IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: 4509/2016

In the application between:

FACTORING SPV (PTY) LTD Applicant

and

MATJABENG LOCAL MUNICIPALITY Respondent

JUDGMENT BY: C REINDERS, J

DELIVERED ON: 26 JUNE 2017

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[1] Applicant is Factoring SPV (Pty) Ltd ("Factoring SPV"), a company registered for unrestricted business and having its registered place of business in Welkom, Free State. Respondent is Matjabeng Local Municipality ("the Municipality") with its principle office in Welkom.

[2] In it's Notice of Motion Factoring SPV moves for orders that:

2.1. The debt repayment agreement and acknowledgement of debt concluded between Maree Van Wyk Incorporated and

Respondent on 26 March 2016 (and ceded to Applicant) be made an order of Court;

2.2. Respondent be ordered to pay Applicant the amount of R 20 064 000,00 plus interest at the rate of 15,5% per annum from 17 July 2015 until date of payment in full;

2.3. Costs of the application.

[3] The application and the relief sought are opposed by the Municipality who in a counter-application moves for orders in the following terms:

3.1 Declaring that the decision of the previous Municipal Manager, Mr Ramathebane, to appoint Maree Van Wyk Incorporated, to be (sic) unlawful;

3.2 Setting aside the Service Level Agreement concluded between Mr Ramathebane (purportedly on behalf of the Respondent) and Maree Van Wyk Incorporated dated 18 December 2013 and declaring same to be invalid and null and void, ab initio;

3.3 Reviewing and setting aside the decision of Mr Ramathebane to appoint Maree and Van Wyk Incorporated;

3.4 Cost of suit

[4] The Municipality raises disputed issues, which in essence boils down to:

4.1 an attack on the jurisdiction of this court to entertain the dispute between the parties;

4.1 an attack on SPV Factoring's *locus standi* to institute proceedings against the Municipality;

4.3 the appointment of MVW offending the principle of legality.

[5] **Background**

5.1 In order to deal with the attack on the jurisdiction of this court to entertain the dispute as well as Factoring SPV's *locus standi*, it is necessary to give an introduction to the history of the matter. Even though the Municipality in its opposing affidavit repeatedly refers to the various agreements which forms the basis of this application as "purportedly" and "allegedly" concluded, it is evident from the papers before me that same were indeed concluded. The validity and/or legality thereof is what should be adjudicated upon by me.

5.2 On 27 May 2013 Mr German Ramathebane ("Ramathebane"), the erstwhile Municipal Manager ("MM") of the Municipality, issued a letter to Maree van Wyk Incorporated ("MVW"), a firm of attorneys. In the said letter MWV was instructed to perform legal services to the Municipality. Same were so called "data purification" by performing a legal audit of the Municipality's contractual agreements and requirements of its credit control and debt recovery policy. The aim thereof was the eventual recovery of arrears and outstanding debts. According to the letter MVW would be allowed to utilise the services of a registered auditor firm to verify the data before the collection of arrears commenced. The purpose of the data purification was for the Municipality to avoid unnecessary legal costs and wasted time. In terms of the letter, the conclusion of a Service Level Agreement contract ("SLA") was a precondition to the rendering of the said services. It is common cause that MWV was at all material times an approved professional service provider ("PSP") for the rendering of legal services to the Municipality and registered as such on its data basis of suppliers.

5.3 On 30 May 2013 a SLA (Annexure "FA4") was concluded between MVW and the Municipality dealing with *inter alia* the PSP's obligations, breach, cession and dispute resolution. The clauses relevant to the current dispute are quoted below.

"

9.

<u>Cession</u>

9.1 The service provider shall not sub-contract or cede this agreement, including any portion thereof or interest therein, unless written permission is granted by Matjabeng Local Municipality and on such conditions as Matjabeng Municipality may approve.

16.

16.1 A dispute between the parties relating to any matter arising out of this agreement of (sic) the interpretation thereof, shall be referred to arbitration, by either of the parties, by way of notice to the other party, in which notice of particulars of the dispute are set out;

16.7 No clause in this agreement which refers to arbitration shall mean or be deemed to mean or interpreted to mean that either of the parties shall be precluded from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator."

17.

