



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

Case No: **PR198/21**

In the matter between:

INXUBA YETHEMBA MUNICIPALITY

Applicant

and

XOLELA MSWELI

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

COMMISSIONER KELVIN KAYSTER

Third Respondent

Heard: 26 June 2024

Supplementary submissions received from the Applicant on 25 July 2024 and the First Respondent on 5 August 2024. Missing portion of the transcript and outstanding exhibit furnished to the Court on 6 August 2024.

Delivered: This judgment was handed down electronically by circulation to the Legal Representatives of the Applicant and the First Respondent by email, publication on the Labour Court website and release to

SAFLII. The date and time for handing- down is deemed to be 14h30 on 7 April 2025.

JUDGMENT

KROON, AJ

Overview

- [1] Public confidence in government institutions depends on the officials who are duty-bound to serve the people, doing so diligently and with integrity. Public servants are the stewards of the trust of the populace. Accountability, whether disciplinary, civil or criminal is one of the measures embraced by the Constitution of the Republic of South Africa, 1996 (the Constitution) to combat the culture of impunity which haunts our administration. Accountability is an antidote to the bovine apathy which casts a shadow over our State organisations. Without accountability we see, in real time, the whittling away of the cornerstones of democracy and the inexorable descent into a regime where maladministration is normalised. When public servants who are guilty of malfeasance are led to feel safe in the knowledge that their misconduct will have no real consequences, the negative outworkings are pervasive. Service delivery is compromised. Those who suffer are the vulnerable and the powerless. The damage done by sustained unaccountability runs deep. It may take generations to undo. Often, many years after the fact, wasteful and expensive litigation must be embarked upon to right the wrongs which mismanagement and abuse of power have left in their wake. In a self-review application, the Supreme Court of Appeal in *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd*¹ put it like this:

¹ [2021] 2 All SA 700 (SCA); 2021 (4) SA 436 (SCA)

[47] ... However, if the maladministration or corruption is discovered late by conscientious officials seeking to take corrective and appropriate action, courts might insist in the future that public authorities seeking time indulgences set out the steps they took in relation to the misconduct by errant officials, that resulted in the need for corrective action, including, but not limited to disciplinary actions, and where appropriate, criminal proceedings. All the more so, if the corruption or maladministration was hidden from disclosure by inept or corrupt officials. If a service provider was complicit then questions might be asked about what steps were taken by the public authority in relation to such complicity. Beyond the courts, these aspects might even be catered for by legislation. We must all of us, in every branch of the State and civil society, make every effort to protect public monies and ensure that our country's necessary developmental goals as envisaged by the Constitution, in the interest of all our people are met...." (own emphasis)

[2] What the Court was saying, by way of the Laozian² clarion call in the last sentence, is that, to set things right, we must begin by holding errant public officials and their accomplices accountable. This brings me to the matter at hand. It is a story about a municipal manager who kept his misconduct secret and, in the words of Navsa ADP³ above, "*hidden from disclosure*". When it was discovered, he embarked upon an exercise of damage control *par excellence* in arbitration proceedings, the arena where he successfully fought his dismissal. It is those proceedings which form the subject of this application.

[3] The Applicant (the Municipality) seeks to review, set aside and substitute an arbitration award (the Award) issued by the Third Respondent (the Arbitrator) under the auspices of the Second Respondent (the Bargaining Council). The

² The ancient Chinese philosopher and founder of Taoism, Lao Tzu, is reputed to have said:
"A journey of a thousand miles begins with one step"

³ As he then was.

application is opposed by the First Respondent (Mr Msweli). The opposition is coupled with a counter application to make the Award an order of Court. In the light of the decision to which I have come, the counter application falls away for the obvious reason that it is not competent to make an award, which has been set aside, an order of Court.

- [4] Mr Msweli, the erstwhile municipal manager of the Municipality, was dismissed for misconduct on 9 April 2021. He was reinstated by the Arbitrator on 22 September 2021. This on the back of a determination that his dismissal was substantively unfair. The Arbitrator determined that, although Mr Msweli was guilty of financial misconduct, financial misconduct which the Arbitrator, in his own words, acknowledged was “*rather serious*”, the sanction of dismissal was nonetheless too harsh. Aggrieved by the Award, the Municipality has approached this Court for relief.

The prosecution of the application

- [5] The heads of argument filed on behalf of the Municipality did not contain any references to the substantial record. They did not refer to either the transcript or the exhibits. Similarly, the heads of argument filed on behalf of Mr Msweli contained no references to the exhibits and only a few vague references to the transcript. Both sets of heads of argument were thus of little assistance to the Court. The filing of what is sometimes termed *pro forma* heads of argument has been frowned upon by the Labour Appeal Court.⁴ One of the duties of Counsel is, in his⁵ heads of argument, to capture and marshal the salient portions of the evidence in a logical (most often chronological), concise and precise manner so as to assist the Court in coming to the correct decision. This exercise self-evidently requires detailed references to the pages of the transcript⁶. Where reference is made to

⁴ Cf. *Minister of Safety Security v Mashego & Others* [2003] 6 BLLR 578 (LAC) at para [10] and *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Others* (2004) 25 ILJ 2135 (LAC) at paras [50] to [51]

⁵ The masculine gender is used in this judgment for the sake of conciseness. References to the masculine gender include the feminine gender.

⁶ This means referring to each relevant line on the applicable page.

exhibits, then the page number and paragraph should be identified⁷. This is often a labour intensive exercise. Nonetheless, it must be undertaken because the Court, with its limited resources, should not be burdened with the task of having to sift and trawl through the record with a view to verifying whether factual assertions made in the heads of argument find support in the record. Compliance by Counsel with the duty to set out a logical and coherent chronology was vital to the adjudication of this application given the, at times, haphazard and otherwise confusing manner in which the evidence was adduced before the Arbitrator. The failure of both representatives to provide such a chronology placed an unnecessary burden on the Court as it tried to put together the pieces of the puzzle.

