THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 272/2023

In the matter between:

MPILO SAKILE MBAMBISA	**FIRST APPELLANT**
MHLELI MLUNGISI TSHAMASE	**SECOND APPELLANT**
TREVOR HARPER	**THIRD APPELLANT**
MZWAKE CLAY	**FOURTH APPELLANT**
WALTER SHAIDI	**FIFTH APPELLANT**
ERASTYLE (PTY) LTD	**SIXTH APPELLANT**
ROLAND WILLIAMS	**SEVENTH APPELLANT**
MAMISA CHABULA-NXIWENI	**EIGHTH APPELLANT**

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	**RESPONDENT**

Neutral citation:	*Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality* (Case no 272/2023) [2024] ZASCA 151 (8 November 2024)
Coram:	SCHIPPERS, MOKGOHLOA and NICHOLLS JJA and BAARTMAN and MASIPA AJJA
Heard:	30 August 2024
Delivered:	8 November 2024

Summary: Statutory interpretation – s 32 of Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) – liability of municipal officials for unauthorised, irregular, fruitless and wasteful expenditure – s 176(1) – exclusion of liability of officials for loss or damage arising from performance of functions in good faith – whether s 176(1) a prerequisite for liability under s 32 of the MFMA.

ORDER

On appeal from: Eastern Cape Division of the High Court, Gqeberha (Rugunanan J, sitting as court of first instance):

1 The appeal is upheld in part.

2 Paragraphs 2, 3 and 4 of the High Court's order dated 26 April 2022, are set aside and replaced with the following:

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

2.1 payment of the sum of R5 263 179.89;

2.2 interest on the aforesaid amount at the prescribed legal rate from the date of summons to the date of payment;

2.3 costs, including the costs of two counsel. Such costs shall include those occasioned by the postponement of the trial on 9 November 2020.

3. The plaintiff is granted judgment against the first, second, fourth, fifth, sixth and seventh defendants, jointly and severally for:

3.1 payment of the sum of R1 390 800;

3.2 interest on the aforesaid amount at the prescribed legal rate from the date of summons to the date of payment;

3.3 costs, including the costs of two counsel.

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

4.1 payment of the sum of R984 197.21;

4.2 interest on the aforesaid amount at the prescribed legal rate from the date of summons to the date of payment;

4.3 costs, including the costs of two counsel.'

5 Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Schippers JA (Mokgohloa and Nicholls JJA and Baartman and Masipa AJJA concurring)

Introduction

[1] This appeal, with the leave of this Court, concerns the meaning and effect of ss 32 and 176(1) of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA). The appellants (defendants) are former senior managers of the respondent, Nelson Mandela Bay Metropolitan Municipality (the Municipality). At the relevant times, the first appellant, Mr Mpilo Sakile Mbambisa (the second defendant), was the Municipal Manager; the third appellant, Mr Trevor Harper (the fifth defendant), the Chief Financial Officer (CFO); and the fifth appellant, Mr Walter Shaidi (the eighth defendant), the Executive Director: Infrastructure and Engineering. They are the only defendants participating in this appeal.

[2] The matter arises from the defendants' respective roles in the Municipality's appointment, in February 2014, of Erastyle (Pty) Ltd (Erastyle) as a lead consultant in the development of a comprehensive communication and marketing strategy, valued at some R6 million, for the Integrated Public Transport System (IPTS) of the Municipality (the impugned appointment). It is common ground that Erastyle was appointed without a public tender process and in breach of the Municipality's Supply Chain Management Policy (the SCM policy); and that pursuant to the

impugned appointment, the Municipality paid the following amounts to Erastyle: R5 263 179.89, R1 390 800 and R984 197.21 (the unlawful payments).

The High Court proceedings

The pleadings

[3] On 11 February 2016 the Municipality instituted an action in the Eastern Cape Division of the High Court, Gqeberha (the High Court), against Erastyle and a number of officials of the Municipality, including the defendants. The Municipality sought orders, inter alia, declaring the impugned appointment unlawful and invalid; and directing Erastyle and the defendants to repay the unlawful payments, jointly and severally.

