



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

CASE NO: 398/2016

In the matter between:

**NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

Plaintiff

and

ERASTYLE (PTY) LTD

(Registration No. 2012/038907/07)

First Defendant

MPILO SAKILE MBAMBISA

Second Defendant

MAMISA CHABULA-NXIWENI

Third Defendant

MHLELI MLUNGISI TSHAMASE

Fourth Defendant

TREVOR HARPER

Fifth Defendant

MZWAKE CLAY

Sixth Defendant

ROLAND WILLIAMS

Seventh Defendant

WALTER SHAIIDI

Eighth Defendant

JUDGMENT

RUGUNANAN, J

[1] The plaintiff is a Category A municipality established in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998 read with section 155(1) of the Constitution¹. The first defendant² is a juristic entity registered in accordance with the laws of the Republic of South Africa. The second to eighth defendants (collectively “the employee defendants”) are uniformly former senior employees of the municipality and were incumbents of various positions namely: The second defendant as municipal manager and accounting officer³; the third defendant as Executive Director: Public Health, and who from time to time had acted as municipal manager; the fourth defendant as Project Manager: Integrated Public Transport System; the fifth defendant as Chief Financial Officer (“CFO”); the sixth defendant as Chief Operating Officer (“COO”); the seventh defendant as Director: Communications; and the eighth defendant as Executive Director: Infrastructure and Engineering.

[2] The plaintiff’s claims arise from its appointment of the first defendant as a lead consultant for the development of a comprehensive communication and marketing strategy in respect of the project for the plaintiff’s Integrated Public Transport System (“IPTS”). The appointment was made during or about February 2014 pursuant to which the following

¹ Constitution of the Republic of South Africa, Act 108 of 1996, as amended

² Also known as “Stratcom”

³ Appointed as such under section 54A of the Local Government: Municipal Systems Act 32 of 2000 read with section 60 of the Local Government: Municipal Finance Management Act 56 of 2003

sums of money were paid to the first defendant, namely; R5 263 179.89; R1 390 800.00; and R984 197.21.

[3] The cause of action against the first defendant essentially is that the appointment of the first defendant occurred in breach of the Constitution and the plaintiff's Supply Chain Management Policy ("the SCM policy" or "the policy") and is for payment of the abovementioned amounts.

[4] The cause of action against the second, third, fourth, fifth, sixth, seventh and eighth defendants arose from their conduct in their employment relationship with the plaintiff, and is posited on a wrongful and intentional, alternatively negligent breach of their obligations to discharge their duties diligently, transparently, with the utmost good faith, and without prejudice to the plaintiff.

[5] Arising therefrom:

- (i) the claim against the second and fifth defendants, alternatively against the third defendant, is for the amounts of R 5 263 179.89; R1 390 800.00; and R984 197.21;⁴
- (ii) the claim against the fourth defendant is for the amounts of R5 262 179.89 and R1 390 800.00; and the amount of R984 197.21 for which the fourth and eighth defendants, the plaintiff contends, are jointly and severally liable;⁵
- (iii) the claim against the sixth and seventh defendants is for the amount of R1 390 800.00 for which it is contended they are jointly and severally liable.

⁴ POC paragraphs 73-74

⁵ POC paragraph 81

- [6] It is alleged that the payments to the first defendant pursuant to its appointment were effected in breach of the provisions of the Local Government: Municipal Finance Management Act⁶ (“the MFMA”), such conduct causing irregular expenditure to be incurred by the plaintiff and falls to be recovered from the second, third, and fifth defendants under the peremptory provisions of section 32(2) of the MFMA.
- [7] The plaintiff accordingly seeks orders: (i) declaring certain decisions of the second and third defendants to be unlawful and invalid; (ii) declaring the appointment of the first defendant to be unlawful and void *ab initio*; and (iii) reclaiming the aforementioned amounts from the first defendant and / or the remaining defendants.
- [8] Each of the defendants filed special pleas and pleaded over on the merits of the plaintiff’s claims. The first defendant raised two special pleas. The first was to the effect that the proceedings instituted by the plaintiff constituted an abuse of process – the plaintiff was obliged to institute proceedings under rule 53 (and to file a record) since the plaintiff sought a legality review of its own decisions. The second special plea raised the issue of delay, it being contended that a review must be brought within a reasonable time and absent condonation the court is precluded from entertaining the action.
- [9] The special pleas of the second defendant were identical. In addition, he pleaded that insofar as the plaintiff relied on section 32(1)(c) of the MFMA for recovering irregular expenditure, it is obliged to prove that its claims are not precluded by the exception contained in section 32(2) (b) thereof. The third, fourth, fifth, sixth, seventh and eighth defendants have taken the same point in their special pleas. In a judgment handed

⁶ Act 56 of 2003, as amended

down on 6 November 2018, reported as *Nelson Mandela Bay Metropolitan Municipality v Erastyle and Others* 2019 (3) SA 559 (ECP), Goosen J dismissed the special pleas on these issues.⁷ The issue of delay (which the learned judge referred to as “the delay special plea”) was, by agreement between the parties, reserved for determination by the trial court.

[10] Accordingly, in addition to the orders sought by the plaintiff, what remained for determination at the trial was the first defendant’s delay special plea and the self-same issue raised by the second defendant - as also the fifth and eighth defendants, in their special pleas.⁸

THE CONDUCT OF THE TRIAL

[11] Consequent to the striking out of the first defendant’s defence on 29 September 2020 the plaintiff pursues its claim against the first defendant by default. At the commencement of the trial I was informed from the bar that the third defendant is deceased and that the plaintiff sought a separation of its claim against the third defendant in anticipation of the claim being pursued against her deceased estate.

[12] Except for mentioning that no executor has been appointed for the estate, no proof was placed before court, by way of a death certificate or an affidavit from a member of the third defendant’s family or perhaps an affidavit from the plaintiff’s attorney whom counsel mentioned has been in contact with a close relative of the third defendant. Nor was any internal record or document of the plaintiff, offering indication of being notified of the third defendant’s death, tendered. In the circumstances in

⁷ All with attendant costs orders that included the costs of two counsel.

⁸ Roll call preparation checklist 23 October 2020 paragraph 1.5.2; Plaintiff’s heads of argument paragraph [11]

the absence of either documentary or factual proof of the death of the third defendant the logical course to adopt is that the separation order sought be refused and that the third defendant be deemed to be in default of appearance.

[13] The default status also applies to the seventh defendant. Although having defended the claim/s against him and having delivered a plea, he made no appearance at the trial notwithstanding service of the notice of set down by registered mail and by email.⁹ The fourth defendant appeared in person while the remaining defendants (i.e. the second, fifth, sixth and eighth defendants) were represented by counsel.

[14] At the commencement of the trial the plaintiff placed before court an indexed and paginated bundle of documents (“the bundle”). Pursuant to the provisions of uniform rule 37 the parties agreed that the documents in the bundle are what they purport to be.

[15] In the conduct of its case the plaintiff led oral evidence of Mr. Burt Botha, a forensic investigator; Ms Barbara De Scande, at present the plaintiff’s Director of Expenditure Management; and Mr Johann Mettler, a former municipal manager of the plaintiff. The plaintiff thereafter closed its case. The defendants in turn uniformly did so without leading oral evidence in rebuttal of the plaintiff’s case.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

[16] The matter essentially concerns the procurement of goods and services by the plaintiff and the liability of its employees for incurring unlawful expenditure in breach of their duties of good faith and diligence towards

⁹ Transcript 19 April 2021 at 2:3-8

the plaintiff. Before proceeding to deal with the factual background to the matter it is desirable to describe in broad outline the legal framework pertaining to procurement of goods and services.

