



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

Reportable:	NO/YES
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CASE NO.: 5000/2023

In the matter between:

THE MATJHABENG LOCAL MUNICIPALITY

Applicant¹

and

DOWN TOUCH INVESTMENTS (PTY) LTD

First Respondent²

THE SHERIFF: WELKOM

Second Respondent³

Coram: M Opperman J

Heard: 2 May 2024

Delivered: 24 July 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 24 July 2024. The date and time of hand-down is deemed to be 15h00 on 24 July 2024

Summary: Rescission of judgment

¹ "The Municipality/Applicant".

² "Down Touch/First respondent".

³ The second respondent did not join the litigation.

ORDER

1. The application for striking out is dismissed with costs.
 2. The application for the relief sought in the notice of motion dated 7 December 2023 is dismissed with costs. It is ordered that the Municipal Manager shall carry the costs *de bonis propriis* and as between attorney and client.
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JUDGMENT

INTRODUCTION

[1] The words of the Municipal Manager of the Matjhabeng Local Municipality⁴ set the scene and atmosphere for the application for the rescission of a default judgement that lies before the court:

15. In September and October 2023, the legal department of the Municipality was metaphorically bombarded with litigation, executions and attachments.
16. As a consequence, the Municipality failed to deliver a notice of intention to oppose the application prior to the expiry of the *dies induciae*. Had the Municipality obtained proper notice of the application it would have opposed it.

[2] The application is not for a legality review of the administrative actions that caused the prelude to this application. The declaration of the

⁴ Founding affidavit dated 5 December 2023 at page 13 of the bundle indexed on 22 April 2024. Any reference to page numbers will be to those in the bundle except if otherwise indicated.

Municipal Manager, in his replying affidavit, is just as crucial to understand the rationale for the litigation that was embarked on here. He unequivocally admits and blatantly declares that a complete lack of governance and maladministration reigned at the Municipality when the agreements with Down Touch were entered into and subsequent litigation happened.

[3] He does, however, not submit any prove of the allegations.⁵ It is denied by Down Touch. This is what he says:

19. My administration is intent on establishing good governance in the municipality:
 - 19.1. The decade-long gravy train that existed at the municipality, has come to a halt.
 - 19.2. All procurement must comply with the law, and the municipality's internal supply chain management prescripts.
 - 19.3. Matjhabeng Local Municipality, the Free State Province, the Attorney-General, the South African Police Service (Hawks) and the Free State Province's Special Investigating Unit have been reviewing supply contracts, procurement processes, payment processes, invoices, compliance processes and reporting processes in Matjhabeng. We have identified substantial irregularities in the

⁵ *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) (2 June 2017):

“[30] ... For, as Three Rivers (par 55) pointed out:

‘A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence.’

[31] Of course, allegations of fraud, dishonesty or bad faith must be supported by particulars and the other party is entitled to notice of the particulars on which the allegations are based...

The matter of *Department of Transport and Others v Tasima (Pty) Limited* (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016) is also applicable in that:

“[165] On the other hand, the allegations of fraud and corruption were not properly made, and therefore should not be considered. Tasima vehemently denies the veracity of the allegations. These were not properly ventilated before the High Court. I therefore do not think that the allegations can be considered in justifying the delay.”

processes. We have also identified criminal activities in the procurement and payment processes, which have been transmitted to the SAPS to investigate.

- 19.4. The consequences are being managed by the Municipality under my watch as municipal manager and accounting officer of the Municipality
- 19.5. External parties, such as criminal investigation and prosecution, are not under control of the Municipality, nor does the Municipality intend to interfere or prejudice any of these external processes or depose to any of the content of these ongoing external processes.
- 19.6. Suffice it to say, evidence of the irregularities in the supply chain process affecting Down Touch's contracts, and the implementation thereof, have been identified by Matjhabeng, ...

THE PRELUDE TO THE APPLICATION AND THE HISTORY OF THE CASE

- [4] This case is unique in that it arises from a settlement agreement that was made an order of court. The history of the case is valuable.
- [5] The application is, principally, for the rescission and setting aside of a court order in terms of rule 42(1) alternatively, the common law. The order is dated 19 October 2023 handed down by Hefer AJ in this case with number 5000/2023.
- [6] The order (“Hefer – order”) reads that:
Having considered the documents filed of record and having heard the legal practitioners,
IT IS ORDERED THAT:

1. Consequent to the order granted by this court on 4 August 2022 under case number 366/2022:
 - 1.1 The Respondent is ordered to pay the Applicant the amount of R4 282 564.51.
 - 1.2 The Respondent is ordered to pay interest on the aforementioned amount, calculated from 30 days after which the invoices appended as “JJC1” to the Founding Affidavit became due and payable, at the prime overdraft rate the Applicant's bank charges of it on any overdue account upon the Applicant's overdraft facility.
2. The Respondent shall pay the costs of this application on a scale as between attorney and client.

[7] *En masse* applications were brought before the courts at grave legal costs to the Municipality as is shown in “JJC3” in the recent past.⁶ These were withdrawn; just for further litigation to ensue.

[8] The Municipality stated in their founding affidavit that:

27. From August 2023 to November 2023, a number of urgent applications were launched by the municipality in this court, as well as in the High Court, Gauteng Division, to stay execution of judgments, *including this order*, in applications termed 'section 152 applications' referring to the relevant section 152 of the Local Government: Municipal Finance Management Act 56 of 2003. After the exhaustion of some of these urgent remedies, and continuation of others; the Municipality reverted to the rescission of default judgments, such as those sought to be issued in favour of the first respondent herein. None of these judgments were judgments on the merits in this matter: they turned on urgency, jurisdiction and Rule 7 of the Uniform Rules of Court. (Emphasis added)

⁶ Pages 88 to 91 attached to the answering affidavit of the first respondent.

[9] On 31 October 2023 the Municipality, apparently for the first time, became aware that a writ of execution and an attachment to the value of R4, 28 million. The notice of motion for the rescission application in *casu* was only filed on 7 December 2023. It seems from the above that they were aware of the default judgment by October 2023.

[10] The 366/2022 – order (Molitsoane – order) came from an application wherein the following was claimed:⁷

TAKE NOTE that Down Touch Investments (Pty) Ltd (hereinafter referred to as "*the Applicant*") intends approaching this court for an order in the following terms:

1. The Respondent is ordered to pay the Applicant the amount of R26 511 456.19.
2. Respondent is ordered to pay interest on the aforementioned amount at the applicable rate calculated from 30 days after date of an invoice until date of final payment.
3. The Respondent is ordered to pay the costs of the application.
4. Further and/or alternative relief.