[4] The Municipality brought four separate claims. Of these only the first, second and third claims are relevant for present purposes. In its first claim the Municipality sought an order declaring the impugned appointment and certain decisions taken by the second and third defendants to facilitate that appointment, unlawful and invalid in terms of s 172(1) of the Constitution. The grounds for this relief were essentially the following:

(a) The decision on 13 February 2014 by the third defendant, the late Dr Mamisa Chabula-Nxiweni, the Acting City Manager, to approve the impugned appointment without a tender process, was a violation of s 217 of the Constitution,[1] and the SCM Policy. The Municipality pleaded that the action was brought without undue delay; alternatively, if it was not, that the delay should be condoned.

(b) The second defendant's decisions: (i) recommending that the Acting City Manager approve the payment of R6 million to Erastyle; (ii) that the cap on payments in respect of the impugned appointment be lifted to increase the

[1] Section 217(1) of the Constitution provides:
'(1) 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 which is fair, equitable, transparent, competitive and cost-effective.'

contract value; and (iii) that the City Manager approve an increase in the contract value from R6 000 000 to R6 984 197.22, are unlawful and invalid. These decisions were made without a competitive bidding process and constitute the incurrence of irregular expenditure as defined in the MFMA.

[5] The second claim was one of unjustified enrichment against Erastyle. The Municipality alleged that since the procurement of Erastyle's services was unlawful, there was no legal basis for the unlawful payments made to it; it did not provide services to the value of R7 638 177.10; and it was unjustifiably enriched to that extent at the Municipality's expense. In addition, the Municipality sought to recover the unlawful payments from the second and fifth defendants under the second claim. The basis for this claim was that they had negligently authorised and effected those payments to Erastyle, which constituted irregular expenditure recoverable in terms of s 32(1)*(c)* of the MFMA, because it was incurred in contravention of the SCM policy.

[6] The Municipality's third claim was founded in delict, namely fraudulent misrepresentation by the fourth and eighth defendants (although the claim was pleaded as a breach of their duties of employment).[2] The Municipality alleged that the fourth defendant, Mr Mhleli Mlungisi Tshamase, had prepared memoranda in which he intentionally, alternatively negligently, represented to the Municipality that the impugned appointment was lawful; that there were exceptional circumstances that justified dispensing with an official procurement process; that Erastyle could be appointed directly and its contract value could be increased; and that Erastyle was entitled to the unlawful payments. These misrepresentations induced the Municipality to make the unlawful payments to Erastyle and caused it to suffer loss in the sum of R7 638 177.10. The eighth defendant, it was alleged, had intentionally or negligently endorsed the fourth defendant's memoranda, and

[2] See J Neethling and J M Potgieter *Law of Delict* 8 ed (2020) at 358-359.

was equally liable for the loss to the Municipality as a result of the misrepresentations.

[7] The second, fifth and eighth defendants filed a special plea that the Municipality had delayed unreasonably in instituting the action for the review of impugned decision, based on the principle of legality. They asked that the action be dismissed for this reason.

[8] In its plea on the merits, Erastyle admitted the impugned appointment but denied that it was unlawful. It also admitted receipt of the unlawful payments, but pleaded that these were received after it had submitted invoices to the Municipality for services rendered, and that the Municipality had benefited from those services.

[9] The second defendant admitted that he signed the relevant memoranda and resolutions giving effect to the impugned appointment. However, he denied that his actions were unlawful or invalid, that the unlawful payments constituted irregular expenditure, or that they were made in breach of the SCM policy. The fifth and eighth defendants did not dispute that they had signed the memoranda and resolutions in which they supported the impugned appointment and authorised the unlawful payments, but they denied that they intentionally or negligently authorised or incurred irregular expenditure.

[10] The fifth defendant pleaded that when the recommendation for the consideration of the financial aspects of the matter was given to him, the impugned appointment had already been approved by the acting City Manager. The fifth and eighth defendants pleaded that at the relevant times they complied with their obligations as officials of the Municipality. They denied that they had deliberately or negligently authorised or made any irregular or fruitless and wasteful expenditure as contemplated in s 32 of the MFMA.

The evidence

[11] The Municipality adduced evidence by three witnesses, namely Mr Burt Botha, Mr Johan Mettler and Ms Barbara de Scande. Mr Botha was a forensic investigator at Deloitte at the time, which had been appointed by the National Treasury (the Treasury) to conduct an investigation into expenditure by the Municipality of grant funding relating to the IPTS project. Mr Mettler was appointed as the Municipal Manager in December 2015. Ms De Scande is the Municipality's Director of Expenditure Management. At the relevant times she was the Acting CFO.