[17] The plaintiff is an organ of state in the local government sphere. The framework in which it procures goods and services is strictly regulated by legislation.¹⁰ The procurement process commences with section 217 of the Constitution. The section lays down the minimum requirements for a valid procurement process and requires that the procurement process preceding the conclusion of contracts for the supply of goods and services must be “fair, equitable, transparent, competitive and cost-effective” (see *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at 617B).

[18] The plaintiff has developed and maintains a SCM policy¹¹. The policy was adopted by the plaintiff’s council under section 217(1) of the Constitution and section 111 of the MFMA. The policy complies with the regulatory framework contained in the Supply Chain Management Regulations¹² (“the Regulations”).

[19] Where deviations from the fair processes envisaged by the legislation occur, they may all too often be symptoms of corruption or malfeasance in the process. Stated otherwise, a procurement process not properly undertaken may signify a deliberately skewed process, and as was

¹⁰ The applicable regulatory instruments being, inter alia, the Constitution (s217); the Preferential Procurement Policy Framework Act 5 of 2000; Chapter 11 of the Local Government: Municipal Finance Management Act 56 of 2003 (including sections 110 to 119); the Municipal Supply Chain Management Regulations published in Government Gazette No. 27636 on 30 May 2005, Government Notice 868 of 2005 (“the Regulations”); and the plaintiff’s Supply Chain Management Policy (“the Policy”) applicable at the time

¹¹ The policy is included in the plaintiff’s bundle

¹² as published in Government Gazette No. 27636 on 30 May 2005, Government Notice 868 of 2005

evident from the testimony of Mr Botha the procurement of the services of the first defendant through irregular procurement practices was part of a pattern of conduct endemic to the IPTS project.¹³ The rationale for insistence on faithful compliance with procedural formalities in the procurement process serves a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences (see generally *Allpay supra* at paragraph [27]).

[20] In summary the plaintiff's SCM policy, (the applicable paragraph numbers are indicated in brackets):

- (a) Delegated to the accounting officer all powers and duties necessary to discharge the supply chain management responsibilities conferred on accounting officers in accordance with chapter 8 of the MFMA and the Policy (paragraph 4);
- (b) stipulates that goods and services above a transaction value of R200 000 (inclusive of VAT) may only be procured by way of a competitive bidding process (paragraphs 12, and 20 to 27);
- (c) cloaks the accounting officer with the authority to dispense with the official procurement processes established by the policy and procure any required goods or services through any convenient process which may include direct negotiations, but only-
 - (i) in an emergency;

¹³ Heads of argument plaintiff paragraph 9

- (ii) if such goods or services are produced or available from a single provider only;
- (iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile;
- (iv) for the acquisition of animals for zoos and / or nature and game reserves; or
- (v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes (paragraph 39).

[21] The liability of employees for unlawful expenditure is regulated by section 32 of the MFMA. In relevant part the section reads as follows:

“32 Unauthorised, irregular or fruitless and wasteful expenditure

(1) Without limiting liability in terms of the common law or other legislation-

- (a) a political office-bearer of a municipality is liable for unauthorised expenditure if that office-bearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure;*
- (b) the accounting officer is liable for unauthorised expenditure 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, is liable for that expenditure; or*

- (d) *any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure 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 adjustment's budget; or*
- (ii) *certified by the municipal council, after investigation by a council committee, is 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."*

[22] It is apparent from the section that a municipality is statutorily obliged to recover unauthorised, irregular or fruitless or wasteful expenditure from the incumbents identified therein. Whether or not a municipality received value therefor is not a factor that poses a limitation to the exercise of such obligation.

[23] In *Nelson Mandela Bay Metropolitan Municipality v Petuna*, and in circumstances in which the plaintiff in this matter pursued a claim against a former employee, Chetty J said the following about section 32:

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"Civil proceedings to recover unauthorised, irregular or fruitless and wasteful expenditure is an obligation which a municipality is statutorily enjoined to Institute. The plaintiff's cause of action is clearly posited upon the provisions

¹⁴ Unreported ECPEHC Case No. 3786/2017, delivered 29 May 2018, at paragraph [4]

of section 32(1)(c) of the Act which provides that any political office bearer or official of a municipality who deliberately or negligently committed, made authorised and irregular expenditure is liable for that expenditure.

[24] The learned judge stated further:

“the language of the section is clear and unambiguous and has only one meaning...”

[25] In his judgment *supra* Goosen J concluded that:

“A reading of [the section] makes it plain that a municipality is obliged to recover unauthorised, irregular or fruitless expenditure unless the expenditure has been authorised or has subsequently been certified to be irrecoverable and written off. No preconditions are set for recovery in terms of [the section].”

[26] The categories of unlawful expenditure mentioned in the section are defined in section 1 of the MFMA. *Irregular expenditure* is the category under which the plaintiff contends the employee defendants assume liability. In broad summary it is expenditure incurred in contravention of, or which is discordant with a requirement of the MFMA including various other statutory provisions and in particular: *“expenditure incurred by a municipality... in contravention of, or that is not in accordance with the requirement of the supply chain management policy of the municipality... 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.”*¹⁵

[27] I am in full agreement with the submission in the plaintiff’s heads of argument that a claim in terms of the section is a claim created by statute providing for the recovery of the amount of the category of expenditure in question from the office bearer or official liable therefor as a penalty

¹⁵ *“fruitless and wasteful expenditure”*, by contrast, is expenditure incurred in vain and would have been avoided had a reasonable care been exercised, and *“unauthorised expenditure”* is expenditure incurred otherwise than in accordance with the specified provisions of the MFMA which require expenditure to be incurred in terms of an approved budget.

(and not as damages). It is a self-standing claim based on the jurisdictional facts provided for in section 32(1). If these are present, the claim will lie without any other requirement (such as for example, to set aside any unlawful action that gave rise to the expenditure in question).

BACKGROUND – A SUMMARY OF THE PLEADINGS AND EVIDENCE

[28] In the circumstances that follow, the plaintiff's pleaded case (and the evidence adduced during trial) essentially tracks the sequence of three payments made by the plaintiff to the first defendant for services ostensibly related to the IPTS project consequent to the first defendant's irregular and unlawful appointment unrelated to any competitive procedure. The plaintiff alleges that the payments were made by the fifth defendant through officials of the plaintiff to whom the necessary authority to do so had been sub-delegated by the fifth defendant.¹⁶

[29] To begin with, the funding for the IPTS project was allocated to the plaintiff by the National Treasury as conditional grant funding.¹⁷ Mr Mettler, the municipal manager of the plaintiff for the period December 2015 to January 2020, testified that such funding was ring-fenced by the national fiscus "*for a specific purpose, namely getting the bus service up and running*".¹⁸ The funding could only be utilised for that specific purpose and all expenditure incurred on the project had to accord with the budget approved by the National Treasury. Such funding did not fall outside the ambit of the usual constitutional and statutory prescripts for the procurement of goods and services and was, of necessity, subject to the procurement rules in terms of the MFMA and the plaintiff's SCM

¹⁶ POC paragraph 50

¹⁷ Evidence Mettler, transcript 19 April 2021, 50:11-13

¹⁸ Transcript 19 April 2021 50:14

policy. Hence, expenditure incurred outside the budgeted framework would be inconsistent with the conditions of the grant and had to be restored to the treasury.¹⁹

[30] The fourth defendant was formerly and at all times relevant hereto employed by the plaintiff as its manager for the IPTS project. Through the compilation of a string of memoranda, the evidence indicates that he procured (with the conscious or unconscious co-operation of other senior employee officials of the plaintiff) the appointment of the first defendant for the supply of services on a contract amount above the transaction value of R200 000 by deviating from the obligatory competitive bidding process stipulated in the SCM policy. Further indications are that he was instrumental in procuring funds for an additional payment (for purposes unrelated to the IPTS project) to the first defendant once the cap or limit on the contract amount was uplifted under the already unlawful contract awarded to the first defendant. It is the plaintiff's case that in the instances in which the memoranda were compiled the fourth defendant misrepresented the facts contained therein – that he did so unlawfully and intentionally, alternatively negligently and in breach of his duty of good faith and diligence, lies at the crux of its claim for damages against him (see further below).

