



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)**

Case Number: **WC/05/22**

In the matter between:

SPECIAL INVESTIGATING UNIT

1st Applicant

MATZIKAMA LOCAL MUNICIPALITY

2nd Applicant

and

DUNECO CC

1st Respondent

(Reg No: CK 1985/002066/23)

NICOLAAS JACOBUS KLAZEN

2nd Respondent

ALDRICH HENDRICKS

3rd Respondent

ISAK EDWARD JENNER

4th Respondent

JAFTA BOOYSEN

5th Respondent

JUDGMENT

Summary – challenge based on the doctrine of legality – decision to purchase Personal Protection Equipment declared invalid – equitable relief under section 172(1)(b) of the Constitution considered – liability of officials of a municipality – section 32 of the Municipal Finance Management Act applied.

Orders – The following orders are issued:

1. It is declared that the decision taken by third respondent, acting on behalf of the second applicant during April 2020 to purchase Personal Protection Equipment from first respondent under order number 103718/0 is declared irregular and invalid.
2. The amount of R400 027.50 paid by the second applicant to the first respondent in respect of the purchase price of Personal Protection Equipment is declared an irregular

expenditure in terms of s 32(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003.

3. The third, fourth and fifth respondents shall pay the amount of R400 027.50 to the second applicant, jointly and severally, together with interest thereon a tempore morae from 22 April 2020.
4. First, third, fourth and fifth respondents, jointly and severally, shall pay the costs of the application.
5. Each party shall pay their own costs in respect of the conditional counter-application.

DAFFUE J:

Introduction

[1] The dispute to be adjudicated emanates from a contract concluded for the amount of R400 027.50 between the Matzikama Local Municipality (the Municipality) and a supplier, Duneco CC (Duneco), for the supply of Personal Protection Equipment (PPE's) such as masks and gloves. The negotiations pertaining to the decision to conclude the contract, the conclusion of the contract and alleged delivery of the goods in terms of the contract took place during the first two weeks of April 2020. This was during Level 5 of the Covid-19 regulations issued as a consequence of the Covid-19 pandemic, also referred to as the period of 'hard lock-down'.

[2] It is apposite to remind ourselves of the following:

- a. evidence of the deadly Covid-19 virus was detected in South Africa in the beginning of 2020 as a result of which President MC Ramaphosa announced a national lock-down from 22 March 2020 to 16 April 2020 which period was later extended to 30 April 2020, the so-called hard lock-down period also known as Level 5;
- b. in terms of this announcement all activities were suspended and only essential services remained available;
- c. our whole country was faced with a pandemic of tremendous proportions that caused serious hardship: people could not go to work and was forced to work from home; court cases set down for hearing during this period were either postponed or conducted through virtual hearings;

- d. Covid-19 officials were appointed by employers across the country and as is apparent from the facts *in casu*, the Municipality also established a Covid-19 team to assist with the essential services of the Municipality;
- e. In order to assist municipalities with procurement during these times, a MFMA Circular 100 was issued and distributed which had to be complied with by them during their procurement processes.

The parties

[3] The Special Investigating Unit (the SIU), the first applicant in this application, investigated the affairs of the Municipality in accordance with Proclamation R23 of 2020. It did its investigation, attended to various interviews and eventually brought this application on the basis of a legality review. The Municipality is cited as the second applicant.

[4] Duneco, the supplier of the PPE's relevant to this application, is cited as first respondent. Its only member, Mr NJ Klazen (Klazen) is cited as the second respondent. The Acting Municipal Manager of the Municipality at the time, Mr A Hendricks, is cited as third respondent. Mr IE Jenner, the Municipality's Covid-19 co-ordinator at the time, is cited as the fourth respondent. Mr J Booysen, the Chief Financial Officer of the Municipality at the time, is cited as the fifth respondent. For the sake of convenience, I shall refer to the three municipal officials as Hendricks, Jenner and Booysen respectively.

The relief sought

[5] The applicants seek the following orders:

- a. declaring the decision taken by Hendricks acting on behalf of the Municipality in April 2020 to purchase PPE's from Duneco under order number 103718-0 irregular and unlawful;
- b. that the transaction for the purchase of the PPE's be set aside;
- c. declaring that the Municipality has incurred a loss as a result of the unlawful transaction in the amount of R400 027.50, being the sum paid to Duneco;
- d. declaring that the aforesaid amount is irregular expenditure in terms of s 32(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA);

- e. directing first, third, fourth and fifth respondents to pay, jointly and severally, the aforesaid amount together with interest from 22 April 2020; and
- f. directing first, third, fourth and fifth respondents, jointly and severally, to pay the costs of the application on a punitive scale.

[6] The SIU intended to seek a declarator that Duneco be deemed not to be a juristic person in terms of s 65 of the Close Corporations Act 69 of 1984 and therefore, that Klazen should be liable in his personal capacity, jointly and severally with the three municipal officials, for payment of the amount of R400 027.50. It wisely decided not to pursue such relief and consequently, no relief is sought against Klazen in his personal capacity.

[7] The application is opposed by all the respondents. All the parties filed extensive documents as well as heads of argument. The papers before me are voluminous to say the least. Consequently, I do not intend to deal with all aspects raised by the parties in much detail, but my failure to do so shall not be construed as a failure to apply my mind to the evidence and legal submissions presented.