[12] Mr Botha testified that in December 2013, the Treasury had paid an amount of approximately R2.1 billion to the Municipality. The investigation by Deloitte which commenced in February 2014, was aimed at establishing the amounts of money transferred to some 300 key suppliers involved in the IPTS project (a bus service); and to locate the documents supporting those payments. The investigation revealed that invoices had been over-inflated, for example, an invoice from Erastyle was submitted for payment of R5.2 million, whereas the value of the work allegedly done was only R2 million.

[13] In August 2015 Deloitte furnished its report to the Treasury and the Municipality. A criminal investigation into the conduct of municipal officials, based on Deloitte's findings, was commenced.

[14] Mr Mettler is an attorney who worked as a municipal manager in various municipalities. He was appointed as the Municipal Manager in December 2015 when the Deloitte report was brought to his attention. The matter was placed under his direct supervision. After he was briefed by Deloitte, representatives from the Treasury and the Municipality's attorneys, Mr Mettler took over all disciplinary proceedings against municipal officials that were ongoing at the time, and he decided to institute disciplinary proceedings against certain other municipal officials in February 2016.

[15] Mr Mettler said that in 2016, in his capacity as the accounting officer, he submitted a report to the Treasury concerning wasteful, irregular and unauthorised expenditure, as he was obliged to do under the MFMA. Prior to his appointment, no such report had been submitted to the Treasury.

[16] Ms De Scande, who at the time was working at the Municipality for some 36 years, testified about the procurement process that the defendants were required to follow, but did not. In her capacity as the Acting CFO, she refused to support a recommendation in a memorandum dated 28 January 2014 by the fourth defendant to the Acting City Manager, that the impugned appointment be approved. The memorandum states that the appointment of Erastyle would be for 12 months for approximately R6 million 'which will amount to R300 000 a month for the 12-month period'. This obviously, is wrong – the total of the monthly fees were R3.6 million.

[17] Ms De Scande's stance was that the fourth defendant's request to bypass the SCM policy was impermissible and that a 14-day tender process had to be followed. The Acting City Manager agreed and declined to approve the impugned appointment.

[18] However, two weeks later the fourth defendant prepared a second recommendation for approval of the impugned appointment, in which it is stated that 'it would neither be practical nor lawful to advertise the tender'; which, he said, 'would have severe legal implications and challenges for the Municipality' as the lead consultant had already been appointed. Based on this so-called legal advice, the Acting City Manager approved the impugned appointment on 13 February 2014.

[19] In March 2014 the fifth defendant was appointed as the CFO of the Municipality. His background was not in local government and Ms De Scande offered to assist him. It was agreed between them that all documents which

required the fifth defendant's signature, would be given to Ms De Scande for her comments. This happened from time to time.

[20] On 23 April 2014 Ms De Scande sent an email to the fifth defendant's secretary in which she reiterated her position that a tender process had to be followed, and that if Erastyle had been appointed as a consultant without following the SCM policy, then there was no purpose in the fifth defendant signing an approval of the impugned appointment, and a report in terms of s 32 of the MFMA was required.[3] She went on to say that neither the CFO nor the accounting officer has authority to condone non-compliance with the MFMA, nor to bypass the procurement process. Ms De Scande also gave evidence of the transactions that resulted in the impugned payments.

[21] The Municipality established that the second, fifth and eighth defendants, according to the documents proved and evidence adduced at the trial, had deliberately or negligently recommended, authorised and supported the impugned appointment and unlawful payments. At the end of the Municipality's case, the defendants chose not to testify.

[22] The Municipality pursued its claims against Erastyle by default because its defence had previously been struck out. The second, fifth and eighth defendants were represented by counsel. At the end of the Municipality's case they chose not

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[3] Section 32(3) and (4) provide:

'(3) If the accounting officer becomes aware that the council, the mayor or the executive committee of the municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and wasteful expenditure.

(4) The accounting officer must promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of-

(a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;

(b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and

(c) the steps that have been taken-

(i) to recover or rectify such expenditure; and

(ii) to prevent a recurrence of such expenditure.'

to testify. They closed their case and called no witnesses in rebuttal of the Municipality's case.

