



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2022/002958

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

8/12/2022
DATE

SIGNATURE

A handwritten signature in blue ink, which appears to read "J. Mooko", is written over the signature line.

In the appeal between:

MOGALE CITY LOCAL MUNICIPALITY

First Appellant

MUNICIPAL MANAGER

Second Appellant

and

INZALO ENTERPRISE MANAGEMENT SYSTEMS

(PTY) LIMITED

Respondent

JUDGEMENT

VAN NIEUWENHUIZEN AJ [SENYATSI J ET MOORCROFT AJ CONCURRING]

- [1] The appellants will be referred to as such or as the Municipality and the Municipal Manager, respectively, as the context may require, and the respondent will be referred to as Inzalo

INTRODUCTION

- [2] This matter has its roots in the failure of the Municipality to follow prescribed supply chain procedures and its own policies in this regard as well the abuse of the deviation procedure which permits the appointment of a service provider without requesting suppliers to bid in an open and transparent process.
- [3] On 14 June 2022 Inzalo was granted urgent relief by Molahlehi J against the Municipality and the Municipal Manager.¹
- [4] The order reads as follows:

"2. Interdicting and restraining:

¹ See paragraph 1 of Molahlehi J 's reasons.

2.1 The First Respondent is interdicted and restrained from implementing and giving effect in any manner whatsoever to:

2.1.1 the award of a tender under reference number RFP COR(ICT) 05/2021 in respect of the provision of a mSCOA²-compliant financial management system ("mSCOA) financial management system") for a period of 36 months ("the Tender"); or

2.1.2 the appointment of any service provider for the supply of a mSCOA financial management systems or any component of a mSCOA financial management system;

Hereinafter referred to as "the Impugned Decision."

2.2. The appointed service provider/s as contemplated in paragraph 2.1 above are interdicted and restrained from carrying out any work and/or continuing with any work in terms of the award of the tender and/or any contracts which may have been concluded between the First Respondent and the said service provider/s as pertaining to a mSCOA-compliant financial system, or the supply of any component thereof.

3. The interim relief contained in paragraph 2 above is granted pending:

3.1 The institution and final determination of the Applicant's internal remedies in respect of the Impugned Decision within 15 days of receipt of the items set out in paragraph 4 and 5 below; and

3.2. The institution and final determination of the Applicant's application to review and set aside the Impugned Decision to be instituted within 15 days of the final determination of the Applicant's internal remedies alternatively within 15 days of receipt of the items set out in paragraph 4 and 5 below.

4 The First and Second Respondents are directed to furnish to the Applicant within 10 days of this Court order the following documents in respect of the Impugned Decision: -

4.1 The First Respondent's written reasons for the Impugned Decision

("The Written Reasons");

4.2 The First Respondent's notice of cancellation in respect of RFP CORP(ICT) 05/2021;

² The Municipal Standard Charter of Accounts.

4.3 The First Respondent's record of decision in respect of the Impugned Decision including but not limited to the reports, meeting agendas, attendance registers, scoring sheets, minutes, and the like of the following committees: -

4.3.1 the First Respondent's bid steering committee ("BSC");

4.3.2. the First Respondent's bid evaluation committee ("BEC"); and

4.3.3 the First Respondent's bid adjudication committee ("BAC").

4.4 Proof of the First Respondent's compliance with its state procurement obligations including but not limited to proof of publishing notices in respect of the Impugned Decision on its website and the eTender Publication Portal;

4.5 Proof of the First Respondent's compliance with MSCOA obligations in terms of the numerous directives issued by the National Treasury in respect of the appointment and replacement of the Municipality's financial management system and service provider.

