



NOT REPORTABLE

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

CASE NO. 1049/2022

In the matter between:

SUNDAY'S RIVER MUNICIPALITY

Applicant/Defendant

and

PROFUSION PROTECTION SERVICES (PTY) LTD

First Respondent/
Plaintiff

THE SHERIFF HIGH AND LOWER COURT
KIRKWOOD

Second Respondent

JUDGMENT IN RESPECT OF APPLICATION FOR RESCISSION

HARTLE J

[1] The plaintiff sued and obtained judgment by default on 14 June 2021 against the defendant (“the Municipality”), a local municipality as envisaged in section 2 of the Local Government: Municipal Systems Act, No. 32 of 2000, after it failed to pay two out of three amounts invoiced to it for the provision of VIP security/ bodyguard services rendered to its Speaker of Council at the time (presently its Mayor) as emergency protection services between the period 6 September to 17 November 2020, leaving a balance owing to the plaintiff in the sum of R762 717.38. The relevant invoices were the last two in the series dated 26 October 2020 and 18 November 2020 respectively. They were payable within 30 days of presentation. The first of the three invoices that covered the initial period from 6 - 23 September 2020 was paid on 15 October 2020 but the last two went unpaid.

[2] The municipality seeks a rescission of that judgment. It’s very belated contention through its present municipal manager, Mr. Sakhekile Fadi, is that the services were arranged via a junior official employed in Corporate Services who was not authorised to enter into the transaction(s); that the procurement process followed was irregular and ensued *sans* the approval of the Municipality’s Council; and that the impugned contract is invalid for want of having been reduced to writing.¹

[3] It is further suggested that to the extent that the plaintiff may seek to rely on the principle that the actions giving rise to the contended for agreement (which the

¹ It was contended on behalf of the Municipality that the requirements of section 116 of the Local Government: Municipal Finance Management Act, No. 56 of 2003, to the effect that an agreement procured through the supply chain management system of a Municipality must be in writing and stipulate the terms and conditions as set out in that section had not been complied with, rendering the contract invalid.

Municipality claims is unlawful or invalid) constituted administrative action which exists and may have legal consequences until set aside by a court of competent jurisdiction, that the Municipality, if it is successful in the present application, intends to pursue a contingent counterclaim seeking the review and setting aside of any such actions on the basis of the constitutional principle of legality.

[4] It is common cause that the summons in question was properly served on the municipality on 28 April 2021 and that it failed to file a notice of intention to defend the action. Indeed, it appears from the evidence that its acting municipal manager at the time, Mr. Pillay, acknowledged receipt of the process and intimated in a letter dated 6 May 2021 that it wished to settle the matter. Despite negotiations that appear to have been had, these have not conducted to a favourable conclusion of the matter and the balance claimed in the action remains unpaid.

[5] In June 2021 the plaintiff lodged an application with the Registrar for judgment to be entered against the Municipality on a default basis.²

[6] Subsequent to judgment having been obtained, the plaintiff on 27 September 2021 served the order together with a “*judgment letter*” upon the offices of the municipal manager at 31 Middle Street, Kirkwood, upon the incumbent’s personal assistant, one Ms. Mgidi.

² It is unclear what happened in-between. The Municipality averred that there was no response to the letter offering to settle the matter. Except to say that the “*offer*” was unacceptable, the plaintiff did not deal with this allegation in its answering affidavit. Furthermore, Mr. Pillay’s account of what happened under his watch or explanation regarding why the Municipality did not file a notice of intention to defend under the peculiar circumstances is absent. This interregnum was however overtaken by other significant events that confirm that despite whatever reservation may have been expressed by him at the time over the “*costs associated with the services provided having been incurred in an irregular and unauthorized manner*”, the Municipality was intent on settling the matter with the plaintiff.

[7] In the absence of payment of the judgment date (and upon the culmination of without prejudice settlement negotiations of which the present municipal manager claims to have had no knowledge, but which evidently came to naught) the plaintiff issued a writ of execution and attached three motor vehicles belonging to the Municipality on 9 May 2022. The plaintiff duly gave notice that the motor vehicles so constrained would be sold in execution on 22 June 2022.

[8] This galvanized Mr. Fadi into action to move an urgent application under Part A to stay execution and under Part B he sought a rescission of the default judgment order that had been granted in favour of the plaintiff a year before.

[9] The Part A application was settled when the municipality put up security for the judgment debt. However, the costs of the interlocutory application were reserved for determination by this court.

[10] To succeed with an application for rescission under the common law - for it is on this basis that the Municipality purported to bring it,³ the application must be brought within a reasonable time and the defendant must demonstrate “*good cause*” therefor to the satisfaction of the court. Whilst what constitutes good cause is not capable of precise definition,⁴ the court will at least require the defendant to give a

³ The Municipality does not pertinently explain why the application was not launched on the basis of Uniform Rule 32 (2)(b) but reading between the lines its intent was to rely on the present municipal manager’s belatedly expressed need, purportedly on the basis that he did not know until recently that the acting municipal manager at the time had followed a different non-litigious approach, to go into the merits of the matter because defences are in his view open to the Municipality which it should be permitted to take. This aligns with the approach adopted in *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) to the effect that the concept of sufficient cause does not necessarily resort under a straitjacket of the grounds provided for in Uniform Rules 31 and 42 (1). As Wessels JA remarked in that matter: “*One can envisage many situations in which both logic and commonsense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief.*”

⁴ *Cairns’ Executors v Gaarn* 1912 A.D. 181 at p. 186.

reasonable and acceptable explanation for its default and to show on the merits that it has a *bona fide* defence which *prima facie* has some prospects of success.⁵

[11] Both requirements must be met on the common law test. As was stated in *Chetty*:⁶

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

[12] Quite evidently, what needs explaining in respect of the first requirement, is why the municipality, acting through its officials at the time, failed to file a notice of intention to defend the action which it should have done around mid-May 2021. The simple answer to that inquiry, as I will indicate below, reveals that the acting municipal manager at the time both had knowledge of the action and evidently consciously elected not to file a notice of intention to defend.

