

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. CA 151/2023

In the matter between:

AMATHOLE DISTRICT MUNICIPALITY

APPELLANT

and

BETRAM (PTY) LTD

FIRST RESPONDENT

**THE SHERIFF OF THE HIGH COURT,
EAST LONDON**

SECOND RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

[1] The central question in this appeal is whether it would be appropriate for this court to rescind an earlier court order which had incorporated a compromise or settlement agreement concluded between the appellant (the municipality) and the first respondent (the respondent) in the course of contested proceedings.

[2] The second respondent does not feature in this appeal.

[3] The consent order between the parties emanated from a defended action instituted by the respondent (as plaintiff) against the municipality (as defendant), and

was made an order of court by Rusi J on 2 August 2022.¹ Subsequent thereto and on 26 June 2023, Makaula J dismissed the application by the municipality to have the consent order rescinded. Following that dismissal he granted the municipality leave to appeal to this court.

[4] The appeal concerns the legality of the settlement agreement.

[5] The grounds for rescission of compromise agreements under the common law are fraud, *justus error*, or any other just cause.² The test is stringent³, the rationale being that a settlement consensually entered into and made an order of court is *res judicata* as between the parties and has binding effect in regard to the matters covered thereby.⁴

[6] At the commencement of the matter three preliminary applications were filed – one of them being an application for condoning the late filing of the notice of appeal and the other two were applications for relief under uniform rule 30. Each of the applications was opposed. I do not intend dwelling much on them save for what is mentioned at the conclusion of this judgment. Relevant to the condonation sought by the municipality the approach adopted is that the outcome on the merits of the appeal will be dispositive of the condonation issue.

[7] The crux of the case for rescission is that the acting manager of the municipality, Mr Mosala, acted contrary to a council resolution to defend the action instituted by the respondent against the municipality and by concluding the settlement agreement the municipality became obliged to incur expenditure otherwise than in accordance with an approved or adjusted budget.

[8] Hence, in concluding the agreement the conduct of the municipal manager was illegal and *ultra vires* the resolution.

¹ The action was instituted in the East London Circuit Court (formerly the East London Circuit Local Division) under Case No 515/2018 as between Betram (Pty) Ltd and Amathole District Municipality.

² *Kunene and Others v The Minister of Police* [2021] ZASCA 76.

³ *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) paras 12-15.

⁴ *Moraitis supra* para 10.

[9] The municipality posits that the legality issue is underpinned by the lack of authority of its manager to have concluded the agreement which the municipality maintains renders the consent order liable to be set aside. The municipality contends that the issue goes to the root of the matter and constitutes just cause for seeking rescission.

[10] It is nowhere apparent from the notice of appeal or anywhere else in the record, that the appeal is advanced on the aforementioned basis. Counsel for the municipality stated that this is evident from the *extempore* judgment of the court *a quo* that granted leave to appeal – but the judgment is not included in the record, nor is the order in terms of which leave was granted. The respondent drew on the fact that the legality issue, amongst others, was abandoned by the municipality when the rescission application was argued before Makaula J. I will revert to this later in this judgment when dealing with the approach adopted by this court on appeal.

History

[11] In April 2018 the respondent instituted action against the municipality in which it claimed an amount of R39,7 million⁵. The action was instituted pursuant to a public tender awarded by the municipality to the respondent during March 2014 for the supply of precast concrete pit latrines. The claim was for specific performance of the contract, alternatively enrichment. The amount was uniformly claimed on both causes of action – it being based in the first instance on the municipality's failure or refusal to pay the balance on the contract price; and in the alternative, the municipality's enrichment at the expense of the respondent's impoverishment.

[12] It is not in dispute that after negotiations that extended over a two-day period, commencing on 1 August 2022 (being the date of trial), the respondent's claim was settled on 2 August 2022. The settlement was initiated by an offer made at the instance of the municipality represented at the time by its then acting municipal manager, Mr Mosala, who had at all material times instructed their attorney and

⁵ This represented the difference between R74 852 730 less R35 095 050.

senior counsel – all of whom, on the version of the respondent, had the ostensible authority to do so.

[13] The respondent contended that Mr Mosala's presence and involvement meant that he knew that settlement negotiations were being conducted on behalf of the municipality, that he allowed the legal representatives accompanying him to do so, and that he conferred upon them the authority to settle.

