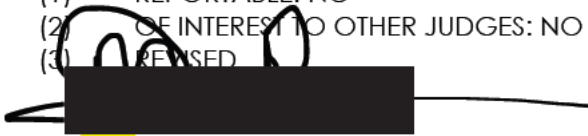




**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 70315/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
	
07/10/2024.....	
DATE	

In the matter between:

MODIMOLLE-MOOKGOPONG LOCAL MUNICIPALITY

Applicant

and

CXMI (PTY) LTD

First Respondent

ADVOCATE G MALINDI N.O.

Second Respondent

JUDGMENT

MKHABELA AJ

Introduction

[1] This is an application for a declaratory order that a tender awarded in favour of the first respondent is unlawful and invalid and unenforceable. The tender in question was awarded to the first respondent without an open tender process and its contractual terms are embodied in an agreement referred to in the papers as the Master Level agreement (MSLA).

[2] The basis for the declaration of invalidity is justified on various grounds. One of the main ones being that the MSLA, was not signed by or on behalf of Modimolle Local Municipality (Modimolle) and the first respondent.

[3] In addition, the applicant also seeks a declaratory order to the effect that the MSLA is unlawful, invalid and unenforceable because it was entered into in contravention of section 217(1) of the Constitution.

[4] It is common cause that the MSLA was signed on 1 June 2012 by one Mr Lekala Kupe (Kupe) on behalf of Modimolle and by one Ms Michelle Fanoe (Fanoe) on behalf of the first respondent.

[5] The applicant contends that Kupe had no authority to bind Modimolle as his services had been terminated on 30 May 2012 and could not have had the authority to sign any agreement binding Modimolle on 1 June 2012.

[6] The statutory prescripts¹ that the applicant alludes to are in reference to various procurement legislation.

[7] In the alternative to the above grounds as prayed for in its amended notice of motion,² the applicant seeks an order setting aside the award granted by the second respondent.

[8] Lastly, the applicant also relies on other ancillary grounds to set aside the MSLA. It is not necessary to dwell on them given the approach I adopt in adjudicating this matter.

[9] The first respondent, who was the service provider, in terms of the MSLA opposes the relief that the applicant seeks chiefly on the ground that there was no violation of section 217(1) of the Constitution and other statutory prescripts as

¹ Section 80, 83,84 of the local Government Municipal Systems Act 32 of 2000, and regulation 12(1)(d)(1) of the Municipal Supply Chain Regulations as promulgated in Government Notice No R80 of 30 May 2005.

² Prayers 5-7 of the amended notice of motion dated 25 September 2018.

there was sufficient transparency on the tender and that the Limpopo Provincial treasury was also aware of the tender.³

[10] Furthermore, the first respondent asserts that the relief that the applicant seeks, is susceptible to a dismissal on the grounds that this court is *functus officio* to adjudicate on the dispute.

[11] The genesis for the *functus officio* argument is that the applicant instituted review proceedings under case number 61871/2016 in this very court on 8 August 2016⁴.

[12] The first respondent filed its answering affidavit and from the case bundle it appears that the applicant did not file its replying affidavit and heads of argument and no legal representative of the applicant showed up in court on 12 May 2017.

[13] In the circumstances, the first respondent contends that this court per Mali J had already dismissed the applicant's review application to set aside the very same MSLA.

[14] The applicant does not seek any relief against the second respondent who granted the arbitration award in question apart from seeking to set aside the award granted on 3 July 2018 in the alternative to its main prayers.

[15] Against the above background, and as I see it, there are two issues that arise crisply for determination. The first is whether this court is *functus officio* as contended by the first respondent. If this question is answered in the affirmative, it would be dispositive of the matter and the applicant would be unsuccessful.

[16] The second question is contingent on the answer to the first question being answered in the negative and it is whether the declaratory relief should be granted on any of the various grounds relied upon.

³ In its supplementary answering affidavit, the first respondent states as follows: "the mere fact that the applicant referred the MSLA agreement to the Provincial treasury for guidance clearly demonstrate that it was a transparent transaction. It is not clear how such a transaction process can offend section 217(1) of the Constitution or any other law".

⁴ I pause to note that this was five days after Modimolle local Municipality had been disestablished as from 3 August 2016,

[17] The third question is whether the award should be reviewed and set aside in the event it is found that the Court is functus officio.

[18] For convenience, the applicant's predecessor, Modimolle Local Municipality shall be referred to as the Modimolle and the applicant shall be referred as the applicant, the first respondent as CXMI or first respondent and the second respondent as the Arbitrator.

Factual Background

[19] On 15 February 2011, the Modimolle issued a public tender in terms of a bid number 74/1/597 to supply and install water and electricity meters for 15 000 households. Pursuant to the issued tender, the Bid Adjudication Committee recommended to Modimolle's accounting officer that CXMI be appointed as the service provider and winning bidder.