The High Court's judgment

[23] The High Court held that s 32 of the MFMA creates a statutory claim for the recovery of unauthorised, irregular or fruitless and wasteful expenditure from the official liable for such expenditure, as a penalty, and not as damages. It found that s 32 constitutes a self-standing claim based on the jurisdictional requirements contained in that provision; and that a municipality is statutorily obliged to recover unauthorised, irregular or fruitless and wasteful expenditure from the persons specified in s 32. Whether a municipality receives value for such expenditure, the court held, is not a relevant factor and no preconditions are set for its recovery.

[24] As regards the first claim, the High Court found that the action was instituted on 11 February 2016 without undue delay, after the Municipality received a draft forensic investigative report from the Treasury in August 2015. The court held that the evidence by the Municipality's witnesses was reliable; that a perceived procedural obstacle should not prevent the court from considering a challenge to the lawfulness of the exercise of public power; and that the issue of delay was irrelevant to a claim under s 32 of the MFMA.

[25] As to the second claim, the High Court held that the evidence showing that the impugned appointment was unlawful was incontrovertible, and that there was no lawful basis for the impugned payments. The second defendant, who was responsible for implementing the SCM policy and managing the Municipality's financial administration, had authorised the unlawful payments to Erastyle. The High Court found that the fifth defendant was aware of the circumstances surrounding the unlawful appointment of Erastyle, and the fact that there was no basis for the unlawful payments. Consequently, he was also liable for irregular expenditure under s 32(1)*(c)* of the MFMA. The court stated that despite having

pleaded a comprehensive defence, the fifth defendant adduced no evidence to contradict the evidence of Ms De Scande. Her evidence established that the SCM policy had been contravened, and accordingly that the unlawful payments to Erastyle had no basis.

[26] Regarding the third claim, the High Court stated that the eighth defendant admitted endorsing the fourth defendant's memorandum seeking an increase in the contract value in an amount of R984 197.22, despite the fact that Erastyle had been paid the full contract value in advance. The court held that the evidence established that the fourth and eighth defendants intentionally, alternatively, negligently breached their duty to act in good faith, and not to engage in conduct prejudicial to the Municipality, which caused the Municipality to suffer loss in the amount claimed.

[27] The High Court made the following declaratory orders in relation to the first claim, and ordered the defendants to pay the costs jointly and severally:

(a) The impugned appointment is unlawful and invalid.
(b) The third defendant's decision to approve the impugned appointment is unlawful and invalid.
(c) The second defendant's decision that payment of R6 million to Erastyle be approved by the Acting City Manager, is unlawful and invalid.
(d) The second defendant's decision requesting the Chief Operating Officer to remove a cap on the value of the contract granted to Erastyle in terms of the impugned appointment, is unlawful and invalid.
(e) The second defendant's decision to recommend an increase of the contract value from R6 million to R6 984 197.22, is unlawful and invalid.

[28] As regards the second claim, the High Court granted judgment in favour of the Municipality against Erastyle, the first, second and fifth defendants, jointly and severally, for payment of the unlawful amounts, together with interest and costs.

In the alternative, the Municipality was granted judgment against the third defendant for payment of the unlawful amounts, together with interest and costs.

[29] In relation to the third claim, the High Court granted judgment in favour of the Municipality:

(a) against the fourth defendant for payment of R5 263 179.89 and R1 390 800, together with interest and costs;

(b) against the fourth and eighth defendants, jointly and severally, for payment of the sum of R984 197.21, together with interest and costs.

Submissions in this Court

The defendants' submissions

[30] The defendants submit that the High Court erred in holding that s 32 of the MFMA is a self-standing penalty provision in terms of which the municipality is obliged to recover the full extent of the prescribed expenditure from the relevant official, regardless of whether the Municipality has sustained any loss or damage, and irrespective of the extent of such loss. Such an interpretation, so the defendants submit, is neither purposive nor contextual, and disregards the general scheme and purpose of the MFMA. It would also be inconsistent with the Constitution and result in an absurdity.

[31] Section 32, it is submitted, does not refer to a penalty and it would be unconscionable and discriminatory to impose such a penalty on a municipal official in circumstances where the municipality has suffered no loss or damage. The MFMA provides for other consequences if unauthorised, irregular or fruitless and wasteful expenditure is incurred.

[32] The defendants contend that the recovery of unauthorised, irregular or fruitless and wasteful expenditure from the person liable in s 32, must be interpreted to mean that officials are 'legally answerable' or accountable. It does

not mean that municipal officials are financially liable for that expenditure. This interpretation, the defendants say, is reasonable and sensible.