- [6] In the light of the form which the heads of argument took, the Court directed that Counsel file supplementary submissions. Matters were not helped by the circumstance that, when supplementary heads of argument were eventually delivered, the page references appeared to correspond to the pagination in the disciplinary proceedings rather than that in the Court file. There were also references to documentation which did not form part of the record⁸.
- [7] The other issue which hampered the hearing was that the record was incomplete. A substantial portion of the transcript had been omitted, as had the pre-arbitration minute. It was agreed, at the hearing, that the outstanding documentation would be furnished to the Court and the parties were reminded of this obligation in a directive dated 24 July 2024. On 6 August 2024 the attorney for Mr Msweli, helpfully, furnished a copy of the outstanding portion of the record, even though his client was not *dominus litus*. He also furnished the Court with a copy of the missing pre-arbitration minute. In his covering email, he observed that the minute was not signed by the parties and questioned whether there was in fact any minute concluded. No response was received from the legal representatives of the Municipality.

⁷ See paragraph 48(2)(b) of the Rules regulating the conduct of the proceedings in the Labour Court (the Rules).

⁸ By way of illustration, Mr Msweli referred in his supplementary submissions to the “*judgment*” handed down pursuant to the disciplinary hearing, a document which was not part of the record.

The query about the status of the pre-arbitration minute, whilst perhaps understandable,⁹ sits uneasily with the content of the transcript from which it is clear that the parties accepted that there was a binding pre-arbitration minute. This all notwithstanding, in my view nothing turns on the contents of the pre-arbitration minute.

The Charges and the Arbitrator's findings

[8] Three charges were preferred against Mr Msweli. The Municipality found him guilty on the first two and acquitted him on the third. This left, for consideration by the Arbitrator, charges one and two. Charge one was comprised of three counts which revolved around (a) the approval, by Mr Msweli, of a variation order, (b) the appointment, by Mr Msweli, of a service provider, Kuhlemcebo Engineers (the Service Provider) without following any Supply Chain Management (SCM) procedures and (c) the failure by Mr Msweli to institute legal proceedings to recover monies which had been erroneously paid for work not done. Charge two concerned an allegation that Mr Msweli had sought to mislead the Municipal Council (the Council) by circulating a document which he misrepresented was a report generated by the Municipal Public Accounts Committee (MPAC).

[9] As a point of reference and to place the analysis which follows in context, I quote the charge sheet:

"1. FINANCIAL MISCONDUCT

1.1 You intentionally, alternatively grossly negligently breached your fiduciary duty to your employer, Inxuba YeThemba Municipality, and/or failed to perform the functions of your office with due care, diligence, good faith and honesty and/or failed to act in the best interests of the

⁹ The attorney who represented Mr Msweli in this Court was not the same attorney who represented and appeared in the arbitration proceedings.

Municipality in that, in your capacity as the Municipal Manager, you:

Count one

- 1.1.1 By your signature thereto and contrary to section 116(3) of the MFMA, approved a variation order on municipal contract or tender with the following description-IYM 04/01/2017T, the amount of which exceeded your financial delegations.*
- 1.1.2 In your conduct as afore-stated you acted contrary to section 171(1)(c) of the MFMA, caused and/or failed to prevent unauthorised and/or irregular and/or fruitless and wasteful expenditure.*

Count two

- 1.1.3 You, in a letter dated 24 July 2018, awarded and/or approved and/or allowed and or permitted the appointment of Kuhlemcebe (sic) Engineers as consultants for the Refurbishment and Upgrading of the Municipal Electrical Infrastructure and Network Located in Cradock and Middleburg.*
- 1.1.4 You, in a letter dated 17 October 2018, further instructed the said service provider to proceed with the pre-engineering and implementation work as soon as they possibly can.*
- 1.1.5 You further authorised and/or approved and/or allowed and or permitted payment of and/or induced the Municipality to pay a sum of R688 896.00 to credit Kuhlemcebo Engineers, a*

service provider appointed contrary to the provisions of the supply chain management (SCM) processes thereby acting in breach of section 171(1)(a) and (c) of the MFMA.

1.1.6 The afore-mentioned conduct (appointment without following SCM processes) amounts to irregular appointment since it was made without following the prescribed SCM process and therefore constitutes breach of sections 62(1)(f)(iv); 111 and 115(1) of the MFMA.

Count three

1.1.7 You terminated a contract between the Municipality and Loyiso Consultants but omitted and/or failed and/or neglected to recover monies paid to the said service provider for which no services had been rendered. In so doing you breached the provisions of section 62(1)(a) and (d) of the MFMA read together with clause 3.13 of your employment contract.”

2. GROSS DISHONESTY

2.1 You intentionally, alternatively grossly negligently breached your fiduciary duty to your employer, Inxuba YeThemba Municipality, and/or failed to perform the functions of your office with due care, diligence, good faith and honesty and/or failed to act in the best interests of the Municipality in that, in your capacity as the Municipality Manager, you distributed and/or tabled and/or submitted a document (ostensibly MPAC report), titled Adoption of the Municipal Public Accounts Committees (MPAC) 2018/2019 oversight report, to the Municipal Council without the

knowledge and/or approval of the MPAC Chairperson, thereby creating a false impression that it was MPAC report, whilst you were aware that it was not.