5. In the event that the First Respondent appointed the service provider in terms of some other procurement process including but not limited to: Regulation 32 or 36 of the Supply Chain Management Regulations, the First Respondent is ordered to provide the following information in respect of the Impugned Decision: -

5.1 A copy of the letter sent to the National and/or Provincial Treasury setting out the reasons for the deviation;

5.2 A copy of the response received from the National and/or Provincial Treasury;

5.3 The bid evaluation committee appointment letters, meeting agenda, report and minutes;

5.4 The bid adjudication committee appointment letters, meeting agenda, report and minutes;

5.5 The Municipality's written reasons for its decision to appoint the service provider;

5.6. The service provider's bid and/or quotation; and

5.7 The record of the decision and the First Respondent's written reasons for the Decision ("the Written Reasons"), including but not limited to: -

5.7.1. proof that the First Respondent published the Notice of Intention to Award (i.e., successful preferred bidder) on the eTender Publication Portal within 7 days of the Impugned Decision;

5.7.2. proof that the First Respondent published the Notice of Final Award (i.e successful bidder) on the eTender Publication Portal within 7 days of the Impugned Decision;

5.7.3. proof that the First Respondent published the Notice of Unsuccessful Bidder on the eTender Publication Portal within 7 days of the Impugned Decision;

5.7.4. proof that the Notice of Intention to Award (i.e., preferred bidder) was published on its website;

5.7.5. proof that the First Respondent published the Notice of Final Award (i.e. success bidder) on its website;

5.7.6. proof that the First Respondent published the Service Level Agreement concluded between the First Respondent and service provider on its website timeously;

5.7.7. proof that the First Respondent conducted a due diligence in terms of the National Treasury's Circular No.6 of the MFMA;³

5.7.8. proof that the First Respondent obtained the approval and/or commentary of the Provincial Treasury or the National Treasury in terms of National Treasury's Circular No. 6 of the MFMA;

5.7.9. proof that the First Respondent obtained the approval of its council and its budget in terms of National Treasury's Circular No 6 of the MFMA;

5.7.10 bid adjudication and bid evaluation reports and the First Respondent's Written Reasons (for both its decision for the purported award, its failure to cancel the Invalid Tender and its decision to appoint a service provider by means of a deviation).

6 The relief sought in paragraph 2 above will lapse in the event of the Applicant failing to exhaust its internal remedies as set out in paragraph 3.1 above or to bring a review application as set out in paragraph 3.2 above.

³ The Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003).

7. The First and Second Respondents are directed, jointly and severally, the one paying the other to be absolved pro tanto from liability, to pay the Applicant's costs.

8. The Applicant is granted leave to bring the review application referred to in paragraph 3.2 above on these papers duly supplemented, as and where may be necessary."

- [5] The undisputed facts are that the Municipality required the services of a service provider who could provide it with a financial management system. The financial management system had to be compliant with the MSCOA standards as set out in the regulations by the Minister of Finance acting with the concurrence of the Minister of Cooperative Governance and Traditional Affairs. The regulations are promulgated in terms of section 168 of the MFMA and more specifically the regulations as set out in the Annexure to the Government Gazette of 22 April 2014 No. 37577.
- [6] The purpose thereof was to set a national standard for the uniform recording and classification of municipal budget and financial information at a transactional level. The MFMA and the regulations prescribe a standard chart of accounts for municipalities and municipal entities which would be aligned to the budget formats and accounting standards prescribed for municipalities and municipal entities and with the standard chart of accounts for national and provincial governments. The aforesaid prescribe the national norms and standards across the whole of government for the purpose of national policy coordination and reporting benchmarking and performance measures in the local government sphere. They also prescribe the minimum prescribed business processes and the minimum financial and business applications or systems requirements as stipulated by the National Treasury.