[13] Without any suggestion that the previous incumbent of the post compromised the Municipality’s position by adopting the non-litigious course he followed at the time, or any explanation being offered as to why the latter’s knowledge of the summons and his dealing with the matter as he did should for some or other reason not be imputed to the Municipality, or that some compelling reason exists for the Municipality to vindicate the constitutional principle of legality, Mr Fadi comes to

⁵ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) at paras [71] and [72]; *Chetty v Law Society, Transvaal* (1985) 2 SA 756 (A).

⁶ *Chetty, Supra*, at 765 D- E.

the party late in purporting to suggest that sufficient cause exists for the Municipality presently to be excused for its default and that this is a proper case for it to be afforded the right to defend the action. If the municipality were so allowed, so he suggests, “*a number of defences would be available to it, which would include at least the fact that the services were not properly authorised and (are) thus unlawful*”.

[14] Mr. Fadi claims to have been authorized to bring the application on behalf of the Municipality “*by virtue of the powers delegated to the incumbent of the office of The Municipal Manager by the Defendants Council.*” It is unclear whether he here suggests an “*ex lege*” authority to institute proceedings or a delegation to him in his official capacity of the authority generally to initiate legal proceedings, because elsewhere he appears to acknowledge the need to have obtained a mandate from Council especially to have instituted these proceedings.⁷ Whether Council has mandated him to seek a rescission of the default judgement for reasons he would have prevailed on it rendered it necessary for it to pursue the present application is unclear, but to be fair to the Municipality, the plaintiff did not challenge his standing on any

⁷ See Nico Steytler, *Local Government Law of South Africa*, Chapter 8 in respect of “*Municipal Management.*” The municipal manager’s legal status and position does not, in and of itself, empower him or her to institute legal action on behalf of the municipality or to represent the municipality. A municipal manager needs delegated authority to initiate legal proceedings on behalf of the municipality. See *Molefe v Dihlabeng Local Municipality* [2008] JOL 22365 (O) at paras 15, 27 and 37, in which the court was unimpressed with an acting municipal manager’s assertion that he had authority to represent the municipality in legal proceedings merely because he was appointed as acting municipal manager. In *Magodongo v Khara Hais Municipality and Others*, (2018) 39 ILJ 406 (LC) (14 November 2017) at paras 31–32 the Court similarly did not accept the municipality’s argument that the municipal manager was authorised to institute proceedings “*ex lege*”.

basis.⁸ He is certainly the current incumbent of the office of the municipal manager of the Municipality and would have had a clear interest from that perspective, for example, to have necessarily launched the proceedings under Part A under the urgency contended for,⁹ but given the curious history of this matter and the conscious resolve of his predecessor not to have required the action to be defended, a clear mandate from the Council to presently seek a rescission of the judgment in contention a year after the fact would have been instructive. This is all the more necessary in my view since Mr. Fadi revealed in his replying affidavit that: “...*this litigation has been debated at length and I can confirm that a number of councillors are vehemently opposed to approving the use of such services.*”

⁸ An accounting officer is obliged in terms of the provisions of 61 (2) of the Finance Act in the exercise of his fiduciary responsibilities to disclose to the municipal council and mayor all material facts which are available to him or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor. There are several other sections of the Finance Act which compel an accounting officer to provide reports to council or other functionaries in respect of any non-compliance with the provisions of the Act. The overarching obligations on him in terms of the Finance to cover his bases as it were imply that he must have provided a written recommendation to the Council to have instituted the present application. The Municipality's Supply Chain Management Policy also provides in section 41(1) (b) for an investigation by its accounting officer into any allegations against an official or other role player of, *inter alia*, irregular practices or failure to comply with the policy, which presupposes a formal on the record report especially justifying steps taken (or to be taken) by him against such persons purportedly to combat the abuse of the supply chain management system.

⁹ The Municipality wished to avert the imminent sale of its service delivery vehicles that had been attached in execution of the plaintiff's judgment.

[15] This statement is surprising (if not concerning in the municipal manager's deference to such opinions) given that personal protection services to the Speaker (who the contentious invoiced amounts concerned) are, and were at the time, legally permissible and also approved by Council.¹⁰ When the services were rendered, the Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils published in GN 475 of 24 April 2020 (Government Gazette No. 43246), effective from 1 July 2019, (*"the Determination"*) provided in section 15 (1) thereof for "personal security" for councillors under the caption of *"tools of trade"*. The speaker would have been entitled as part of his remuneration

¹⁰ According to a report of Mr Pillay submitted to a special meeting of the Council held on 17 September 2020 (while the Speaker was under special guard by the plaintiff) he makes the observation, under the rubric of "Legal Implications" that: *"It should be mentioned that such Gazette (a reference to the Determination) was adopted by Council."* In terms of the provisions of section 7 (3) of the Remuneration of Public Office Bearers Act No. 20 of 1998, the salary and allowances of a member of a Municipal Council is determined by that Municipal Council by resolution of a supporting vote of a majority of its members, in consultation with the member of the Executive Council responsible for local government in the province concerned, having regard to what is provided for in that subsection. Subsection (4), in turn, provides that the salaries and allowances of members of Municipal Councils shall annually form a charge against and be paid from the budget of a municipality concerned. In section 1, "allowances" means any allowance, including out of pocket expenses, which forms part of an office bearer's conditions of service, other than a salary and benefits. The Preamble to the Determination (which intends to embrace the same words and meanings referred to in the Office Bearers Act) repeats that the salary and allowances of a councillor is determined by that municipal council by resolution of a supporting vote of the majority of its members, in consultation with the member of the Executive Council responsible for local government in each province, having regard to the upper limits as set out the Determination itself, the financial year of a municipality and affordability of a municipality to pay within the different grades of the remuneration of councillors, including the austerity measures as approved by national Cabinet. For purposes of implementation of the Determination, "in consultation with" means that a municipal council must obtain concurrence of the MEC for local government prior to the implementation of the provisions of the relevant notice. "Tools of trade" is a somewhat confusing concept. It means, in the definitions which preface the Determination: "the resources provided by a municipal council to a councillor to enable such councillor to discharge his or her duties in the most efficient and effective manner, and at all times remain the assets of the municipality concerned." The confusing part is that personal security services can hardly present itself as an asset of a municipality and the acquisition of a service as opposed to an asset would surely require a different process when it comes to procurement. Be that as it may, there can be no question that the budget of a municipality is required to include provision for personal security albeit this resorts under *"tools of trade"* rather than presenting as an "allowance." This much is evident from the provisions of section 18 (1) of the Determination, its effect of which was retrospective to 1 July 2019, that required detail concerning the municipalities' "total budget for personal security" to have been provided to the Minister by not later than 30 July 2020 as part of the budget work up and planning. The takeaway of all of this is that the expense that the Municipality had to incur in order to provide personal security to the Speaker should have been within budget, or at least within the contemplation of the Municipality as a necessary expense.