2.2 *In your conduct as aforesaid you committed (sic) breach of item:*

2.2.1 *7(b) of the Code of Conduct for Municipal Staff Members contained in Schedule 2 of the Local Government System Act 32 of 2000; and*

2.2.2 *20 of annexure A to the Local Government: Disciplinary Regulations for Senior managers, 2010.”*

[10] The Arbitrator determined that Mr Msweli fell to be acquitted on charge one, count three (the alleged failure to comply with his duty to recover monies erroneously paid by the Municipality) and charge two (the alleged misrepresentation of the MPAC report). The Arbitrator found Mr Msweli guilty on charge one, count one (the approval of the variation order in excess of his financial delegations) and charge one, count two (the appointment of the Service Provider without following any SCM procedures). The Arbitrator however reasoned that the appropriate sanction to be imposed was not that of dismissal. He accordingly reinstated Mr Msweli, but he did so without any retrospectivity.

Overview of the grounds of review

Introduction

[11] Shorn of all elaboration, the Municipality asserts that the Arbitrator failed to apply his mind to the evidence and the legal issues. He accordingly came to a decision to which no reasonable Arbitrator could have come. In a word, it is the case of the Municipality that the Award was not justified if proper regard is had to the evidentiary material before the Arbitrator.

- [12] The Municipality challenged the Arbitrator's findings that Mr Msweli fell to be acquitted of the allegations of misconduct relating to the failure to institute legal proceedings and the misrepresentation concerning the MPAC report. Counsel for the Municipality, Mr Nzuzo, did not however, in argument, persist with these grounds of review with any vigour. It became clear during the hearing that the gravamen of the complaint of the Municipality was the determination which the Arbitrator made when it came to the fairness of the sanction which had been imposed by the Municipality. The application thus had the character of a so-called "*penalty review*". I will, nonetheless, briefly dispose of the grounds attacking the Arbitrator's acquittal of Mr Msweli on the two allegations of misconduct, as they were not abandoned.

The alleged failure by Mr Msweli to institute legal proceedings

- [13] The Arbitrator found that Mr Msweli was not guilty on count three of charge one i.e. the charge alleging that Mr Msweli had not taken steps to institute legal proceedings against Loyiso Consultants (Loyiso) to recover monies which had allegedly been paid for services which had not been rendered. The Arbitrator found that shortly after legal advice had been furnished to the Municipality recommending that legal proceedings be instituted, Mr Msweli was suspended and accordingly could not be blamed for not having instituted the legal proceedings contemplated by this part of charge one.
- [14] It is correct that, after having sought legal advice from the attorneys of the Municipality regarding whether monies could be recovered, Mr Msweli, on 16 April 2020, received a communication from these attorneys advising the Municipality that three steps needed to be taken before the launching of legal proceedings. Firstly, various documentation relating to the tender in question was required to be collated. Secondly, a supplementary report was to be obtained setting out the defects in the work purportedly done by the supplier. Thirdly, a quantification exercise by an expert had to be undertaken in order to calculate the costs of the remedial work. Thereafter, Mr Msweli was suspended on 28 May 2020.

[15] The Municipality led no evidence to demonstrate that Mr Msweli had taken a decision not to institute legal proceedings. If anything, seeking advice from the legal representatives of the Municipality about whether legal action could be taken against Loyiso was an indication that Mr Msweli was of the mind to address the situation. The highwater mark of this complaint was that, at the stage that Mr Msweli was suspended, no legal proceedings had yet been instituted against Loyiso. It does not however follow, as a matter of course, that because legal proceedings had not been instituted by the time that Mr Msweli was suspended that he had failed or refused to do so. There was also no suggestion, at the date on which Mr Msweli was suspended, that the Municipality had lost its right to institute proceedings or was in any way prejudiced. It was further conceded that, after the suspension of Mr Msweli, the Municipality could have instituted the contemplated legal proceedings but failed to do so. The Arbitrator's determination on this allegation of misconduct cannot be faulted.

Misrepresentation of the MPAC Report

[16] The Arbitrator also exonerated Mr Msweli when it came to his alleged misleading of the Council about the MPAC report. In summary, what happened is that an official (not Mr Msweli) had prepared a document which Mr Msweli described as a "*line item*" which had been placed on the agenda for the meeting, the purpose of which was, on the face of the document, to motivate for the adoption of the report by MPAC, although it was, perhaps unfortunately, labelled as a "*report*". The generation of the line item soliciting the adoption of the MPAC report was, in a sense, premature as, at the time the meeting was convened, the report had yet to be finalised. It, curiously, even referred to what was to be contained in the MPAC report when that report had not yet been completed.

[17] It was Mr Msweli's version that he anticipated that the report would have been ready by the date of the Council meeting and had, on that basis, circulated the line item. This appears to have caused a degree of consternation at the meeting because the Mayor, who was newly appointed

and had been in the job for a month, was under the impression that the document was the actual MPAC report, notwithstanding the circumstance that, as mentioned above, if regard was had to the substance of the line item it would have been apparent that it was not. In this context, it was not in dispute that it was not for Mr Msweli to have tabled the MPAC report. That was a task for the Chairperson of MPAC. The evidence demonstrated that, if anything, it was the Mayor, not Mr Msweli, who wrongly referred to the document as the MPAC report. The members of MPAC, who were in attendance at the meeting, unsurprisingly so, pointed out that the line item was not the report of MPAC.

- [18] As to the allegation that Mr Msweli misrepresented that the document was the MPAC report, the Arbitrator found this contention to be implausible. This was because, so he said, the members of MPAC were members of Council and it followed that it could not have been the intention of Mr Msweli to have deceived persons about the very existence of their own report. Such a nonsensical plan would have had no hope of success. I agree. I would add that it is all but inconceivable that Mr Msweli would seek, for no motive or reason, to place his own job in jeopardy by, as it were, seeking to pull the wool over the eyes of members of Council in a manoeuvre so clownish that it was bound to fail. In such circumstances there can be no scope for imputing a dishonest intention on the part of Mr Msweli as the Municipality sought to do. In my view, this charge was more about administrative confusion and perhaps personalities, even egos, and was in truth no more than a proverbial storm in a teacup.