[11] The matter was set down for hearing on Thursday 21 July 2022 but on 18 July 2022 this court received a letter from the legal representatives of the Municipality wherein it was informed that the parties are in the process of drafting a settlement agreement and that the matter will not proceed. It was indicated that a draft order would be presented to the court that will cause the settlement agreement to be made an order of the court. The parties could not proceed on 21 July 2022 with this undertaking and the matter was by agreement postponed to 4 August

⁷ Notice of Motion at pages 3 to 4 of case 366/2022.

2022 for the same purpose; to conclude the settlement in an order of the court. Both parties were represented by experienced counsel.

- [12] The facts that gave rise to the litigation and the 366/2022 – order is succinctly set out in the applicant’s heads of argument in the 366/2022 – case.⁸ It is that after a tender process was followed, Down Touch was appointed on 27 March 2018 to perform services for the Municipality. This included the resealing and refurbishment of various roads and ancillary works for a period of three years, as and when required.
- [13] On the strength of this award, the parties concluded a Service Level Agreement. Not one of the agreements, in whatever form, was ever taken on review or questioned over the years.
- [14] In the three years that followed, Down Touch received various instructions under this agreement to perform work. On each occasion, it received an order from the Municipality, performed the work and issued an invoice. These documents were all appended to the founding affidavit in case 366/2022.
- [15] In an emergency, it helped the Municipality with the supply of water to inhabitants of the areas of Hennenman and Ventersburg. This is not disputed. Consequently, Down Touch issued an invoice on 22 May 2020 in the amount of R106 400.00.

⁸ Paragraph 3 of said heads of argument that is contained in pages 5 to 12. File 366/2022 was entered into evidence by the first respondent. See paragraph 6.1.1 of the answering affidavit of the first respondent on page 63.

[16] A further contract was concluded in September 2020, after the Municipality called for tenders for the appointment of a panel of service providers for the hiring and letting of a so-called yellow fleet for a period of three years. Down Touch was appointed on 23 October 2020.

[17] Consequently, Down Touch provided these services on the back of work orders received. This was primarily in December 2021.

[18] The parties had consensus on a so-called safety measure to avoid illegal and tenuous payments by the Municipality; this also to protect the Municipality. One material term is relevant. It deals with the way invoices will have to be certified by the contractor for services rendered, and that the Municipality must pay these within 30 days after receipt. The Municipality in turn would certify such invoices within 7 days, but importantly:

Should the invoices not be acceptable to the Municipality, the contractor shall be informed within 14 days of receipt of the invoice. Upon receipt of proof referred to in clause 5.6 (the Invoices) of the agreement, Matjhabeng shall verify information contained therein before processing any fee due and payable. Should the Municipality not be satisfied with work done by the contractor, the Municipality shall request the contractor to rectify or improve the work done at the contractor's costs.⁹

[19] The Municipality took no issue with the invoices at all, and it did not make any attempt at explaining why it did not take up with Down

⁹ Paragraph 3.3 of the heads of argument for the applicant in case 366/2022.

Touch, at any stage, the accuracy or not, of said invoices. This had to be done within 14 days after the invoice was submitted.

[20] *It is clear and unambiguously so, that the Municipality decided to settle the issue and comply and fulfill their obligations in terms of the contract and the claim.*

[21] The above litigation ended in the 366/2022 – court order on 4 August 2022 by Molitsoane J. It states the following:

Having considered the documents filed of record and having heard the legal practitioner/s,

IT IS ORDERED BY AGREEMENT BETWEEN THE PARTIES THAT:

1. The Respondent shall pay the Applicant the amount of **R26 511 456.19** (“capital amount”);
2. The Respondent shall pay interest on the capital amount calculated at the prescribed rate of interest calculated from 27 January 2022 to date of final payment;
3. The Respondent will make payment of the outstanding capital amount and interest as follows:
 - 3.1 An amount of R1 000 000.00 by 19 August 2022;
 - 3.2 An amount of R500 000.00 per month with the first payment by **31 August 2022** and by the last day of each succeeding month until final payment of the capital amount and interest;
 - 3.3 All outstanding interest will be payable together with the last payment, the amount of which will be confirmed by the Applicant’s attorneys 7 days prior to the final payment being due;
4. In the event of failure by the Respondent to make payment of any amount at the date as specified above, the full outstanding balance will immediately become due and payable and the Applicant will be entitled to without notice proceed with a writ of execution;

5. Should the Respondent dispute any invoice payable as set out in the application they shall, within 60 days after date of this order resolve such invoice with the Applicant. Such a dispute will have no impact on the payments as set out in prayer 3.1 and 3.2 above or the capital amount and interest due but shall form part of the remainder of the outstanding balance due by the Respondent to the Applicant in the amount of R8 954 287.94 *which does not form part of this application*; (Emphasis added)
6. Should the Respondent fail to actively partake in resolving such a dispute, their right to rely on this clause to stay payment on a specific invoice will lapse. All invoices not in dispute will form part of the monthly payments as set out above;
7. The Respondent shall pay the Applicant's taxed or agreed costs.

[22] From the evidence follows the common place fact that the Municipality did not honour the Molitsoane – order and the Hefer – order was the result. Down Touch noted in their affidavit that the Municipality: “has raised each and every conceivable defence open to it in the 366/2022 - case. This included a case of uncertainty, failure to follow procurement regulations etc.” *At the hearing of case 366/2022 the Municipality capitulated and ceased their defences and the settlement agreement was reached.*

[23] Notwithstanding the contractually sacred settlement agreement that was solemnised into a court order by agreement between the Municipality and Down Touch, and whilst assisted by experienced counsel; the Municipality now attacks the Hefer – order.

STRIKING OUT¹⁰

- [24] Before I can continue, the interlocutory application for striking out of some statements by Down Touch in their affidavits, must be disposed of. I stated unequivocally in court during the hearing that each case must be adjudicated on and limited to its own merits.
- [25] The peripheral debating by both the Municipality and Down Touch is unwanted.
- [26] Papers must at all times be drafted with the utmost respect to the administration of justice and the parties involved. The remarks and irrelevant issues, that are obvious and speak for itself right through the papers, will be ignored by the court in the instance with the disdain it deserved. It was unnecessarily strongly and emotionally worded by both parties but it does not prejudice any of the parties in the facts to be adjudicated. The objective facts are the objective facts.
- [27] The Municipality, the same, made themselves guilty of similar questionable statements as Down Touch. As was correctly stated by counsel for Down Touch in their heads of argument at 9.3: "Allegations of fraud must be supported by particularity. Such allegations should not find its way into an affidavit lightly. It must be backed up by hard evidence, because fraud is not easily found, much less inferred."