[31] In *Pietersen v The State*²⁰ an appeal court considered the conviction of the appellant (a former accounting officer) on criminal charges under the MFMA *inter alia* relating to irregular expenditure negligently caused by his approval of a “deviation” in terms of policy provisions precisely similar to those contained in the SCM policy of the plaintiff. The court concluded that:

¹⁹ Transcript 19 April 2021 50:15-51:9

²⁰ Unreported, A309/2017 (ZAWCHC) (6 February 2019) at paragraph [53]

“The deviation was a stratagem designed to justify the appointment of [the service provider] the politically preselected consultant, for an open ended range of purposes over an extended period without a competitive tender process. It did not meet the requirement of Regulation 36 and was therefore invalid. As a result, all the expenditure incurred on [the service provider] was incurred in contravention of the SCM policy. That had the consequence that the payments to [the service provider] constituted irregular expenditure as defined in the MFMA, since all expenditure incurred in contravention of a municipality’s SCM policy ... amounts to irregular expenditure.”

[32] This statement, as correctly submitted by plaintiff’s counsel, unmistakably resonates with what occurred in this matter.

[33] In a memorandum dated 28 January 2014 (“the first memorandum”) the fourth defendant sought the authority of the third defendant as municipal manager (a.k.a the city manager) to appoint the first defendant directly as a lead consultant to the plaintiff *“for the development and implementation of a comprehensive communications and marketing strategy [for the IPTS project].”*²¹ At the time the third defendant was an incumbent in an acting capacity in place of the second defendant. It was motivated that the appointment will be for the duration of 12 months at R300 000 per month for the specified period with the contract amount capped at approximately R6 million (excluding contingencies and inclusive of VAT).²² In its heading the memorandum indicates that the fourth defendant purported to rely on paragraph 39 of the SCM policy where provision is made for an *“exceptional case where it is impractical or impossible to follow the official procurement processes”*.²³

[34] Except for pointing out that there is a current service provider but that *“an evaluation”* had indicated that *“it is unable to continue with the*

²¹ Particulars of Claim (POC), annexure POC2

²² annexure POC2 paragraph 2.17

²³ See also annexure POC2 paragraph 6

*marketing component of the project*²⁴, the memorandum offers no indication as to how the first defendant was identified, much less does it offer indications of the detailed scope of work to be undertaken or the first defendant's suitability to give effect to the mandate.

[35] As required by the plaintiff's internal procedures, prior to the memorandum being submitted to the third defendant, it was circulated to the eighth defendant (the executive director to whom the fourth defendant was accountable) who, by his signature, recommended the fourth defendant's proposal to the accounting officer. It was further signed by the then Director: Supply Chain Management who endorsed it as compliant "*with the MFMA supply chain policies, procedures and relevant financial processes*", and by the responsible accountant who confirmed the availability of funding.²⁵

[36] When the memorandum served before the then acting chief financial officer, Ms Barbara De Scande ("the acting CFO"), as testified by her, she commented that the SCM policy could not be bypassed. She declined to support the proposal and counter-proposed that an expedited bidding process or "*a 14-day tender process*" be followed.²⁶ On 6 February 2014 the third defendant declined to approve the fourth defendant's recommendation and favoured the counter-proposal by Ms De Scande for the implementation of a competitive bidding process.

[37] In a second memorandum dated 12 February 2014 the fourth defendant sought the reconsideration by the third defendant of her decision not to

²⁴ annexure POC2 paragraph 2.14

²⁵ Heads of argument, plaintiff paragraph 31.6-31.7, also annexure POC2 paragraphs 9.1; 10; and 10.1

²⁶ POC paragraph 14; annexure POC 2 paragraph 10.2

authorise the appointment of the first defendant.²⁷ He bypassed Ms De Scande and motivated the proposal for reconsideration on the basis that:

- (a) the existing service provider had indicated that it was unable to continue with the marketing component of the IPTS project and that an additional service provider was needed to “*market the service much better*”;
- (b) whereas the process proposed by him for the appointment of the first defendant was compliant with the SCM policy, “*the acting CFO did not consider the said supply chain and legal implications*”²⁸;
- (c) as the lead consultant had already been appointed “*it would neither be practical nor lawful to advertise the tender as suggested by the acting CFO*”; *this would have severe legal implications and challenges for the municipality to advertise the tender*;²⁹ and
- (d) “*the appointment will be for the duration of 12 months with the amount of approximately R3.6 million (excluding contingencies and inclusive of VAT) which will amount to R300 000 a month for the 12 months period*”.³⁰

[38] In making the submissions that he did, the fourth defendant suggested that the advertisement of a competitive tender would cause the existing service provider to raise a legal challenge and by inference that it was accordingly necessary to make the appointment out of the public eye.³¹

²⁷ annexure POC3

²⁸ annexure POC3 paragraph 4

²⁹ annexure POC3 paragraph 3

³⁰ annexure POC paragraphs 17-17.4

³¹ Heads of argument plaintiff paragraph 32.6

By means of an endorsement on the second memorandum effected on 13 February 2014 the third defendant approved the appointment of the first defendant for the stipulated period, adding that such approval was given “*on the strength of the legal advice from the project manager*” (i.e. the fourth defendant);

[39] In a memorandum directed to the third defendant on 20 February 2014³², Ms De Scande proffered detail as to why she did not support the appointment of the first the defendant without following SCM processes. The purport and contents of her memorandum was confirmed by her when she testified *viva voce*.

[40] Notwithstanding the contents of the aforementioned memorandum by the acting CFO, the third defendant proceeded on 21 February 2014 to sign a formal resolution.³³ It confirmed the decision of 13 February 2014 favouring the appointment of the first defendant. She did so in her capacity as “acting city manager” and also purportedly as “acting chief financial officer”; the latter, according to Ms De Scande, being a self-standing post and by implication a post which the third defendant did not and could not have held in a dual capacity.³⁴

[41] On 18 March 2014, some three weeks after having been so appointed, the first defendant submitted an invoice (No. 001) for payment of R5 263 157.89 (exclusive of VAT), notwithstanding its appointment being restricted to anticipated monthly payments of R300 000 in total amounting to R3,6 million over a year.³⁵ A contract payment certificate

³² annexure POC4

³³ annexure POC5

³⁴ Transcript 20 April 2021 41:11

³⁵ Two invoices were initially rendered under the same invoice number 001, the first for an amount of R5 263 157,89 excluding VAT and the second for the amount of R6 million inclusive of VAT; vide annexures POC6.1 and POC6.2

electronically certified by the fourth defendant and generated on 15 April 2014 by Mr Skade, an incumbent seconded to the plaintiff's IPTS division as its financial manager, authorised payment of R5 263 157.89 in favour of the first defendant to be effected on 21 May 2014. In spite of this the aforementioned memorandum by Ms De Scande presented an impediment to the processing of the payment sought. This is apparent from an email dated 23 April 2014³⁶ in which she had advised the fifth defendant (who had by then been appointed as CFO) that SCM processes were not followed in the appointment of the first defendant and that payment not be approved consequent to an illegal appointment³⁷.