[20] Consequently, on 4 July 2011, an agreement between the Modimolle and CXMI was concluded, the first Service Level Agreement ("the first SLA").

[21] On 6 July 2011, and pursuant to an authorisation given by the Municipality, CXMI placed an order with its suppliers for 15 000 water and electricity meters.

[22] However, on 1 August 2011, Modimolle cancelled the first SLA and requested that the first SLA be amended from an outright purchase to a fee for service model.

[23] The reason for the cancellation of the first SLA was attributed to the lack of funding for the project. It was initially envisaged that the project would be funded by a grant from the Development bank of Southern Africa (DBSA), however, this was no longer feasible.

[24] On 1 June 2012, a new agreement was concluded between the Modimolle and CXMI in terms of which CXMI was contracted to install 7 500 electrical and water meters in terms of phase one of the project.

[25] The parties contemplated that there would phase two after a successful execution of phase one.

[26] The costs of phase one was R32 000 000.00 and it was agreed further that the CXMI would be responsible to find finance options in respect of phase one of the agreement.

[27] CXMI, in an attempt to perform in terms of the latest agreements as alluded to above, obtained approval to finance the project from Standard Bank. The approval was conditional upon the Modimolle standing surety for the service fee agreement and agreeing to a repayment plan.

[28] However, the applicant failed to sign a repayment plan or to sign as surety, notwithstanding various demands to do so by CXMI.

[29] It should be noted that it is common cause that the MSLA was concluded without a preceding tender process as was the case in respect of the First SLA which was signed pursuant to an open tender process.

[30] Ultimately, Modimolle failed to comply with its obligations in terms of the MSLA. CXMI met with various representatives from the applicant in order to kick start the project but to no avail.

[31] The dispute was eventually arbitrated after lengthy delays occasioned by various postponements at the instance of the Modimolle or the applicant.⁵ During the course of the arbitration proceedings, the applicant requested a postponement in order to review the validity of the MSLA, on the grounds, among others that it was concluded in contravention of procurement prescripts.

⁵ I interpose to observe that at some stage after Modimolle was disestablished, the applicant continued challenging the MSLA and even instituted the current proceedings after the first respondent had commenced executing its cost awards granted by the Arbitrator.

[32] As I have already indicated the review application was ultimately heard as an unopposed application and ultimately dismissed on 12 May 2017 by Mali J in this very Court under case 61871/2016.

[33] What is instructive is that Modimolle was the applicant in that case (the dismissed review application) notwithstanding the fact that Modimolle was disestablished on 3 August 2016⁶.

[34] Notwithstanding the fact that Modimolle was disestablished on 3 November 2016, Modimolle instituted the review proceedings that culminated in the Mali J order. This was on 8 August 2016.

[35] More telling is the fact that the dismissed review, Modimolle sought, inter alia, an order that the MSLA entered into on 1 June 2012 between CMXI and Modimolle be declared void and unenforceable, alternatively that it be set aside.

Is this Court functus officio because of the Mali J order

[36] In order to answer this question the relief sought in the dismissed review under case number 61871/2016 needs to be compared with the relief that the applicant seeks in terms of the amended notice of motion under case number 70315/2018 which is the current application for a declaratory relief.

[37] The relief that the applicant sought in the dismissed review is contained in prayers 1- 4 and reads as follows in so far as it is relevant:

“that the contract entered into during June 2012 between the above mentioned parties be declared void and unenforceable⁷. In the alternative that the decision taken on behalf of the applicant to enter into the contract referred in prayer 1 above be reviewed and set aside⁸. That flowing from prayer 2 above the contract referred to in prayer 1 be declared void and unenforceable⁹. That the late launch

⁶ Government Gazette notice 94 of 2016.

⁷ Prayer 1 of the notice of motion dated 8 August 2016.

⁸ Prayer 2 thereof.

⁹ Payer 3 thereof.

of this review be condoned in accordance with section 9 of the Promotion of administrative Justice Act, 3 of 2000¹⁰

[38] In the dismissed review the applicant and the first respondent were the only parties and the second respondent was not a party in the review proceedings since the application was launched during the arbitration process.

[39] In addition to the quoted notice of motion in respect of the dismissed review, the founding affidavit in support of the relief prayed for stated as follows:

“the purpose of this application is to review and set aside the decision to enter into a written agreement between the municipality and the respondent, such agreement dated 1 June 2012. A true copy of the aforesaid agreement is annexed as Annexure “MM1” (“the agreement”).

[40] I turn now to the relief that the applicant is currently seeking in terms of the amended notice of motion in this application for a declaratory relief. It will be recalled that the dismissed review was sought in terms of PAJA and not under the principle of legality.