Common cause facts and/or objective evidence

[8] The deponent to the founding affidavit, Mr Allie Kok was the Principal Forensic Investigator of the SIU in this case. He made the point that he was intimately involved in the investigation and fully acquainted with the work performed and the evidence and information obtained during the interviews of the various role players and other witnesses. Insofar as some of the respondents tried to make the point that he relied on hearsay evidence and/or that his version was wrong or even untrue, transcriptions of the interviews conducted with Klazen, Hendricks and Jenner were attached to the replying affidavit.

[9] The following sequence of events, as presented in documentary evidence and/or is common cause between the parties, indicates what occurred from the end of March to the middle of April 2020, ie during the hard lock-down period:

- a. the Acting Municipal Manager of the Municipality during March 2020 was Mr Lionel Phillips, who upon the announcement of the hard lock-down, established a Covid-19 team, inter alia to arrange for the purchase of PPE's; Mr Saul was the Covid-

19 co-ordinator and Ms H Meyer (Meyer) of the Supply Chain Management (SCM) unit was one of the team members;

- b. Meyer instructed a clerk, Mr Farmer, to obtain quotes for PPE's who sent out written requests for quotations (RFQ's) to certain suppliers for 5 000 gloves, 5 000 100ml bottles of hand sanitisers and 20 000 surgical masks, responses to be received before the closing date of 1 April 2020 at 12h00;
- c. four suppliers responded, to wit Safepro, Sulizest, Marice Mercuur and Greenfield, but Greenfield was held not to be compliant as its registration had expired;
- d. several further RFQ's were also sent to suppliers listed in the annexure to the National Treasury's MFMA Circular 100;
- e. on 1 April 2020 Hendricks replaced Phillips as Acting Municipal Manager and on that same day Meyer provided him with the quotations obtained, including the quotation of Greenfield;
- f. Hendricks admitted the hearsay evidence that Meyer presented the quotations to him on 1 April 2020, but on his version he had no idea of 'the contents of the sheet of paper' which was handed to him a few hours after he had reported for duty for the first time;
- g. on 2 April 2020 Hendricks disbanded the Covid-19 team and appointed Jenner as the Covid-19 co-ordinating officer;
- h. on the very same day, to wit 2 April 2020, Klazen of Duneco and Hendricks had a telephonic conversation about the supply of PPE's to the Municipality;
- i. these two gentlemen were not only acquainted to each other, but were involved in a transaction or transactions in terms whereof Klazen required and was in fact provided with full banking details of Hendricks' wife;
- j. on that same day Jenner and Klazen had a telephonic conversation based on Hendricks' suggestion to Klazen during which conversation it was agreed that Klazen would quote for PPE's – the objective facts indicate that no written RFQ was provided to Duneco and/or Klazen;
- k. on 3 April 2020, two days after the expiry date for the submission of quotations, Duneco provided Jenner and not the SCM unit, with a quotation per email for 10 000 masks and 25 000 pairs of gloves in the total amount of R400 027.50, a quotation that differed completely from the RFQ's mentioned above – again, the quotation by Duneco is an unsolicited bid as defined in the legislation;

- l. after hours, and at 17h33 that same day, Jenner forwarded the quotation per email to Booysen who soon thereafter at 17h55 made his recommendation to Hendricks who in turn responded per email a few minutes later at 18h30, approving the recommended quotation and thus on that Friday evening, 3 April 2020 made a decision in haste, simultaneously requesting a deviation report to be sent to him on 6 April 2020;
- m. a request for deviation was sent by Jenner the next week which is totally irregular and which will be considered again infra;
- n. although denied by Klazen that he had knowledge of the quotations obtained earlier from the three mentioned suppliers at the time of Duneco's quotation, these documents were found in his possession during a search and seizure operation;
- o. on 7 April 2020 Jenner prepared an order form, but clearly manipulated the document by adding in his handwriting an extra '0' after the printed order number; the original order was for an unrelated supply requested the previous year;
- p. delivery of PPE's took place although there is uncertainty whether Duneco fully complied with its contractual obligations;
- q. Duneco was paid the amount of R400 027.50 by the Municipality on/or about 21 April 2020 in accordance with its quotation.

Structure of this judgment

[10] This judgment will be dealt with under separate headings in order to deal appropriately with the issues in dispute, to wit

- a. the delay;
- b. whether a proper procurement process has been followed, ie was the Municipality's Supply Chain Management (SCM) policy, read with MFMA Circular 100, complied with;
- c. whether and on what basis it may be found that the decision taken to purchase PPE's from Duneco was irregular and invalid and should be set aside;
- d. what relief should be granted in the event of a finding of invalidity, considering s 172(1)(b) of the Constitution; and
- e. whether the third, fourth and fifth respondents are liable in accordance with s 32(1)(c) of the MFMA, jointly and severally, for payment of the irregular expenditure in the amount R400 027.50.

Delay

[11] The first issue to consider is whether or not there was an undue and/or an unreasonable delay that cannot be condoned or overlooked. The application was issued on 26 May 2022, more than two years after the date of the impugned decision taken by Hendricks on behalf of the Municipality in the beginning of April 2020. It is the first two respondents' case that the delay of two years appears to be hopelessly unreasonable and that insufficient reasons for the delay were provided.