[42] In these circumstances a report dated 29 April 2014 ("the third memorandum") ensued from the fourth defendant.³⁸ It was directed to the fifth defendant and to the second defendant (who had by then been occupying the position of municipal manager). The fourth defendant sought approval for the payment by the plaintiff to the first defendant of the amount of R6 million inclusive of VAT. In that memorandum the fourth defendant:

- (a) referred to the resolution of the third defendant (as acting municipal manager) of 21 February 2014 approving the appointment of the first defendant and stated that the latter had been appointed on 6 March 2014;
- (b) stated that the acting CFO (i.e. Ms De Scande) was not supportive of the item as she was of the view that an open tender process ought to have been followed;

³⁶ Plaintiff's bundle page 114-115

³⁷ Cross-examination De Scande, Transcript 20 April 2021, pp 27-30

³⁸ annexure POC8

- (c) contended that an open tender process would have exposed the plaintiff to the risk of a legal challenge by the appointed service provider Distinctive Trading (appointed on 18 September 2013) and sought to motivate this further by stating that the only means of avoiding such a challenge would have been to seek the review and setting aside of that prior appointment which would result in delay and additional costs;
- (e) contended that consequently there were “*exceptional circumstances which rendered it impractical to procure... services through an open tender method*”; and
- (f) stated that the award amount was capped at R6 million inclusive of VAT.³⁹

[43] Despite the advice given to him by Ms De Scande, the fifth defendant on 20 May 2014 recommended that the payment be approved since the approval of the appointment of the first defendant had already been granted on 21 February 2014. The second defendant also signed the third memorandum on 20 May 2014 and approved the fourth defendant’s recommendation. On the same date, both the second and the fifth defendants signed a formal resolution.⁴⁰ By his signature thereof the fifth defendant certified that he supported the fourth defendant’s submission and confirmed that it complied with MFMA supply chain policies, procedures and relevant financial processes. The second defendant, by his signature to the resolution, effectively approved payment of the capped amount to the first defendant.

³⁹ annexure POC paragraphs 24.1-24.6

⁴⁰ annexure POC9

[44] On 21 May 2014 the plaintiff paid to the first defendant the amount of R5 263 157.89 (“the first payment”). The payment is reflected in an extract from the plaintiff’s general ledger attached to the particulars of claim.⁴¹ The first payment was followed by two sequential payments of R1 390 800.00 and R984 197.22 to the first defendant. The circumstances in which this occurred are comprehensively pleaded in the plaintiff’s particulars of claim. In narrating them, I rely heavily on the proficiency exemplified in the main heads of argument submitted by plaintiff’s counsel.

[45] The budget allocation by the plaintiff’s municipal council for the year 1 July 2013 to 30 June 2014 included a vote description entitled “*Special Projects and National Pride*” which made provision for the funding of the event described as the “*20 Years of Freedom Celebrations*” in the amount of R1 474 160.00. Following rejection by the plaintiff’s municipal council of a proposal that this amount be increased, it was resolved on 11 March 2014 that all service providers for the celebration events be appointed in terms of the SCM policy.⁴²

[46] On 27 May 2014 the seventh defendant directed a written enquiry⁴³ to the aforementioned Mr Skade as to the availability of funds in the IPTS budget to pay for the freedom celebrations but was unable to obtain a commitment from the IPTS division. Following an order (understood to have been generated at the instance of the seventh defendant⁴⁴) to the first defendant for goods and / or services, the first defendant submitted an invoice on 12 June 2014 to the plaintiff’s communications division (headed by the seventh defendant) for the sum of R1 390 800.00. The

⁴¹ annexure POC10

⁴² annexure POC paragraph 31

⁴³ annexure POC11

⁴⁴ Heads of argument plaintiff paragraph 34.3

seventh defendant then sought to persuade⁴⁵ the plaintiff's Acting Director: Supply Chain Management, Mr Mantyontya to lift the contract limit or cap on the first defendant's existing contract (i.e. the contract for which the first defendant had been illegally appointed by the third defendant and paid pursuant to the resolution signed by the second defendant on 20 May 2014). By means of an email dated 15 July 2014⁴⁶ Mr Mantyontya informed the seventh defendant that his attempt at removing the cap was unsuccessful for want of a new resolution signed by the municipal manager.

[47] What followed on 5 August 2014 was a letter⁴⁷ from the seventh defendant to the sixth defendant, which in the opinion of the seventh defendant indicated the prudence of making use of the existing contract (i.e. the existing IPTS Communications and Marketing contract held by the first defendant) to pay for the 20 Years of Freedom Celebrations for the reason *inter alia* that the programmes had the same functionality. The letter disclosed that an order had been generated but as the existing contract was capped the payment process could not be concluded. It was in this context that the seventh defendant requested the sixth defendant to escalate the matter to the city manager (the second defendant) to seek approval for the lifting of the cap.⁴⁸ On 7 August 2014 the sixth defendant signed the letter from the seventh defendant thereby signifying his approval of the payment request and the recommendation to the second defendant that the cap be lifted. On the same day the second defendant resolved that the cap be lifted but in doing so did not specify a new limit on the amount to be paid to the first defendant.⁴⁹

⁴⁵ annexure POC13

⁴⁶ annexure POC14

⁴⁷ annexure POC15

⁴⁸ annexure POC paragraph 36

⁴⁹ annexure POC paragraphs 37-38 and 41

Consequent thereto and on 18 September 2014 payment in the amount of R1 390 800.00 (“the second payment”) was made to the first defendant.⁵⁰

[48] Arising from the abovementioned facts relating to the actions of the sixth and seventh defendants consequent to which the second payment was made, the plaintiff’s case is that it suffered damages due to an unlawful and intentional, alternatively negligent breach by each of them of their duty of good faith and diligence⁵¹ (dealt with further below).

[49] On 10 September 2014 and notwithstanding that it had been effectively paid the full contract amount in advance, the first defendant submitted a further invoice (No. 002) in the amount of R984 197.22 (including VAT).⁵² The fourth defendant consequently directed a further memorandum (“the fourth memorandum”)⁵³ to the second defendant seeking an increase in the contract value and approval for payment of the said amount to the first defendant.⁵⁴ He appeared to contend that the expenditure incurred by the first defendant was in relation to the 2014 Splash Festival and that the plaintiff was liable to make payment for which the authorisation of the second defendant was required. In addition he recommended that the second defendant approves the increase of the contract value from R6 million to R6 984 197.22 .⁵⁵

[50] The recommendation and authority to make payment was endorsed by the eighth defendant (on 24 February 2015); by the fifth defendant, as CFO (on 25 February 2015) who, in doing so, certified that it complied with

⁵⁰ annexure POC16 and POC17

⁵¹ POC paragraphs 85-87

⁵² annexure POC18

⁵³ annexure POC19

⁵⁴ POC paragraphs 42-44

⁵⁵ POC paragraphs 45-46 and POC19

the MFMA supply chain procedures, policies and relevant financial processes; and by the second defendant (on 26 February 2015).⁵⁶

[51] Consequent to the above and on 4 March 2015 the plaintiff paid the amount of R984 197,21 (“the third payment”) to the first defendant.⁵⁷

[52] In accordance with what has been set out above what follows is a determination as to whether the evidence is supportive of the plaintiff’s specific claims.