- [7] The phrase "standard chart of accounts" is defined in the regulations to mean:
"a multi-dimensional classification framework providing the method and format for recording and classifying financial transaction information in the general ledger forming part of the books of account containing a standard list of all available accounts."
- [8] The above regulations were intended to take effect in July 2017. Ever since the Minister continued to publish notices pursuant to the MSCOA regulations and, more specifically, Circular No 107, applicable for the 2021/22 Medium Term Revenue and Expenditure Framework ("MTREF"), also known as the Municipal Budget Circular for the 2021/22 MTREF dated 4 December 2020. A portion of a further circular styled annexure "B", is the process forward with municipal integrated financial management and internal control systems, known as Circular No 6, dated 2 August 2016, MFMA Circular No 83, and pertains to the advertisement of bids and the publication of notices in respect of the award of bids. The MFMA Circular No 83 cancelled bids, variation and extensions of existing contracts on the e-tender publication portal, during July 2016, as well as the Municipal SCOA Circular No 5 – implementation, with the out of compliance date 15 July 2016..
- [9] In the Answering Affidavit filed on behalf of the Municipality and the Municipal Manager there is an annexure "FA8" which is indexed and contain all the documentation the Municipality could find. It is clear from these documents that the tender was advertised twice during 2021 and found to be unresponsive. The bid committee recommended that the tender be cancelled and readvertised as a competitive tender. No explanation was provided as to

bidders from the earlier bidding process were not notified about the cancellation.

- [10] In paragraph 27 and 28 of the Answering Affidavit it is stated that Ms Diale in her capacity as Acting Accounting officer of the Municipality appointed Solvem (Pty) Ltd ("Solvem") on 29 April 2022⁴ and that it is on site and has been performing services from 1 May 2022.
- [11] Ms. Diale furnished Solvem with a letter of appointment without a deviation report or recommendation from the Municipality's evaluation and adjudication committees and was acting on a frolic of her own, and in contravention of the standards set out in the MFMA and the Treasury circulars.
- [12] The "Letter of Appointment" contains a condition in paragraph 2 thereof i.e., that Solvem should submit its written acceptance to the Municipality within 3 working days from receipt thereof and conclude a Service Level Agreement with the Municipality within a month.
- [13] It is also signed by Ms Diale on behalf of the Municipality and by a Mr Oosthuizen on behalf of Solvem.
- [14] Item 7 listed on Annexure "FA8" refers to a minute between the Municipality and Solvem regarding a request for comments on the Master Services Agreement dated 5 May 2022. Item 9 of "FA8" refers to a Master Service Agreement between Solvem Consulting (Pty) Ltd and the Municipality. This was presumably intended to be the Service Level Agreement. It is signed by

⁴ See Annexure "FA7" to the Answering Affidavit.

a representative of Solvem Consulting (Pty) Ltd in Cape Town on 3 May 2022 and was never signed by the Municipality. If this was the proposed Service Level agreement it is not only not signed but purports to introduce a different entity to the contractual relationship with the Municipality. It is not the entity mentioned in the letter of appointment.

[15] It is of interest to note that Solvem was disqualified by the Municipality's bid evaluation committee in the tender process that took place during September 2021. No reasons are advised by the Municipality as to whether this time around Solvem met the minimum requirements.

[16] It is clear that Inzalo's constitutional right to administrative fair procedure was infringed and that Solvem's so-called appointment fails the legality test.

[17] Whilst it is correct that unfair and illegal administrative decisions stand until formally set aside by a review the present case does not quite rise to the level of the *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others*⁵ decision and relief in the form of a structural interdict. More on this will follow below.

THE APPLICATION FOR LEAVE TO APPEAL

[18] An application for leave to appeal the latter order was launched on 30 June 2022 and was heard on 3 August 2022 together with an application for

⁵ 2014(4) SA 170 (CC).

Molahlehi J's recusal.⁶ Both applications were dismissed with costs on 15 August 2022.⁷

[19] The whole notion of structural relief was also raised as one of the grounds in the Application for Leave to Appeal. No concession was however forthcoming at the time to the effect that the contract was awarded irregularly.

[20] I now turn to the Contempt of Court proceedings which were heard by Manoim J. These proceedings are relevant because of the defences raised before us in the automatic appeal which follows on a section 18 enforcement order.