[14] As a result, the respondent accepted the offer. The acceptance constituted a settlement in terms of which the municipality would pay the respondent the amount of R19 140 000 and culminated in the order taken by consent before Rusi J.

[15] The order recorded that the settlement shall, by agreement between the parties, be made an order of court and that it shall constitute a judgment of the court entitling the respondent to proceed to execution in the event of the municipality's failure to comply therewith.

[16] At the outset, Mr Monwabisi Somana, who had succeeded Mr Mosala as acting municipal manager and was the main deponent to the founding papers in the rescission application, did not dispute that the order was taken by consent. For purposes of this appeal the issue for the municipality is Mr Mosala's alleged lack of authority, which it contends detracts from the legality of the settlement agreement.

[17] In the course of events following the consent order the municipality proposed a structured payment plan. The respondent declined acceptance and caused a writ of execution to be issued, whereupon the sheriff attached movable property to the value of R862 600.

[18] On 14 October 2022 the municipality launched an urgent application to stay the execution proceedings pending an investigation into the circumstances surrounding the conclusion of the settlement agreement pending the institution of the rescission application. Mr Somana averred that the basis on which the settlement was concluded remained unknown. The basis of the complaint was that the absence of a memorandum setting out the ingredients for the settlement constituted a

material omission that for all intents and purposes warranted the grant of a rescission order.

[19] In the appeal the primary contention regarding the settlement agreement was that Mr Mosala did not have the authority to conclude it. It was argued that no valid agreement can flow from a settlement amount that was not budgeted for by the municipality, and that the public interest requires the courts to guard against the misappropriation of public funds. In summary, the municipality contended that once it was shown that the settlement agreement was invalid on any of these grounds, the consent order fell to be set aside on the basis of just cause. The respondent, on the other hand, argued that the legality issue had been abandoned, along with several other grounds, when the rescission application was argued in the court *a quo* and could not be revived on appeal. The basis for this argument was that the case advanced on appeal is an entirely new one for which this court would impermissibly be acting as a court of first instance in respect of an issue that the municipality now seeks to build, on grounds not previously raised.

[20] It is unnecessary to deal with each of the specific grounds set out in the founding affidavit in the rescission application, or to mention those that were abandoned. What is evident, however, is that the affidavit alludes to the legality issue – and although it does so on limited facts, I consider that it is an issue flowing fairly from the record and in relation to which this court can make a finding.⁶

Lack of authority

[21] Foundational to our constitutional order is the doctrine of legality. It stresses that state organs and public officials can never act beyond or contrary to their powers as are prescribed by law.⁷

[22] The crux of the municipality's case for rescission was that the acting municipal manager, Mr Mosala, acted contrary to the council resolution to defend the action

⁶ An approach countenanced by the Supreme Court of Appeal in *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA).

⁷ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 49 and 75-77; *Nyathi v MEC: Department of Health Gauteng* 2008 (5) SA 94 (CC) para 80.

instituted by the respondent and by concluding the settlement agreement it became obliged to incur expenditure that was not in accordance with an approved or adjusted budget, in terms of its approval process and the Local Government: Municipal Finance Management Act⁸ (the MFMA). Hence, in concluding the agreement the conduct of the municipal manager was illegal and *ultra vires* the resolution.

[23] In its answering affidavit the respondent raised as defences, an interplay between estoppel and the Turquand Rule⁹ (also known as the indoor management rule¹⁰). These are at the heart of the decision in *Merifon (Pty) Ltd v Greater Letaba Municipality and Another*¹¹ on which the municipality, in argument, placed significant store in attempting to counter the respondent's reliance on the ostensible authority of Mr Mosala and the legal representatives of the municipality in concluding the settlement.

[24] At the outset *Merifon* is distinguishable on the facts since it concerned the acquisition of a capital asset contrary to the prescripts of s19 of the MFMA. The section applies to capital projects and the provision for the approval by a municipal council for appropriation in a capital budget of monies to be spent on such projects. In argument it was submitted, for the first time, that s19 was applicable. This is new matter. It was not canvassed in the founding affidavit in the rescission application and, in any event, I am not persuaded that the section finds application to this matter. I shall revert to this issue.