[12] It is important to note that we are not faced with a review in terms of the Promotion of Administrative Justice Act 2 of 2000 (PAJA), but a legality review.¹ In assessing delay, it is incumbent to follow the approach endorsed by the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (Asla)*.² The first question to be considered is whether the delay was unreasonable or undue. If the delay is found to be unreasonable, I should nevertheless thereafter consider whether the delay can be overlooked in the interests of justice. The Supreme Court of Appeal considered the delay in launching a legality review in *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd*.³ It confirmed the principle in *Asla* referred to above, but mentioned that where there is no basis to overlook unreasonable delay, relief may still be granted in terms of s 172(1)(a) of the Constitution. I quote:⁴

'Finally, even if there is no basis to overlook the unreasonable delay, a further principle arising from *Gijima* is that the court is obliged by virtue of the provisions of s 172(1)(a) of the Constitution to declare invalid any law or conduct that is inconsistent with the Constitution, to the extent of its invalidity. The Constitutional Court in *ASLA* held that this applies when *the unlawfulness is clear and undisputed*. It further went on to state that the *Gijima* principle should 'be interpreted narrowly and restrictively so that the valuable rationale behind the rules of delay are not undermined'. At the same time it should not be ignored, but applied where there *is indisputable and clear inconsistency with the Constitution*.' (My emphasis - Footnotes omitted.)

¹ State Information Technology Agency SOC Ltd v Gijima Holding (Pty) Ltd 2018 (2) SA 23 CC paras 2 and 27.

² CCT91/17 [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (16 April 2019) para 48.

³ (216/2020) [2021] ZASCA 90; [2021] 3 All SA 791 (SCA); 2022 (5) SA 416 (SCA) (25 June 2021) paras 26 – 31.

⁴ *Ibid* para 31.

[13] More recently, in *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others*⁵ (*Simeka*) the Supreme Court of Appeal confirmed the well-known principle that the Constitution is the supreme law of our country. It continued as follows:

'In that event, s 172(1)(a) of the Constitution enjoins the courts to declare any conduct inconsistent with it to be invalid. What is clear from this Constitutional imperative is that once a court has found that any conduct is, as a fact, inconsistent with the Constitution, such a court is obliged to declare it invalid. It has no choice in the matter.'

Therefore, the issue of delay cannot be considered without also weighing up the merits of the review. In this regard the Supreme Court of Appeal held as follows in *Simeka* after a finding pertaining to the substantive merits of the case that the award of the tender in that case was contrary to the dictates of s 217 of the Constitution and the requests for proposals:⁶

'This then brings me to the issue of delay. Insofar as the substantive merits of this case are concerned, this judgment has already concluded above that the award of the tender was contrary to the dictates of s 217 of the Constitution and the RFPs itself. Coupled with this, is the fact that those intimately involved in the implementation of the project subsequently agreed on something that was fundamentally at variance with the requirements of the RFPs. Therefore, it is now timely to determine whether the admitted delay was, as the high court found, both unreasonable and unexplained. In the event that the delay is found to be unreasonable, it will be necessary to determine whether it should nevertheless be overlooked.'

[14] Based on the *Gigima* principle referred to in *Engineered Systems Solutions supra*, reconsidered in *Asla* and more recently in *Simeka*, the issue of delay will become irrelevant when the unlawfulness in awarding the contract to Duneco is clear and undisputed. *In casu*, I am prepared to accept that there is a dispute to be adjudicated and therefore, delay must be considered based on the established principles.

⁵ (610/2021) [2023] ZASCA 98 (14 June 2023) para 31.

⁶ *Ibid* para 63.

[15] In *Merafong City Local Municipality v AngloGold Ashanti Limited*⁷ Cameron J reiterated that:

'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'

[16] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (Khumalo)* the Constitutional Court referred to compliance with the rule of law and stated:⁸

'Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'

[17] In *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa*⁹ (*Swifambo*) it was accepted that a court's discretion cannot be exercised in the air and that there must be a factual basis to do so, either by referring to facts placed before the court by the parties or objectively available factors. In *Swifambo* a delay of three years was condoned in circumstances where the full extent of malfeasance at PRASA was concealed from its Board.

[18] The third, fourth and fifth respondents, being the municipal officials in their aforesaid capacities at the time, did not raise delay as a defence with any conviction. It is only raised by the first two respondents and Duneco in particular. Although it may be argued that the SIU could have launched the review proceedings earlier, I am of the view that it would be wrong to adopt an arm-chair approach. One can imagine how difficult it may be for any team of investigators to enter the premises of an organisation, even a relatively small organisation such as the Municipality, in order to search for and find incriminating documents and/or other evidence, especially in the face of objections

⁷ (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016) para 73.

⁸ (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013) para 45.

⁹ (1030/2017) [2018] ZASCA 167; 2020 (1) SA 76 (SCA) (30 November 2018).

and recalcitrant behaviour by senior officials such as Hendricks, the Acting Municipal Manager at the time. I do not intend to set out the evidence in support of the SIU, or against it, in any detail, save to mention the following:

- a. in late May 2020 Hendricks' impugned decision was reported to the SIU by a whistle-blower, but the proclamation empowering the SIU to act was only published on 23 July 2020, whereupon a search warrant was obtained on 31 July 2020;
- b. an additional search warrant was issued on 14 August 2020 and interviews were conducted with the respondents during late August and early September 2020, but these initial interviews were only concluded in February 2021;
- c. bureaucratic processes had to be followed to obtain authorisation to institute proceedings; there were also delays caused by the Covid-19 pandemic and several people, including the particular State Attorney, contracted the Covid-19 disease;
- d. the intransigent attitude of Hendricks as Acting Municipal Manager at the time who refused to co-operate with the investigation team is blamed;
- e. the SIU and its investigators were only able to access further documentation with the co-operation of the new management team of the Municipality after the municipal elections in November 2021 and the appointment of the current Municipal Manager where after final interviews were held with officials in March 2022 and with the new Municipal Manager in May 2022;
- f. Duneco submitted that the co-operation of municipal officials was not a prerequisite to do an investigation into a matter of this kind and also, on the applicants' own version, they had *prima facie* evidence of wrongdoing as early as 14 August 2020; Duneco's submissions are without substance, especially bearing in mind the test to be applied in adjudicating the evidence in opposed motion proceedings: I fail to understand the submission that an affidavit in support of an application for a search warrant, indicating a *prima facie* contravention of s 217 of the Constitution, is proof that sufficient evidence was available, already in August 2020, to commence with a legality review as it is clear that at that stage further information was required to present a proper case.

[19] It would be difficult for the three municipal officials to persuade me that the application should be dismissed due to unreasonable delay. They were interrogated as early as August 2020 in the presence of their legal representatives and their

versions were transcribed as is apparent from the record. They knew from the very beginning what allegations were made against them.

[20] Duneco relies on prejudice. On its version, it has already paid its suppliers and it would be unfair and inequitable if a finding was to be made that it had to repay the Municipality what it had received. Also, as restitution will have to take place, it would be impossible for the Municipality to return the masks and gloves to Duneco as these would have been distributed years ago.

[21] Having considered the evidence and submissions by the parties, I am satisfied that the delay was not unreasonable. Even if I am wrong in concluding so, I am of the view, based on all relevant facts, that I may overlook any unreasonable delay based on a proper consideration of the factors mentioned in *Engineered Systems Solutions*, relying inter alia on *Asla*,¹⁰ *South African Roads Agency Ltd v City of Cape Town*¹¹ and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*.¹² The first factor to be taken into consideration is the potential prejudice to affected parties, as well as the possible consequences of setting aside the decision. Potential prejudice may be ameliorated by the power to grant just and equitable relief. I do intend to be pragmatic and am of the view that this will appear from the relief to be granted. Secondly, the nature of the impugned decision must be considered, eg whether or not non-compliance with statutory prescripts was egregious. Hendricks and Jenner acted in a cavalier approach with the obvious purpose to assist a friend of Hendricks. Thirdly, the conduct of the applicants is also a relevant factor. The Municipality's conduct must be seen in light of Hendricks' and Jenner's unlawful action. Hendricks had reason to ensure that co-operation with the SIU was compromised. It is correct that there is a higher duty on organs of State to respect the law, but *in casu*, the very person who was the accounting officer of the Municipality at the time is the person to be blamed. The SIU did as best as it could under the circumstances to obtain sufficient evidence to seek a legality review that was in the first place the duty of the Municipality.

¹⁰ *Engineered Systems Solutions loc cit* para 30.

¹¹ (66/2016) [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) (22 September 2016) para 81.

¹² (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014) para 82.

[22] Although the applicants did not expressly seek condonation in the notice of motion, it is clear from the evidence and submissions by the parties that they at all times would be seeking such relief. I am satisfied that any delay, even on the basis that it was unreasonable, should be overlooked and condoned. It is apparent that the investigators of the SIU *in casu* experienced enormous problems in order to consult with relevant role players and to collate the mound of documentation in order to draft founding papers in support of the legality review. No doubt this was an extremely difficult and time-consuming exercise. Therefore, I shall now deal with the merits of the legality review.

The procurement process: whether the Municipality's SCM policy, read with MFMA Circular 100, was complied with

[23] In order to establish whether there was any proper compliance with the various statutory and regulatory measures, one has to consider the evidence. Ms Ipser referred several times to the probabilities, indicating that the respondents' versions should not be accepted. We are not dealing with a civil trial in which case the party who bears the onus must prove their case on a balance of probabilities, or an application for interim relief. The applicants seek final relief in opposed motion proceedings. The well-known *Plascon Evans* rule applies as more recently endorsed in *National Director of Public Prosecutions v Zuma*.¹³ I quote:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

¹³ (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (12 January 2009) para 26.

[24] Having referred to the *Plascon Evans* rule, it is important to acknowledge that litigants who purport to raise disputes in motion procedure have to comply with the following dictum in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*:¹⁴ 'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. ... When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. *There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.*' (My emphasis.)

[25] It is trite that the doctrine of legality and the rule of law lie at the heart of the Constitution as Petse AP yet again confirmed in *Merifon (Pty) Limited v Greater Letaba Municipality and Another*.¹⁵ The framework in which an organ of state in the local government sphere procures goods and services is strictly regulated. Most importantly, s 217 of the Constitution lays down the minimum requirements for a valid procurement process in requiring that the procurement process preceding the conclusion of contracts must be 'fair, equitable, transparent, competitive and cost-effective.' Related to this and directly as a consequence of s 217, the following regulatory instruments are important, to wit:

- a. chapter 11 of the MFMA (specifically including ss 110 to 113 in this case);
- b. the Municipal Supply Chain Management Regulations published in the Government Gazette no 27636 on 13 May 2005;
- c. the Municipality's SCM policy applicable at the time; as well as

¹⁴ (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008) para 13.