THE CONTEMPT OF COURT PROCEEDINGS

[21] On 25 August 2022 Inzalo instituted Contempt of Court proceedings against the respondents based on the breach of the order granted on 14 June 2022. The Municipal Manager was cited in his official and personal capacity in this application (hence the presence of three respondents).

[22] Manoim J heard the Application for Contempt of Court proceedings on 7 September 2022.

⁶ See dates at end of Leave to Appeal Judgement.

⁷ See paragraphs 9,17 and 18 of the Leave to Appeal Judgement.

[23] For the sake of convenience, he categorised the various orders granted by Molahlehi J as follows:

“(a) The first part of the order is to interdict the Municipality and the appointed service provider (now known to be Solvem) from further implementing the latter’s award as service provider for the MSCOA system. (Paragraph 2 of the order).

(b) The second part of the order requires the Municipality to provide information to the applicant, inter alia the record of decision, and proof that it has complied with its various regulatory obligations (paragraph 4).

(c) The final part (paragraph 5) requires information in the event that the appointment had been made following some process other than the tender process.”

[24] At the time the hearing of the Contempt application took place the Municipality had not yet complied with any of the obligations imposed in terms of the order granted by Molahlehi J.

[25] It raised the same defence i.e., that it is not certain how Solvem was appointed. The Acting accounting officer, Ms Diale, allegedly made the appointment on 29 April 2022 and Solvem commenced work on 1 May 2022 and has been rendering services since then. Ms Diale and another employee whose involvement was not made clear, were put on special leave following a special council meeting on 18 May 2022.

[26] It also claimed that it was waiting on the results of two Anton Piller awards and the process was incomplete at the time of the hearing for contempt of Court, It alleged that it has searched its own premises for the relevant documentation and could find none and hence it is unable to comply with the documentary part of the order.

- [27] The Municipality conceded in front of Manoim J that the process was irregular.
- [28] The Municipal Manager claimed that he was only appointed on 9 May 2022 (after Ms Diale appointed Solvem) and for that reason he could not supply any further information.
- [29] An undertaking was given and recorded as "X1" to Manoim J's order to the effect that an application for self-review of the Impugned Decision will be brought within 15 days of receipt of the Diale documents from the Sheriff.
- [30] In the answering affidavit of the Municipal Manager in the application heard by Molahlehi J, he stated as follows:

"31 Furthermore, if such an interdict is granted the first respondent shall act in breach of its appointment of SOLVEM (PTY) LTD if it prevents SOLVEM (PTY) LTD from acting in terms of the appointment. The practical effect if relief in this regard is granted will be devastating:

31.1 The first respondent will have to cancel its appointment of the service provider and physically prevent the service provider to render services in terms of the appointment. I respectfully submit that the first respondent should not be ordered to do this, in particular not in the absence of the service provider.

31.2 The first respondent will have to face legal action by SOLVEM (PTY) LTD which will undoubtedly follow.

31.3. The most devastating consequences will be that the first respondent's ability to collect rates and taxes due to it, will come to a standstill. I can state as a fact that the first respondent's contract with its previous service provider came to an end and that the previous provider is still only involved in a temporary transitional process. If the present newly appointed service provider does not carry on with the performance of its obligations without interruption, the first respondent will not be able to send out accounts in respect of rates and taxes. No accounts means (sic) no payments and without its income the first respondent will come to a standstill.

31.4 This must be contrasted with the prejudice which the applicant consistently allege it will suffer, namely impairment of its constitutional right to fair administrative procedure. I respectfully submit that the trite considerations with regard to the balance of convenience, no alternative remedy and irreparable harm which the parties may suffer, clearly favours the first respondent and the application should not be granted.

31.5 If protection of the applicant's right to fair administration will not ultimately cause the applicant damages, the whole process will be to no avail. Constitutional rights does (sic) not exist in vacua. The applicant did not make a case that it will suffer damages if the urgent relief which it now seeks, is not granted.