[25] However, *Merifon* underlined the settled proposition that estoppel and the indoor management rule cannot operate in a way that brings about a result not permitted by law. Put otherwise, they cannot cure an action that is *ultra vires*¹² or illegal.¹³ It follows that the defences will not avail the respondent in the event of the municipality making out a case on legality.

⁸ Act 56 of 2003.

⁹ The rule protects persons from being affected by a company's non-compliance with an internal formality pertaining to the authority of its representatives.

¹⁰ *Strydom and Kroqwana Construction CC v MEC for Human Settlements Eastern Cape and Another* [2017] ZAECHC 11 para 8.

¹¹ [2022] ZACC 25.

¹² As opposed to one that is *intra vires* (within one's legal powers) but suffers some other defect.

¹³ *Merifon (Pty) Ltd v Greater Letaba Municipality and Another* [2022] ZACC 25 para 42.

[26] The municipality premised its submissions on the council resolution to defend, which resolution, so it was argued, did not authorise settlement by Mr Mosala. I emphasise that it is not the case for the municipality that its legal representatives were not authorised to settle. Since the legality issue lies squarely with the terms of the council resolution, proof thereof assumes significance in the appeal.

[27] In support of its case the municipality placed reliance on *Kunene and Others v The Minister of Police*¹⁴, and *Saldhana Bay Municipality v SAMWU obo Wilschut N.O. and Others*¹⁵. In dealing with the legality argument this judgment makes the following observations – the first of which deals with the legislation pertaining to local government, and the second will address the cases referred to.

[28] The Constitution confers the executive and legislative authority of a municipality on its municipal council.¹⁶ Under the Local Government: Municipal Systems Act¹⁷ (the MSA), a municipality is a statutory entity that has a separate legal personality. It can therefore sue and be sued. The municipal manager is the head of the administration of a municipality who performs functions subject to the policy directions of the municipal council¹⁸. The resolution to defend the action instituted by the respondent is not attached to the founding affidavit in the rescission application and is therefore not in the record before us. It is evident from a supporting affidavit by an incumbent, Mr Makhaya Dungu, who acted as municipal manager prior to the appointment of Mr Somana, that the existence of the resolution is not denied by the municipality. The extent of the mandate and authority conferred on Mr Mosala in respect of the litigation can only be determined by the terms of the resolution.

[29] In the absence of any indication by Mr Dungu that he has personal knowledge of its contents, this court has no objective evidence of its terms. However, it was common ground that, pursuant to the resolution, a mandate was given to attorneys to defend the claim and counsel were instructed to conduct the trial.

¹⁴ [2021] ZASCA 76.

¹⁵ [2015] ZALCCT 2.

¹⁶ Section 151(2).

¹⁷ Act 32 of 2000.

¹⁸ Section 55.

[30] In emphasising the necessity of proof that a municipal official has the authority to act on behalf of a municipality, the court in *Kouga Municipality v South African Local Government Bargaining Council and Others*¹⁹ approved of the following *dictum* in *Pretoria City Council v Meerlust Investments (Pty) Ltd*²⁰.

‘[S]ince an artificial person, unlike an individual, can only function through its agents, and can only take decisions by passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above-mentioned onus, the petitioner ought to have placed before this court an appropriately worded resolution.’

[31] By parity of reasoning, where a party seeks to make a case that an official has exceeded the mandate conferred on him by a resolution of the municipal council it is incumbent on it to provide the resolution. While conceding that the resolution to defend is not included in the papers, in argument, counsel for the municipality argued that, in any event, Mr Mosala did not have the authority to conclude the settlement agreement because no budget was approved. The respondent disputed this.

[32] Section 109(2) of the MSA provides as follows:

‘A municipality may compromise or compound any action, claim or proceedings, and may submit to arbitration any matter other than a matter involving a decision on its status, powers or duties or the validity of its action or by-laws.’

In addition, s59(1)(b) read with s59(2)(b) of the MSA confers upon the municipal council the authority to delegate powers or functions in writing to, *inter alia*, a municipal manager. In its heads of argument the municipality

¹⁹ [2009] ZALC 158 para 19.