Conclusion on the grounds of review pertaining to the Arbitrator's findings of not guilty

- [19] It follows from what I have stated above that the grounds of review which were aimed at impugning the Arbitrator's findings which exonerated Mr Msweli in respect of charge one, count three and charge two cannot be sustained. That, however, is not the end of the matter. As mentioned, the

mainstay of the application is an attack on the Arbitrator's determination as to what would be a fair sanction given the misconduct committed by Mr Msweli.

Context within which the misconduct was committed

The importance of context

[20] Before dealing with the Arbitrator's findings when it comes to sanction, it is essential that the matter be placed in its true and proper context. In *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and Others*,¹⁰ it was observed that:

*"As it's often said, context is everything."*¹¹

[21] The maxim finds application to the assessment of the gravity of the misconduct committed by Mr Msweli. The intrinsic gravity or otherwise of such misconduct aside, an analysis and evaluation of the misconduct can only be properly performed if due consideration is given to the context within which the misconduct was committed inclusive of the post occupied by Mr Msweli within the Municipality and the framework, constitutional, statutory and contractual, within which he was required to fulfil his obligations as the municipal manager.

The appointment of a municipal manager

[22] Section 54A(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) requires the Council to appoint:

"(a) a municipal manager as the head of the administration of the municipal council." (own emphasis)

¹⁰ 2020 (4) SA 375 (CC)

¹¹ At paragraph [37]. This maxim is attributed to Lord Steyn – see *R v Secretary for the Home Department, ex parte Daly* [2001] UKHL 26; [2001] 3 All ER 433 (HL) at 447a as approved in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* [2002] 4 All SA 138 (SCA); 2003 (1) SA 155 (SCA) at para [1].

[23] Section 54A(2) of the Systems Act provides that:

“(a) A person appointed as municipal manager ... must at least have the skills, expertise, competencies and qualifications as prescribed.”

[24] A municipal manager is also designated as the accounting officer of the Municipality for purposes of both the Systems Act¹² and the Local Government: Municipal Finance Management Act 56 of 2003¹³ (the MFMA). In *Notyawa v Makana Municipality*¹⁴ it was observed that “*municipal managers are vital to the proper administrative functioning of municipalities*”.¹⁵ As the head of the administration and as the accounting officer, the municipal manager is in charge of service delivery, financial management, compliance and strategic planning.

Financial management within municipalities

[25] The overarching Section 195 of the Constitution provides that administration within government must be accountable, that a high standard of professional ethics must be promoted and there must be an efficient, economic and effective use of resources.¹⁶ The standards set out in Section 195 of the Constitution and the legislation referred to below are mediums designed to ensure that municipalities fulfil their Constitutional duty¹⁷ to deliver services to the communities they serve in a sustainable manner.

[26] The Legislature has seen fit, through the MFMA and the Regulations promulgated thereunder as well as Treasury Guidelines, to devote much time to putting in place constraints and guardrails so as to ensure that the interests of municipalities and in particular their assets and resources are

¹² Section 55

¹³ Section 60

¹⁴ 2020 (2) BCLR 136 (CC)

¹⁵ At para [11]

¹⁶ Section 195 (1) (a), (b) and (f)

¹⁷ Section 152(1)(b) of the Constitution

protected. The MFMA has as its purpose to secure sound and sustainable management of the fiscal and financial affairs of municipalities by, *inter alia*, setting norms and standards for the management of revenues and expenditures.¹⁸

- [27] Section 62 of the MFMA requires the accounting officer of a municipality to be responsible for the management of the financial administration of a municipality and places an obligation on him, *inter alia*, to take all reasonable steps to ensure that the resources of the municipality are utilised properly; to maintain accurate financial records, to prevent unauthorised; irregular or fruitless and wasteful expenditure.
- [28] Section 78 of the MFMA requires all officials of a municipality exercising financial management responsibilities to take all reasonable steps to ensure that the system of financial management and internal control established for a municipality are carried out diligently. It is required of the relevant officials to ensure that the financial and other resources of a municipality are utilised effectively, efficiently, economically and transparently. Further, unauthorised and irregular or fruitless and wasteful expenditure and any other losses must be prevented. Senior managers performing obligations within the province of this Section do so under the supervision and watchful eye of a municipal manager.¹⁹

Procurement

- [29] All procurement by Organs of State must be scrutinised through the lens of Section 217(1) of the Constitution. It provides that:

“When an organ of state ... contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.” (own emphasis)

¹⁸ Section 2 of the MFMA

¹⁹ Section 78 (2) of the MFMA

[30] In terms of Section 111 of the MFMA, municipalities are obliged to develop a SCM policy which comports with Section 217 of the Constitution and satisfies the plethora of regulatory conditions contained in Section 112 of the MFMA. In terms of Section 62(1)(f)(iv) of the MFMA, it is the accounting officer who must ensure that an SCM policy is implemented in accordance with the applicable provisions in the MFMA.

[31] Section 118 of the MFMA provides as follows:

“118. No person may –

- a) interfere with the supply chain management system of a municipality or municipal entity; or*
- b) amend or tamper with any tenders, quotations, contracts or bids after their submission.”*

[32] A municipal manager is required to account for, report on, and accept responsibility for financial expenditure when goods and services are procured. More often than not, as in this case, procurement in Local Government involves the expenditure of large amounts of public funds. Regrettably, experience has taught us that there is a minefield of ills which plague the awarding of tenders or “bids”. Municipalities have shown themselves to be vulnerable targets when it comes to corruption, nepotism, cronyism and even institutional capture. It is thus imperative that procurement should be free from any appearance of improper interference or influence. National Treasury has, through its circulars, stressed that audit findings have revealed that municipalities have been guilty of unsound financial management including the circumvention of official competitive bidding processes. It has frequently stated that the relevant provincial treasuries are available to assist municipalities should guidance be required.