General

17.3 No addition to, variation or agreed cancellation of the Agreement shall be of any force or effect unless in writing and signed by the authorised and duly delegated representatives for the parties concerned; and …. ”

5.4 Pursuant hereto an addendum to the SLA (the "Addendum", Annexure "FA5") was concluded on 18 December 2013. Same dealt with the appointment of PKF Professional Auditors as sub-contractors to MVW and payment. In terms of clause 2.2.6 hereof:

> "The parties agree that Matjabeng Local Municipality, if not satisfied with the service provider's final work and services as delivered in 2.2.5 supra, Matjabeng Local Municipality will declare a dispute with the service provider, in writing and by registered post at his chosen *domicilium citandi et executandi*, to any such matter arising out thereof within 30 (THIRTY) calendar days after receipt of the final work and services as per required compact disc. If no such dispute is declared by Matjabeng Local Municipality, it will be regarded that all such work, services and information has been completed sufficiently by the service provider and is accepted accordingly in such form and manner by Matjabeng Local Municipality."

5.5 After the services were rendered by MWV a debt repayment agreement (the "DRA", Annexure "FA7") was concluded on 26 March 2014 in terms whereof the indebtness of the Municipality to MVW in the amount of R 20 064 000,00 was acknowledged. Clause 13 of the DRA reads as follow:

"

13. **CESSION AND DELEGATION**

13.1 The Creditor shall-

13.1.1 be entitled, at any time, to cede any of its rights in terms of this Agreement;"

5.6 On 28 March 2016 MVW ceded its rights under the DRA to Factoring SPV (Annexure "FA12").

[6] **<u>Does this Court have jurisdiction to entertain the dispute between the parties?</u>**

6.1 On the papers and in argument before me Mr Mokoena on behalf of the Municipality, submitted that this court lacks the necessary jurisdiction to entertain the dispute. Relying on clauses 16.1 and 16.7 of the SLA as quoted in para [5.3] above, he stressed that clause 16.1 provides that "any matter arising out of this agreement" must be referred for arbitration, and since SPV Factoring is seeking a substantial relief on the merits, it ought to be done this way. Furthermore, in terms of clause 16.7, a competent court could only be approached in instances whereby "interim relief on an urgent basis" is sought.

6.2 Mr Louw on behalf of SPV Factoring stressed that the applicant's cause of action is based on the DRA and not the SLA. He submitted that in any event Clause 16.1 envisages that such a dispute shall be referred by either of the parties by way of notice to the other party, setting out the particulars of the dispute. No such notice was given by any party.

Furthermore, clause 2.2.6 of the Addendum (para [5.4] above) makes it clear that, should the Municipality be dissatisfied with the final work and services of the PSP, it was incumbent upon the Municipality to declare a dispute with the PSP in writing within thirty calendar days after receival of such work and services rendered. It is common cause that no such dispute was declared by the Municipality.

[6.4] In **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture** [2009] 3 All SA 407 (SCA) a similar dispute arose between the parties. It was held by the Supreme Court of Appeal at para [17] that a dispute has to exist before it can be referred for arbitration. *In casu* it is clear that a dispute must be in existence and notice thereof must be given to the other party in writing according to clause 16.1 of the SLA. The Municipality failed to raise same and cannot now contend that clause 16.1 ousts the jurisdiction of this court. In **Joob Joob** *supra* Navsa JA held that the appellant chose not to pay rather than to declare a dispute.

6.3 The Municipality prays for an order that the SLA be declared invalid, the very same SLA upon which the Municipality relies for its contention that the matter should have been referred to arbitration. It is hard to imagine how effect can be given to the arbitration clause when the validity of the contract itself is in dispute. After all, the matter can only be referred for arbitration where the parties are ad idem that the contract appointing such arbitrator is valid. Para [6.1] of the agreement requires notice being given by any party in the event of a dispute. I am satisfied that I should hear this matter and has the necessary jurisdiction to do so. The first point in *limine* is dismissed.

[7] **<u>Does Factoring SPV have *locus standi* to initiate the proceedings against the Municipality?</u>**

7.1 Factoring SPV is a cessionary of the rights under the DRA as is evident from Annexure “FA12”. The Municipality contends that clauses 9.1 and 9.2 of the SLA specifically preclude MVW as the PSP, from ceding the agreement unless written permission thereto is granted by the Municipality.

7.2 In terms of the DRA upon which SPV Factoring relies, provision is made in clause 13 thereof for entitlement by the creditor (MVW) to cede any of its rights in terms of the DRA. MVW exercised its rights in terms of the contract and ceded its claim to SPV Factoring on 28 March 2016. I am satisfied that SPV Factoring has sufficient interest in the determination of the dispute before me and accordingly has *locus standi* to initiate litigation.