¹⁵ 2023 (1) SA 408 (SCA); (CCT 159/21) [2022] ZACC 25; 2022 (9) BCLR 1090 (CC) (4 July 2022) at para 1.

d. the MFMA Circular 100.

[26] The Municipality as a local government may only act within the powers lawfully conferred upon it as emphatically stated by the Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.¹⁶ The Constitutional Court reiterated in *Gobela Consulting CC v Makhado Municipality*¹⁷ that the procurement prescripts serve to promote fairness and impartiality on the one hand and to prevent patronage and corruption on the other.

[27] As mentioned, the general principles underlying procurement provide for a fair, equitable, transparent, competitive and cost-effective process.¹⁸ Chapter 11 of the MFMA and ss 112 and 113 specifically relevant for purposes hereof, give effect to s 217 of the Constitution. Section 112 stipulates that the Municipality must have and implement a SCM policy. Section 113 regulates unsolicited bids. The person responsible for compliance with the prescribed regulatory framework is the accounting officer, to wit Hendricks, the Municipal Manager *in casu*.¹⁹

[28] The Municipality approved and implemented its SCM policy on 28 May 2019 which was applicable at the time of the transaction in question. MFMA Circular 100 was issued by the National Treasury on 19 March 2020. It deals with emergency procurement in response to the Covid 19 pandemic. National Treasury has engaged with several suppliers of PPE's and obtained quotations on behalf of all State institutions from these suppliers who are identified in the annexure to the circular.

[29] The respondents rely, belatedly I may add, on s 168 of the MFMA which states that the Minister may make regulations or guidelines applicable to municipalities, but that no guidelines are binding on a municipality, unless adopted by its council. *In casu*, there is no proof that the Municipality's Council adopted MFMA Circular 100. In argument Ms Ipser on behalf of the applicants submitted that even if this was the case, which she accepted, the municipal officials accepted that they were bound thereto as

¹⁶ (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374 (CC) para 56; 1998 (12) BCLR 1458 (14 October 1998).

¹⁷ (Case no 910/19) [2020] ZASCA 180 (22 December 2020) at para 14.

¹⁸ Section 217 of the Constitution.

¹⁹ General notice 868 in Government Gazette 27636 of 30 May 2005.

is apparent from the emails referred to *supra*. Also, directives were issued and published under Regulation 432 in the Government Gazette number 43184 of 30 March 2020 in terms of subsec 27(2) of the Disaster Management Act 57 of 2002. In terms thereof municipalities were directed to: ‘.... (e) adhere to all applicable National Treasury Regulations and MFMA Circular 100, Emergency Procurement in Response to COVID-19 Pandemic, that were issued by the National Treasury in terms of the Municipal Finance Management Act, 2003 (Act No. 56 of 2003).’ Consequently, she submitted that MFMA Circular 100 was binding on the third, fourth and fifth respondents in their capacities as municipal officials at the time that the impugned transaction was concluded notwithstanding the Council’s failure to adopt MFMA Circular 100. I must say that it could hardly be expected of municipal councils to convene in order to adopt MFMA Circular 100, bearing in mind the applicable timeframe and the draconian measures implemented during level 5, the hard lockdown period.

[30] Section 113 of the MFMA deals with unsolicited bids received outside a municipality’s normal bidding process. The municipality is not obliged to consider an unsolicited bid, but may only do so in accordance with the prescribed framework. Regulation 3 of the Municipal Supply Chain Management Policy Regulations provides that no municipality or municipal entity may act otherwise than in accordance with its SCM policy when procuring goods or services. The general principle is as set out in regulation 12 of the same regulations, stipulating that subject to regulation 11(2), a competitive bidding process must be followed for procurements above the transaction value of R200 000 as was the case *in casu*.

[31] It is appropriate to mention at the onset that the procedural requirements play an important role in procurement matters. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*²⁰ (*Allpay*) the Constitutional Court emphasised that ‘if the process leading to the bid’s success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.’ The Constitutional Court proceeded to observe that ‘deviations from fair

²⁰ (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013).

process may themselves all too often be symptoms of corruption or malfeasance in the process.²¹ The insistence on compliance with procedural formalities serves a three-fold purpose according to the Constitutional Court, to wit '(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.'²²

[32] The learned author, Bolton, dealt with the underlying rationale for a competitive and fair procurement process and made the following statement in his well-known publication, duly endorsed by the Constitution Court:²³

'One of the primary reasons for the express inclusion of the five principles in section 217(1) of the Constitution is to safeguard the integrity of the government procurement process. The inclusion of the principles, in addition to ensuring the prudent use of public resources, is aimed at preventing corruption.'

[33] Clause 36 of the SCM policy is applicable insofar as the transaction value *in casu* is in excess of R200 000.00. Consequently, a competitive bidding process had to be followed, unless the transaction could have been considered as exceptional as provided for in clause 36.3. In such case the accounting officer may dispense with the official procurement processes by following any convenient process, including direct negotiations, but only in the case of an emergency, if the goods or services are produced or available from a single supplier only, or in any other exceptional cases where it is impractical or impossible to follow the official procurement processes. In such instances the accounting officer must record the reasons for any deviations and report them to the next council meeting of the council and include as a note to the annual financial statements. The facts speak for themselves. Ms Ipser made valid submissions in this regard which I do not intend to repeat. There was just no compliance with clause 36.3.

²¹ Ibid para 27.

²² Ibid.

²³ *The Law of Government Procurement in South Africa* 2007 para 57, endorsed in *Simeka loc cit* para 41.