[41] The current application is a declaratory relief and the relevant parts of the notice of motion reads as follows:

“a declaratory order that the Master Service Agreement concluded by the applicant ‘s predecessor, Modimolle Local municipality, and the first respondent on 1 June 2012 is valid and unenforceable, due to inter alia the following circumstances:

6.2. “ the agreement was not signed by or on behalf of the Modimolle Local Municipality”

“7. A declaratory order that the MSLA purportedly concluded between the applicant ‘s predecessor, the Modimolle Local Municipality, and the first

¹⁰ Prayer 4 thereof.

respondent on 1 June 2012 was entered into in contravention of the legislation listed hereinunder and accordingly unlawful, invalid and unenforceable”.

“7.1 Section 217(1) of the Constitution”.

“7.2 Section 80, 83, 84 of the Local Government municipal Systems Act, no 32 of 2000”.

“7.3 Regulation 12(1)(d)(1) of the Municipal Supply Chain Regulation as promulgated in Government Notice R88 of 30 May 2005”.

[42] It bears repeating that the first respondent both in its answering affidavit dated 12 December 2018 and in its Supplementary affidavit dated 13 August 2019 has pertinently raised the issue of the dismissed review application as constituting a potential legal impediment for the applicant.

[43] For the sake of completion, I can do no better than reproduce what is stated in the supplementary affidavit which reads as follows:

“As indicated in paragraph 13 of the main answering affidavit, the applicant’s review application relating to the validity of the Agreement was dismissed by this honourable Court as per Annexure hereto marked “MF11”. Notwithstanding the dismissal of the applicant ‘s review application on the previous occasion, the applicant now brings a similar application disguised as the review of the arbitration award”.

Res judicata

[44] I now turn to consider as to whether the *functus officio* contention is sustainable. It is evident that essentially what the first respondent is asserting is that the question of the invalidity or validity of the MSLA is *res judicata* as per this Court order granted by Mali J on 12 may 2017.

[45] It is therefore necessary to consider the requirements and the relevant authorities dealing with the doctrine of *res judicata*.

[46] It is trite that the expression *res judicata* means that the dispute raised for adjudication has already been decided. In terms of the common law, the three requirements are, that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause of action.

[47] These requirements entail that the doctrine of *res judicata* can be raised by a litigant in a subsequent litigation, the first respondent in this case, against the applicant who is apparently praying for the same relief based on the same cause of action.

Analysis

[48] In the case of *Caesarstone SDOT-Yam Ltd v World of Marble and Granite 2000 and Others*, the Supreme Court of Appeal stated that the plea of *lis alibi pendens* bears affinity to the plea of *res judicata*, which is directed at achieving the same policy goals¹¹.

[49] The policy goal being referred to are among others that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation.¹²

[50] With time, the common law requirements were relaxed giving rise to the expression issue estoppel which describes instances where a party can successfully plead that the matter at issue has already been finally decided even though the common law requirements have not all been met.

[51] This relaxation of the common law requirements was explained as follows in the case of *Smith v Porrit and Others*¹³:

¹¹ 2013 (6) SA 499 (SCA) at para 3.

¹² Para 2 supra fn 11.

¹³ 2008 (6) SA 303 SCA para 10.

“following the decision in *Boshoff V Union Government* 1932 TPD 345, the ambit of the exception *rei res judicata* has over the years been extended by the relaxation in an appropriate case of the common law requirements that the relief claimed and the cause of action be the same (*eadem petendi causa*) in both the case in question and the earlier judgment”.

[52] It is trite that the requirements are that the parties must be the same (*idem actor*) and the same issue (*eadem questio*) must arise.

[53] In determining whether the validity of the MSLA was before Mali J, the first question is to establish whether, as a matter of fact, the same issue of fact or law was determined by Mali J on 12 May 2017 and is also before this Court for adjudication.

[54] It is also well established in our law that the requirement of the same issue is an essential requirement for a plea of *res judicata* in the form of issue estoppel and without it there is no scope of upholding the plea.

[55] In my view there is no doubt that the same relief to impugn the validity of the MSLA was before Mali J and the applicant sought the same relief based on the same cause of action, namely among others, that the MSLA was concluded contrary to the relevant procurement prescripts alluded to in the preceding paragraphs.

[56] It is also evident that the issue of the validity of the MSLA was between the applicant and the first respondent. Modimolle was disestablished on 3 July 2016 and the applicant became successor in title despite protestations.

[57] It is now accepted that there will be circumstances where the same parties requirement of *res judicata* may be relaxed, similar to the relaxation of the same cause of action as the Supreme Court of Appeal stated in *Caesarstone*.

[58] Accordingly, for all intents and purposes, Mali J order was granted in respect of the same parties since the validity of the MSLA was an issue between the applicant and the first respondent.