THE FIRST CLAIM

[53] The plaintiff seeks declaratory relief to the effect that the actions and decisions of the second and third defendants⁵⁸ occasioning the appointment of the first defendant and the consequent payment to it of the above-mentioned sums amounts to conduct inconsistent with the Constitution and falls to be declared unlawful, void *ab initio*, and invalid under section 172 (1) of the Constitution, in particular:

- (a) The decision of the third defendant on 13 February 2014 and its confirmation by means of a formal resolution dated 21 February 2014 which culminated in the appointment of the first defendant without initiating a competitive bidding process and where none of the grounds specified in paragraph 39 of the SCM policy were present (Such decision and resolution the plaintiff contends, including those that follow in the sub-paragraphs below, are invalid and fall to be declared as such under the provisions of section 172(1) of the Constitution for the reason that the procurement

⁵⁶ POC paragraph 47

⁵⁷ annexures POC20 and POC21

⁵⁸ As pleaded in paragraphs 51 to 55 and in paragraph 58 of the POC

process followed by the third defendant was not fair, equitable, transparent, competitive and cost effective);

- (b) The decision and resolution of the second defendant on 20 May 2014 in support of the fourth defendant's recommendation for approving the first payment, which decision and resolution were illegal consequent to the third defendant's illegal appointment of the first defendant;
- (c) The decision of the second defendant on 7 August 2014 for the lifting of the cap on the first defendant's contract in circumstances that culminated in the second payment being made - such decision being tainted by the illegality of the initial decision and resolution of the third defendant and amounted to irregular expenditure under the MFMA incurred in contravention of the SCM policy and constituted an improper increase in the contract value without compliance with competitive bidding requirements and where none of the grounds specified in paragraph 39 of the SCM policy were present; moreover in circumstances in which the second defendant was obliged to ensure that no payment was made to the first defendant pursuant to the latter's irregular appointment by the third defendant; and
- (d) The decision of the second defendant on 26 February 2015 which culminated in the third payment to the first defendant, such decision being illegal in the light of the invalidity of the decision and resolution of the third defendant, and that the payment authorised by the second defendant constituted irregular

expenditure (for which he was obliged to avoid) incurred in contravention of competitive bidding requirements.

[54] The declaratory relief sought by the plaintiff is characterised as a legality review by the second, fifth and eighth defendants in their remaining special pleas.⁵⁹ These defendants raise the issue of undue delay by contending that such relief ought to have been claimed within a reasonable time as a jurisdictional fact necessary to establish the plaintiff's claims against them.⁶⁰ The fourth defendant's belated reliance on the delay issue was not pleaded but impermissibly raised in his heads of argument.

[55] The material facts pleaded by the plaintiff in support of its contention that the action was brought without undue delay⁶¹ are adequately borne from the evidence by Mr Botha and Mr Mettler. In essence their evidence indicates that the plaintiff sought the assistance of the National Treasury to investigate irregularities in the expenditure of IPTS funds as soon as it became aware that such investigation was warranted, and that the investigation was pursued and completed as soon as possible with the plaintiff taking the necessary steps to institute this action within a reasonable period after receiving, in August 2015, a draft forensic investigative report from the National Treasury.

[56] The action was instituted on 11 February 2016 and progressively graduated through case management processes until it proceeded to trial. In the greater scheme of things and regard being had to the scope and complexity of the plaintiff's operations as an organ of state, my sense is that the plaintiff acted swiftly and with a sense of purpose in instituting

⁵⁹ Heads of argument plaintiff paragraph 11

⁶⁰ See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC)

⁶¹ POC paragraph 56.

these proceedings. The evidence tendered by the aforementioned witnesses (including Ms De Scande) was not speculative - it was *bona fide* and reliable, and absent evidence to the contrary this court should be slow to allow a perceived procedural obstacle that prevents it from looking into a challenge to the lawfulness of the exercise of public power. In any event, the issue of undue delay is entirely irrelevant for the purpose of pursuing a claim against the defendants in terms of section 32 of the MFMA.

THE SECOND CLAIM

As against the first defendant:

[57] The plaintiff has fully pleaded the pertinent facts in support of this claim⁶² and for reasons elsewhere stated, it proceeds against the first defendant by default. Incontrovertibly, the procurement of the services of the first defendant as set out in this judgment was unlawful, nor was there a lawful basis for effecting the series of specified payments.

As against the second defendant:

[58] Implicated are the first, second and third payments authorised by the second defendant in favour to the first defendant. The payments amounted to irregular expenditure.⁶³ The first payment was made consequent upon the authorisation given by the second defendant on 20 May 2014. The second payment was made consequent upon the authorisation given by the second defendant on 7 August 2014. The third payment was made consequent upon the authorisation given by the second defendant on 26 February 2015.

⁶² POC paragraph 59

⁶³ POC paragraphs 63-65

[59] In his capacity as accounting officer of the plaintiff the second defendant was at all material times relating to this claim bound to the provisions of the Code of Conduct for Municipal Staff Members as contained in the Local Government: Municipal Systems Act 32 of 2000 (“the Systems Act”). He was *inter alia* bound to loyally execute the lawful policies of the plaintiff’s council, to perform the functions of his office in good faith, diligently, honestly and in a transparent manner, and was required to uphold the values underpinning public administration⁶⁴ and to act with integrity and in the best interests of the plaintiff without compromising its integrity and credibility.

[60] Moreover, the second defendant was cloaked with the responsibility for implementing the plaintiff’s SCM policy, and for managing the financial administration of the plaintiff and for that purpose was obliged to take all reasonable steps for ensuring that its resources are used effectively, efficiently and economically and that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented as is stipulated in section 62 of the MFMA.

[61] In his plea the second defendant does not dispute having signed the following documents and what is recorded in each of them:

- (a) The third memorandum and the consequent formal resolution of 20 May 2014⁶⁵;
- (b) Annexure POC 15 on 7 August 2014⁶⁶; and

⁶⁴ Section 195 of the Constitution

⁶⁵ POC paragraphs 26 and 27, annexures POC8 and POC9, and paragraphs 22 and 23 of second defendant's plea

⁶⁶ POC paragraph 38 and paragraph 25 of second defendant's plea

(c) The fourth memorandum on 26 February 2015⁶⁷.

[62] These documents themselves are not disputed – they are what they purport to be and in terms authorised the first⁶⁸, second⁶⁹ and third⁷⁰ payments to the first defendant. By virtue of the evidence of Mr Botha and Ms De Scande the documentation relating to these payments⁷¹ constitute confirmation of the payments made to the first defendant. The second defendant has not disputed such documentation and the plaintiff need not have gone any further than the evidence of the abovenamed witnesses to prove the payments were made to the first defendant.

[63] The resolutions of the third defendant appointing the first defendant were before the second defendant at the time when he signed the above-mentioned documents for approving the payments and were known to him. It ought to have been apparent to the second defendant that the motivations submitted by the fourth defendant did not support any of the requisites for a deviation in terms of paragraph 39 of the plaintiff's SCM policy. (The resolutions appointing the first defendant were, in any event, irregular for the reasons stated by Ms De Scande. In this regard I allude to her counter-proposal to the first memorandum⁷² and her subsequent memorandum directed to the third defendant⁷³).

[64] On the above facts there is merit in the plaintiff's submission that the second defendant deliberately authorised the irregular expenditure and falls to be held liable therefore in accordance with section 32(1)(c) of the MFMA. Objectively considered, and regard being had to his position

⁶⁷ POC paragraph 47.3, annexure POC19 and paragraph 27 of second defendant's plea

⁶⁸ POC paragraph 30 and annexure POC10

⁶⁹ POC paragraph 41 and annexure POC17

⁷⁰ POC paragraph 49 and annexure POC21

⁷¹ annexures POC 10, POC 17 and POC 21

⁷² POC2

⁷³ POC4

and statutory responsibilities the second defendant should have foreseen that the payments he was requested to authorise would be irregular. In these circumstances it was incumbent on him to have taken reasonable steps⁷⁴ to avoid the incurring of such expenditure by refusing to authorise it. In failing to do so he was negligent.⁷⁵ The evidence establishes the case pleaded by the plaintiff⁷⁶ whereas no evidence to the contrary was tendered by the second defendant.