[34] Mr Cesare Baartman assisted Klazen during the investigative proceedings and Adv Van der Schyff assisted Hendricks and Jenner. Although filed as annexures to the replying affidavit in response to what was stated by these three municipal officials, the evidence tendered speaks for itself. There was no objection to the filing of the transcriptions. Klazen affectionately referred to Hendricks by his nickname, Aldrich Green Eyes. When asked about his cellphone records, he answered that: 'Tien teen een het hy [Hendricks] by my geld geleen of gevra.' Just thereafter he responded: 'Dit sal nie leen wees nie dan moes hy dit teruggee het.' On a question whether he just gave the money, he was uncertain, but said: 'Ja ek het? Ek gee baie mense ...' Further on he said: 'Nee ek is – as mense sukkel ek sal vir 'n man 'n *tyre* koop en gee.' Also in respect of the same issue he said: 'In Williston eet almal saam uit dieselfde pot uit.'

[35] Klazen made a huge issue in his answering affidavit of the allegation that an investigator of the SIU mentioned under oath that he had lent money to Hendricks. But, he was extremely vague about the payment by himself by merely saying that the question pertaining to the payment to C Hendricks on 6 March 2019 could not be recalled. He also said that he was not even sure whether the person was a male or a female. Klazen pertinently failed to deal with the uncontested evidence that the bank details of C Hendricks were provided to him by Hendricks. On a question why Hendricks would provide these details, he responded as follows: 'Ek kan nie nou sê. Miskien het hy geld gesoek. Ek weet nie.' I would have expected him to ascertain the correct facts prior to deposing to his answering affidavit. This is exactly what the Supreme Court of Appeal warns against in *Wightman supra*.

[36] Hendricks confirmed his nickname. However, he is untruthful. He tried to convey that there was no close connection between him (and/or his wife) and Klazen, the sole member of Duneco. In his answering affidavit he denied ever lending money to Klazen. That was never the issue, but whether Klazen lent money to him. He testified that although he knew Klazen, such knowledge could not be 'elevated to anything resembling a relationship.' I also quote the following *verbatim* in order to show the vagueness of his version:

'The reference to Klazen giving me money is incorrect and taken out of context. Klazen deposited a small amount of money into my wife's banking account arising from a private transaction in 2019.'

Hendricks' vagueness demonstrates his intransigent attitude. His version and consequently, that of Klazen, speaking on his own behalf and that of Duneco, should be held to be untenable, far-fetched and rejected as false. There is just no acceptable explanation why Klazen was provided with the bank account details of Hendricks' wife. Klazen on behalf of Duneco completed a Declaration of Interest Form after the transaction had already been approved, but failed to indicate his money deal(s) with Hendricks and/or his wife.

[37] Hendricks tried to give the impression that he did not know what documents were presented to him by Meyer. This is an astonishing version, bearing in mind that Meyer was from the SCM unit who was tasked to obtain quotations urgently. Also these documents found their way to Jenner and eventually to Klazen. I find that these documents were indeed written quotations obtained earlier and that Hendricks deliberately avoided to come out with the truth. It was necessary in order to assist the version of Jenner that no supplier, except Duneco, had PPE stock which it could sell and deliver to the Municipality.

[38] Jenner was not only Hendricks' companion, but his lackey. It is no co-incidence that Hendricks started his stint at the Municipality on 1 April 2020 and that Jenner became the Covid-19 co-ordinator the next day. The previous Covid-19 panel members were removed to make space for Jenner. I accept that Duneco's bid was unsolicited and that Hendricks and Klazen initiated the process to award the contract to Duneco. Jenner was used to take the process further and Booysen as Chief Financial Officer was thereupon persuaded to make a recommendation which he did without applying his mind as could be expected of a diligent senior official.

[39] The request for deviation, completed and submitted by Jenner belatedly, was incomplete and did not contain sufficient reason for a deviation of the Municipality's SCM policy. The whole process was flawed. Significantly, Jenner fraudulently stated in the request for deviation that it was impractical to source stock from the list of service providers attached to MFMA Circular 100. It is clear that he was at that stage fully aware of at least three quotations. In fact, this deviation request was nothing but window-dressing as Hendricks had already approved the deal. Furthermore, Jenner elected to attach the two highest quotations and not the quotation of Sulizest which

quotation was lower than quoted by Duneco. Jenner was the author of the request for an official order dated 7 April 2020. He used an old order number 103718 issued to a totally different supplier in October 2019 and created a false new order by inserting in his handwriting the number '0' so that it reads 103718-0. If it was not for the information provided by a whistle-blower, nobody would have asked any questions.

[40] Booysen, to his credit, was brave enough to admit 'that the Duneco transaction constitutes irregular spending as envisaged in terms of the MFMA.' Booysen alleged that he has made a qualified recommendation, but this is incorrect. He stated the following:

'I am in agreement with the author and recommend that we purchase as per the quotation and complete a deviation as per our supply chain policy read with Treasury Circular 100.'

Although he stated that information was withheld from him in order to frustrate and circumvent his oversight function, he should not have made a recommendation in favour of Duneco in the circumstances. He also confirmed that he only became aware of the two quotations of Safepro and Marice Mercuur after Hendricks had already decided to accept the Duneco quotation. Ms Ipser again made valid submissions pertaining to Booysen's failure to comply with his duties. I do not intend to repeat same, save for emphasising that he did nothing to ensure compliance with the MFMA circular, that he did not request a declaration of interest before recommending the quotation, that he certified that the goods ordered had been received without verifying the information and that he approved payment without being in possession of the necessary documentation. I am not prepared to find, as submitted by Ms Ipser, that Booysen colluded with the other respondents, but no doubt, he was guilty of gross negligence.