¹⁰ Rule 6(15)

"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."

[Substituted by GG 39715 of 19 February 2016 – Regulation Gazette 10566, Vol 608.]

[28] The Municipality admitted in their founding affidavit that they were: “metaphorically bombarded with litigation, executions and attachments.”¹¹

[29] As to the alleged hearsay evidence; Mr Mbambo did file a confirmatory affidavit. The Plascon-Evans principle applies and the testimony must be accepted. If the Municipality was so adamant about the evidence of Mr Small and Mr Kruger nothing prevented them from dealing with it in terms of the rules of court and contesting the evidence of Mr Mbambo.

[30] The whole of the defence of Down Touch is stated unequivocally in their Practise Note:

Summary of the First Respondent’s argument:

- 7.1 This application is an abuse. It is the latest attempt on the part of the delinquent Municipality simply not wanting to pay for services it has already received.
- 7.2 None of the grounds alleged as a defence (belatedly) constitute any grounds in law at all.
- 7.3 The application can only succeed if a procedural irregularity is shown to have been committed in the process leading up to the granting of the default judgments. None has been shown.

[31] I am not satisfied that the applicant proved that they will be prejudiced by any of the issues raised in the application. The application to strike

¹¹ Paragraph 15. of the founding affidavit on page 13. Also see “JJC3” and from pages 88 to 91.

out is dismissed with costs. This brings me to the factual findings on the evidence.

FACTUAL FINDING

[32] The averments in the affidavit for Down Touch, now the first respondent, are the real proven facts on which the case must be adjudicated. The Plascon Evans principle causes it to be so. I will refer to it later when I discuss the applicable law.

[33] This is what the first respondent aptly and supported by the objective events in the case; submitted:¹²

- a. The Municipality refuses to accept the consequences that flow from the conclusion of a settlement agreement.
- b. The settlement entailed that the Municipality would make full payment of the amount claimed in the first application, it accepted liability for the interest that was charged, set out how the Municipality would embark upon payment of the judgment debt, etc.
- c. Paragraphs 5 and 6 of the settlement agreement and the order of the court expressly directed that the subject matter of the first application did not involve all outstanding payments to Down Touch.
- d. The Municipality had offered to deal with invoices that were issued on strength of the agreements but it did not form part of the dispute.

¹² Pages 65 to 67 of the 5000/2023 – case.

- e. In paragraphs 5 and 6 of the order the parties agreed that the value of the remaining work was R8 954 287.91. The Municipality would be entitled to dispute any of those invoices with the proviso that it would do so within 60 days after the date of the order.
- f. Paragraph 6 of the court order stated that should the Municipality fail in this agreed upon duty, it would forego its right to stay payment of any such a debt.
- g. As had undisputedly happened, the Municipality did not dispute the invoices, nor did it at any stage dispute the quantification of the invoices. An enforcement of paragraph 6 of the order was the consequence.
- h. Hefer AJ accepted the above evidence when he issued the 5000/2023 – order. The 366/2022 – order made it clear what was going to happen with the approximately R8.9 million debt in future, how it would be sorted out and if the Municipality didn't do what it was supposed to do, what would be the effect.

THE ISSUES

[34] It took some careful reading of the papers to ascertain all the defences and bases for the application for rescission. The Municipality squarely relies on rule 42(1) in that the order was erroneously granted. I will list the issues later but, in an attempt to sift the wheat from the chaff I will start with the heads of argument for the Municipality dated 23 April 2024. The introduction is helpful where it refers to the claim that is now before court. It reads:

Introduction

1. This application sought the following substantive relief in the Notice of Motion, some of which has become moot subsequent to the institution of the proceedings:
 - 1.1. That this application be heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of this honourable Court and that the forms and service provided for in the Rules be dispensed with, and the Applicant's non-compliance with the timeframes in the Rules be condoned. **This relief has become academic: see section title URGENCY below.**
 - 1.2. That the order granted by the High Court, Free State Division, on 19 October 2023 in Case Number 5000/2023 shall be rescinded and set aside. The order is annexed to this Notice of Motion as annexure X1. **This annexure is also attached as FA2 to the Founding Affidavit.**
 - 1.3. That the warrants of execution and attachments issued in this matter be set aside. **This relief will follow setting aside and rescission; but is also independently sought (in the event rescission is not granted), based on independent grounds.**
 - 1.4. That all attached movables seized from the applicant and in possession or under control of the second respondent at premises under control of the second respondent be released by the second respondent to the applicant at such premises at no cost to the applicant. **This relief will follow setting aside and rescission; but at the time of this hearing, and in terms of an undertaking of the parties after institution of this application; this relief is moot, as no movables are currently seized and in possession of the second respondent.**
 - 1.5. That the operation and execution of all process be stayed pending judgment in the main application. **This relief is necessary, as rescission, unlike appeal, does not by operation of law stay the operation and execution of a judgment in terms of Section 18(1)**

of the Superior Courts Act 10 of 2013. The grounds for this relief is Rule 45A of the Uniform Rules of Court.

- 1.6. That the First Respondent pay the costs of this application on an attorney and client scale, including the costs of two counsel where so employed.

[35] The issues that crystallised are:

- a. The order was erroneously issued and the applicant relies on rule 42(1)(a). In the alternative, they rely on the common law grounds for rescission.
- b. The application of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 as to notice and service. Section 3 was not complied with.
- c. Service of the notice for application of the default judgment was not procedurally proper. (Rule 4(1)(a)(viii) of the Uniform Rules of Court read with section 115(3) of the Local Government Municipal Systems Act No 32 of 2000.)
- d. The Hefer – order is alleged by the Municipality to be a nullity because of their version of the application of the *res judicata* doctrine. The Municipality maintains that the order does not flow from the rights begotten from the previous court order, and the order is “fatally and irreconcilably inconsistent: either the relief in Case Number 366/2022 is sought, or new relief is sought.”¹³
- e. Irregularities in the procurement process.
- f. The dispute and the settlement agreement.
- g. Alternatively, good cause for the default.

¹³ Page 18 at paragraph 32.3. of the founding affidavit.

h. Costs

SOME GENERAL REMARKS

[36] The consternation, conflict and costs that non-compliance with court orders and the rules of court have caused in civil litigation have become a menace in the administration of justice. It affects justice and pollutes the sanctimony of the rule of law.