²⁰ 1962 (1) SA 321 (A) at 325D-E.

referred to its system of delegations (developed in terms of s59 of the MSA) in which the municipal manager is permitted to settle litigation subject to an approved budget. The municipality contended that Mr Mosala was precluded from incurring expenditure for an amount that had not been budgeted for in terms of s15 of the MFMA. Section 15 of the MFMA deals with the appropriation of funds for expenditure. And so, the rescission is intended to protect public funds for purpose of ensuring that the municipality is able to comply with its constitutional obligations to provide services to the community.

[33] Reverting to the facts, as I have said, the respondent's main claim in the action was for specific performance of the contract that flowed from the award of a tender. While admitting that it had purported to contract with the respondent the municipality denied that a lawful contract had resulted. It filed a counterclaim in which it sought an order that the purported contract was unlawful and void *ab initio*. In respect of the alternative claim, it tendered to pay to the respondent such sum as may ultimately be determined as constituting any enrichment enjoyed by the municipality, as a consequence of goods and services delivered to the municipality pursuant to the purported agreement.

[34] On the morning of the first day on which the trial was set down the municipality was represented by Mr Mosala, and a legal team comprising of an attorney and senior counsel. They proposed that the matter be settled and ultimately suggested an amount of R19 140 000. The amount was indicated in a handwritten note handed by its legal representatives to the respondent's attorney and was tendered in circumstances where the parties were fully prepared for trial based on the pleadings and the documentation discovered. Thus they were aware of the issues and the facts relating to the matter. I accept, for purposes of this judgment, as the parties did in argument, that the contract concluded was unlawful and of no force or effect. However, as I have explained, the issue in dispute in the alternative claim related to the alleged enrichment of the municipality at the respondent's expense. The municipality had taken a resolution to oppose the claim, and pursuant thereto attorneys and counsel had been instructed to conduct the trial. From this point on, in law, the conduct of the case at the trial was in the hands of counsel. The mandate given to counsel includes the authority to compromise the action or any matter in it,

unless he has received instructions to the contrary.²¹ This did not amount to incurring “expenditure” as envisaged in s15 or s19 of the MFMA. It merely involved the determination of the extent of a pre-existing liability. Unless some impropriety in the conduct of the legal practitioners is established, and none was suggested, or the settlement is shown to be unlawful on another basis, the municipality is bound by it, and by the order of court.

[35] The municipality had known that it was exposed to the risk of a judgment for a large amount claimed against it when they resolved to instruct legal representatives, and the settlement that they subsequently concluded, which resulted in an order, was for a substantially reduced sum. The municipality acquiesced in the order by their proposal for a structured payment plan. It was only after the sheriff’s attachment that the municipality initiated the rescission proceedings to stave off payment of the judgment debt.

[36] In terms of Chapter 8 of the MFMA the financial administration of a municipality resorts under the control of its accounting officer, the municipal manager. His responsibilities include *inter alia*: (a) the duty to ensure that the municipality has and maintains effective, efficient and transparent systems of risk management and internal control²²; (b) the management of the liabilities and assets of a municipality²³, including its revenue²⁴ and expenditure²⁵; (c) the duty to assist the mayor in the preparation of the municipal budget, and (d) the duty to report in writing to the municipal council any impending shortfalls in budgeted revenue, as well as overspending of the municipality’s budget²⁶.

[37] In addition to those responsibilities the accounting officer has a general obligation to report to the National Treasury, the provincial treasury, the department for local government in the province, or the Auditor-General such information as may be prescribed or required.²⁷ The accounting officer is criminally liable if found to have

²¹ *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) para 10.

²² Section 62(1)(c).

²³ Section 63.

²⁴ Section 64(1).

²⁵ Section 65(1).

²⁶ Section 70(1)(a).

²⁷ Section 74.

deliberately or in a grossly negligent manner contravened his responsibilities or deliberately misleads or withholds information and may on conviction of any specified offence be fined or imprisoned for a period not exceeding five years.²⁸ He was present throughout and participated in the negotiations, which would undoubtedly have created the impression that he was duly authorised to instruct counsel. Absent the council resolution authorising the defence of the action we are bound to accept that he was.

[38] I turn to consider the cases to which reference was made during argument. It is not intended to traverse them in specific detail save to mention at the outset that, as correctly pointed out by the respondent, they are distinguishable and do not lend support for the proposition for which the municipality contends.