[41] I am satisfied that the Municipality's SCM policy, read with the MFMA Circular 100, has not been complied with. Therefore, the next issue to be considered is whether the decision of Hendricks to award the contract to Duneco should be declared irregular and unlawful.

Should the decision by Hendricks as Acting Municipal Manager to purchase PPE's from Duneco be declared irregular and invalid?

[42] It is unnecessary to repeat what I have stated under the previous heading. For all of the reasons advanced earlier, Hendricks' decision to purchase PPE's from Duneco should be declared irregular and invalid.

What relief should be granted, considering subsec 172(1)(b) of the Constitution pertaining to the invalid agreement?

[43] In *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others*²⁴ the Supreme Court of Appeal stated that as a general rule, even innocent parties are not entitled to benefit or profit from an unlawful contract. Whether or not first respondent, acting through its sole member, Klazen is an innocent party to the contract awarded to first respondent must be considered. Notwithstanding Klazen's allegations and attacks on the SIU investigators and the SIU deponents to various affidavits in the record, I am satisfied that he, Hendricks and Jenner were in cahoots. Duneco was not an innocent party. Having said this, I shall have to consider just and equitable relief.

[44] Subsec 172(1) of the Constitution reads as follows:

'(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

I have already held that the decision taken by third respondent on behalf of the Municipality to enter into the contract with first respondent is irregular and invalid insofar as that conduct was inconsistent with the Constitution and the legislative measures ordained in accordance therewith. The next issue to consider is what order to be made in compliance with s 172(1)(b).

²⁴ (119/2021) [2022] ZASCA 54; 2022 (5) SA 56 (SCA) (13 April 2022) para 42.

[45] My finding that the decision to award the contract to Duneco is irregular and invalid is not the end of the matter. The remedy to be considered must be appropriate in respect of the matter at hand and in line with the options contained in subsec 172(1)(b) quoted above.

[46] Bearing in mind the *Plascon Evans* rule, I have difficulty in finding that the PPE's were not delivered to the Municipality. I have much doubt about the veracity of the allegations made in respect of delivery. The applicants did not ask that the matter be referred to oral evidence. In the absence of cross-examination, an important tool to establish the truth, I am bound to accept that proper and full deliver has taken place.

[47] In arriving at a just and equitable order under s 172(1)(b) of the Constitution the rule of law must never be relinquished as stated in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*.²⁵ In *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC*²⁶ (*Ikamva*) the Supreme Court of Appeal confirmed that relief under s 172(1)(b) may range 'from keeping alive an invalid contract for the public good to ordering repayment of ill-gotten profits derived from such a contract ... '

[48] In considering an appropriate remedy, I recognise that I cannot make a finding that the PPE's have not been delivered. Unlike the conclusions arrived at pertaining to the evidence of Klazen and the three municipal officials in respect of the negotiations and eventual conclusion of the contract, it is not possible to find that Duneco has not executed the contract. There are fingers pointing towards non-compliance, but I cannot adjudicate this issue on the probabilities. The versions of the third parties called upon to confirm delivery of PPE's might have been properly tested if the matter was referred to oral evidence. Consequently, insofar as the SIU has decided to institute application procedure and failed to apply for the matter to be referred for oral evidence, an opportunity was lost to cross-examine the role players, to wit Klazen, Hendricks, Jenner and Booysen, but in particular the persons who allegedly delivered PPE's to the Municipality. That being the case, it appears to be unfair to set aside the contract and order restitution at this stage, three years after the event. No proper finding can

²⁵ (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010).

²⁶ (544/2021) [2022] ZASCA 184; [2023] 1 All SA 579 (SCA); 2023 (2) SA 514 (SCA) (20 December 2022) para 32.

be made that the PPE's have not been distributed for the benefit of the Municipality, its employees and possibly community members. Although Duneco made a substantial profit, its quotation was in line with the quotations of other suppliers obtained by Meyer and her Covid-19 team earlier.

[49] Duneco filed a conditional counter-application on the basis of a finding that the contract with the Municipality might be declared invalid and a further order directing it to repay the purchase price received. In such instance it would have sought an order that the Municipality be directed to deliver gloves and masks to a value equal to the purchase price agreed upon to it. In the light of my finding it is unnecessary to consider this counter-claim. The only relevant issue to be considered is the costs relating thereto. This will be done in due course.

[50] Recently the Supreme Court of Appeal also had to consider whether or not the high court was wrong in refusing to grant relief in the form of payment under s 172(1)(b) of the Constitution. The case dealt with the infamous lease contract of the SALU building in Pretoria that accommodates the Department of Justice and Correctional Services. The high court granted an order in favour of the SIU in terms whereof the lease contract entered into between the Department and the lessor was declared invalid in accordance with the provision of s 172(1)(a). However, the high court declined to grant further relief in terms of s 172(1)(b), specifically dismissing the claim for payment of almost R104 million paid as rental which the SIU claimed was wasteful expenditure incurred during the lease. On appeal the Supreme Court of Appeal dealt with the matter in *The Special Investigating Unit v Phomella Property Investment (Pty) Ltd and Another (Phomella)*.²⁷ The court referred to *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*²⁸ (*Allpay 2*) in which case the Constitutional Court did not hold that a party could derive no benefit from an invalid contract. In *Allpay 2* the party was allowed to retain payments and thus to benefit under an invalid contract. This approach was also accepted to be correct in *Gijima supra*.²⁹ Consequently, in *Phomella* the Supreme Court of Appeal held that the high court was correct in refusing

²⁷ (Case no 1329/2021) [2023] ZASCA 45 (3 April 2023).