[37] The significance of the execution of court orders cannot be denied. De Vos¹⁴ emphasised the execution of court orders when he wrote that:

As former Chief Justice Sandile Ngcobo pointed out in a public lecture, the judiciary needs to retain the public's confidence in order for it to fulfil its role properly. Public confidence was important, suggested Ngcobo CJ, because it is necessary for the effective performance of judicial functions. *What was required was for members of the public to recognise the legitimacy of individual decisions of the court even when it disagreed with the outcome of such decisions*: in other words, public opinion related to the institutional position of a court and hence courts had to act in such a manner that it retained the confidence – if not always full agreement – of the public it served.

... If members of the public come to believe that what matters is not what a specific legal principle requires, but what those with money and power dictate, lawlessness in its most extreme form logically follows. (Emphasis added)

To quote former Chief Justice Ishmael Mahommed, “[u]nlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state

¹⁴ De Vos P, *Flouting a court order: Government risks making a paper tiger of the law*, 15 June 2015, <https://www.dailymaverick.co.za/opinionista/2015-06-15-flouting-a-court-order-government-risks-making-a-paper-tiger-of-the-law/> accessed on 9 July 2024.

refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship.”

- [38] The ease with which court orders are ignored by litigants and counsel alike, and the Uniform Rules of Court just disregarded, is astounding. *In the meanwhile, the justice system battles to maintain veracity because the layperson cannot fathom the delays and the astronomical costs that makes access to justice unreachable.* The Constitutional Court remarked in *Grootboom v National Prosecuting Authority and Another* (C696/08) [2009] ZALCCT 15 (18 December 2009) that:

[21] The failure by parties to comply with the rules of court or directions is not of recent origin. *Non-compliance has bedevilled our courts at various levels for a long time.* Even this Court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court. (Emphasis added)

- [39] Parties may not twist, manipulate and maneuver the rules of law as, when and how it suits them; it simply destroys the administration of justice. Litigants have the right and the duty to keep each other accountable to the rule of law. In the matter of *Zipp v Zipp*¹⁵ Sutherland J said, and I agree, that:

Too often, legal practitioners display sycophantic acquiescence in their client's desires. This is wrong. Diligent and professional advice includes frankly telling a would-be litigant what the realities of the law are. Indulging in litigation which serves only to wear down the opposition or protract the case is a violation of the

¹⁵ Unreported judgment in *GH Zipp v LA Zipp*, in the High Court of South Africa: Gauteng Local Division, Johannesburg, Case number 2016/23915, judgment on 16 February 2017.

duty of both attorneys and counsel to the process of the court. Litigation is not a free for all. Our adversarial system of litigation does not license practitioners, whether attorneys or counsel, to ignore their duties to the court which requires them to act so as to promote the efficacy and efficiency of the process of the court. When practitioners, in their zeal for loyalty to their clients, abandon this duty they behave unprofessionally. (See: D.Ipp, 'Counsel's duties to the Court' (1998) 114 LQR 63)

- [40] The Municipality did more than rely on rule 42(1)(a); they also attacked the legal veracity of the Hefer – order. I will deal with all the issues to put an end to the litigation.

THE LAW APPLICABLE TO APPLICATIONS FOR RESCISSION

- [41] Counsel for the applicant, during the hearing on 2 May 2024, placed emphasis on the Plascon Evans principle to be applied by the court. The consequence is that the applicant will have to stand and fall by the law of applications. The Plascon Evans principle allows courts to make determinations on disputes of fact in application proceedings without hearing oral evidence. The rule decrees that in motion proceedings, a final order may be granted if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. There are exceptions to the rule, such as when allegations or denials are far-fetched or clearly untenable. The Plascon-Evans rule applies only to final relief and not interlocutory matters.¹⁶

¹⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (1984) (3) SA 623 (A). In the case of *Thwala v Miway Insurance Ltd; In re: Miway Insurance Ltd v Thwala* (A 230/21) [2022] ZAGPPHC 843 (8 June 2022) (Du Plessis AJ (with Davis J) at [24] it was confirmed that a rescission application is interlocutory since it is associated with the main action. It is only once an application for a rescission order is dismissed that it will have a final effect.

[42] Constitutional principles have come to play a pivotal role in matters of this kind and specifically in rescission applications. In *RGS Properties (Pty) Ltd v eThekweni Municipality* 2010 (6) SA 572 (KZD) a mindful and balanced approach by courts adjudicating these cases was the resolve to the constitutional challenge. The test as summarized is:

- a. A court should not, in an application for the rescission of a default judgment, scrutinize too closely whether the defence is well founded, as long as, *prima facie*, there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim.
- b. Where a defendant has never clearly acquiesced in the plaintiff's claim, but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard.
- c. Judgment by default has been said to be inherently contrary to the provisions of section 34 of the Constitution. This section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum.
- d. Therefore, in weighing up facts in an application for the rescission of a default judgment, the court must balance the need of an individual who is entitled to have access to court and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance.
- e. In its deliberation, the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being

shown, that, while, among others, this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence.

- f. The fact that the court may be in doubt about the prospects of the defence to be advanced is not a good reason why the application should not be granted.
- g. That said, however, the nature of the defence advanced must not be such that it *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant.
- h. An absolute constitutional rejection of default judgments will not suffice because there is a persistent tension between commercial certainty and prompt remedies in law for non-compliance with contracts and court orders, on the one hand; and the right to access to courts on the other hand.
- i. Each case must be adjudicated on its own merits and there is no *numerus clausus* of factors. The law is that the court has a wide discretion in evaluating good cause to ensure that justice is done.
- j. The explanation for default must be stated and be reasonable. The default may not be willful and an attempt to delay justice.

[43] Rule 31(2) of the Uniform Rules of Court:

- (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

- (b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

[Sub-r. (2) substituted by GNR.417 of 1997 and by GNR.61 of 25 January 2019.]

- [44] The proceedings that caused the default judgment in *casu* were not action proceedings. In *Makhomisani N.O. and Another v SB Guarantee Company (RF) (PTY) Limited* (2019/41752) [2022] ZAGPJHC 179 (23 March 2022) it was ruled that:

55 Rule 31 concerns default judgments granted in action proceedings ...

56 It is quite evident that Rule 31, concerning action proceedings, is not applicable to the current circumstances.

- [45] Rule 42(1) of the Uniform Rules of Court:

The court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected,

- (a) rescind or vary: an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties.