[33] The defendants submit that their interpretation accords with s 176 of the MFMA. It provides that municipal officials exercising a power or performing a function in good faith under the MFMA, are not liable for any loss or damage resulting from the exercise of that power or the performance of that function; and that a municipality may recover from its officials any loss or damage it suffered because of the deliberate or negligent unlawful actions of those officials. This interpretation, the defendants submit, accords with s 32(1), 'expands on section 32(2) which provides for the obligation of the municipality to recover', and is consistent with the law that a party ought not to be doubly compensated, nor receive compensation where no loss or damage has been suffered. Section 32(2) should thus be read in general terms and subject to the circumstances prescribed in s 176.

[34] Finally, it is submitted that the municipality received significant value for work done under the IPTS. As regards the claim against the second defendant, which is based on contractual damages, the Municipality failed to prove its damages and the claim must fail for that reason alone.

Submissions on behalf of the Municipality

[35] Counsel for the Municipality submit that on its plain language, s 32 of the MFMA creates a statutory liability on the part of the office-bearers and officials referred to in s 32(1), who intentionally or negligently incur the expenditure described in that provision, in addition to any liability under the common law. A municipality is obliged under s 32(2) to recover that expenditure from the person liable for incurring it. The further obligations referred to in s 32(4) to (7) emphasise the seriousness with which the Legislature considers unauthorised, irregular, or fruitless and wasteful expenditure.

[36] It is submitted that the defendants' argument that it could never have been the legislative intention that a municipality could have the benefit of services rendered, yet still claim repayment of monies expended, must fail. This defence was not pleaded and was raised for the first time in argument in the application for leave to appeal. Apart from this, the defendants' argument would require words to be read into s 32(2).

The issues

[37] This appeal raises three issues:

(a) The proper construction of s 32 of the MFMA.

(b) Was the Municipality precluded from instituting the action against the defendants on account of unreasonable delay in seeking an order to review and set aside the impugned appointment?

(c) Was the High Court correct in making the order it did? More specifically, the effect of the order is that the Municipality's three claims are duplicated.

Section 32 of the MFMA

[38] The Municipality's case is principally based on s 32(1) and (2) of the MFMA, located in Chapter 4 of the Act that regulates municipal budgets. These sections provide:

'**Unauthorised, irregular or fruitless and wasteful expenditure**

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

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

(b) the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3);

(c) any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure; or

(d) any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.

(2) A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure-

(a) in the case of unauthorised expenditure, is-

(i) authorised in an adjustments budget; or

(ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.'

[39] The Municipality's case concerning the first and second claims, is founded on s 32(1)*(c)* – the liability of municipal officials who deliberately or negligently authorise or make irregular expenditure, which is defined in s 1 of the MFMA as follows:

'"**irregular expenditure**", in relation to a municipality or municipal entity, means-

(a) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of this Act, and which has not been condoned in terms of section 170;

(b) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act;

(c) expenditure incurred by a municipality in contravention of, or that is not in accordance with, a requirement of the Public Office-Bearers Act, 1998 (Act 20 of 1998); or

(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality's by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-law, but excludes expenditure by a municipality which falls within the definition of "unauthorised expenditure".'

[40] The proper approach to statutory interpretation is settled:

'It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation . . . [T]he triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concept expressed by those words and the place of the contested

provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.'[4]

[41] The inevitable starting point is the language of the statutory provision.[5] Section 32 of the MFMA has been drafted with a specific purpose in mind, expressed by the words and concepts that Parliament has chosen. These words are therefore the primary source by which meaning is ascertained. For these reasons, as this Court stated in *Capitec*,[6]

'interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

[42] Applied to the present case, it is not helpful to characterise s 32 as a penalty provision. And, contrary to the defendants' submission, nothing turns on the fact that the word 'penalty' does not appear in s 32. Rather, when interpreting a statute, courts are required to ascertain the meaning of the words which Parliament has used.

[43] Section 32(1), on its plain wording, renders municipal officials statutorily liable for unauthorised, irregular or fruitless and wasteful expenditure, in addition to any liability under the common law or any other legislation. The reach of s 32(1) and (2) is not limited to municipal officials, but extends to political office-bearers, who are not involved in the day-to-day running of a municipality.