See: **<u>Rinaldo Investments (Pty) Ltd [2012] 3 ALL 57(SCA)</u>** at para [14]

[8] **<u>The merits</u>**

Mr Mokonea (assisted by Mr Mathopo) ably drafted comprehensive heads of argument with the Constitutional approach to matters of this nature as the point of departure. Indeed, the principle of legality as enshrined in section 217(1) of the Constitution, is of the utmost importance in deciding the dispute before me. Same provides that:-

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent and cost-effective."

[9] Section 217 should be read with the applicable legislation in regards to procurement, including the Local Government Municipal Finances Management Act 56 of 2003 ("MFMA") and the Municipality's Supply Chain Management Policy ("SCMP"). Determination of the dispute should also involve the principal of *pacta sunt servanda*, namely that it is in public interest that parties should comply with their contractual obligations.

See: **Reddy v Siemens Telecommunications (Pty) Ltd** 2007 (2) SA 486 (SCA).

[10] In essence the dispute between the parties is whether the cause underlying the DRA infringes upon the applicable procurement legislation which rendered the appointment of the PSP and subsequent SLA void, thereby absolving the Municipality from payment.

[11] In terms of section 111 of the MFMA it is imperative on every municipality to have a SCMP which must comply with a prescribed regulatory framework for municipal chain management.

See also: **<u>Metroprojects Developments (Pty) Limited v Jozini Local Municipality and Others</u>** [2015]JOL 33417 (KZP].

[12] The Municipality has adopted its own SCMP. At the time of MVW's appointment same contained specific provisions relating to the appointment of PSP's. The relevant portions thereof (Annexure "RA1" annexed by SPV Factoring) read as follow:

"

Part 2

Appointment of professional service providers

7.14 This part outlines the approach of the Municipality in the appointment of professional service providers (PSPs), otherwise referred to as consultants. The Municipality shall, like government departments, appoint PSPs using a roster system. The policy sets out the principles used for the establishment and operation of a roster system for the appointment of PSPs.

Categories of PSPs

7.15 This roster system will generally cover, but will not be limited to, the following categories of PSPs:

M **-** Legal services

Purpose of the roster

7.16 The **purpose** of the roster are (sic) to-

(a) Enable the Municipality to appoint PSP's efficiently **without having to follow a competitive bidding process**;

(b) Ensure that the services are carried out in a professional, competent and **cost effective** manner;

(c) Allocate work in a **fair and equitable** manner; …. (my emphasis)"

[13] In oral argument before me and in heads of argument it was submitted by Mr Mokoena that the appointment of MVW offends the principal of legality as no bidding process was followed, the SLA concluded between MVW and Ramethebane is *contra bonos mores* and that the agreement between Rametebane and MVW was subversive, in secret and lacked transparency with a history of irregularities involving unauthorized and/or suspicious payments advanced to MVW.

[14] The Municipality places reliance thereupon that the service rendered by the MVW was a “municipal service” as described in section 1 of the Local Government: Municipal Systems Act 32 of 2000 (“Systems Act”) and accordingly the provisions of the Systems Act applies to the agreement concluded between MVW and the Municipality. In terms of section 1 a municipal service means “a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether such service is provided, or to be provided by the municipality through an internal mechanism contemplated in Section 76 or engaging an external mechanism contemplated in Section 76 and irrespective of whether fees, charges or tariffs are levied in respect of such service or not.” The Systems Act enables municipalities to *inter alia* provide for municipal services by way of service delivery agreements and the selection of service providers should be done through specified selection and pre-qualifications processes.

[15] Mr Mokoena argued that the work performed by MWV was not of a legal nature. According to him no mention was made in the letter to MVW that it was appointed in terms of a roster and the SLA makes reference to “service” and “work” only, not to “legal service” or “legal work”.

[16] From Annexure “A” annexed to the SLA it can be gleaned that MVW *inter alia* had to perform the following:

> “… verification of opening balances of each account, prescription periods, interest on interest…. possible success rate should legal proceedings be instituted… those amounts/accounts to be written off as prescribe (sic) by the MFMA and other applicable legislation…”

I do not have any doubt that same amount to legal services. I likewise do not agree with Mr Mokoena that the services rendered by MVW can be construed as a “municipal service”. Accordingly I am of the view that the Systems Act is not applicable *in casu*.