- [46] Harms¹⁷ is correct when he pointed out with reference to case law that at common law the court is entitled to rescind a judgment obtained in

¹⁷ Harms D: Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 42 VARIATION AND RESCISSION OF ORDERS, Grounds, Last Updated: April 2024 - SI 79. <https://www.mylexisnexis.co.za/Index.aspx> accessed on 19 July 2023.

default of appearance provided sufficient cause is shown. This includes a reasonable and acceptable explanation for the default and that on the merits the party has a bona fide defence. *The application of this principle is limited to those few cases where the application does not fall strictly within the limits of rule 31 or 42.*

[47] It is claimed by the Municipality¹⁸ that the default judgment was erroneously sought and granted; alternatively, the applicant has shown that it has a reasonable explanation for its default of appearance. It is their argument that rule 42(1)(a) of the Uniform Rules of Court and the common law, in the alternative, find application. They are silent on rule 31(2) and the delay in bringing the application. During argument in court counsel for the Municipality correctly submitted that rule 31(2) is not applicable as action proceedings are not in play.

[48] Counsel for Down Touch claims¹⁹ that Rule 31(2)(b) is applicable and the law to be applied. The order was not erroneously sought. Rule 42(1)(a) deals with procedural irregularities and not the merits of the case. He referred to the judgment of the Supreme Court of Appeal in *Freedom Stationery (Pty) Limited and Others v Hassam and Others* (921/2017) [2018] ZASCA 170; 2019 (4) SA 459 (SCA) (30 November 2018):

[18] ... As Streicher JA explained in *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) paras 25-27, the phrase 'erroneously granted' relates to the procedure followed to

¹⁸ As per paragraph 7.3. of their heads of argument dated 23 April 2024.

¹⁹ Paragraphs 7 and 8 of his heads of argument dated 26 April 2024.

obtain the judgment in the absence of another party and not the existence of a defence to the claim. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 6 and 9. *Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of another party.* (Emphasis added)

[49] He further argues that the common law does not find application on the basis of the judgment of *Ellis v Eden; Eden v Ellis and Another* (10604/2020) [2022] ZAWCHC 112; [2022] 3 All SA 381 (WCC); 2023 (1) SA 544 (WCC) (6 June 2022) wherein Rogers J then ruled that:

[54] If, as I consider, rule 31(2)(b) is applicable, Mr Eden cannot escape the 20-day time limit by falling back on the common law, since otherwise rule 31(2)(b) would be a dead letter. However, if I am wrong in finding that rule 31(2)(b) is applicable, the case for rescission based on the common law confronts similar difficulties to the case for rescission based on rule 31(2)(b).

[55] First, a defendant seeking common-law rescission of a default judgment must establish good cause, and the scope of that requirement would be much the same as the good cause requirement in rule 31(2)(b). Second, although Mr Eden's claim for common-law rescission is not subject to a 20-day time limit, common-law rescission is a discretionary remedy. A claimant seeking a discretionary remedy may be non-suited if he or she delays unreasonably in claiming the remedy, and this applies to common-law rescission. Mr Eden thus needs to satisfy the court that his delay, which was undoubtedly unreasonable, should be overlooked. The 20-day period stipulated in rule 31(2)(b) provides at least a starting point to assess what would be reasonable in the case of a default judgment granted by a Court on a claim for a debt or

liquidated demand. For the reasons I have given in my discussion of rule 31(2)(b), I would reject the claim for common-law rescission.

[50] *It is trite that even though the applicant seeks the setting aside of the warrants of execution and attachments, and suspension of further execution; execution has, according to the first respondent, apparently already been effected and the money has been paid out to the first respondent. There is no relief sought for repayment.*²⁰

[51] The Municipality wants to put the merits of the case before a court in pursuit of their right in terms of section 34 of the Constitution of the Republic of South Africa, 1996.

[52] Section 34 of the Constitution cuts both ways; both the Municipality and Down Touch have a right to justice by the effective application of the administration of justice and the utmost respect to the rule of law.

[53] The case of *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* (2014/14286) [2015] ZAGPJHC 176; 2016 (1) SA 78 (GJ) (3 August 2015) said it all and lays down the law:

[7] The efficient conduct of litigation has as its object the judicial resolution of disputes optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort... Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and

²⁰ Heads of argument for the first respondent at paragraph 1.1.

argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.

[54] I stated in previous cases that litigants may not be allowed to turn their backs on the justice system and the court and walk away as, and when, and how it suits them and then return when the shoe pinches. It often ensues that the party with due knowledge of the ongoing court case ignores the litigation and stays away from court and then abruptly reacts when a warrant of execution is implemented. This cannot be tolerated by our courts anymore. It has caused a scourge of unacceptable disrespectful litigation.

[55] Litigants are the masters of their cases and not their legal representatives. It should not be necessary for the court to protect the rule of law against litigants. The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021): was clear and unyielding when it was ruled that:

[103] ...If our law, through the doctrine of peremption, expressly prohibits litigants from acquiescing in a court's decision and then later challenging that same decision, it would fly in the face of the interests of justice for a party to be allowed to willfully refuse to participate in litigation and then expect the opportunity to re-open the case when it suits them. It is simply not in the interests of justice to tolerate this manner of litigious vacillation.

[56] It is the constant tug of war between contractual freedom and the administration of justice that often prevails in cases of this nature that causes the complications. The litigants here did not resolve their disputes in terms of the contracts. The contracts or agreements have not been legally challenged hitherto. The settlement that was made an order of the court was not honored. It speaks volumes. Eksteen JA in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 761 to 762 remarked that: In Roffey's case supra Didcott J refers to the dictum of Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 with approval, where the learned Judge said at 465:

'If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.' (Emphasis added)

[57] In weighing up the public interest involved in the principle of freedom of trade against the sanctity of contracts, South African law prefers the sanctity of contracts. The importance, in the public interest, is that people should keep their promises. The principle of *pacta sunt servanda*, particularly where parties contract on a basis of equality, is a basic requirement of good faith. It is grounded therefore not only in law but also in morality.

[58] Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph [26] described equal protection under the law as: "a central consideration in a constitutional state".

These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.

- [59] The above goes to a basic civilized society. Bowden²¹ discussed this dichotomy to be managed in a democracy:

R.G. Collingwood has outlined three aspects of civilization: economic, social, and legal. Economic civilization is marked not simply by the pursuit of riches—which might actually be inimical to economic civilization—but by “the civilized pursuit of wealth.” ...

- [60] It cannot be the law that when the existing regime at the Matjhabeng Municipality does not approve of the settlement agreement that was made an order of court by the previous administration; *mero moto* rescind the agreement. There must be compliance until a so-called legality self-review by a court of law was initiated and all the facts of the case were exposed and the *audi alteram partem* dictum complied with. The court must, in the end, rule in terms of the Constitution on a just and equitable outcome. I will deal with this hereunder again.

²¹ Brett Bowden, *Civilization and Its Consequences*, <https://doi.org/10.1093/oxfordhb/9780199935307.013.30>, Published: 11 February 2016. Accessed on 19 July 2024.