package to the provision of two bodyguards at least. No threat or risk analysis by the South African Police Service would have been required in these circumstances. In terms of section 15 (2) of the Determination if a municipal council makes available tools of trade in terms of sub-section (1) it would have to simply take into account “*accessibility, affordability and cost control, equity, flexibility, simplicity, transparency, accountability and value of tools of trade*”. Although “*personal security*” is lumped in together with laptops and other tangible assets that are capable of being insured (section 15 (3)), there would have been no reason to suppose that the ordinary procurement processes for the acquisition of such services, except in the peculiar context of the exigency under which the need for these arose in this instance, could not be adopted without any fuss. They would certainly however have been within budget so to speak, courtesy of the provisions of the Determination under the caption of “*tools of trade*” for councillors.¹¹

[16] In this instance the need for the plaintiff to have provided personal around-the-clock protection to the Municipality’s Speaker arose on the weekend of 5 September 2021 after he received death threats.

[17] At the time, Mr. Fadi had been suspended from office, according to him due to “*political instability*” that endured for a period of approximately a year.

[18] This was not the first time that this had happened but when it did on 19 March 2020, Mr. Fadi was still the incumbent of the office and it appears that exactly the same *modus operandi* as it were procurement wise was then employed to contract for the plaintiff’s services. In this regard the plaintiff pleaded in the summons that

¹¹ See footnote 10.

its representative was contacted telephonically by Ms. Susan Fourie, who was “*duly appointed and authorised to act on behalf of the Defendant*” and who entered into an oral agreement with it to provide emergency security services to the Municipality.

[19] The Municipality again engaged the services of the plaintiff on 24/25 May 2020. During this period the incumbent of the office was an acting municipal manager in the person of a Mr. Machelesi who again instructed Ms. Fourie to secure emergency security services with the plaintiff on behalf of the Municipality which was facing an imminent strike at the time.¹²

[20] When the services in contention were rendered, commencing from 6 September 2020, Mr. Machelesi similarly “*authorised*” Ms. Fourie to contract the business with the plaintiff which entailed in this instance once again the placement of around the clock protection for the Council’s Speaker, which services were confirmed renewed on a weekly basis for their duration at an agreed upon rate.

[21] The invoices for services rendered in March and May 2020 respectively were paid by the Municipality on 11 August 2020, still during the watch of Mr. Machelesi.

[22] When the Municipality was served with the summons, Mr. Machelesi had been replaced by Mr. Pillay who had been sent to act in the position from the Sarah Baartman District Municipality.

[23] Mr. Fadi was reinstated soon thereafter as municipal manager in June 2021 and again took up the cudgels of the financial stewardship of the Municipality.

¹² As an aside the provisioning of these services to the Municipality might have posed a different kettle of fish than the permissible personal security services for councillors made provision for in the Determination.

[24] It hardly needs to be stated that Mr. Fadi and those who acted as municipal manager at each interval would have had the ultimate responsibility for the administrative oversight of the municipality and its diligent compliance with the Local Government: Municipal Finance Management Act (“the Finance Act”)¹³ at all relevant times.¹⁴ They would also have borne the vast responsibilities and functions assigned to the office as “*accounting officer*”.¹⁵ It should also fairly be assumed that the chief financial officer would have had the ear of the incumbent of the office of municipal manager and that the latter (in conjunction with the chief financial officer) would have kept his own finger on the pulse as it were of expenditure that was “*irregular*”, “*fruitless and wasteful*” or “*unauthorised*,” within the meaning of each concept as defined in the Finance Act, including how the Municipality was expected to deal with any concerns that may have been raised in respect of such expenditure.¹⁶ An astute municipal manager would also notably have concerned himself with the powers devolved to him by Council to effectively oversee the implementation of the SCM policy especially within the context of providing emergency protection services to the municipality’s office bearers.

[25] Despite the expectation of such institutional integrity, Mr. Fadi’s explanation for the default however assumes that he need only account for his own parochial knowledge of the fact of the judgment and explain away *his* default.

¹³ No. 56 of 2003.

¹⁴ Section 55 of the Finance Act. See also Nico Steytler, *Local Government Law of South Africa*, Chapter 11 on “Financial Management” generally.

¹⁵ Section 60-79 of the Finance Act read with Nico Steytler, *Local Government Law of South Africa*, Chapter 11 on “Financial Management”.

¹⁶ The provisions of section 32 of the Finance Act would certainly have applied in the view of both Messrs Pillay and Fadi. The concern that the expenditure was unauthorised (as in off budget) or irregular, should have been a matter of record.

[26] In this respect he asserts that *he* only became aware that a summons had been issued against the Municipality when the plaintiff made the attachment of its motor vehicles. Duly alerted thereby, he commenced an investigation into why the summons had not been dealt with by the Municipality's legal department.

[27] His discoveries revealed the approach adopted by Mr. Pillay which he suggests he would have handled differently had he known of the summons and correspondence in question.

[28] Despite the strong views presently expressed by him that the action should in his view have been defended, all the email correspondence addressed to the Municipality by the plaintiff's attorneys and marked for his attention on the subject of the judgement debt and requests for payment (which should for that reason alone also have caused him in the exercise of his oversight functions as accounting officer to have interposed himself), for some or other reason never piqued his interest.