[59] It is also irrelevant that the applicant was not present for purposes of upholding the plea of *res judicata*.

[60] However, the authorities suggest that it does not follow that once a conclusion is reached that the same issue was determined, the plea of *res judicata* must be upheld.

[61] This is so because the Court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of *res judicata*. On the authorities, the court must therefore with reference to the facts of the case and considerations of fairness and equity, decide whether in a particular case the plea of *res judicata* should be upheld¹⁴.

[62] As I see it, nothing militates against upholding the plea of *res judicata* based on the facts of this matter. The applicant has been forewarned by the Judgment of Tolmay J which although it was set aside by the Supreme Court of Appeal alerted the applicant about the existence of the Mali J order as a legal obstacle to its relief.

[63] Notwithstanding being alerted to the Mali J order that the dismissed review involved the same issue, the applicant has to date not taken any steps to either rescind the Mali J order since it blames its erstwhile attorneys for not pursuing with its review application that led to the dismissal of its application.

[64] It follows therefore that even on the relaxation of the one of the requirements of *res judicata*, the remaining ones being that the Mali J order involved the same parties and involved the same issue are pertinently present.

[65] It is true that the dismissed review application was based on PAJA but the MSLA was also sought to be impugned on the primary ground that it was

¹⁴ *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA) para 26.

concluded without adherence to the procurement legislation after the First Service Level agreement was cancelled by agreement between the applicant and the first respondent.

[66] It is equally of no moment that the Arbitrator was not a party to the dismissed review application since the contention that the MSLA is invalid is not an issue involving the Arbitrator.

[67] For all these reasons, this court is *functus officio* on the basis that the doctrine of *res judicata* is applicable on the dispute between the applicant and the first respondent in respect of the invalidity or validity of the MSLA by virtue of the existence of the Mali J order.

[68] Finally, and in the light of the fact that the applicant has been unsuccessful in terms of its main prayers, its alternative prayer to set aside the award need to be considered.

[69] On this score, it well to remember that the applicant requested a postponement on the day of the Arbitration on the common cause fact that it had not filled its witness statements.

[70] The application for a postponement was refused by the Arbitrator, rightly so in my view. The application to struck off the applicant 's defence was inevitable in the absence of filed witness statements.

[71] In the circumstances, the award is not tainted by any procedural irregularity that would invite the Court 's interference . After all, Courts are reluctant to set aside awards for obvious commercial reasons.

[72] Our case law is replete with examples indicating the policy underpinnings as to why such an approach is not only desirable but essential for commerce to flourish unhindered.

[73] Accordingly, the alternative relief to set aside cannot succeed since no case has been made out in the papers to justify granting such a drastic relief.

[74] What remains is the issue of costs. It is trite that costs are within the discretion of the court which must be exercised judicially. Invariably, the rule is that costs follow the cause.

[75] But this is not an immutable principle and both the applicant and CXMI did not cover themselves with glory in conducting themselves in this litigation.

[76] CXMI instituted arbitration proceedings to enforce a flagrantly unlawful contract in circumstances in which it had actual knowledge that there was no open tender process preceding the conclusion of the MSLA. Justifying the conclusion of a patently unlawful tender was an insurmountable task from the beginning.

[77] By the same token, the applicant first subjected the first level agreement to an open tender process but changed tacks when it concluded the MSLA without any tender process. This was an egregious disregard of procurement prescripts.

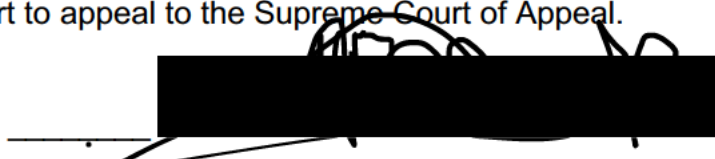
[78] In my a view a contractor who turns a blind eye to the egregious violation of procurement legislation and nevertheless contracts with a Municipality should in an appropriate case not be awarded costs even in the event of being successful in the litigation.

[79] This is one of an appropriate case in my view for the reasons that I have advanced.

Order

[80] In the result I therefore make the following order:

1. The application is dismissed.
2. Each party to pay its own cost, including all cost associated with the current application as well as the cost associated with remittal order by the Supreme Court of Appeal and the application for leave granted by this Court to appeal to the Supreme Court of Appeal.


R B MKHABELA

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA**

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 October 2024**.

FOR THE APPLICANT: Adv E Labuschagne SC, Adv W Lusenga

INSTRUCTED BY: Gsm Mohlabi Incorporated

FOR THE FIRST RESPONDENT: Adv J Mnisi

INSTRUCTED BY: Matojane Malungana Inc

DATE OF THE HEARING: 15 March 2024

DATE OF JUDGMENT: 7 October 2024