32 I do not at this stage indulge in the question whether the applicant acted correctly or incorrectly in appointing the service provider; the fact of the matter is that a service provider has been appointed and is on site rendering services in terms of the appointment."

- [31] The so-called petition (it is actually an application to appeal to the SCA in terms of section 17(2)(b) of the Superior Courts Act 10 of 2013) which was only filed on 15 September 2022 was already referred to and foreseen in the argument before Manoim J and it was submitted that by appealing the Municipality intended to obtain a form of structural relief as set out below in conjunction with a self-review.
- [32] The aforesaid concession was only made in the contempt proceedings.
- [33] Manoim J gave regard to the intention to obtain structural relief coupled with an application for self-review and considered the risk of the Municipality's financial artery being severed as formulated in paragraph 31.3 of the answering affidavit in the proceedings before Molahlehi J (quoted above).
- [34] The notion of structural relief coupled with the fact that the stated intention of the Municipality was to bring an application for self-review to obtain a structural remedy of the type granted in *Allpay* – decision led him not to decide

the issue of ongoing service provision. He held that the most he can decide is that to further interdict the operations of Solvem are so massively consequential that prudence dictates that he accepts the Municipality's version. He was also motivated to do so because Solvem was not a party to the original proceedings nor a party to the Contempt of Court proceedings, although he found it should have been given the nature of the relief in 2.5 of the order which imposes obligations on it.

[35] This led him to conclude that he cannot find that the Municipality is in wilful default until further facts are made known. He nevertheless held the Municipality and the Municipal Manager in contempt in respect of the failure to provide reasons as was required in terms of paragraphs 4 and 5 of Molahlehi J's order.

[36] He ultimately granted the following order:

"2. The First Respondent ("the Municipality") and Second Respondent ("the Municipal Manager") are in wilful and deliberate contempt of order 4 and 5 of this court as granted by the Honourable Justice Molahlehi on 14 June 2022, under case number 2022/2958, set out in Case lines from 000-1 to 000-7 ("the Molahlehi Court order").

2.1 The Municipality and the Municipal Manager are ordered and directed to immediately deliver to the Applicant within 7 (seven) days of this court order:

2.1.1 The Municipality's written reasons for the Impugned Decision together with the items stipulated in prayer 4 and where applicable 5 of the Molahlehi J Court Order; and

2.1.2 In the event that the Municipality is unable to deliver any of the items stipulated in prayer 4 and 5 of the Molahlehi J Court Order, then in such event the Municipal Manager is ordered and directed to deliver together with the written reasons by the Second Respondent as aforesaid a duly sworn and commissioned affidavit setting out the reasons why such items have not been delivered to the Applicant.

3. A rule nisi is hereby issued calling upon all persons with a legitimate interest to show cause, if any, on a date to be arranged with the Registrar why the following orders should not be made final: -

3.1. That the First Respondent and/or the Second Respondent and/or the Third Respondent, jointly and severally, the one paying the other to be absolved, be ordered to pay a fine in the amount of R250,000 to the Applicant;

3.2. For purposes prayer 3.1 above, it is hereby ordered and directed that the Applicant is granted leave to file a supplementary affidavit setting out any further facts within 30 days of granting this court order.

3.3. Further, for the purpose of prayer 3 above, the First and Second respondent may file an affidavit to demonstrate their compliance with the undertaking given by them set out in Annexure X hereto.

4. The First Respondent is ordered, to pay the costs of this contempt of court application, such costs to be taxed on the attorney client scale, including the cost of counsel.

Annexure X(1) [my insertion]

1. The first respondent is ordered to, within 15 days after receipt of the documents and other material from the Sheriff of the High Court, Polokwane and the Sheriff of the High Court, Pretoria seized by them as a result of the Anton Piller orders executed by them, launch an application for the self-review of its impugned decision referred to in prayer 3.1 of the notice of motion.
2. The Sheriff of the High Court, Polokwane and the Sheriff of the High Court, Pretoria are directed to deliver to the first respondent the documents and other material seized by them as a result of the Anton Piller orders executed by them within 10 days after this order is e-mailed to them."