[29] The effort by the plaintiff who had taken the cautionary step of warning the Municipality in a "*judgment letter*" dated 17 September 2021 served by the sheriff on Mr. Fadi's personal assistant, Ms. Mgidi on 27 September 2021, that it had obtained judgment on 14 June 2021 and would be executing on it unless payment was received within 30 days, similarly missed his attention. Ms. Mgidi put up an affidavit in which she acknowledges having received the letter but simply apologizes with absolutely no explanation given to this court (or purportedly to Mr. Fadi himself) for her failure to have brought the judgment letter to his attention.

[30] As for the email correspondence that had been addressed to the Municipality concerning its liability to the plaintiff, Mr. Fadi claims to have routinely forwarded

these communications on to corporate services who were dealing with all legal issues at that time.¹⁷ He claims however that had he known that the correspondence involved a matter that *had not been defended* he would have taken the necessary steps to ensure that a mandate be obtained from the Municipality's Council to in fact defend the action. Corporate services in turn failed to inform him that the correspondence which he was forwarding on to them to be dealt with formally was not actually being handled by them.¹⁸ They too, in being asked for an account by Mr. Fadi for their failure to have pointed out such fact to him, yielded no "*satisfactory answer*". This presupposes that an answer must have been provided to him in this connection but that he failed to disclose this information to the court. (Seen from the opposite perspective, however, corporate services appeared from correspondence exchanged between the parties to have been engaged with the plaintiff throughout in an ongoing exercise to settle the Municipality's indebtedness to it and on the very clear basis that "*SRVM is committed to payment of the debt incurred*".)¹⁹

[31] Mr. Fadi felt himself constrained to mention (because he had issued a read receipt in respect of one of these emails addressed to him on 14 December 2021 giving cover to a notice of a taxation in respect of the action) that on that day his office was closed for the holiday period and that he "*would have read the email and forwarded it on to corporate services to be dealt with in the new year*".

[32] He also mentioned the hiatus between 1 November and 5 December 2021 between electioneering and the appointment of the new council when the defendant

¹⁷ This is a recognition by Mr. Fadi that the correspondence related to a "legal issue."

¹⁸ This is an odd statement to make bearing in mind his assertion that corporate services were dealing with all legal issues at the time.

¹⁹ This is plainly evident from correspondence put up by the plaintiff.

would purportedly not have been able to make a decision to defend the action should he *“have even been aware of this matter”*.

[33] Given the institutional integrity of the Municipality alluded to above, I consider it curious that Mr. Fadi purported to explain that: *“Given that no one at the Defendant had any knowledge of the summons other than Mr Pillay, it took some time to investigate the matter and appoint attorneys to act on behalf of the Defendant who in turn also had to investigate the matter and make copies of the documents in the court file.”*²⁰

[34] Leave aside the fact that corporate services must obviously have been in the know of the matter, this amounts to a concession that Mr. Pillay’s knowledge of the matter and reaction to the summons at the time, which must of course be imputed to the Municipality, was pivotal to the mystery perceived by Mr. Fadi but there is no affidavit from the latter put up. In my view Mr. Pillay ought naturally to have been approached as a first point of enquiry to give an account of his handling of the matter in his official acting capacity, more particularly to explain his decision taken and perhaps, as Mr. Fadi suggests might have been the problem, to offer an explanation for why he failed to brief him of a matter that required his ongoing attention.

[35] Mr. Pillay should also notably have been called upon to give a context to his reservations raised in the 6 May 2021 letter and perhaps more especially to provide a context as to why he appeared *laissez-faire* about the matter despite the qualification expressed by him in the letter that the services rendered by the plaintiff

²⁰ It is also curious for the reason that Mr Fadi elsewhere maintained that corporate services were dealing with all legal issues and that he was for this reason, or because of such an expectation, forwarding correspondence concerning the matter on to them to deal with.

had (at least according to Mr. Fadi's account) been *procured* in an irregular and unauthorized manner.²¹

[36] It was further through his own investigations, so Mr. Fadi related, that he learnt of Ms. Fourie's involvement at least from the point of view that she had been served with the summons and that she had handed it to Mr. Pillay to deal with. He asserted that "*she was thus under the impression that the summons had been dealt with*" as if to suggest that she assumed the action had been defended, but quite to the contrary and as appears from correspondence addressed by her to the plaintiff's attorneys on the issue in October 2021, she must have been aware that Mr. Pillay had not dealt with the matter by defending the action.²²

[37] Mr. Fadi went on to explain that he had also gleaned that in respect of *all* the services rendered by the plaintiff to the Municipality pre-summons (which would have included the first transaction in March 2020 on his own watch) Ms. Fourie had been instructed to do so by Mr. Machelesi.²³ According to him she was however a relatively junior administrative official employed in corporate services who did not have the authority to procure goods and/or services or to enter into contracts on behalf of the Municipality yet proceeded to comply with those instructions.

[38] In this respect the Municipality put up her confirmatory affidavit in which she agrees with what Mr. Fadi says concerning her, but this is patently inconsistent with

²¹ See section 32 of the Finance Act.

²² The confirmatory affidavit by Ms Fourie that was put up by the Municipality only confirmed the allegations in paragraph 34 of Mr. Fadi's affidavit concerning his claim that she had no authority to engage with the plaintiff to procure its services.

²³ It is unlikely that Mr. Machelesi, who is ordinarily the director of corporate services, would have involved himself in the March 2020 procurement. Ms. Fourie's confirmatory affidavit does not pertinently deal with the first transaction under Mr. Fadi's watch.

an email written contemporaneously by her to the plaintiff's attorneys on 25 January 2021 prior to the issue of the summons and in response to their invitation to the Municipality to discuss a settlement of the matter to avoid the inevitable. In her email she acknowledges quite unflinchingly that she is the person who had instructed the plaintiff to provide security services to the Council's speaker, but not off her own bat, as follows:

“PPS (the plaintiff) is correct that they received instruction from me. This instruction was issued on the instruction of my immediate superior at the time - Mr. Machelesi, Director: Corporate Services, *who was also the acting Municipal Manager*.