As against the fifth defendant:

[65] Liability for the first, second and third payments by the plaintiff to the first defendant is similarly attributed to the fifth defendant under section 32(1)(c) of the MFMA. He was similarly bound to the Code of Conduct (*supra*) and plainly aware of the background and circumstances relating to the unlawful and irregular appointment of the first defendant as lead consultant for the IPTS project. This is apparent from the evidence by Ms De Scande in relation to her email of 23 April 2014 in which the attention of the fifth defendant is pertinently drawn to her memorandum of 20 February 2014 (which was directed to the third defendant). The evidence by Ms De Scande stands uncontradicted and despite a comprehensive defence having been pleaded by the fifth (and eighth) defendant, no evidence was led in support thereof. The evidence indicates that the fifth defendant indubitably ought to have known that the decision of the third defendant on 21 February 2014 contravened the provisions of the SCM policy and did not establish a lawful basis for any payment to the first defendant and consequently any payment to the first

⁷⁴ MFMA, section 173(1)(a)(iii)

⁷⁵ cf. *Pietersen supra* at paragraphs [54]-[56]

⁷⁶ POC paragraphs 61-66

defendant would be irregular expenditure. In approving the payments it is the plaintiff's case that he acted negligently⁷⁷.

As against the third defendant:

[66] This claim is pleaded as an alternative to the claims against the second and fifth defendants, in the event of those claims failing. In as much as the third defendant has pleaded a positive defence no evidence was led to substantiate it. For reasons stated elsewhere in this judgment the third defendant is deemed to have been in default of appearance at trial.⁷⁸ The background and evidence referred to in the preceding paragraphs assumes relevance and has not been disputed. Indications are that upon making her decision of 13 February 2014 and her resolution of 21 February 2014 the third defendant ought to have known that her appointment of the first defendant would result in irregular expenditure, more particularly because such expenditure would be expenditure incurred by the plaintiff in contravention of, or that was not in accordance with the competitive bidding requirement in the plaintiff's SCM policy.⁷⁹

THE THIRD CLAIM – AS AGAINST THE FOURTH AND EIGHTH DEFENDANTS

[67] This is a common law claim for damages suffered by the plaintiff and is posited on an unlawful and intentional, alternatively a negligent breach by the fourth and eighth defendants of their duties to deal with the plaintiff with the utmost good faith, diligently and in a transparent manner and to refrain from doing anything that might prejudice or

⁷⁷ POC paragraphs 67, 68 and 69

⁷⁸ The position therefore is regulated by uniform rule 39(1) of the rules of court

⁷⁹ POC paragraphs 70, 71 and 72

detract from the rights, assets or interests of the plaintiff.⁸⁰ The scope of these duties, as pleaded, are not disputed by either of the defendants, except for the plaintiff's allegations of a breach of duty occasioned by unlawfulness and intent, and in the alternative, negligence. It is also not disputed by the fourth defendant that he drafted the first, second, third and fourth memoranda, and that these are what they purport to be.

[68] The eighth defendant admits having signed the fourth memorandum after having considered the recommendations of the fourth defendant. The eighth defendant has pleaded a positive defence (framed in the same terms as the fifth defendant) but chose not to testify in support thereof. To the extent that it can be gleaned that the fourth defendant has pleaded a defence, he similarly has chosen not to give evidence in support thereof. There is accordingly no evidence of an effective rebuttal against the plaintiff's allegations of unlawfulness and/or negligence attributed to the fourth and eighth defendants. In effect, the plaintiff's pleaded version having regard to the memoranda and being supported by the evidence of Ms De Scande, is unchallenged. It only bears mentioning that the unlawfulness of the actions of the second, third and fifth defendants, where it has been shown to intersect with the unlawfulness of the actions of the fourth and eighth defendants, has been established.

THE FOURTH CLAIM – AS AGAINST THE SIXTH AND SEVENTH DEFENDANTS

[69] This is similarly a claim under the common law for damages following a breach by the sixth and seventh defendants of their obligations of good faith and diligence which are pleaded in terms substantially similar to those under the third claim. Both defendants occupied senior positions

⁸⁰ POC paragraphs 75 – 79 comprehensively

while they were employed by the plaintiff. The sixth defendant was the “COO”, an executive incumbent directly accountable to the city manager and located at the second highest level of seniority in the administration. The seventh defendant was the director of communications, who reported to and was accountable to the sixth defendant, and was an official at the third highest level of seniority.

[70] Of relevance to the fourth claim is the request by the seventh defendant in his letter of 5 August 2014 for the city manager to lift the cap on the first defendant’s existing contract and the sixth defendant’s endorsement of the letter. On the plaintiff’s case this occurred in circumstances in which the sixth and seventh defendants unlawfully and intentionally, alternatively negligently misrepresented to the plaintiff that, *inter alia*, the limit on the existing contract could lawfully be lifted without following prescribed procurement procedures⁸¹, and that the second defendant could approve payment of the amount of R1 390 800.00 to the first defendant.⁸²

[71] The seventh defendant formulated the submissions in the letter and incorporated the pleaded misrepresentations⁸³. The sixth defendant signed the letter incorporating the misrepresentations and effectively endorsed the request made therein. As a direct consequence of the misrepresentations, the second defendant approved the request, removed the limitation on the contract amount and authorised the second payment.

[72] In his plea the seventh defendant admits having written the letter but denies that he owed the obligations pleaded by the plaintiff and denies

⁸¹ POC paragraph 86.3.4

⁸² POC paragraph 86.3.5

⁸³ POC paragraph 83

having acted unlawfully and intentionally, or negligently. Absent evidence to the contrary, the denials are plainly at odds with the prescripts in the Code of Conduct for Municipal Staff Members and the common law obligations of an employee to their employer.

[73] As for the sixth defendant, save for admitting the obligations pleaded by the plaintiff, he denies that he breached them unlawfully and intentionally, or negligently.

[74] The breaches complained of by the plaintiff are apparent from the content of the letter read in the context of the regulatory provisions relating to procurement and the SCM policy. Both defendants have purported to raise positive defences – the seventh defendant made no appearance at the trial and the sixth defendant did not testify. What stands incontrovertibly is that the first defendant was appointed in contravention of the SCM policy, and that had the consequence that payment to it was unlawful (*Pietersen supra*) and that the plaintiff incurred damage.

THE ARGUMENTS

[75] A note of gratitude is extended to the parties for preparing heads of argument. A composite set has been submitted by the second, fifth and eighth defendants. In all material respects that submitted by the fourth defendant raises similar issues to that submitted by the second, fifth and eighth defendants. The sixth defendant submitted heads with discrete issues.

[76] In dealing with the arguments of the fourth, second, fifth and eighth defendants the plaintiff has referred to the heads submitted by them

collectively as “the first heads” and the heads submitted by the sixth defendant as “the second heads”. It is considered sensible and expedient to adopt the same nomenclature. In response to the first and second heads, the plaintiff filed heads of argument in reply.

THE FIRST HEADS

[77] The principal contentions raised by the defendants are:

- (a) that section 32 of the MFMA must not be read in “isolation”⁸⁴ but “holistically”⁸⁵ and falls to be interpreted in context⁸⁶;
- (b) that section 32 is inconsistent with the Constitution - it gives rise to an “irrationality”⁸⁷; and is “anomalous”; “patently unfair”⁸⁸; and “not just and equitable”⁸⁹; and
- (c) that the plaintiff unduly delayed in seeking the relief in claim 1⁹⁰.

The interpretation of section 32:

[78] The defendants seem to contend that section 176 of the MFMA modifies the meaning of section 32. While referring to the prescript of statutory interpretation stated in *Cool Ideas 1186 CC v Hubbard*⁹¹, the difficulty with their stance is that they do not make submissions as to what they contend the modified interpretation of the section may be. In *Petuna*,

⁸⁴ First heads paragraph 17

⁸⁵ First heads paragraph 7

⁸⁶ First heads paragraph 17

⁸⁷ First heads paragraph 15

⁸⁸ First heads paragraph 43

⁸⁹ First heads paragraph 45 and 52

⁹⁰ First heads paragraphs 31, 39-42

⁹¹ [2014] ZACC16 at paragraph [28]

Chetty J made an unmistakable pronouncement as to its “*clear and unambiguous and ... only meaning*”.