[37] On 15 September, the Application for leave to appeal to the SCA was duly filed. It had the effect of suspending the Molahlehi J Court Order. In these proceedings the argument is repeated that Solvem should have been cited as a party before the interdictory relief could be granted and that the illegality of its "appointment" as "service provider" does not entitle a court to order interdictory relief until same is reviewed and set aside.

THE SECTION 18 APPLICATION

- [38] On 22 September 2022 Inzalo launched proceedings under section 18 of the Superior Courts Act for enforcement of the Molahlehi J Court Order. It alleged that the Municipality's conduct is egregious and baseless. It is further alleged that it deliberately dragged its feet and did nothing to have its own illegal conduct reviewed. It is specifically alleged that it is still operating the old financial system despite expiry of the service level agreement with the previous service provider.
- [39] It is also alleged that the Municipality never had the need to permit Solvem to continue developing a new financial system and that the notion that the Molahlehi J Court Order would wreak havoc with its financial billing system is false.
- [40] In addition it is alleged that the Municipality still refuses to provide Inzalo with the written reasons in respect of the award despite the Molahlehi Court Order and it having been found guilty of Contempt of Court by Manoim J in respect of its failure to respond in terms of paragraphs 4 and 5 of the aforesaid order.
- [41] Inzalo requires the aforesaid to meaningfully prepare its objection against the Award in terms of Regulation 63 of the Municipality's Supply Chain Management ("SCM") policy. It is emphasized that the written reasons are a new document that must be delivered by the Municipality whenever an aggrieved person intends to challenge the lawfulness of any administrative

action by an organ of state. The failure to do provide same is an infringement of section 33 of the Constitution and a breach of section 5 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) ("PAJA").

[42] Under the rubric of exceptional circumstances Inzalo alleges it is a matter of urgency, that the Court processes thus far has been abused, that the application for leave to appeal to the SCA is a continuation of such abuse, that the Municipality and the Municipal Manager was at all times able to deliver the aforesaid reasons and that its failure to do so is to insulate and protect the unlawful award. The failure to comply with the existing orders merely serves to entrench Solvem's perceived rights. In addition, all of the aforesaid is funded by taxpayers' monies.

[43] The Municipality has also not published its decision as it is required to do under the SCM regulations and Circulars of National Treasury.

[44] The Municipality's response to the above is inter alia that as a consequence of Manoim J's judgment that Solvem should have been joined, it is justified to act accordingly given that the matter of Solvem's non-joinder is now either res judicata or due to issue estoppel finally adjudicated as between the respective parties.

[45] It also contends that Manoim J's order as to timeframes are tantamount to structural interdict being in place and that the Section 18 order is an abuse of procedure.

[46] It further argues that Inzalo can bring its own review application to set the appointment aside and that the urgency contended for is self-created.

- [47] It further states that the wrong laptop was seized in terms of the Anton Piller orders and that the city allocated cell phone must still be analysed.
- [48] Molahlehi J dismissed the technical points raised by the applicant pertaining to the Municipal Manager's authority to oppose the proceedings and file an answering affidavit. Given that the Section 18 application was filed about 4 days after the notice for leave to appeal to the SCA was delivered, he also held that Inzalo's urgency was not self-created.
- [49] The defences of res judicata (and presumably issue estoppel) were found not to be demonstrated given that Manoim J's order has two elements i.e., a finding of Contempt of Court and a Rule Nisi.
- [50] The Court held that the question whether exceptional circumstances prevail as intended in section 18 is a factual bound issue. It was emphasised that the Municipality undermined its own procurement policies, the principle of legality and that the Constitutional rights of fair administrative rights of Inzalo were infringed. Over and above that the illegal conduct of the municipality continued even beyond the award of the tender. In addition, the Municipality conceded the irregularity of the awarding of the tender and its intent to self-review.
- [51] Therefore, the Court found that to allow the 14 June 2022 order to remain suspended pending the application for leave to appeal would amount to countenancing the illegal conduct of the Municipality and the Municipal Manager unabated. The aforesaid facts persuaded the court that exceptional circumstances are present.