[33] In guarding against interference in procurement and SCM processes, it is critical that a bright line be drawn between the role of the governing and legislative body (the Council) and that of the officials who are in charge of the

administration of the Municipality (the municipal employees led by the municipal manager). The Council exercises what is called political oversight and oversees the administration. It takes overall responsibility for policy decisions and the approval of the budget. Whilst the Council approves the budget, it is the officials of a municipality who incur expenditure and who are responsible for the effective, efficient, economical and transparent use or management of the municipal resources.

- [34] The Code of Conduct for Councillors prohibits their interference in operational issues.²⁰ In terms of Section 52(b) of the MFMA, the Mayor of a municipality is expressly prohibited from interfering with the responsibilities of an accounting officer. In terms of Section 117 of the MFMA, Councillors are prohibited from participating in procurement processes. Requiring that Councillors and management stay in their respective lanes is essential to maintaining the integrity of the SCM system of a municipality. Councillors are political appointees. Although many politicians no doubt possess impressive qualifications, there is no requirement that they have any specialised knowledge or experience when it comes to SCM or any other aspect of financial management. By contrast, the employment of officials within a municipality must be based on merit and they are required to possess the requisite qualifications and experience attaching to the post they occupy. Section 119 of the MFMA provides that all officials involved in the implementation of the SCM Policy must meet prescribed competency levels. The more senior the employee, the greater the qualifications and experience required. Once appointed, officials from SCM, unlike Councillors, have security of employment in that they are protected from unfair dismissal in terms of, *inter alia*, the provisions of the Labour Relations Act 66 of 1995 (the LRA). There can thus be no excuse for them to become pliable employees who shirk their responsibilities when it comes to SCM and other aspects of financial management.

²⁰ See item 12 of the Code of Conduct for Councillors Schedule 7 of the Systems Act.

[35] As mentioned, it is, regrettably, common knowledge that one of the most ubiquitous sins in Local Government is the improper interference in procurement processes. The promise of lucrative tenders has, *ala* the gold rush prospectors of days of yore, spawned a breed of businessmen who have become known as “*tenderpreneurs*”.²¹ Although it is a bleak reality to digest, it cannot be gainsaid that there exist delinquent politicians and greedy businessmen who, motivated by self-interest, view tenders with a predatory eye. Officials, especially SCM officials of a municipality are, on the other hand, required to be both objective and independent. In a word, “*ice cold*”²². But the Constitution demands more of senior officials than this. They must have the character to stand up to powerful political and business interests. In *Member of the Executive Council for Health, Province of the Eastern Cape NO and another v Kirland Investments (Pty) Limited t/a Eye and Laser Institute* both the Supreme Court of Appeal²³ and the Constitutional Court²⁴ stressed that those who bear the heavy mantle of making administrative decisions which bring in their train the expenditure of large amounts of public funds or other matters of consequence, should demonstrate “*moral courage*” and not yield to improper interference or influence. Even before the advent of the Constitution, at common law, it was trite that a functionary tasked with exercising a discretion must do so independently and not at the behest, or to satisfy, the wishes of a third party²⁵.

Contractual obligation

[36] Turning to the contractual obligations resting on and common law duties of a municipal manager. He owes a fiduciary duty of good faith to and must only act in the interests of the municipality. The nature of this duty was explained

²¹ A term commonly used in South Africa to describe an individual or business that profits from government tenders, often through political connections and not through merit or fair competition.

²² See *Coega Development Corporation (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 923 (LC); [2016] 2 BLLR 151 (LC) at para [93]

²³ 2014 (3) SA 219 (SCA); [2013] JOL 30626 (SCA) at paragraphs [1], [7] to [11] which portion was quoted and confirmed by the Constitutional Court at para [31]

²⁴ *Member of the Executive Council for Health, Province of the Eastern Cape NO and another v Kirland Investments (Pty) Limited t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) at paragraphs [31] and [38]

²⁵ *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117 F-G

by Heher JA in *Phillips v Fieldstone Africa (Pty) Limited & Another*²⁶ in comprehensive detail with reference to both local and international jurisprudence. Importantly, the more senior the position, the greater the duty.²⁷

Financial misconduct by a municipal manager

[37] Section 171 of the MFMA makes it clear that “*financial misconduct*” is a trespass which is considered to be more serious than others. It has its own category. It reads:

“Financial misconduct by municipal officials

171.(1) *The accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently—*

(a) contravenes a provision of this Act;

(b) fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality;

(c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or ...”

When do municipal managers commit criminal conduct

[38] As to what constitutes an offence by a municipal manager, the Legislature has provided that:

“Offences

²⁶ [2004] 1 All SA 150 (SCA); 2004 (3) SA 465 (SCA) see generally paras [30] to [34]

²⁷ See also *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* 2019 (5) SA 354 (CC) generally at paras [49] to [76]

173. (1) *The accounting officer of a municipality is guilty of an offence if that accounting officer—*

(a) deliberately or in a grossly negligent way—

(i) contravenes or fails to comply with a provision of section 61(2)(b), 62(1), 63(2)(a) or (c), 64(2)(a) or (d) or 65(2)(a), (b), (c), (d), (f) or (i);

(ii) fails to take reasonable steps to implement the municipality's supply chain management policy referred to in section 111;

(iii) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure; or

(iv) fails to take all reasonable steps to prevent corruptive practices—

(aa) in the management of the municipality's assets or receipt of money; or

(bb) in the implementation of the municipality's supply chain management policy;

(b) deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality; or

(c) deliberately provides false or misleading information in any document which in terms of a requirement of this Act must be —

(aa) submitted to the Auditor-General, the National Treasury or any other organ of state; or

(bb) made public...."