The matter is now with the Chief Financial Officer, Mr Hannes Kraphohl, it would be appreciated if this could be taken up with him. His contact details are as follows...”
(Emphasis added)

[39] Mr. Fadi has not bothered to advert to Mr. Machelesi's peculiar views on the matter either. He was after all the acting incumbent when the services that are the subject matter of the summons were procured and is the director of corporate services including legal affairs. One would expect him to have confirmed or denied his own authority given to by Ms. Fourie to carry out his instruction as acting municipal manager at the time. Mr. Kraphohl's insight is also critical to assess whether the Municipality's supposed defence of a lack of authority should be given a plausible context but there is no affidavit put up by him either.

[40] It is not clear who the Chief Financial Officer was at the time the impugned services were requested and rendered but it is apparent from the minute of a Special Council Meeting convened by the Council (eleven days later) on 17 September 2020 *inter alia* to discuss the “*provision of security services for councillors - life threatening situation of councillors,*” that the meeting was attended in that capacity

by one “*Joko N (Acting Chief Financial Officer)*”. This person’s account, that would also have been critical to the discussion had at the special meeting in this regard, ought also to have been offered to this court.

[41] It should be noted however that no one other than Mr. Fadi (with hindsight) has an issue with Ms. Fourie’s having requested the plaintiff’s services on behalf of the Municipality on any one of the four occasions on which she did.

[42] The plaintiff pleaded in its particulars of claim that the obtaining of its services, on all the occasions when it had provided these to the Municipality, had been procured in emergency situations in terms of section 39 of the Sundays River Valley Municipality Revised Supply Chain Management Policy (“the SCM Policy”), adopted on 30 May 2016 in terms of section 111 of the Local Government Municipal Finance Management Act, No. 56 of 2003. The relevant section of the policy reads as follows:

“39. Deviation from, and ratification of minor breaches of, procurement processes

(1) *The accounting officer may—*

(a) *after consultation with the Chief Financial Officer, 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;*
- (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) *acquisition of animals for zoos; or*
- (v) *in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and*

- (b) ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.
- (2) *The officer must record the reasons for any deviations in terms of subparagraphs (1) (a) and (b) of this policy and report them to the next meeting of the municipal council and also include such reasons as a note to the annual financial statements.*
- (3) Subparagraph (2) does not apply to the procurement of goods and services contemplated in paragraph 11(2) of this policy.”
(Emphasis Added)

[43] It is not seriously suggested by the Municipality that the services were not rendered in an emergency situation, but one gets the distinct impression that the provision of such protection services to the Speaker on an ongoing basis was perhaps a matter of concern to Mr. Machelesi (the acting manager at the time), hence the fact that he reported on the issue at the special meeting of the Council eleven days in while the Speaker was still under guard in order to seek its “*approval*” of such security measures going forward.²⁴

[44] Despite the plaintiff’s contention that this meeting could have had no bearing on the services forming the subject matter of the action because the amounts for these were only invoiced long after the date of Mr. Machelesi’s report and Council’s special meeting of 17 September 2020, it is however plain from the acting municipal manager’s report reproduced below that he was being prescient about the anticipated

²⁴ An affidavit from Mr. Machelesi would have been instructive. I have already mentioned in footnote 10 the curious construction in the Determination of the provision of personal security to a councillor under the rubric of “tools of trade” lumped in together with the provision of other tangible assets that would obviously conduce to a councillor discharging his or her duties in the most efficient and effective manner. Being under guard would no doubt also be of assistance to a councillor who has received death threats but it appears that not much thought was given by its inclusion in the Determination to the difference in procurement of such a commodity in relation to other tangible tools of trade. Perhaps the practicalities of providing the “tool” have ironed themselves out by now and guards are provided to the Speaker and Mayor at least without a threat or risk analysis needing to first be established, but it may have caused confusion at the time. The notional expense was not off budget, but still had to be procured under extremely urgent circumstances in accordance with the Municipality’s SCM Policy. Alternatively, perhaps Mr. Machelesi’s report to the Council purported to be in compliance with section 39 (2) of the Municipality’s SCM Policy. Only he could have enlightened the court in this regard.

expenditure that would follow upon the need to continue to provide personal security to the Speaker emanating from events that had happened on the preceding weekend of 5 September 2020 already. His report (which coincidentally raises no complaint against Ms. Fourie for having engaged with the plaintiff on the municipality's behalf to procure the services) reads as follows in this respect:

“REPORT TO SPECIAL COUNCIL MEETING 17 SEPTEMBER 2020

4.1 **PROVISION OF SECURITY SERVICES FOR COUNCILLORS- LIFE THREATENING SITUATION OF COUNSELLORS**

PURPOSE OF REPORT

To request Council to consider approval of security measures for Councillors in life threatening situations

BACKGROUND

A complaint of intimidation, which is threatening the life of the Speaker of Council, was received and registered. An anonymous telephone call was received by the Speaker, alerting him about a death threat plot to assassinate him. He then informed the Acting Municipal Manager on the weekend of 5 September 2020.

A private security company was engaged to provide close contact security guards as it was not known how and when the plot would be unleashed. A case was reported to the South African Police Service, who referred it to the Crime Intelligence Unit for further investigation. No further communication was entered with the Unit thus far.

It should also be mentioned that the State Security Agency was also approached to advise on what else can be done to ensure that the matter is mitigated. Investigation continues.

LEGAL IMPLICATIONS

In terms of section 15 (1) (g) of the government Gazette on the Upper Limits on allowances and benefits “Executive Mayors, Mayors and Speakers are entitled to two bodyguards.”

Attached as **Annexure A** find a copy of the Gazette for ease of reference.²⁵

²⁵ I have referenced the Determination in paragraph 15 above.

It should be mentioned that such Gazette was adopted by Council. For other Councillors, it promulgates for a security assessment (to) be done with the South African Police Service.