[17] It is contended by the Municipality that the appointment of MVW was subversive, in secret and lacked transparency. From the papers before me it is evident that:

17.1 Prior to the appointment of MVW discussions were held between Mr Riaan Van Wyk (“Van Wyk”) of MVW and Ramathebane aiming at determining the fee to be charged by MVW per consumer file. Moroka Attorneys (“Moroka”), one of the other PSP’s used by the Municipality to render legal services (and the current attorney of record to the Municipality), was requested by the Municipality to comment on the proposed fee. It was opined in a letter addressed to the Municipality and dated 28 May 2013 (Annexure “RA4”) that R100,00 per file was “more than reasonable” with reference to prescribed tariffs by the Free State Law Society.

17.2 The permanent representative of the Auditor General, stationed at the Municipality’s offices, one Elsje, formed part of the discussions on the agreed fees.

17.3 At a meeting chaired by the Mayoral Member Committee: Finance and several other officials, of which Mr Andre Steyger, who is the shadow Mayoral Member Committee: Finance of the Democratic Alliance and a representative of Moroka Attorneys, were present.

17.4 MVW submitted invoices to the Municipality for the total amount owing, R 25 600 00.00. Two interim payments of R 4 560 000.00 were effected. In the DRA concluded on 26 March 2014 the Municipality undertook to pay the outstanding capital before or on 1 July 2014 and 30 November 2014. In an effort to ensure payment without resorting to litigation, various meetings and discussions ensued between MVW and the present Municipal Manager Mr Mothusi Frank Lepheana (“Lepheana”), who is also the deponent to the answering affidavit of the Municipality. It involved other officials in the finance department as well. MVW was requested to afford extension to make payments and undertakings were given, in particular by Lepheane.

> The validity of the appointment, the various agreements, the services rendered or the quantum of the amounts were never questioned.

[18] The Municipality contends that the appointment of MVW and the amounts received in respect of the services rendered, unfairly and unlawfully compromise the fiscus of the Municipality. Reliance is placed on section 33 of the MFMA which deals with contracts imposing financial obligations on a municipality beyond the three years covered by the annual budget. It is alleged that the binding of the Municipality to the amount as contracted for "should have been allocated in the budget and therefore this should be dealt with at council level". In its contention that the amount of procurement was not budgeted for or all payments and authorisation procedures were not followed, the Municipality failed to set out any facts in support hereof. No particulars of the budget to which it refers are given, neither are copies of any policies in this regard appended. I am satisfied that the appointment of MVW did not amount to a contract which would impose financial obligations on the Municipality beyond the three years covered by the relevant annual budget as contemplated by section 33. The fees were reasonable and could be recovered from a particular debtor in terms of the agreement between the Municipality and the debtor/consumer and the budget of the Municipality was not negatively affected. In fact, the product of the legal services rendered by MVW was utilised by Moroka in the subsequent debt recovery performed by them on behalf of Municipality.

[19] The Municipality avers that the invoices rendered by MVW did not comply with legislation but does not elaborate on the alleged unlawfulness hereof. According to the applicant the deponent clearly does not bear any knowledge as to the history of the matter and the Chief Financial Officer was not only fully aware of all invoices, but at his instance invoices were broken down into parts and rendered as it was.

[20] It is furthermore denied by the Municipality that MVW rendered services in accordance with the SLA. Reliance is placed on a report conducted by Morar Incorporated ("the report", Annexure "MLM7"), titled "Report on our review of the contract between Matjabeng Local Municipality and Maree van Wyk Incorporated relating to the review and audit of all arrear accounts in the municipality's accounting system (debtors data purification)" . The logo of Maroka Attorneys is displayed at the bottom thereof. In the sixteen page document and on page 2 thereof, a letter dated 5 February 2016 is addressed to Maroka indicating the attachment of a report. The report is neither signed nor dated, but it appears to have been concluded in March 2016, after the issuing of the letter in February. The report concluded that there was no value for money for the services rendered by MVW. The report did not account for any input by MVW on the services rendered. No confirmatory affidavit is attached confirming the contents of the report. In any event, on 14 March 2014 the minutes of the Municipal Mayoral Committee (Annexure "FA10") indicate that the services rendered by MVW served before the Council of the Municipality. It was approved and the write offs recommended were sanctioned by the Auditor-General. In terms of the minutes of

a meeting held on 10 November 2015 (Annexure “RA7”) Lepheana who was in attendance, did not raise any question as to the fact that the Municipality did not receive any value for money. Lepheane rather undertook to resolve the outstanding payment to MVW and mandated one Mr Mofokane (“Mofokane”) to attend to same. All documentation to finalise the matter was included in a letter by MVW to Mofokane. Lepheane did not appraise me of the fact that he was given all documentation pertaining to the conclusion of debt repayment but rather creates the impression that he only very recently became involved in the dispute. He avers that he as accounting officer of the Municipality, together with the current Chief Financial Officer Mr Tsoaeli “deemed it prudent to seek legal advise pertaining to how the Applicant was appointed and the obligations created to the Respondent resulting from the service level agreement”.