THE APPLICATION OF THE INSTITUTION OF THE LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT NO. 40 OF 2002

- [61] In his heads of arguments for the applicant counsel at paragraph 7.1 states that “Down Touch failed to comply with the Institution of Legal Proceedings Against Organs of the State Act 40 of 2002, including section 3. The Act applies to all proceedings for the recovery of debt from a municipality.”
- [62] In *Matjhabeng Local Municipality v Pakampho Electrical and Others* (911/2023) [2024] ZAFSHC 153 (6 June 2024) counsel for the Municipality’s argument was extensively dealt with and rejected:
- [8] In the First Respondent's answering affidavit, the deponent, Mr Kruger, the First Respondent's attorney of record, stated as follows:
- “As a result of this claim not being delictual in nature no service in terms of Act 40 of 2002 is necessary.”
- [9] *Mr Snijders, appearing for the Applicant, is correct in his submission that this defence is wrong in law.* However, his reasons for this contention are not correct. According to him, the notice requirement in Section 3(1) applies to a debt which means “any debt arising from the cause of action - which arises from delictual, contractual or any other liability”.
- [10] In the matter of *Vhembe District Municipality v Stewarts & Lloyds Trading (Pty) Ltd and Another* referred to by Mr Grobler, appearing on behalf of the First Respondent, the Supreme Court of Appeal has confirmed that when a litigant's claim against an organ of state is not a damages claim, the Act does not apply.
- [11] The claim by the First Respondent against the Applicant is not a claim for damages. In *International Harvester v Ferreira*, it was held that a claim for work done and material delivered is one for a debt or liquidated demand.

[12] In the present matter the claim by the First Respondent against the Applicant is also a claim for a debt or liquidated demand and the notice in terms of Section 3 of Act 40 of 2002 was therefore not a prerequisite.

[63] Counsel for the Municipality referred the court during the hearing of the matter to two cases in support of his assertion that section 3 is applicable to the process of the obtainment of judgment or order on the facts of this case. These are *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* (293/09) [2010] ZASCA 27; 2010 (4) SA 109 (SCA); [2010] 3 All SA 537 (SCA) (25 March 2010) and *Botha and Others v Eskom Holdings SOC Ltd* 2024 (2) SA 322 (FB).²²

[64] The Botha matter ruled that Eskom is not an organ of the state in terms of section 1(1) of Act 40 of 2002 and does not enjoy the notice protection afforded by section 3. The issue to be adjudicated was whether Eskom was an organ of the state. The claims were all for damages incurred due to fires. The case does not find application here.

[65] The CJ Ranch – matter also dealt with claims for damages due to fires. The issue here was one of condonation for the delayed and late notice in terms of section 3. The case also does not find application.

[66] The deficiency alleged by the Municipality does not exist in *casu* and the argument is rejected. The Institution of Legal Proceedings Against

²² The judgment in the Botha case was confirmed on appeal in *Eskom Holdings SOC Ltd v Botha and Others* (A97/2023) [2024] ZAFSHC 204 (3 July 2024).

Organs of the State Act 40 of 2002 does not apply unless damages are sought. A claim for work performed is not a claim for damages.

[67] The claim here is for work performed and payment therefor that is outstanding in terms of a settlement between the parties and determined based on an order of court.

[68] *The defence of the Municipality that the order was erroneously granted on this aspect is rejected.*

SERVICE

[69] The Municipality stated and admitted in their founding affidavit that:

12. On 22 September 2023, the application in Case 5000/2023 *was served on Mrs Bianca van der Spuy, a professional assistant in the legal department of the Municipality.* The return of service is annexed to the application (R:91).
13. On that day, 22 September the Litigation Manager in the Legal Department, Ms Tsholofelo Gaborone, was in Bloemfontein appearing in the High Court in a (sic) matters heard by Mme Justice Opperman on behalf of the Municipality. *For reasons unknown to Ms Gaborone, she did not gain knowledge of the application on that day, or any time thereafter.*
14. At no time prior to judgment did this application come to the attention of the Municipal Manager. (Emphasis added)

[70] The Municipality admits that the notice was served on them. By implication on the above, in the least, was Ms Gaborone authorised to receive service of legal documents. She is not the Municipal Manager. Mrs van der Spuy is a professional assistant in the legal department and

in terms of the legislative decree and case law that will be referred to hereunder, competent to receive the notice.

[71] The content of the return of service as drafted by the sheriff stands undisputed. It was served on Mrs van der Spuy and the evidence of Down Touch stands corroborated by the Sheriff: Welkom²³ that service must be on Mrs van der Spuy:

8.6 Ms Pienaar subsequently spoke to Mr Small at the Welkom Sheriff's office. This was on 9 February 2024. Mr Small confirmed to her that on each occasion he and Mr Victor Mbambo, the deputy sheriff, were called upon to serve legal process upon the Municipality, the Municipal Manager or his or her secretary would instruct that the process must be served upon Mrs van der Spuy, or Mr Vanga (the Head of the Legal department in the Municipality). Mr Mamba (sic) also confirmed that the instruction was changed at the end of January 2024, whereby the deponent had asked that all legal process henceforth be served on his office in future.²⁴

[72] The above said; the legislation provides as follows:

- a. Rule 4(1)(a)(viii): "where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the municipal manager **or** a person in attendance at the municipal manager's office of such local authority **or** to the secretary **or** similar officer **or** member of the board **or** committee of such body, **or** in any manner provided by law;"²⁵ (Empasis added)
- b. Section 115(3) of the Local Government Municipal Systems Act 32 of 2000 was also regarded in the case of *Great Kei*

²³ Confirmatory affidavit of Victor Mbambo at pages 84 to 85.

²⁴ Page 69.

²⁵ Substituted by GNR.1343 of 18 October 2019.

Municipality v Danmist Properties CC (ECJ 2004/032) [2004] ZAECHC 32; [2004] 4 All SA 298 (E) (10 September 2004) on issues of this nature and as relevant. It reads that: “Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager *or a person in attendance at the municipal manager’s office.*” (Emphasis added)

- [73] The legislation does not decree that unless service is executed upon the Municipal Manager it is defective. It cannot be the law that if the Municipal Manager is not available no service may occur. It will cause preposterous results on litigation with organisations such as local municipalities. The administration of justice will suffer severely. What the “office of the Municipal Manager” can be defined as is also not clear. In the least the “legal department” will suffice.
- [74] In *Mkhondo Municipality v Voster and Another* (354/2019) [2020] ZAMPMBHC 10 (14 April 2020) a similar situation presented as in this case:
- [8] The return of service reflects that the notice of motion was served on Ms. Mathebula working at the Legal Department of the Applicant. It is the same person to whom the court order was also served by the Sheriff once it was granted. The deponent to the Applicant’s affidavit, the municipal manager, claims that the notice of motion was not served on him. It was only the court order that was served on him.
- [9] It was finally submitted in support of the argument that the judgment was erroneously sought and erroneously granted; that the service by the Sheriff was not in accordance with the Local Government: Municipal Systems Act

32 of 2000 and Rule 4 of the Rules. In making this submission, the Applicants relied on a decision by the Northwest Division of the High Court of *Rustenburg Local Municipality v Renaissance Security and Cleaning Services CC*. In this decision Hendricks J (as he then was) found that the service of summons on the archives administration clerk was not a proper service on the municipality. Rescission of judgment was for this reason allowed.

