

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:030618/2023

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED.
	
SIGNATURE	DATE
	14/03/2025

In the matter between:

BA-PHALABORWA MUNICIPALITY

APPLICANT

and

TIPUPROX (PTY) LTD

FIRST RESPONDENT

MM RIP SC N.O.

SECOND RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 14 March 2025.

JUDGMENT

MALI J:

- [1] This is an application for an order declaring the arbitration award void, based on the lapsing of the arbitration. If it is found that the arbitration award is not void, the applicant seeks to set aside the arbitration award based on the provisions of section 33 of the Arbitration Act, 42 of 1965 (the Act).
- [2] The applicant is a municipality duly established in terms of section 12 of the Local Government: Municipal Structures Act, 117 of 1998, with its principal place of business in Limpopo. The first respondent is a company duly registered and incorporated within the Laws of the Republic, with the registered address in Pretoria Gauteng. The second respondent is a major male practising Senior Advocate based in Pretoria, Gauteng.
- [3] The first respondent instituted action proceedings in the Polokwane High Court against the applicant during July 2014 for the payment of amounts allegedly due in terms of an agreement. The first respondent and the applicant concluded an arbitration agreement during February 2021. The second respondent is the Arbitrator.
- [4] The first respondent is opposing the application. The first respondent first raised two points in *limine*, (i) Non-compliance with Rule 7 due to lack of Council resolution and (ii) Lack of jurisdiction.

Non-compliance with Rule 7 of the Uniform Rules of Court

- [5] Rule 7 reads:

*“7 Power of Attorney (1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not filed, **but the authority of anyone acting on behalf of a party may**, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.” [Own emphasis]*

- [6] The deponent to the founding affidavit is the duly appointed Municipal Manager. In opposing the point in *limine*, at paragraph 11 of the replying affidavit the following is stated:

“11.1 The applicant has indeed complied with the Rule 7 notice.

11.2 It is disputed that a council resolution is required.”

- [7] The averments are as brief as above, the applicant does not take the court into confidence as to how it has complied with Rule 7 notice. It also does not state the basis of disputing the requirement of council resolution.

- [8] The law pertaining to the Council Resolution to institute legal proceedings by the Municipality has long been settled in *Manana v King Sabata Dalindyebo Municipality* (345/09) **[2010] ZASCA 144**. At paragraphs 16 and 17 the following is stated:

“[16] A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to perform the particular function itself. As the authors of De Smith's Judicial Review express it:

'[I]t has sometimes been stated that delegation implies a denudation of authority.... This cannot be accepted as an accurate general proposition. On the contrary, the general rule is that an authority which delegates its powers does not divest itself of them'

[17] In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.

- [9] The power/s of the Municipal Manager are not being challenged, but the lack of authority in the form of Council Resolution by the Municipal Manager to institute legal proceedings. The issue is whether this application is authorised by Council resolutions and nothing more. From the above, the Municipal Manager of the Municipality cannot appoint attorneys and authorise litigation in the absence of a Council Resolution.
- [10] The applicant has failed to show that the application is authorised by the Council resolutions. In conclusion the Rule 7 challenge on the lack of authority of the Municipal Manager to institute the application stands to be upheld. This issue alone is dispositive of this application. In the result I grant the following order.

ORDER

1. The application is dismissed.
2. The applicant is ordered to pay the costs of this application on a punitive scale as between attorney and client.



N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

APJ Els SC

apjels@lawcircle.co.za

Adv. N.G Louw

Attorneys:

Thomas & Swanepoel Attorneys

louis@tslegal.co.za

For 1st Respondents:

Adv. K Mokwena

kprofessionalincorporation@gmail.com

Attorneys:

HLM Mamabola Attorneys

hlm@hlmlegal.co.za