- [52] It also held that the continued illegal conduct of the municipality to allow the development of the financial system in the absence of a formal appointment letter will result in irreparable harm. At the same time there was insufficient information before the Court relating to the alleged damage the municipality will suffer if the court were to hold otherwise. The Municipality did not update the court regarding the details of the development of the financial system nor was any information supplied as to the current role of the old service provider. There was also no information supplied as to the progress of the illegal awarding of the tender. For the aforesaid reasons, the Court held that there is no likelihood that the Municipality would suffer irreparable harm if the relief sought in terms of section 18 were granted.
- [53] Hence the relief sought by Inzalo in terms of section 18 was granted and the order granted on 14 June 2022 was not suspended pending the application for leave to appeal to the SCA filed by the Municipality and the Municipal Manager. The latter was ordered to pay the costs of the application the one paying the other to be excused.

EVALUATION

- [54] Section 18 of the Superior Courts Act 10 of 2013 ("the Act") reads as follows:

"18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)-

- (i) the court must immediately record its reasons for doing so;
- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules"

[55] We are seized with the automatic appeal against the judgment of Molahlehi J in the aforesaid section 18 proceedings. We are enjoined to deal with it as a matter of extreme urgency and the order so granted remains suspended pending the outcome of this judgment.

[56] The Municipality could easily have given effect to the interdictory relief and terminated any co-operation with Solvem as the interdict required. It was also effectively free to continue with the previous service provider until such time as it appointed a new service provider to provide it with a software programme capable of compliance with the so called MSCOA standards.

[57] The test to be applied by the Court a quo was formulated in *Incubeta Holdings (Pty) Ltd v Ellis*⁸, by Sutherland J (as he then was) as follows:

“The requirements are:

- First, whether or not ‘exceptional circumstances’ exist, and
- Second, proof on a balance of probabilities by the applicant of –
 - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and,
 - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.”

[58] In *Knoop NO and another v Gupta (execution)*⁹ the Supreme Court of Appeal came to a similar conclusion and held that the effect of sections 18(1) and (3) is that an applicant seeking an execution order must prove three things, namely:

- “(a) exceptional circumstances,
- (b) that it will suffer irreparable harm if the order is not made; and
- (c) that a party against whom the order is sought will not suffer irreparable harm if the order is made.”

[59] Counsel for the appellants argued before us that due to the Oudekraal - principle¹⁰ the illegal conduct of the Municipality and the Municipal Manager

⁸2014 (3) SA 189 (GJ)

⁹2021 (3) SA 135 (SCA) as quoted in Erasmus Superior Court Practice RS 16, 2022, A2-66.

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA).

remains in place until reviewed and set aside. In the ordinary case of illegality that argument would be correct. That, however, cannot apply in this case.

[60] The letter of appointment is conditional to a service level agreement being concluded within a month. This condition was never fulfilled and the so-called Master Service Agreement which was disclosed in any event sought to introduce a new party to the matter i.e., Solvem Solutions (Pty) Ltd. The Municipality never signed same.

[61] Thus, there is at present no *vinculum juris* between the Appellants and Solvem.

[62] It was further argued that the findings made by Manoim J as to the issue of Solvem's non-joinder has made the issue *res judicata*, alternatively, due to the operation of issue estoppel, it stands, and as a result it prevents the continued operation of the interdictory part of the orders made by Molahlehi J. This it was argued, prevented the interdictory part of the orders made by Molahlehi J, from being part of a section 18 enforcement order.

[63] In my view this argument ignores several issues underlying the concepts of *res judicata* and issue estoppel.