[44] Parliament has also defined unauthorised, irregular, and fruitless and wasteful expenditure in considerable detail, which leaves no uncertainty as to what

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[4] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25, referring to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18, affirmed in *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 64.
[5] *Natal Joint Municipal Pension Fund* fn 4 para 18; *Capitec* fn 4 para 25.
[6] *Capitec* fn 4 para 51.

they comprise.[7] And s 32(1) makes it clear that in each category, the relevant political functionary or municipal official who deliberately or negligently incurred, made or authorised the expenditure, is liable to the municipality for payment of 'that' expenditure, ie the expenditure contemplated in s 32(1)*(b), (c)* and *(d)*.

[45] It follows that the defendants' argument that the word 'liable' in s 32(1) should be interpreted according to its dictionary definition, which means 'accountable' as opposed to monetary liability, is wrong. It ignores the plain language and context of s 32(1). As this Court cautioned in *Capitec*:[8]

'*Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that *the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose*. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.' (Emphasis added.)

[46] The plain wording of s 32 also makes it clear that recovery of unauthorised, irregular, and fruitless and wasteful expenditure by a municipality, is not optional. Instead, a municipality is enjoined to recover such expenditure from the person liable for it, hence the word 'must' in s 32(2).

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[7] Section 1 provides that 'unauthorised expenditure' means, 'any expenditure incurred by a municipality otherwise than in accordance with section 15 or 11 (3), and includes-

(a) overspending of the total amount appropriated in the municipality's approved budget;

(b) overspending of the total amount appropriated for a vote in the approved budget;

(c) expenditure from a vote unrelated to the department or functional area covered by the vote;

(d) expenditure of money appropriated for a specific purpose, otherwise than for that specific purpose;

(e) spending of an allocation referred to in paragraph *(b), (c)* or *(d)* of the definition of 'allocation' otherwise than in accordance with any conditions of the allocation; or

(f) a grant by the municipality otherwise than in accordance with this Act.'

'Fruitless and wasteful expenditure is defined as 'expenditure that was made in vain and would have been avoided had reasonable care been exercised.'

[8] *Capitec* fn 4 para 50.

[47] What is more, Parliament has clearly stated the exceptions to the obligation to recover: (i) unauthorised expenditure, in subsection (2)*(a)*; and (ii) fruitless and wasteful expenditure, in subsection (2)*(b)*. Unauthorised expenditure need not be recovered if it is (a) authorised in an adjustments budget; in other words, the unauthorised expenditure should have been part of planned expenditure, or (b) the unauthorised expenditure is certified as irrecoverable and written off by the council, after investigation by a committee. The exception in (b) also applies to irregular, or fruitless and wasteful expenditure envisaged in s 32(1)*(d)*.

[48] The above interpretation accords with the context of s 32 as a whole. Thus, s 32(3) of the MFMA provides that an accounting officer (the municipal manager) will not be liable for unauthorised, irregular, and fruitless and wasteful expenditure if he or she informs the council, the mayor or the executive committee in writing that a decision, which if implemented, is likely to result in such expenditure.[9] The fact that unauthorised, irregular or fruitless and wasteful expenditure has been written off as irrecoverable, is no excuse in criminal or disciplinary proceedings against the person who incurred that expenditure.[10]

[49] The seriousness with which Parliament considers unauthorised, irregular or fruitless and wasteful expenditure, is underscored by s 32(6) of the MFMA. It obliges the accounting officer to report to the police, all cases of alleged irregular expenditure which constitute a criminal offence, and theft and fraud which occurs in the municipality. Further, s 32(7) enjoins the council of a municipality to take all reasonable steps to ensure that all cases referred to in s 32(6) are reported to the police if the charge is against the accounting officer, or where that officer fails to comply with that subsection.

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[9] See s 32(3) of the MFMA quoted in fn 3.

[10] Section 32(5) of the MFMA reads:

'The writing off in terms of subsection (2) of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable, is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of this Act relating to such unauthorised, irregular or fruitless and wasteful expenditure.'

[50] The text and structure of s 32 – an independent provision imposing statutory liability for the deliberate or negligent incurrence of specific categories of expenditure – is reinforced by the object of the MFMA contained in s 2: 'to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities'.[11] This central purpose is also stated in the long title to the Act.