[21] As I have found in para [16] above, the appointment of MVW was not for the provision of a “municipal service” as an external service provider. Accordingly I am of the view that it was not necessary for Ramatebane to involve the various officials referred to by the Municipality in its answering papers in concluding the SLA. Ramathebane as the municipal manager was entitled to make the appointment in terms of the Municipality’s SCMP. The Municipality avers that in terms of the MFMA Ramathebane, as the accounting officer, would have had to ensure that the SCMP was implemented when the services of MVW was procured. The conclusion is then drawn that the SLA was invalid, unlawful and *contra bonos mores*. However, the Municipality failed to attach the provisions of its SCMP on which it relies or to indicate which of the provisions of the

SCMP was not adhered to. In fact, it becomes evident that Lepheane has no knowledge of the Municipality's SCMP Department. No confirmatory affidavits by either the Manager of the said department or the respective chairpersons of the Bid Evaluation or -Adjudication committees are appended.

[22] In **Mothapo Consulting Engineers (Pty) Ltd t/a Mothapo Projects v Nala Local Municipality** (1053/2012) [2012] ZAFSHC 118 (21 June 2012) at par [25] Daffue J held that

> "There is no doubt that the municipality must act in accordance with a fair, equitable, competitive and cost effective system and in terms of a Supply chain management policy designed to have that effect. The failure to comply with these precepts renders the contract invalid and open to nullification by a court. It is also clear that **a court cannot make such a finding without the necessary factual foundation and on mere speculation or conjecture**. In order to succeed with its allegation of illegality respondent must be successful in the factual enquiry, i.e. that the tender process followed and the contracts thereafter did not comply with section 217 of the Constitution, the other procurement legislation referred to above as well as respondent's SCMP." (My emphasis)

[23] A party alleging that a municipality's procurement policy had not been complied with, bears the onus of proving it.

See: **Manong and Associates v Director General: Department of Public Works and Others** [2004] 1 All SA 673 (C) at 687.

[24] Mr Mokena pressed hard upon me to find that the Municipality had to follow a competitive bidding process in accordance with the

Systems Act and had failed to do so. I cannot agree with him. MVW was a registered PSP and was appointed from the roster system, which system enabled the Municipality to forego the process of competitive bidding. The contract concluded for the work to be done was in writing as per the SLA. In **Premier, Free State, and Others v Firechem Free State (Pty) Ltd** 2000 (4) SA 413 (SCA) the contract concluded between the parties was set aside as it was held that same was "entirely subversive of a credible tender procedure". In *casu* no tender procedure was required and MVW was appointed in terms of the roster system aimed at cost effectiveness and fair allocation of work. The appointment of MVW was done lawfully and in accordance with a recognised procedure for the appointment of PSP's.

[25] The municipality elected to rely upon a plethora of legal provisions which deal with requiring of bidding and tender procedures unrelated to the circumstances in *casu*. The parting shot of the submissions made by Mr Mokoena was that MVW was appointed by Ramathebane without the involvement of the existing procurement structures of the Municipality and that the appointment was in contravention of section 217 of the Constitution and other legislative prescriptions. I am unable to find as such.

[26] In view of what was stated above, I am satisfied that the process of the appointment of MVW was open and transparent and did not offend the principle of legality as envisaged in the Constitution and relevant legislation.

[27] Accordingly I grant the following orders:

27.1 The Debt Repayment Agreement and acknowledgement of debt between Maree Van Wyk Incorporated and the Respondent concluded on 26 March 2014 (and ceded to the Applicant), is made an order of Court.

27.2 Respondent is ordered to pay Applicant the amount of R 20 064 000,00 plus interest at the rate of 15,5% per annum from 17 July 2015 until date of payment in full.

27.3 Respondent is ordered to pay the costs of this application.

27.4 The counterclaim is dismissed with costs.

C. REINDERS, J

On behalf of the applicant:	Adv. M.C. Louw Instructed by: Hill, McHardy & Herbst Inc. BLOEMFONTEIN
On behalf of the respondents:	Adv.P.L. Mokoena SC Adv. K.T. Mathopo Instructed by: Moroka Attorneys BLOEMFONTEIN