[39] When it comes to the sentences which a Criminal Court may impose for financial misconduct, the MFMA provides:

"Penalties

174. *A person is liable on conviction of an offence in terms of section 173 to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.”*

When will a municipal official be personally liable for expenditure

[40] There are other serious consequences for officials who are responsible for unauthorised, irregular or fruitless and wasteful expenditure. I quote further from the MFMA:

“Unauthorised, irregular or fruitless and wasteful expenditure

32. (1) *Without limiting liability in terms of the common law or other legislation*

...

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

...

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

...

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

[41] In *Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality*²⁸ the Supreme Court of Appeal held that Section 32 of the MFMA was a self-standing provision that imposed statutory liability on political office-bearers

²⁸ (2025) 46 ILJ 277 (SCA) At the time of the delivery of this judgment leave to appeal to the Constitutional Court was pending.

and municipal officials for unauthorised, irregular, and fruitless and wasteful expenditure as defined by Section 1 of the MFMA. The Court held that the recovery of unauthorised, irregular and fruitless and wasteful expenditure is not optional. It noted that the Legislature viewed the prohibited conduct in such a serious light that it placed an obligation on the accounting officer to report to the South African Police Service all cases of alleged irregular expenditure which constitute criminal offences.

The Charge concerning the appointment of the Service Provider without following any SCM procedures

Introduction

[42] It was not in dispute that Mr Msweli appointed the Service Provider on a contract potentially worth millions of Rands without following any SCM procedures. Mr Msweli maintained that he had acted in terms of Regulation 36 of the Municipal Supply Chain Management Regulations (the Regulations).²⁹ In summary, it was Mr Msweli's case that a deviation was necessary because the Municipality was pressed for time when it came to the submission of a business plan required by the Department of Energy (the Department). He feared that if he had followed the SCM procedures, this would have delayed matters and the Municipality may, as a result, have forfeited funding, so he said.

Statutory framework

[43] The Regulation, as relied on by Mr Msweli, provides:

“36 Deviation from, and ratification of minor breaches of, procurement processes

²⁹ At the arbitration reference was made to Section 36 of the SCM Policy of the Municipality, a document not contained in the record before the Court. It is however clear from a reading of the transcript that Section 36 of the SCM Policy mirrored Regulation 36.

(1) A supply chain management policy may allow the accounting officer—

(a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only—

(i) in an emergency;

(ii) if such goods or services are produced or available from a single provider only;

(iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile;

(iv) acquisition of animals for zoos; or

(v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes;
and

(b) to ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.

(2) The accounting officer must record the reasons for any deviations in terms of subregulation (1)(a) and(b) and report them to the next meeting of the council, or board of directors in the case of a municipal entity, and include as a note to the annual financial statements.” (own emphasis)

[44] The reason for the constraints on deviations is to curb abuse in the form of either patronage or corruption, to ensure fairness and transparency when it

comes to the appointment of service providers and to ensure value for money when it comes to the securing of goods and services by the Municipality. In an article published in *De Rebus*³⁰ the author³¹ notes the abuse of Regulation 36 discretionary powers by municipal managers. He urges stakeholders not to lose sight of the fact that Organs of State, such as municipalities, should do everything within the parameters of the law to procure goods or services on the best available terms to ensure conformity with Section 217(1) of the Constitution, which looms over every procurement process.

[45] The peremptory obligation to report deviations fosters accountability and transparency. It is one of the mechanisms for reining in abuse. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*³² the Constitutional Court emphasised that the abuse of the deviation procedure was one of the oldest tricks in the book. It explained that:

“[27] ...As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.

...

[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative

³⁰ 1 May 2024

³¹ Sithelo Magagula

³² 2014 (4) SA 179 (CC)

procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.” (own emphasis)

The Arbitrator’s determination

[46] By way of introduction, I quote the Arbitrator’s findings on this charge:

“Allowed/approved/permitted the appointment of Kuhlemcebo Engineers, and instructing them to proceed with pre-engineering and implementation work

...
34. The employee was charged for appointing Kuhlemcebo Engineers without following the prescribed SCM processes. This charge does not require detailed consideration, because the employee conceded that he failed to comply with the SCM processes. He however explained that he was pressed for time, as the municipality stood to lose funding from the Department of Energy for electricity upgrades. He further argued that the service provider was appointed on risk, and the former mayor

was aware of his actions, and was expected to inform Council accordingly.

35. *Clause 36(1) of the employer's SCM policy allows the accounting officer to dispense with the official procurement processes, but only in an emergency (amongst a few exceptions). The employer disputed that it was an emergency situation, because the awarding of funds is gazetted, and happened in any event despite the submissions prepared by Kuhlemcebo Engineers.*
36. *As far as I know, risk appointment (contingency basis) are (sic) not provided for in the municipal financial legislation. The MFMA places an obligation on an accounting officer to safeguard the public funds under his/her control, the legislative measures are intended to prevent any potential of wasteful, fruitless and/or irregular expenditure. I am not convinced that the appointment of the service provider posed an emergency to the extent that the employee could discard all procurement and SCM procedures. Merely informing the mayor about his actions without the slightest attempt to comply with legislative prescripts, is in my view a dereliction of his fiduciary duty. I accordingly find that the employee breached this rule."*

[47] On a broad general level, I do not have an objection to the Arbitrator's reasoning. He did appreciate firstly that there was no basis to justify the complete failure by Mr Msweli to follow SCM procedures and secondly that Mr Msweli had not taken even one step towards reporting the purported deviation. However, in my view, more could and should have been said about the gravity of the misconduct, having particular regard to the context within which it was committed as well as the disingenuous manner in which Mr Msweli mounted his defence and gave his evidence.