RECOMMENDATION

- (a) That Council take note of the report on the intimidation of the Speaker of Council, threatening his life.
- (b) That State Security Agency be encouraged to investigate the matter of intimidation of all Councillors and be acted upon.
- (c) *That the expenditure implications of the security company used be condoned and covered for.*

SUBMITTED FOR CONSIDERATION”

(Empasis added)

[45] In the special meeting that ensued and for which the acting municipal manager had tabled his report it is apparent that the Council and Mr. Machelesi (and evidently the acting chief financial officer who was present in the meeting) misunderstood the import of the provisions of section 39 of the Supply Chain Management Policy read together with section 15 (1) of the Determination. This is evident from what the minute records as follows:

“6. REPORT FROM THE ACTING MUNICIPAL MANAGER

6.1 PROVISION OF SECURITY SERVICES FOR COUNCILLORS - LIFE THREATENING SITUATION OF COUNCILLORS

On proposal by Cllr Nodonti seconded by Cllr Payi and Councillor Ndawo Council resolved:

- (a) That Council defer the report on provision of security for councillors to a Special Council Meeting.
- (b) That the report must include all outstanding information such as the term of contract for the bodyguards of the Speaker
- (c) That the expenditure implications of the security company be detailed in the report.

The Acting Municipal Manager asked that Council give a directive on what to do with the security company currently on guard for the Speaker. The Acting

Speaker responded that he acted without consulting Council and therefore cannot expect a directive from Council.”²⁶

[46] It cannot be gainsaid that after this special meeting the first invoice in the series of three, that is for personal security services provided by the plaintiff to the Speaker over the period 6 to 23 September 2020 was in fact paid on 15 October 2020, quite obviously by administrative fiat and by obvious implication with the concurrence at least of those seized with the Municipality’s financial responsibilities.²⁷

[47] Mr. Fadi in particularizing the nature of the supposed defence available to the Municipality under the guise that the procurement process was supposedly irregular suggested an entirely different process that is not even evident from the Municipality’s SCM Policy, as follows:

- “36. It is unfortunately not unusual for prominent councillors of the Defendant to be threatened by members of the public or political opponents. The municipal manager however does not have authority to determine whether protection services should be provided to the councillor in question. The process required by the Council to be followed when a councillor (or official) of the Defendant has received threats and requests protection is for that councillor to report the matter to the South African police services and obtain a case number.
- 37. Upon the receipt of such documentation, the municipal manager (who is the accounting officer) is obliged to convene an urgent Council meeting and submit a report to it with the relevant details and seeking authority for the provision of security services and the expenditure of funds for this purpose. Only if approval is received, is the accounting officer authorised to procure such services by means of the appropriate procurement process.”

²⁶ It is not apparent from the SCM Policy that the prior approval of the Council was necessary to be obtained. The deviation is within the province of the accounting officer who is expected to get the buy in only of the chief financial officer.

²⁷ Section 65 of the Finance Act provides for expenditure management by the accounting officer who is responsible therefor.

[48] The shortcoming contended for by him (in the absence of anything explained by Mr. Machelesi or the acting chief financial officer who would have been responsible for applying their minds to the issue at the time), is that Council had deferred its decision on the issue for lack of sufficient detail of the terms of the contract and the expenditure implications and indeed had “*refused*” to give any directive in relation thereto. Additionally, so he averred, it appears that this item was not tabled at any further meeting of the Council. There is further according to Mr. Fadi in any event the absence of any record of the reasons for the alleged deviation or a report to Council in this respect (assuming the provisions of section 39 (1) and (2) of the SCM Policy to be applicable) and no record of any consultation with the Chief Financial Officer. (Ironically both of these obligations would have fallen to him as municipal manager to have overseen.) In this respect neither Mr. Machelesi nor the chief financial officer at the time have filed affidavits that support Mr. Fadi’s claim that the transaction falls to be impugned for such a reason. The fact that it might so appear is hardly a convincing basis upon which to upset a final judgment. The onus is on the municipality to show on the merits that it has a *bona fide* defence that has some prospects of success.

[49] It is perhaps apposite to refer to Mr. Pillay’s letter of 6 May 2021 at this juncture as this has a direct bearing of the belated defence that Mr. Fadi seeks to assert on behalf of the Municipality that on his insistence goes to the root of the contract.

[50] It was inevitable that the plaintiff would want to submit to this court that Mr. Fadi could not get away with relying on only a portion of this “*without prejudice*” correspondence favourable to it without the complete letter having been disclosed to

present a true picture of the entire matter in fairness to the plaintiff.²⁸ Indeed, Mr. Fadi opened the door for it to deal with the import of the letter in reply by not rendering the entire version and in the absence of any supporting affidavit put up by Mr. Pillay to gainsay the particular spin Mr. Fadi put on what the latter had supposedly said about the procurement process.²⁹ Contrary to what the Municipality sparsely avers concerning Mr. Pillay's "assertion" that the services were "*procured in an irregular and unauthorised manner*," he firstly does not complain that any irregularity lies in the fact that either Mr. Machalesi or Ms. Fourie did not have the required mandate to request the services. Further it also does not really substantiate what about the transaction might have caused Mr. Pillay in his official position as accounting officer to be concerned but he ostensibly does not suggest that the *procurement process* was necessarily tainted. What the letter conveys is that:

"The costs associated with the services provided by Profusion Protection Services has been incurred in an irregular and unauthorised manner. The practice of incurring irregular and unauthorised expenditure is deemed illegal in terms of the Municipal Finance management Act and other legislation pertaining to Local Government."
(Emphasis added)

[51] Having regard to the precise definitions in the Finance Act of the different kinds of expenditure falling foul of what the Act requires (each with their own

²⁸ The court in *Venmop 275 (Pty) Ltd and Another v Cleveland Projects (Pty) and Another* 2016 (1) SA 78 (GJ) at paragraph [16] and the cases cited therein spells out the approach to be adopted where there is an imputed waiver by implication, one which arises from the element of publication of the privileged content, or at least as in this instance a part thereof, which can serve as a ground for the inference of an intention no longer to keep the content secret. A waiver by implication is concerned not so much with an ascertainment of the subjective implied intention of the party relinquishing the privileged, but fairness and consistency. In litigation privilege, the mere disclosure of the fact of a privileged communication, or its existence, is not sufficient to justify an imputed waiver of its contents, but where its substance is disclosed to secure an advantage in legal proceedings, the High Court of Australia has found that this will reach the point that fairness and consistency requires disclosure of the whole of the communication and a concomitant loss of privilege in respect thereof.