[39] In *Saldhana Bay* the issue was whether the municipality was bound by a settlement agreement concluded by its municipal manager with an employee while the latter was in the midst of a disciplinary hearing. In holding that the agreement was *ultra vires* and not binding on the municipality, the court found that the agreement was concluded contrary to the provisions of a collective agreement with the South African Local Government Association which expressly conferred the power of compromise or settlement on the chairperson of the disciplinary enquiry. This does not find application to the facts of this case where an agreement was concluded by counsel in the course of litigation pursuant to their undisputed mandate to conduct the trial, nor is there in this case an instruction that the authority to compromise is excluded from the mandate.

[40] In *Kunene*, a settlement agreement concluded by the state attorney, on behalf of the Minister of Police in a delictual claim, was set aside because it was tainted by impropriety. Their conduct was found to have been irrational and had subverted the administration of justice. As I have said, in this appeal the conduct of the legal representatives is not called into question, nor has a case been made that Mr Mosala acted dishonestly, or with an ulterior motive, when instructing counsel. The argument was merely that he did not have authority.

²⁸ Section 173; section 174.

[41] The common denominator in these cases is that they illustrate the principle that settlement agreements must be grounded on principles of legality and the rule of law. They serve to emphasise that an act can only be found to be *ultra vires* or unlawful where the unlawfulness is proven. In the present case the mere assertion that Mr Mosala did not have the authority to settle because he acted contrary to a resolution to defend carries no weight where the resolution is not disclosed. The absence of authority is a conclusion to be drawn from primary facts that must appear from the papers. None have been presented. Moreover, and by itself, the assertion by Mr Somana that the municipality does not know on what basis the settlement was concluded does not constitute just cause for seeking a rescission.

[42] In the circumstances the municipality has advanced no persuasive argument for rescinding the order of the court *a quo*.

Condonation

[43] The municipality sought condonation for the late filing of its notice of appeal which had been filed nine days beyond the period prescribed in the rules of court. The application was filed on 23 June 2023. The deponent to the founding affidavit in the application is the attorney of record for the municipality. He explains that he was ‘delayed’ in his ‘ability to take instructions’ notwithstanding clear indications on his own version that during the prescribed period he regularly met with the municipal manager to discuss the numerous matters in which the municipality was litigating.

[44] The affidavit is terse and fails to establish good cause which in principle requires *inter alia* that prospects of success on the merits of the appeal be addressed²⁹. I might add that the delay in filing the notice of appeal appears not to be the only shortcoming in the prosecution of the appeal. The municipality did not enter into good and sufficient security before lodging copies of the appeal record with the registrar. The failure to provide security was remedied a few days prior to the hearing of the appeal, this in reaction to a rule 30 application filed by the respondent

²⁹ Erasmus, Superior Court Practice at D1-322 [Service 17, 2021].

on 14 December 2023. In addition, the pagination of the record comprising of four volumes amounting to 503 pages was illegible, nor was every tenth line on every page numbered³⁰. The index itself rendered navigation of the record problematic for failure to contain sufficient information identifying documents and annexures.

[45] The explanation proffered for the delay in filing the notice of appeal is unsatisfactory. Viewed in the light of the unsuccessful outcome of the appeal on the merits, the opposition to the application for condonation was not unreasonable.

The rule 30 applications

[46] In the condonation application the respondent filed its answering affidavit on 16 April 2024. This prompted an application by the municipality to have the answering affidavit declared 'an irregular step and set aside'. Considering that none of the parties addressed the Court on the merits of the application, no order is made.

[47] The other application at the instance of the respondent arose from the failure by the municipality to provide security. At the commencement of argument in the appeal, counsel for the municipality conceded that the application became moot by the belated provision of security but that the respondent was nonetheless entitled to its costs.

[48] In the result:

1. The application for condoning the late filing of the notice of appeal is dismissed with costs.
2. The appeal is dismissed with costs, such costs shall include the costs of the respondent's rule 30 application.

M S RUGUNANAN

³⁰ Rule 49(8)(a).

JUDGE OF THE HIGH COURT

I agree.

J W EKSTEEN
JUDGE OF THE HIGH COURT

I agree.

A BODLANI
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: *M Osborne* with *N Mdunyelwa*, instructed by Y
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Date heard: 27 May 2024

Date delivered: 20 August 2024