- [10] The facts in this case can however be distinguished from those in *Rustenburg Local Municipality v Renaissance Security and Cleaning Services CC* in that in *casu*, the notice of motion was not served on “the archives administration employee of the municipality” who in all probability would not have an idea on what to do with the summons or the application so served as her work has nothing to do with legal documents. *The notice was served on an employee in the legal department of the municipality. This is the department with the responsibility to litigate on behalf of the Applicant.*
- [11] *As an employee in the legal department, Ms. Mathebula is presumed to be working with legal documents daily and would know what should be done when a notice of motion is served on her.* The Applicant does not explain who Ms. Mathebula is nor does it dispute that she is an employee working in its legal department. It also does not dispute that the court order was served on the same person as reflected in the Sheriff’s return of service.
- [12] In *Vhembe District Municipality v Stewarts & Lloyds Trading (Booyens) (Pty) Ltd and Another*, the Supreme Court of Appeal (the SCA) had to decide if the service executed by the Sheriff in the same fashion complied with the Local Government: Municipal Systems Act 32 of 2000. Just like in this case, the municipality only took steps to rescind the judgment after receiving a writ of execution that was served on the same legal advisor in the employ of the municipality. The court *a quo* had held that service was proper and dismissed the rescission application. It also held that the applicant did not have a bona fide defence to the claim.

- [13] *On appeal, the SCA confirmed the High Court's finding that the service on the legal adviser of the municipality was a proper service in compliance with the Local Government: Municipal Systems Act 32 of 2000. For these reasons, the argument that service on Ms. Mathebula of the Applicant's legal department was improper has to fail.* (Emphasis added)
- [75] In the *Great Kei Municipality v Danmist Properties CC* (ECJ 2004/032) [2004] ZAECHC 32; [2004] 4 All SA 298 (E) (10 September 2004) the notice was not served at the address of the municipality. It is dissimilar to this case. It came to the fore that there was no such entity as the Great Kei Local Municipality and that the municipal offices at 27 Frontier Street, Kei Mouth are not the main offices of the actual municipality, namely the Great Kei Municipality. The municipal manager's office is not situated at 27 Frontier Street, Kei Mouth but is situated at Komga. Furthermore, contrary to what is stated in the return of service, such service was not effected at 27 Frontier Street but at the private residence of Mrs. Lawrence.
- [76] As result of the dictum in the Supreme Court of Appeal referred to above, I respectfully disagree with the finding of Hefer AJ in *Matjhabeng Local Municipality v Pakampho Electrical and Others* (911/2023) [2024] ZAFSHC 153 (6 June 2024) wherein he ruled that the fact that the return of service did not indicate that Mrs van der Spuy was authorised to accept service on behalf of the applicant nor the municipal manager causes it to be ineffective service. There are also some factual differences in that Down Touch's entitlement stems from a previous court order granted by agreement between the parties. The

5000/2023 – order is a so-called follow-on order, granted by default because the invoices for service were settled. The certification of the manner of service is not at issue here as in the Pakampho Electrical – case.

- [77] The evidence is that it was common practise to serve on Mrs van der Spuy, she was employed at the legal department. The evidence of the Sheriff: Welkom stands substantially unanswered. As I indicated above; as to the alleged hearsay evidence Mr Mbambo did file a confirmatory affidavit. The Plascon-Evans principle applies and the testimony must be accepted.
- [78] If I am wrong on the above; the Municipality admitted that Mrs van der Spuy received the notice but they do not explain why it was not brought to the attention of Ms Tsholofelo Gaborone. By implication Ms Gaborone was authorised to accept service and not only the Municipal Manager. There is not any explanation from Mrs van der Spuy as to why she did not or if she did; bring the notice to the attention of the Municipal Manager.
- [79] *It is ruled that service was executed in terms of the law. The Hefer – order was not erroneously granted on this aspect.*
- [80] The Municipality complains in their founding affidavit that the notice of set down and thus no notice on enrolment on the unopposed roll was served on them. “The Municipality therefor was not aware that the

matter would be heard and was therefore not afforded a right to a fair hearing contrary to its rights protected in terms of section 34 of the Constitution.”²⁶ The law does not dictate that the notice of set down had to be served on the Municipality because they did not defend the matter.

THE HEFER ORDER ALLEGEDLY A NULLITY & *RES JUDICATA*

[81] As already indicated; the Municipality resists the order of the court as to be a “nullity”. They maintain that it is void because of the *res judicata* doctrine. The order does not flow from rights begotten from the previous court order, and the order is “irreconcilably inconsistent.....”

[82] I pause to point out that this defence does not go to procedural errors; but the substantive defence of the Municipality and the merits of the case. I will adjudicate it for the sake of finality.

[83] No court order is a nullity. On 14 February 2022, the Constitutional Court; Pillay AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring) ruled in *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* (CCT 45/21) [2022] ZACC 3; [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC) that:

Introduction

²⁶ Paragraphs 18 and 19 on pages 13 to 14.

If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.

[84] The Constitutional Court reaffirmed above that a court order is binding until it is set aside by a competent court, and that this necessitates compliance, regardless of whether the party against whom the order is granted believes it to be a nullity or not. *Importantly, however, the court further confirmed that where an organ of state genuinely believes that an order of court is a nullity, then it has a duty in the public interest to pursue an appeal to correct the illegality.*

[85] The court summed it up:

- Court orders granted by a competent court are binding until set aside by a competent court in terms of section 165(5) of the Constitution, irrespective of whether they are valid; and
- Wrongly issued judicial orders are not nullities.²⁷

[86] It is trite that the case for Down Touch is that the Municipality did not comply with the Molitsoane – order. They had to turn to the litigation that resulted in the Hefer – order. They based their claim in the Hefer – order on the breach of the settlement after they followed the process prescribed in the agreement and the Municipality did not perform in accordance. I reiterate; this is the words of the Molitsoane – order:

5. Should the Respondent dispute any invoice payable as set out in the application they shall, within 60 days after date of this order resolve such

²⁷ Paragraphs [23] to [34].

invoice with the Applicant. Such a dispute will have no impact on the payments as set out in prayer 3.1 and 3.2 above or the capital amount and interest due but shall form part of the remainder of the outstanding balance due by the Respondent to the Applicant in the amount of R8 954 287.94 which does not form part of this application;

6. Should the Respondent fail to actively partake in resolving such a dispute, their right to rely on this clause to stay payment on a specific invoice will lapse. All invoices not in dispute will form part of the monthly payments as set out above;

[87] Down Touch complied with the process above but the Municipality ignored the claims payable on invoices supplied. This is undisputed. The amount of R4 282 564.51 is due and payable.