²⁹ An irregularity in the *procurement* process was suggested which could have significant consequences for it in the arena of tender laws. This is very different from the neutral concepts of "unauthorised" or "irregular" expenditure within the contemplation of the definitions in the Finance Act.

unique impact and which both a financial and accounting officer would be especially attuned to), it is significant in my opinion that Mr. Pillay was comfortable to assert, despite his reservation aforesaid, that the Municipality's recourse for the claimed irregularity referenced by him would however be redressed by it taking action against the individuals concerned who had in his view fallen foul of the Finance Act and the regulations thereto.

[52] It is hardly of any comfort to advert to Mr. Fadi's opinion (formed after the fact and evidently only in the context of this application) that the transaction falls to be impugned without regard to what in Mr. Pillay's opinion caused the mischief, what that irregularity was and how it was intended to be addressed or perhaps already had been addressed by the Municipality by the time he eventually focused his attention on the problem.

[53] In this respect there is merit in the plaintiff's complaint that Mr. Fadi has not taken the court into his confidence regarding what the shortcomings were or why they were condonable (certainly *vis-à-vis* the plaintiff) in the opinion of the then acting municipal manager. Insofar as Mr. Fadi has made capital of claimed irregularities discovered by him after the fact in the conduct of his belated investigations and now supposedly warranting the drastic step of setting aside the default judgment, he has left a gaping void in accounting or vouching for these. If he conducted a formal investigation, one would expect a report as contemplated under the numerous applicable provisions of the Finance Act and section 41 (1) of the SCM Policy. There is simply no assistance offered to this court in understanding the enormous sea change in approach adopted between the two municipal managers neither is there a clear indication of where exactly the breaches of the SCM policy lie. Nothing new has emerged to show that the Municipality has been hard done by

as a defaulting party or that it should, as a matter of fairness and justice, be afforded an opportunity to go into the merits of the action.

[54] In a random supplementary affidavit filed three days after the launch of the application Mr. Fadi was constrained to relate that it had come to his attention after signing his founding affidavit that corporate services (which includes both Ms. Fourie and Mr. Machelesi, neither of whom have provided any input to the court on what appears to have been a significant intervention by their department to have dealt with the matter on a non-litigious basis) had appointed a firm of attorneys, Boqwana Burns, to act on the Municipality's behalf "*in order to broker a settlement*" with the plaintiff. Without critically divulging when this was, he claimed to have had sight of the correspondence and could confirm that the negotiation attempts had come to naught. In any event, so he added, "*I confirm that Corporate Services did not have a mandate from Council to broker such a settlement nor to instruct attorneys.*" He belatedly added the assurance that this too he had been unaware of - that is the fact of such intervention, and that "*had the fact that the summons had not been defended been brought to (his) attention, (he) would have immediately obtained a mandate from Council to defend it.*"³⁰

[55] Not surprisingly, the plaintiff opposed the application for rescission. Notably it took issue with Mr. Fadi's claim that Ms. Fourie (known to it as a *manager* of Corporate Services as opposed to a mere junior administrative officer) was not authorised despite every indication to the contrary that she was permitted to make the necessary security arrangements to prevent harm to the Speaker even in March 2020 under Mr. Fadi's own watch when the Plaintiff's services were contracted for

³⁰ Ironically he elsewhere bemoaned the fact that corporate services had not dealt with the matter although his concern appears to be that they did not deal with the matter as a defended action as *he* saw fit after the fact.

the first time. In the instances where it did business with the Municipality it was further satisfied that these situations could comfortably be brought within the ambit of permissible deviations from the normal supply chain management processes in emergency situations. It was also satisfied, as Ms. Fourie clarified to them later on in the 25 January 2021 letter, that she had received the nod from Mr. Machelesi himself to procure its services.³¹

[56] The first two invoices issued for such services rendered (requested in exactly the same manner procurement wise on each occasion) on 19 March and 24/5 May 2020 respectively were paid by the Municipality on 11 August 2020. An invoice submitted on 23 September 2020 for services rendered from 6-23 September 2020 was also paid on 15 October 2020, this despite Council's stance adopted in the minute of its Special Meeting of 17 September 2020 (of which the plaintiff was evidently unaware at the time). It is only the last two invoices for the services rendered in Oct and Nov 2020 that had gone unpaid. For this reason, it had on 25 January 2021 invited Ms. Fourie, who it knew as the person that had instructed them to provide emergency security services to the Speaker at the time, to discuss a settlement of the matter rather than issuing a summons against the Municipality and she had responded as indicated in paragraph 38 above on the very same date.

[57] The plaintiff had also prior to issuing out the summons sent a "*demand*" to the Municipality in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 ("ILPACOSA"), which was delivered to it at the offices of the municipal manager via registered mail. The registered mail

³¹ Notably Mr. Fadi has not challenged Mr. Machelesi's authority as acting manager at the time to have given Ms. Fourie the go ahead to instruct the plaintiff.

receipt indicates that the letter was in fact signed for and collected on the Municipality's behalf on 13 February 2021.

[58] Summons was thereafter issued on 23 April 2021 and served five days later at the offices of the municipal manager in Kirkwood. This was then followed by receipt of Mr. Pillay's letter dated 6 May 2021 which I have already referred to above.

[59] The plaintiff fairly contends in my view that there is a particular void in the Municipality's explanation regarding what happened after Mr. Fadi was reinstated. It questions how he could claim (especially as a responsible accounting officer) to have had no knowledge of the summons or intended steps to be taken around it until he came to be faced with the problem of the imminent sale in execution of the Municipality's service vehicles. Its further contentions that Mr. Fadi's own nescience of the issue cannot redound to its disadvantage, and that it is entitled to finality in respect of the matter and to enforce its judgment, are to my mind sound submissions.