²⁸ (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014) para 67.

²⁹ *Gijima loc cit* para 54.

to exercise its discretion to order the landlord to pay the almost R104 million claimed by the SIU.³⁰

[51] The record indicates that Duneco did in fact make a profit, but that its profit was in line with the profits to be made by any of the other suppliers who provided the Municipality with quotations. On the assumption that the contract for the delivery of the PPE's was properly executed, it would be unfair at this stage to set aside the contract and order first respondent to repay either the purchase price received or any portion thereof, such as the profit made.

Should the third, fourth and fifth respondents be held liable, jointly and severally for payment of the irregular expenditure in the amount R400 027.50

[52] The SIU's case is that the three employees of the Municipality, to wit Hendricks, Jenner and Booysen should be held liable for incurring irregular expenditure in breach of their duties of good faith and diligence towards the Municipality. I have already referred to the legal framework pertaining to procurement of goods and services *supra*. A procurement process not properly undertaken may signify a deliberately skewed process and the symptom of corruption or malfeasance as recently remarked by the Supreme Court of Appeal in *Allpay*.³¹ Deviations from fair processes must be carefully considered. This case is a good example of how a process can be manipulated to the advantage of some and the detriment of the entity that requires the goods or services.

[53] The relevant part of s 32 of the MFMA reads as follows:

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

(a) ... ;

(b) ... ;

(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) ... '

³⁰ *Phomella loc cit* para 27.

³¹ Para 31 *supra*.

[54] Section 32 is unambiguous. A municipality is statutorily obliged to recover irregular expenditure from the identified incumbents, whether or not the municipality received any value. Irregular expenditure is *inter alia* defined in s 1 of the MFMA as follows:

‘expenditure incurred by a municipality ... in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality ... or any of the municipalities by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-law.’

[55] Booyesen is in agreement with the SIU and the Municipality that the Duneco transaction constituted irregular spending as envisaged in the MFMA as clearly confirmed in his answering affidavit. He tried to exonerate himself by referring to the extraordinary circumstances and the fact that he relied on the honesty of co-officials. He must have done much more as set out above. I repeat that I am satisfied, having considered the totality of the evidence, that he was grossly negligent.

[56] Hendricks and Jenner were in cahoots with Klazen. The collusion between them has been established. Objective evidence has been presented. Their explanations are false and far-fetched and therefore rejected. They should make good as provided for in s 32 of the MFMA. All three officials shall be held liable in terms of subsec 32(1)(c) for the irregular expenditure incurred by the Municipality in the amount of R400 027.50.

Costs

[57] Although the applicants are not successful in obtaining a monetary order against Duneco, it has obtained substantial success insofar as the decision taken by Hendricks is to be declared irregular and invalid. Each party shall pay their own costs in respect of the conditional counter-application. In the exercise of my discretion, I find that the most appropriate order to be made is that Duneco, Hendricks, Jenner and Booyesen should pay the costs of the application jointly and severally. The SIU asked for a punitive costs order, but I do not deem it prudent in the circumstances. It might have been a different matter if I was able to find that Duneco did not comply with its contractual obligations.

Orders

The following orders are issued:

1. It is declared that the decision taken by third respondent, acting on behalf of the second applicant during April 2020 to purchase Personal Protection Equipment from first respondent under order number 103718/0 is declared irregular and invalid.
2. The amount of R400 027.50 paid by the second applicant to the first respondent in respect of the purchase price of Personal Protection Equipment is declared an irregular expenditure in terms of s 32(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003.
3. The third, fourth and fifth respondents shall pay the amount of R400 027.50 to the second applicant, jointly and severally, together with interest thereon a tempore morae from 22 April 2020.
4. First, third, fourth and fifth respondents, jointly and severally, shall pay the costs of the application.
5. Each party shall pay their own costs in respect of the conditional counter-application.



JUDGE JP DAFFUE

Appearances

Counsel for the Applicants: Adv MA Ipser
Attorney for the Applicants: The State Attorney: Cape Town

Counsel for the 1st and 2nd Respondents: Adv C Tsegarie
Attorney for the 1st and 2nd Respondents: CMB Attorneys: Bellville

Counsel for the 3rd Respondent: Adv J Van der Schyff
Attorney for the 3rd Respondent: CMB Attorneys: Bellville

Counsel for the 4th Respondent: No appearance, but heads of argument
having been drawn by Adv B Prinsloo (who
has withdrawn a week before the hearing)
Attorney for the 4th Respondent: CMB Attorneys: Bellville

Counsel for the 5th Respondent: Adv A Titus
Attorney for 5th Respondent: Abrahams Kiewitz: Bellville

Date of hearing: 11 April 2023 (leave having been granted to the third respondent to file heads of argument on 14 April 2023)

Date of judgment: 23 June 2023

Mode of delivery: this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 12h00 on 23 June 2023.

