. The principle of legality was implicated because the Municipality’s conduct was at odds with Section 19, Chapter II, Part 1 and in particular Sections 112 and 116 and Regulation 12(1)(d) of the MFMA.
- [22] TJL’s contention that the Acting Municipal Manager in his capacity as the accounting officer, entered into the agreement with all powers and authority vesting in him, cannot displace peremptory statutory requirements.
- [23] In the circumstances, “no court can compel a party to flout the law and more fundamentally, the principle of legality which is the cornerstone of our constitutional democracy. And sight should never be lost of the fact that in exercising their judicial functions, courts are themselves constrained by the principle of legality...”⁷ I therefore find that it was impermissible for the Municipality to enter into an agreement contrary to the prescripts of the

⁷Merifon (Pty) Ltd v Greater Letaba Municipality and Another (112/2019) [2021] ZASCA 50 (22 April 2021) at para 29

MFMA. The order of 31 August 2023 dismissing the application for default judgement was therefore duly granted.

**O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by release to SAFLII

Order granted on: 31 August 2023

Judgement delivered on: 18 January 2023

On behalf of the Applicant: Adv M. Motlhale

Instructed by: Lerato Mooketsi Attorneys

On behalf of the Respondent: No Appearance