[51] For the above reasons, the defendants' submission that where the Municipality's claim is not based on loss or damage being sustained, the claim must fail, is wrong. This, as the Municipality correctly submits, would require words to be read into s 32(1). It is trite that words cannot be read into a statute by implication, unless that implication is necessary in the sense that without it effect cannot be given to the statute as it stands.[12]

[52] The defendants' submission that a claim under s 32 should fail where significant value is received for the work done, is also incorrect. No such requirement is contained in s 32. Rather, s 32 is a self-standing provision that imposes statutory liability on political office-bearers and municipal officials for unauthorised, irregular, and fruitless and wasteful expenditure, as defined in s 1 of the MFMA. In this case the Municipality proved that the defendants had incurred irregular expenditure – the impugned appointment and the unlawful payments were made deliberately or negligently in violation of the SCM policy – which the Municipality was enjoined to recover.

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[11] Section 2 of the MFMA provides:
'The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-
(a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
(b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
(c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
(d) borrowing;
(e) the handling of financial problems in municipalities;
(f) supply chain management; and
(g) other financial matters.'

[12] *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 22E.

[53] In any event, the defendants ignore the facts: they adduced no evidence to contradict the fact that the impugned appointment and the unlawful payments that followed, was a contravention of the SCM policy. Neither did the fifth and eighth defendants present any evidence to rebut the Municipality's case against them on the third claim, despite having pleaded a comprehensive defence. And the submission that the Municipality received value for the work done has no foundation in the evidence: it is based on a speculative response by Mr Botha in cross-examination that according to what he had been told, Erastyle may have done some work.

[54] The defendants' reliance on s 176(1) of the MFMA is misplaced,[13] and can be dealt with briefly. Section 176(1) protects, amongst others, a municipality and its officials against liability to third parties, for loss or damage that results from the bona fide exercise of a power or the performance of a function under the MFMA. In terms of s 176(2), a municipality is authorised to recover loss or damage it suffered from the official concerned, where that loss or damage has been caused deliberately or negligently. Such loss obviously excludes the expenditure contemplated in s 32, which the municipality is obliged to recover in terms of that provision.

[55] Section 176(1) has nothing to do with the recovery of unauthorised, irregular or fruitless and wasteful expenditure from municipal officials: it merely underscores the fact that s 32 is a self-standing provision aimed at the recovery of such expenditure. The definition of unauthorised expenditure illustrates the point. It includes overspending of the total amount appropriated in an approved budget,

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[13] Section 176(1) provides:
'**Liability of functionaries exercising powers and functions in terms of this Act**
(1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.
(2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.'

which may cause no loss or damage to the municipality, yet the amount that has been overspent must be recovered. Likewise, a municipality might benefit from a service procured in contravention of a SCM policy, but the expenditure incurred in obtaining that service remains irregular expenditure, recoverable under s 32(2). Similarly, fruitless and wasteful expenditure means expenditure made in vain that could have been avoided by the exercise of reasonable care – loss or damage to a municipality is not a prerequisite for its recovery.

[56] To sum up:

(a) Section 32, construed in the context of that section as a whole and the wider context of the MFMA, makes it clear that the place and function of s 32 is to create personal liability on the part of municipal officials in particular circumstances. The meaning conveyed by the wording of s 32 is clear and unambiguous. Liability arises as soon as an official intentionally or negligently incurs unauthorised, irregular, and fruitless and wasteful expenditure: s 32 is not conditional upon a municipality sustaining loss or damage.

(b) Section 32 gives effect to the intention of Parliament: to secure sound and sustainable management of the fiscal and financial affairs of municipalities, by holding political office-bearers and municipal officials personally liable for the intentional or negligent incurrence of the defined expenditure. This is what renders s 32 completely different from s 176(1) of the MFMA in its purpose and operation.

(c) This construction is not unconscionable and produces no absurdity. The construction that the defendants contend for – that a municipality can recover unauthorised, irregular, and fruitless and wasteful expenditure only if it has suffered loss or damage – renders s 32 meaningless.

Unreasonable delay is no defence

[57] A delay in challenging administrative action or the exercise of public power may serve to bar the challenge. The two main reasons for the delay rule are to curb potential prejudice resulting from the delay; and the value of finality and certainty in relation to public decision-making.[14]

[58] The Municipality's claims are founded on s 32 of the MFMA. Section 32 does not require the review and setting aside of the impugned appointment before the Municipality may invoke its provisions. The High Court was correct in holding that the issue of undue delay is irrelevant to a claim under s 32 of the MFMA. In addition, undue delay is entirely irrelevant to the third claim against the fifth and eighth defendants, which is founded on a misrepresentation.