[48] What the Arbitrator and the parties overlooked was that the defence which was put up by Mr Msweli, that he was acting in terms of Regulation 36, was

not a defence put to the Municipality. The defence which was put to the witnesses of the Municipality was two-fold. Firstly, it was the case of Mr Msweli that the Service Provider was appointed “*on risk*” and for that reason it was unnecessary for SCM procedures to be followed. Secondly, Mr Msweli argued that what should count in his favour is the fact that the payment to the Service Provider (which he, himself, had authorised) was stopped and accordingly the Municipality did not suffer any financial losses.

[49] Before dealing with the failure by Mr Msweli to put his version about invoking Regulation 36 to the Municipality, I will address the two defences which he did, in fact, put to the Municipality. Leaving aside, for the moment, whether appointments, as it were, on risk, are permissible, the more important point is that there is, unsurprisingly, no provision in the Regulations mandating that where service providers are engaged on risk, the Municipality does not need to follow the SCM procedures. Accordingly, the outrageous suggestion by Mr Msweli that there was a pocket of appointments which could be made by municipalities, namely appointments on risk, which were subject neither to legal scrutiny nor to the reach of Section 217 of the Constitution, falls to be rejected out of hand. Such a contention is repugnant to the rule of law and the principle of legality as enshrined in Section 1(c) of the Constitution. Section 217 of the Constitution applies to all procurement. Ironically, when Mr Msweli gave evidence, he, albeit unwittingly, acknowledged as much through his belated reliance on, and recourse to, Regulation 36. If there were no SCM procedures applicable, there would have been no need for a deviation.

[50] It is beyond the purview of this judgment to express a definitive view on whether the Arbitrator was correct when he intimated that it was, in the first place, impermissible *per se* for the Municipality to have entered into a contract on risk nor is it necessary for me to do so given the more important issue which is the failure by Mr Msweli to follow any SCM procedures. My preliminary view however is that I can see no reason why such a genre of contract should, as a matter of principle, be proscribed. I also could not find anything in the governing prescripts which prevents contracts on risk. I am thus not convinced that the Arbitrator was correct in his finding on this

point.³³

[51] Assuming such contracts are permissible, they must be lawful. In my view, however, the contract which Mr Msweli purported to enter into with the Service Provider was patently unlawful. As I understand it (the terms of the agreement are detailed below), in substance, the agreement was that the Service Provider would draw up a business plan *gratis* or free (without any expectation of remuneration) and that if, on the strength of that business plan, the Municipality received funding, then the Service Provider would receive work from the Municipality which would be financed from the funding so received. This arrangement has the characteristics of what in legal parlance is called *touting*. To put it crudely, the arrangement was that the Service Provider, motivated by the promise of a large amount of open ended work being given to it in the future, would compile a business plan free of charge. In my view, this type of *quid pro quo* arrangement in terms of which a service provider effectively “buys” further work by performing other work for free anathema to Section 217 of the Constitution. This is for the obvious reason that, at the end of the day, the Service Provider will, in terms of the agreement, be given work worth potentially millions of rands to the exclusion of its competitors and without having to participate in a procurement process. Such a state of affairs would not only be unfair and untransparent, but it would provide fertile ground for abuse by the Service Provider and it would all but be a certainty that the Municipality would not receive the best value for money.

[52] One would have thought that the proper and lawful way to do things, if a contract was going to be concluded on risk, would have been for the Municipality to have followed a SCM process, expedited if necessary, in terms of which interested parties were requested to provide quotations to develop the business plan in question. That way, the contract would address the situation at hand (the need to urgently draw up a business plan), rather

³³ See generally *New Integrated Credit Solutions* wherein the Supreme Court of Appeal did not appear to have any difficulty with a municipality concluding a contract on risk.

than constituting a metaphorical ticket to an undetermined amount of work for an extended period in the future in the absence of any SCM procedures being followed.³⁴ Thus, although it is not necessary for me to decide for the purpose of this judgment, it is my strong *prima facie* view that the appointment by Mr Msweli of the Service Provider was, on the terms of the contract itself, unlawful and invalid.

[53] I turn now to Mr Msweli's reliance on the fact that the payment to the Service Provider which he had authorised on the strength of the contentious agreement was stopped. It was not in dispute that this was done by the Chief Financial Officer (the CFO). On the back of this development, Mr Msweli sought to make capital out of the circumstance that the Municipality did not suffer any financial losses and appeared to contend that he should, for that reason alone, effectively be immune from criticism or culpability. I find this argument to be contrived, cynical and self-serving. It is akin to contending that someone who drives home intoxicated is not culpable if he does not have an accident or that a security guard who falls asleep on duty is not culpable if, by good fortune, the premises, which he was supposed to be guarding, are not burgled. It is analogous to arguing that a thief, who is apprehended red-handed in the act of stealing monies, is not culpable because his attempt at theft failed. Nothing further needs to be said about this argument, save to state that the absence of logic in it is surpassed only by its lack of substance.

[54] As mentioned, Mr Msweli failed to put to the Municipality his version that he had acted in terms of Regulation 36. Yet it ultimately transpired that reliance on Regulation 36 was the foundation of his case. It is trite that, based on notions of fairness and justice, the version of an opposing party is required to be put to the other side so that party will have an opportunity to deal with it by way of, *inter alia*, the leading of evidence. Whilst a version not so put is not inadmissible *per se*, it will (save in exceptional circumstances which do not

³⁴ *Ngaka Modiri Molema District Municipality v Naphtronics (Pty) Ltd and Others* (M379/2015) [2018] ZANWHC 8 (25 May 2018) at para [48]

apply to this matter) have little or no probative value. This principle has been endorsed by the Labour Appeal Court³⁵, by the Supreme Court of Appeal³⁶ and the Constitutional Court³⁷. *Masilela v Leonard Dingler (Pty) Ltd*³⁸ elucidates the principle clearly with reference to events which occurred at arbitration proceedings about a labour dispute. In this matter, it was only in his evidence in chief that Mr Msweli took the arbitration into his confidence and explained about the allegedly dire situation the Municipality was allegedly facing, which had compelled him to act in terms of Regulation 36. The Municipality had no opportunity to deal with any of the principal factual assertions underpinning this defence which was raised *ex post facto*.