[64] A contempt of Court Application with the type of order as made by Manoim J hardly meets the requirements for *res judicata* or issue estoppel. To qualify same must meet the following requirements:

"The exceptio res judicata is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. This presumption is founded on public policy, which requires that litigation should not be endless and on the requirement of good faith, which does not permit of the same thing being demanded more than once.¹¹

[65] It is, inter alia, a requirement that the judgment or order must be final and definitive on the merits of the matter. The judgment must also be that of a competent court. Consequently, an order given in interim interdict proceedings or an order that is subject to variation or review because of changed circumstances cannot be relied upon.¹² (my underlining)

[66] In addition, the same thing must have been demanded twice. A Contempt of Court application seeks to bring to the Court's attention a breach of its order and involves the Court imposing a punitive sanction.¹³

[67] On the basis of the aforesaid, res judicata cannot apply.

[68] As far as issue estoppel is concerned, it is important to note that the ambit of the exceptio res judicata has been extended by the relaxation in appropriate cases of the common-law requirements that (a) the relief claimed and (b) the cause of action be the same.

"Where the circumstances justify the relaxation of these requirements those that remain are that (a) the parties must be the same and (b) the same issue must arise. The latter involves an inquiry into whether an issue of fact or law was an essential element of the judgment on which reliance is placed. It has become

¹¹ See *Amlers Precedents of Pleadings* 9th ed Harms p 314

¹² See *Amlers Precedents of Pleadings* 9th ed Harms, p 315.

¹³ See *Amlers Precedents of Pleadings* 9th ed Harms, p 316

commonplace to speak of 'issue estoppel' when the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed."¹⁴

[69] The question thus arises whether I should hold that, because Manoim J found that Solvem should have been joined to the initial proceedings as well as the contempt proceedings, the underlying order to these section 18 proceedings is, for some or other reason, to be found wanting.

[70] In my opinion, this is not the case. In the present matter, there is no indication to what extent, if any, it was argued before Manoim J whether any vinculum juris existed as between the Municipality and Solvem. In the absence of such indication, we are unable to say that due to the contempt of court judgment the finding that Solvem should have been joined is binding or renders issue estoppel of application. If anything, the fact that this is not only a case of illegal conduct by a state organ which must still be set aside, but also involves a contractual issue as to whether any agreement came into existence at all due to the conditionality of the letter of appointment suggests the opposite. There is no indication that here was an earlier finding as to the existence of a vinculum juris with Solvem (other than in the context of an irregularity) or that same was argued before Manoim J. Hence issue estoppel cannot succeed. Absent such vinculum juris nothing stands in the way of the execution of the interdictory components of Molahlehi J's order, and neither was Inzalo obliged to join Solvem. It should not be forgotten that Solvem is on site rendering services at risk under a non-existing agreement and has no legal interest in

¹⁴ See *Amlers Precedents of Pleadings* 9th ed Harms, p316.

the matter. Nothing stands in the way of the interdictory relief granted by Molahlehi J being made operative.

[71] I have considered the various circumstances pertaining to exceptional circumstances and irreparable harm as well as Molahlehi J's approach thereto.

[72] I am of the view that Molahlehi J approach cannot be faulted.

[73] In the circumstances, the appeal cannot succeed.

[74] The following order is thus made:

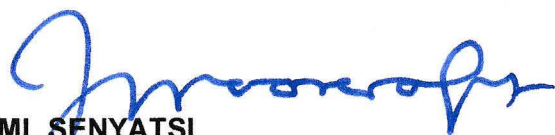
74.1 The appeal is dismissed.

74.2 The appellants are ordered to pay the costs of this appeal jointly and severally, the one paying the other to be excused.



**S VAN NIEUWENHUIZEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

I agree and it is so ordered.

pr 

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

I agree and it is so ordered.



**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

APPEARANCES:

For The Appellants: Adv JJ Botha instructed by Smith van der Watt Inc.

For the Respondent: Adv Wayne Pocock instructed by Di Siena Attorneys

Hearing Date: 28 October 2022