The High Court's order

[59] In paragraph 2 of the High Court's order dated 26 April 2022, it granted judgment on the Municipality's second claim against the first, second and fifth defendants, jointly and severally, in the amounts of R5 263 179.89, R1 390 800 and R984 197.21, together with interest and costs. In the alternative, however, it also granted judgment against the third defendant for payment of these amounts.

[60] The parties were asked to file brief submissions as to whether paragraph 2 of the High Court's order dated 26 April 2022, is appropriate. Concerning the second claim, the defendants submit that there is no scope for any monetary judgment to be retained as against the second and fifth defendants, because the High Court granted the alternative relief against the third defendant and no appeal lies against that order, since there is no cross-appeal by the third defendant.

[61] The defendants further submit that the eighth defendant should be excluded from any order; the claim against him was contractual and no damages were proved

[14] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 720.

against him. But that is not so. The third claim against the eighth defendant, based on an intentional; alternatively, negligent misrepresentation, was proved by the documentary and oral evidence – which was unchallenged. On 24 February 2015 he signed a memorandum (prepared by the fourth defendant) approving an increase in the contract value from R6 000 000 to R6 984 197.22, and the payment of R984 197.22 to Erastyle. He also endorsed the misrepresentations by the fourth defendant that Erastyle had been lawfully appointed; that the increase in the contract value without following the SCM policy, was lawful; that there was compliance with the MFMA supply chain policies and finance procedures; and that the payment of R984 197.22 to Erastyle was lawful.

[62] The Municipality submits that if the appeal is dismissed, the alternative order against the third defendant should be set aside, since at the time of the trial she was deceased and the Municipality did not pursue the claims against her or her estate. Therefore, all references in the High Court's order to the third defendant should be deleted. The Municipality concedes that in granting relief in respect of all three claims in the total amount of R7 638 177.10, the first, second and third claims were in effect duplicated. Therefore, paragraphs 2, 3 and 4 of the High Court's order should also be set aside and substituted with an order in terms of prayers 4, 5 and 6 of the particulars of claim (excluding the third defendant), which the Municipality sought at the conclusion of the trial.[15]

[63] In conceding that it did not pursue any claim against the third defendant, the Municipality, in effect, has abandoned the alternative order granted erroneously in its favour. The High Court's order should thus be amended accordingly. It is also doubtful whether it was competent for the High Court to grant judgment in favour of the Municipality in respect of the second claim, on both its main and alternative claims. The latter claim was specifically pleaded by the Municipality as an

[15] In prayers 4, 5 and 6 of the particulars of claim, the Municipality sought payment of the amounts of R5 263 179.89, R1 390 800 and R984 197.21 separately, against the defendants liable for that irregular expenditure.

alternative, in the event of the main claim against Erastyle and the first, second and fifth defendants failing. That was the case which the defendants were called upon to meet. What is more, the alternative claim contains different allegations of fact which contradict those in the main claim. But no more need be said about this.

[64] The Municipality is correct that the effect of the High Court's order is that the first second and third claims are duplicated, and that this was never intended by the Municipality nor the court. In this respect, the order must also be corrected.

[65] I make the following order:

1 The appeal is upheld in part.

2 Paragraphs 2, 3 and 4 of the High Court's order dated 26 April 2022, are set aside and replaced with the following:

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

2.1 payment of the sum of R5 263 179.89;

2.2 interest on the aforesaid amount at the prescribed legal rate from the date of summons to the date of payment;

2.3 costs, including the costs of two counsel. Such costs shall include those occasioned by the postponement of the trial on 9 November 2020.

3. The plaintiff is granted judgment against the first, second, fourth, fifth, sixth and seventh defendants, jointly and severally for:

3.1 payment of the sum of R1 390 800;

3.2 interest on the aforesaid amount at the prescribed legal rate from the date of summons to the date of payment;

3.3 costs, including the costs of two counsel.

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

4.1 payment of the sum of R984 197.21;

4.2 interest on the aforesaid amount at the prescribed legal rate from the date of summons to the date of payment;

4.3 costs, including the costs of two counsel.'

5 Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For first, third and fifth appellants:	J J Nepgen SC
Instructed by:	Kaplan Blumberg Attorneys, Gqeberha
	Honey Inc, Bloemfontein
For respondent:	R G Buchanan SC with J G Richards
Instructed by:	Pagdens Inc, Gqeberha
	Bezuidenhouts Inc, Bloemfontein