[79] Section 176 of the MFMA reads as follows:

176. Liability of functionaries exercising powers and functions in terms of this Act

- (1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.
- (2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.

[80] A reading of section 176(1) indicates that it precludes a claim against a municipality or any of its functionaries pursuant to the exercise “*in good faith*” of a power or function in terms of the MFMA, for “*loss or damage*” resulting therefrom. The primary purpose of the provision is that it precludes the liability of a municipality and its functionaries from claims by third parties for loss or damage incurred by them where the actions of a municipality or its functionaries were undertaken in good faith.

[81] The section notably refers to “*loss or damage*”. Section 32(2) by contrast does not relate to the recovery of loss or damage by a municipality, but rather for expenditure which is “*unauthorised, irregular or fruitless and wasteful*” as defined in section 1. The peremptory requirement to recover such expenditure is not limited by a provision that precludes such recovery where a municipality has suffered no loss or damage.

[82] In its heads of argument plaintiff points out that it is significant that the defendants appear not to have had regard to section 176(2). The section provides for a statutory right of recovery by a municipality from a political office bearer or official of any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that person. This remedy exists independently of any common law or other statutory remedy (see *Pikitup Johannesburg SOC Limited v Nair (Maharaj and Others as Third Parties)* [2019] 3 All SA 899 (GJ) at 904i). The legislature has plainly felt strongly enough about the consequences of deliberate or negligent conduct on the part of municipal functionaries to provide for a claim for loss or damage in addition to the common law Aquilian claim (which is the basis of the claim against the fourth and eighth, and the sixth and seventh defendants).

[83] If the defendants are correct in their apparent contention as to the meaning of section 32(2) (which though not stated would seem to be that a claim in terms thereof would only lie where the municipality in question has suffered loss or damage), then the provision in section 176(2) would seem to be entirely unnecessary. The contention, would, in any event, constitute a special defence which has not been pleaded. It is therefore not open to the defendants to raise it in argument particularly where they have made no assertions that the conclusions by Chetty and Goosen JJ forming part of the *rationes decidendi* of those judgments, which are binding on this court, are wrong.

Section 32 inconsistent with the Constitution:

[84] The defendants' ostensible reliance on section 172(1) by contending that the issue to be resolved is a constitutional matter, that the constitution

must apply and accordingly there must be a just and equitable remedy overlooks the logical sequence of the section. The conclusion contended for is insupportable.

[85] The making by a court of any order that is just and equitable must be preceded by:

- (a) a conclusion that the court has before it “a constitutional matter within its power”;
- (b) that such matter falls to be decided;
- (c) a declaration that any law or conduct inconsistent with the Constitution is invalid;
- (d) That such declaration is made only to the extent of the inconsistency in question.

[86] Only then may a court make an order that is just and equitable.

[87] The defendants’ contention that the statutory provision upon which the plaintiff relies is inconsistent with the Constitution stems from their denial of the case made out by the plaintiff. It was correctly submitted for the plaintiff that the contention as to unconstitutionality would constitute a positive defence and would require that facts be pleaded upon which the contention is based as also the legal conclusion flowing therefrom.

[88] The defendants have not done so in their pleadings and have fallen short of making any such case in argument.

[89] Beginning with the obligations of a litigant when pleading, it has authoritatively been stated that “*it is for the parties either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues ... even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for it is impermissible for a party to rely on a constitutional complaint that was not pleaded*” (see *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at paragraph [13]). A party has a duty to set out in its pleading a clear and concise statement of the material facts upon which it seeks to rely for its claim with sufficient particularity to enable the opposite party to reply thereto. The rationale therefor is that an opponent must be properly informed of the case it has to meet and not be ambushed at trial⁹².

[90] It bears noting that none of the defendants has made the allegation in their plea that a notice in terms of rule 16A was filed with the registrar and that it was placed on a notice board designated for that purpose. The need for such a notice is premised on the constitutional issue of which notice must be given, and the particularity of the issue being properly raised in the pleadings.

[91] It does not avail the defendants to obliquely raise the constitutionality of section 32 in heads of argument without laying a proper foundation for such challenge in the papers or the pleadings.⁹³ Tellingly, it has not in argument or otherwise been suggested which portions of the section are inconsistent with the Constitution; or on what basis is it irrational; what

⁹² *Minister of Safety and Security v Slabbert* [2010] All SA 474 (SCA) at 478c and 480d; *Hillman Brothers Ltd v Kelly & Hingle* 1926 WLD 153 at 154

⁹³ *Prince v President of the Law Society of the Cape of Good Hope and Others* 2001 (2) SA 388 (CC) at paragraph [22]

basis the court should dismiss the plaintiff's claims; or what order the defendants seek on the basis that it would be just and equitable.

Undue delay:

[92] Although the issue is addressed elsewhere in this judgment it suffices to make a few additional comments. The review and setting aside of the decisions to appoint the first defendant is not a prerequisite for a claim under section 32(2) of the MFMA. It is only necessary to establish that one of the unlawful forms of expenditure has been incurred in the manner anticipated in section 32(1). Expenditure is of course irregular once it has been incurred in contravention of, or if it is not in accordance with a requirement of the supply chain management policy of a municipality. For the irregularity to arise there is no pre-requisite for the unlawful conduct to be reviewed and set aside, and the determination of the special pleas in question is thus entirely irrelevant to the question of the relevant employee defendants' liability.

THE SECOND HEADS

[93] It is pointed out in plaintiff's heads of argument that its claim against the sixth defendant lies neither in terms of section 32 nor in terms of section 172(2) of the MFMA (as is speculated by the sixth defendant). The claim against the sixth defendant is pursued in terms of the common law and has been comprehensively pleaded⁹⁴.

[94] The case pleaded for the sixth defendant is that he was appointed as "COO" of the plaintiff with effect from 1 April 2014, that he was requested to escalate the lifting of the cap to the second defendant and

⁹⁴ POC paragraphs 75 to 84

that such request cannot be construed as an authorisation by him which attracts liability. He contends that the plaintiff failed to prove its damages.

[95] The evidence before court is that a payment was made to the first defendant of the amount claimed against the sixth and seventh defendants for which there was no lawful basis. By virtue of such evidence the plaintiff has established *prima facie* that as a consequence of the second payment, absent any legal basis for it to have done so, it suffered damages.

[96] It was therefore not necessary for the plaintiff to prove that it did not receive value for such payment (if that is what the sixth defendant seeks to convey by contending that plaintiff failed to prove its damages) but rather, for any defendant who contended that value was indeed received, to allege and prove this. This is not the case made out for the sixth defendant; nor is it the case for any of the other defendants despite their contending that Mr Botha had knowledge of the plaintiff's acquisition of the services of the first defendant and that he admitted that the plaintiff received value for the payments made.⁹⁵ These contentions are not borne from the evidence. Mr Botha stated⁹⁶ that he interviewed witnesses who indicated that invoices submitted to the plaintiff for payment were over-inflated. He stated however that to the extent that "*some work may have been done by the first defendant ... no value for money audit [was] done*".

[97] In the second heads a similar admission is sought to be attributed to Ms De Scande, with the fourth defendant making common cause therewith. The

⁹⁵ First heads paragraphs 22 and 25

⁹⁶ In cross-examination by the fourth defendant, Transcript 19 April 2021 31:23-32:10

evidence indicates the contrary – not only did she have concerns about the procedure for the appointment of the first defendant but advised, that payment not be made to the first defendant.⁹⁷ Against the backdrop of this evidence, the fourth defendant’s criticism that she had no legal background or supply chain expertise assumes no relevance.