[88] The defence of the Municipality is wrong in law. *The defence fails*. The Molitsoane – order was the confirmation of a contract that remained susceptible to future claims. *In Democratic Alliance v Brummer* (793/2021) [2022] ZASCA 151 (3 November 2022) the Supreme Court of Appeal confirmed that:

- [13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (*eadem quaestio*) was not determined by the earlier court, an essential requirement for a plea of *res judicata* in the form of issue estoppel is not met. There is then no scope for upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That 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*. It must therefore, with

reference to the facts of the case and considerations of fairness and equity, decide whether in that case, the defence should be upheld.

IRREGULARITIES IN THE PROCUREMENT PROCESS

[89] The Municipality may not rely on alleged or suspected irregularities in the procurement process here; it is the proverbial figs after easter. It is inefficient administration of the law and abuse of power. The law is trite and the Constitutional Court has already spoken; the correct remedy in law is a legality review.

[90] In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014) the Constitutional Court criticised public officials for taking the law into their own hands and delaying compliance with contracts and court orders.

[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. **Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.**

[97] ... proceedings for judicial review must be instituted without unreasonable delay and, ... They therefore retain lawful consequence. No other approach is practicable.

[99] So the absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable, usually on the grounds of lawfulness (but sometimes also on the grounds of reasonableness). ...

[100] ... The narrow dispute for decision was whether the invalidity of a preceding administrative act (the Administrator's grant of township development rights) entitled a local authority to refuse to do something (approve an engineering services plan for the township) it would have been obliged to do if the Administrator's preceding act had been valid. The Court said No. The local authority could not simply treat the Administrator's act as though it did not exist. *Until it was properly set aside by a court of law, it engendered legal consequences.*

[101] The essential basis of Oudekraal was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process.

[91] *The defence is rejected.*

THE DISPUTE AND THE SETTLEMENT AGREEMENT.

[92] The disputes in the 366/2022 – case were judged. It may not be raised again in litigation.

[93] The settlement is a contract between the parties. The contract was not complied with. The application of the Plascon Evans principle proved this beyond any doubt. Down Touch opted to rely on the breach of contract remedy and not the contempt of court remedy. It cannot be faulted if the terms of the agreement are regarded.

- [94] The Molitsoane – order *inter alia* envisaged that the parties settled a pending dispute between them concerning invoices that did not form the subject matter of the litigation. It gave the Municipality an opportunity to dispute the invoices within a period stated in the order resulting from the settlement. The Municipality ignored this right; the invoices were presented and submitted. The default followed.
- [95] The first respondent is correct in their submissions that a party litigating cannot undo a settlement on the basis he or she got a bad bargain. It operated *res judicata*. Whether or not a settlement agreement is made an order of court; it remains a contract (*transactatio*) and may be challenged on the basis of contractual defences such as mistake, fraud, impossibility of performance, illegality and the lack of authority to compromise.
- [96] In *Provincial Government North-West and Another v Tsoga Developers CC and Others* (CCT 91/15) [2016] ZACC 9; 2016 (5) BCLR 687 (CC) (24 March 2016) it was ruled that:
- [50] I read both judgments to say that, if on the face of the order, one is able to conclude that what the court has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded. These cases are distinguishable from the instant scenario and are not authority for the proposition that the order of 16 May 2013 may suddenly be of no force and effect. On its face, that order is perfectly valid and competent. If there be a need to explain this, the so-called nullity of the settlement order does not – so to speak – jump out of the page, as was the case with the nullity of the orders in *Changing Tides* and *Motala*. There has to be an antecedent step: proof of the grounds of review. *In any event, it seems to me that the*

applicants may well not be in a position to prove these grounds. Eke stands in their way. If the issues they raise did not form part of the defences to Tsoga's claim before the High Court, they could have. That they were not raised matters not. (Emphasis added)

[97] The ruling in *Eke v Parsons* 2016 (3) SA 37 (CC) states unequivocally:

[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.

[32] Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which — depending on the nature of the litigation — might have entailed many days of contested hearing.

[98] *The defence is rejected.*

GOOD CAUSE & CONCLUSION

[99] The impugned order was not granted erroneously. If I am mistaken on the rule 42 – defences; the Municipality did not explain their default

adequately. The argument that the Municipality was poorly administrated and that the community and service providers must bear the brunt for it now, is unconvincing. Service was proper and effective.

[100] From the above it follows that the default order was granted in compliance with the law and the prayers for the relief in the rest of the application must fail. As indicated above; apparently execution was already effected and the money has been paid out. There is no claim for repayment in *casu*.

[101] The fact that the Municipal Manager subjectively and honestly believes in their defence does not raise it to bona fide in the sense required here and in law.

[102] The Municipality did not meet the yardstick summed simplistically in *Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)* on page 228:
... It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing. (Emphasis added)

COSTS

[103] The application is ambitious. It is a settlement solemnised into a court order between parties represented by experienced counsel that was simply not complied with. The Municipality did not join the litigation when it was invited to do so. The Municipality did not stand behind the allegations of fraud and corruption and take the service level agreements on review. The Municipality took the law into their own hands and *mero moto* disregarded the order.

[104] Costs must follow the cause. Down Touch asked the court for a *de bonis propriis* costs order and on the scale C²⁸ as between attorney and client.²⁹ I am duty bound to grant a punitive costs order and to hold the Municipal Manager accountable for the dismal litigation on the rescission application. The taxpayer may not be mulcted with the costs. I will not do the same with the application to strike out.

[105] **ORDER**

1. The application for striking out is dismissed with costs.
2. The application for the relief sought in the notice of motion dated 7 December 2023 is dismissed with costs. It is ordered that the Municipal Manager shall carry the costs *de bonis propriis* and as between attorney and client.


M OPPERMAN J

²⁸ Rule 67A addresses itself only to awards of costs as between party and party. See *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024).

²⁹ Paragraph 9.4 of the heads of argument for the first respondent.

Appearances

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Sandton

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