[60] Mr. Fadi's belated revelation of the settlement negotiations undertaken at the Municipality's behest by Messrs Boqwana Burns on its own confirms that the matter was in fact receiving the attention of the Municipality in this interregnum whether he was aware of it as he ought to have been in his official capacity or not due to his being remiss. This is further evident from the series of emails exchanged between the parties in the period 6 to 15 October 2021 put up by the plaintiff in its answering affidavit which were as a matter of fact copied in to Mr. Fadi. Leave aside that they reveal a settlement proposal, there is no suggestion from their content that the Municipality's liability to the plaintiff is disputed even against the assertion by its chief financial officer that the expense was irregular.

[61] It is also evident from the fact of Boqwana Burns Attorneys' formal intervention on the Municipality's behalf between 19 October and 4 November 2021 which correspondence the plaintiff included to demonstrate how incomprehensible it was for Mr. Fadi to assert a lack of knowledge of the default judgement, that the issue of the judgement debt was very much known to the Municipality despite his supposed ignorance of it all.

[62] There were also other interactions with Mr. Fadi which the plaintiff says indicate that he was very much in the know regarding the fact that the Municipality was indebted to it, which I need not go into.

[63] Leave aside what Mr. Fadi says he knew or did not, the point is that the Municipality cannot wear two hats. What in fact happened and the knowledge that must necessarily be imputed to it concerning the events that actually occurred and which demonstrate that it had no real desire to contest the action cannot be wished away. Insofar as Mr. Fadi suggests that some compelling reasons exists presently to revisit the matter (even if just prompted by the fact that the settlement discussions came to naught), he has as I have indicated above provided no formal report of his investigations into the matter that provides the official basis for the drastic relief that the Municipality seeks.

[64] In the absence of any such report, have already remarked upon the difficulty I have in giving flight to the purported concerns raised by him in a vacuum without any illumination by Messrs Machelesi and Kraphohl at least. In the parlance of the Finance Act, irregular expenditure is given a peculiar meaning in section 1. Apart from Mr. Fadi's reference to possible defences, he has not even identified what

exactly about the transaction forming the subject matter of the action renders it actionable. Insofar as the provisions of section 116 of the Finance Act have been adverted to, it is plain that written contracts can be departed from in terms of the Municipality's SCM Policy in emergency situations and do not afford a self-standing reason to invalidate procurement contracts. The failures he complains of in relation to the Municipality's obligations pursuant to the provisions of section 39 of the SCM Policy (which Mr. Fadi has not pertinently accepted are of application in this instance) are ones that the municipal manager and chief financial officer would be beholden to themselves. It would indeed be counterintuitive to launch a legality review where the shortcomings that would make the contract choate reside with the functionary who is required to have taken the relevant steps in the aftermath of the municipality having had to procure emergency services in terms of its SCM Policy. Notably Mr. Fadi has not complained of any constitutional breaches, suggesting that whatever imperfections may have existed around the procurement of the plaintiff's services are administrative or technical in nature. These can certainly be condoned under the SCM Policy as Mr. Pillay appears to have done.

[65] Whilst being alive to the fact that the defaulting party need not show that the probabilities of the purported defences it relies on are in its favour, that being left to a trial court to decide, I am as I have said before not persuaded that *the Municipality* (not Mr. Fadi) has provided a reasonable or satisfactory explanation for its default in all the circumstances. Further, even if I were in my thinking to isolate the prospects of success of the notional defences Mr. Fadi suggests the Municipality should be entitled to test in a trial from the curious background of this matter, I am not satisfied, on the common law principles, that this court is justified in exercising its discretion in favour of the Municipality by acceding to the relief sought. In fact, the problem here, reading between the lines, suggests a clear tug of war or internal

conflict going on in the domain of the Municipality. Whatever tension has motivated this application, it is simply inequitable to visit the plaintiff with the prejudice and inconvenience caused thereby.

[66] In the result the application falls to be dismissed with costs to follow that result. I am satisfied that the plaintiff was entitled to resist the applications under both Part A and B. I am advised that the security that the Municipality put up to avert the sale in execution happened at the last minute. It could have offered to do so sooner. Indeed, if its financial expenditure was properly managed as it ought to be, it should never have been pushed to the precipice that it was. The plaintiff was more than reasonable in keeping it posted of what next step it would take, and when, and even extended it more time than was due to it to bring up its end of the bargain.

[67] The plaintiff asks for costs on the punitive scale in respect of Part B. I am in agreement that this is an appropriate instance in which the court should mark its disapproval of the conduct of the Municipality. Not only was there a substantial delay in bringing the application, but when it did so it launched it on an urgent basis and could not even be bothered to ask for condonation. It further purported to gloss over its institutional memory as if it did not exist evidently in a bid to avoid having to account for the substantial delay in making the application.

[68] Concerning its application to strike out, I have dealt with this in part above concerning Mr. Pillay's letter of 6 May 2021. For the rest and in these bizarre circumstances where like a Jekyll and Hyde character the Municipality (through Mr. Fadi's contentions) disavowed any settlement, yet complained that the communications demonstrating such negotiations should not have been referenced by the plaintiff on the basis that they relate to without prejudice settlement

discussions which are accordingly inadmissible and accordingly irrelevant, I am satisfied that their very existence was necessary to be put up by the plaintiff as proof of the Municipality's *male fides*. In any event the Plaintiff sensitively redacted the portions necessary to protect the Municipality's privilege.

[69] In the result I issue the following order:

1. The application to strike out is dismissed with costs on the party and party scale.
2. The application under Part B is dismissed with costs on the scale of attorney and client.
3. The defendant is ordered to pay the costs of the application under part A on the party and party scale.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 10 November 2022

DATE OF JUDGMENT : 17 August 2023

Appearances:

For the Applicant/Defendant: Ms. K M Morgan instructed by McWilliams & Elliot Inc., Gqeberha (ref. I Petersen).

For the First Respondent/Plaintiff: Ms M P Morgan instructed by Hardy Attorneys, Gqeberha (ref. JH/P0009).