[98] A further aspect raised by the sixth defendant concerns the reserved costs of his application for a postponement of the trial on 9 November 2020. Quoting directly from the plaintiff’s heads of argument, the following is apparent:⁹⁸

“That application was not argued, but in bringing it, the sixth defendant sought an indulgence to enable him to properly ready himself at trial. The lack of readiness was plainly not justified and the sixth defendant should in the ordinary course be liable for such costs. In any event however the Court need not enter into the merits of that application. The plaintiff informed the allocated trial judge in chambers that the seventh defendant had exhibited symptoms consequent upon which he had submitted himself to a test for Covid-19 and that on the morning of the trial he remained ill and had not received his test result. In addition, [the trial judge] at the same time indicated that she had concluded that she was precluded from hearing the matter as she had presided in disciplinary hearings relating to IPTS and had been required to reach conclusions regarding the credibility of witnesses to be called by the plaintiff. At best such costs should be costs in the cause.”

⁹⁷ Transcript 20 April 2021, 28:1-23, and pp 29-30

⁹⁸ Heads of argument in reply paragraphs 38 and 39

[99] The costs issue was not raised by any of the other defendants and as I have not had the benefit of their submissions, I readily accede to the view expressed by the plaintiff.

CONCLUSION

[100] The plaintiff bears the overall *onus* of establishing its entitlement to the relief it claims (see *Pillay v Krishna and Another* 1946 AD 946 at 952-953). Its case is uncontradicted. The defendants led no evidence in rebuttal to substantiate their exculpatory versions or pleaded defences, when, indubitably, there was an obligation upon them to have done so (see *Pillay v Krishna and Another* at 952). In these circumstances there can be no weighing of probabilities and the matter cannot be determined by weighing exculpatory assertions put to any of the plaintiff's witnesses in cross-examination, where the defendants themselves have not opened their versions to scrutiny under cross-examination. Quite simply the plaintiff has established facts which give rise to an evidential burden on each of the employee defendants to proffer an answer - the absence of which serves as a cogent factor in support of the natural inference that their evidence will expose facts unfavourable to them. In addition, it is significant that none of the defendants contest what is said in the plaintiff's main heads regarding the facts established by the evidence and the status of the documentation before court.

[101] In the circumstances the following order issues:

101.1 In relation to the plaintiff's first claim:

- (i) The decision by the third defendant dated 13 February 2014 as reflected in annexure POC3 to the particulars

of claim and the resolution of the third defendant of 21 February 2014 as reflected in annexure POC5 to the particulars of claim are declared unlawful, invalid and void *ab initio*;

- (ii) The decision and resolution of the second defendant dated 20 May 2014 in annexures POC8 and POC9 are declared unlawful, invalid and void *ab initio*;
- (iii) The decision of the second defendant dated 7 August 2014 in annexure POC15 is declared unlawful, invalid and void *ab initio*;
- (iv) The decision of the second defendant dated 26 February 2015 in annexure POC19 is declared unlawful, invalid and void *ab initio*;
- (v) The appointment by the plaintiff of the first defendant as lead consultant for the development of a comprehensive communication and marketing strategy for the Integrated Public Transport System (“IPTS”) project is declared unlawful, invalid and void *ab initio*;
- (vi) The costs of this claim including the costs of two counsel shall be paid jointly and severally by the defendants, the one paying the other(s) to be absolved; such costs are to include those occasioned by the postponement of the trial on 9 November 2020;

101.2 In relation to the plaintiff's second claim:

The plaintiff is granted judgment against the first, second and fifth defendants jointly and severally for:

- (i) Payment of the sum of R5 263 179.89;
- (ii) Payment of the sum of R1 390 800.00;
- (iii) Payment of the sum of R984 197.21;
- (iv) Interest on the aforesaid sums at the prescribed legal rate from date of summons to date of payment;
- (v) The costs of this claim including the costs of two counsel shall be paid jointly and severally by the defendants, the one paying the other(s) to be absolved; such costs are to include those occasioned by the postponement of the trial on 9 November 2020;

Alternatively, the plaintiff is granted judgment against the third defendant for:

- (i) Payment of the sum of R5 263 179.89;
- (ii) Payment of the sum of R1 390 800.00;
- (iii) Payment of the sum of R984 197.21;

- (iv) Interest on the aforesaid sums at the prescribed legal rate from date of summons to date of payment;
- (v) The costs of this claim including the costs of two counsel; such costs are to include those occasioned by the postponement of the trial on 9 November 2020;

101.3 In relation to the plaintiff's third claim:

The plaintiff is granted judgment against the fourth defendant for:

- (i) Payment of the sum of R5 263 179.89;
- (ii) Payment of the sum of R1 390 800.00;
- (iii) Interest on the aforesaid sums at the prescribed legal rate from date of summons to date of payment;
- (iv) The costs of this claim including the costs of two counsel; such costs are to include those occasioned by the postponement of the trial on 9 November 2020;

As against the fourth and eighth defendants jointly and severally, the one paying the other to be absolved, the plaintiff is granted judgment for:

- (i) Payment of the sum of R984 197.21;
- (ii) Interest on the aforesaid sum at the prescribed legal rate from date of summons to date of payment;

- (iii) The costs of this claim including the costs of two counsel shall be paid jointly and severally by the defendants, the one paying the other to be absolved; such costs are to include those occasioned by the postponement of the trial on 9 November 2020;

101.4 In relation to the plaintiff's fourth claim:

As against the sixth and seventh defendants jointly and severally, the one paying the other to be absolved, the plaintiff is granted judgment for:

- (i) Payment of the sum of R1 390 800.00;
- (ii) Interest on the aforesaid sum at the prescribed legal rate from date of summons to date of payment;
- (iii) The costs of this claim including the costs of two counsel shall be paid jointly and severally by the defendants, the one paying the other to be absolved; such costs are to include those occasioned by the postponement of the trial on 9 November 2020.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: R.G. Buchanan SC and J.G. Richards
Instructed by
GRAY MOODLIAR INC.
19 Raleigh Street
Central
Gqeberha
Tel: 041-586 3920
Email: sarah@gmlaw.co.za
(Ref: W Gray/S Roberts/N10873)

For the First Defendant: No appearance

For the Second Defendant: P.E. Jooste
Instructed by
TANIA KOEN ATTORNEYS
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Gqeberha
Tel: 041-373 9690
(Ref: MAZ/bg/CIV 4668/16)

For the Third Defendant: No Appearance

For the Fourth Defendant:

In Person

Email: mohleli786@gmail.com

For the Fifth and Eighth
Defendants:

P.E. Jooste

Instructed by

KAPLAN BLUMBERG ATTORNEYS

Southern Life Gardens

70 2nd Avenue

Gqeberha

Tel: 041-363 6044

Email: Terri-Ann@kaplans.co.za

Email: Bronwynne@kaplans.co.za

(Ref: MAT 14864/T Radloff

/Bronwynne)

For the Sixth Defendant:

T. Zietsman

Instructed by

GOLDBERG & VICTOR INC.

12 Graham Street

Gqeberha

Tel: 041-484 3346

Email: goldvic@mweb.co.za

(Ref: M. Bumenthal/C143)

For the Seventh Defendant:

No Appearance

Tel: 063 691 5966

Email: rolandwilliams777@icloud.com

Email: ceo@williamsconsulting.co.za

Dates heard:
2021

19, 20, 21 April; 21 June; and 19 July

Date delivered:

26 April 2022.

This judgment was handed down in open court and circulated to the parties by email.