[55] I think that, in this matter, one can however go further. It seems to me that the facts ineluctably drive one to the conclusion that, not only is this a version which was not put to the Municipality and, for that reason alone, should not be accepted, it, additionally, is a version which has all the hallmarks of a recent fabrication. I say this for three main reasons:

55.1 The first is that Mr Msweli was legally represented and if it was his case from the outset that he had acted in terms of Regulation 36, then he would have instructed his legal representative to put this version to the Municipality.

55.2 The second is that the version Mr Msweli put to the Municipality is, as has been pointed out, irreconcilable with the version that he presented in evidence. The two mutually destructive versions are, firstly that there was no obligation to comply with SCM procedures because the Service Provider was engaged on risk and, secondly, that although there was such an obligation, a deviation was

³⁵ *Absa Brokers (Pty) Ltd v Moshwana N.O. and Others* (2005) 26 ILJ 1652 (LAC); [2005] 10 BLLR 939 (LAC) at paras [39] to [42] *SA Nylon Printers (Pty) Ltd v David* [1998] 2 BLLR 135 (LAC) at 137 and 138

³⁶ *SA Veterinary Council v Veterinary Defence Association* [2003] 2 All SA 156 (SCA); 2003 (4) SA 546 (SCA) at 557B-C

³⁷ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras [61] to [63]

³⁸ [2004] 4 BLLR 381 (LC) at para [28]

implemented. In such circumstances, there can be little or no room for an argument that the failure to put the version was somehow an oversight as opposed to a case where Mr Msweli changed his version when he gave his evidence in chief.

55.3 Thirdly, as will appear from the analysis set out below, the version which Mr Msweli gave regarding having purportedly acted in terms of Regulation 36 is simply not credible. It is riven with improbabilities, illogicalities, embellishments and contradictions.

The factual matrix

[56] Before working for the Municipality, Mr Msweli was employed both as a municipal manager as well as an executive director in other municipalities. He was thus an employee with substantial experience. He commenced his employment with the Municipality on 15 March 2018.

[57] In his evidence in chief Mr Msweli stated, for the first time, that he was under pressure to appoint consulting engineers in order to secure funding. He did so without following any SCM procedures as he was concerned that if he did not set matters in motion with a degree of urgency, the Municipality may lose funding.

[58] He thus appointed the Service Provider on 24 July 2018. The Service Provider was tasked with preparing a business plan for the Integrated National Electrification Program (INEP) administered by the Department. The purpose of the plan was to secure funding for the Municipality for the following financial year, namely 2019/2020. The financial year for Local Government and municipalities runs from 1 July to 30 June.

[59] Mr Msweli stated that the closing date for the submission of the business plan was 6 July 2018. He did not however produce any documentation to support this contention i.e. that the application for funding effectively needed to be made one year in advance such as, for example, an invitation to apply

for funding. This notwithstanding the fact that, when the CFO gave his evidence, he hotly disputed Mr Msweli's version when it came to how funding was secured by the Municipality.

[60] On a careful consideration of the timeline, it is clear that the offer of appointment by Mr Msweli to the Service Provider was, on his own version, made more than two weeks post the alleged deadline of 6 July 2018. The business plan was only finalised three weeks after the deadline, namely on 28 July 2018. What the objective facts thus demonstrate is that, despite Mr Msweli's concerns about being constrained by the 6 July 2018 cut-off, non-compliance with the alleged deadline had no adverse consequences for the Municipality.

[61] As mentioned above, it is the case of Mr Msweli that the Service Provider was appointed on risk in the sense that it would not be paid for the work done when it came to the compilation of the business plan, but that if funding was secured, then the Service Provider would be engaged on further projects which needed to be completed with a view to upgrading the electrical services provided to communities served by the Municipality. The offer of appointment, addressed to the Managing Director of the Service Provider, Mr Nkabinde, read as follows:

"1. This letter serves to inform you that the client, Inxuba Yethemba Local Municipality (IYM), has resolved to appoint your Kuhlemcebo Engineers (Pty) Ltd, to develop the business plan to source funding and manage the Implementation of the project upon the approval of the required funding as per the Business Plan for the above-mentioned project.

2. This appointment is for the inception (feasibility study) concept and visibility (preliminary engineering design) engineering stages and project registration with the Department of Energy through INEP Grant or any other for the above-mentioned project.

...

6.1 This appointment is for the sourcing of funding for construction, refurbishment and upgrading the electrical infrastructure and network in both Cradock and Middleburg for ensuring effective management of these facilities. In compliance with environmental regulatory framework. The project/s will be located in the IYM jurisdiction area.

...

7.1 The Consultant is made aware of the fact that this appointment is undertaken on a provisional basis and until such stage that approval of funding for the project is obtained.

7.2 Upon the approval of the funding to be sourced, consider your appointment confirmed for managing the implementation of this project.

...

7.4 Subject to the Consultant's performance in terms of this appointment and the conditions as stipulated in Item 7.1, this appointment may be considered for the extension of the remainder of the engineering stages at the sole discretion of the IYM.

...

8.1 The fees shall not exceed 10% of the total value of the project.

8.2 *One professional fee account per month may be submitted, separately for each project.” (own emphasis)*

- [62] A response was required within seven days. In terms of the offer of employment, Mr Msweli gave the Service Provider 14 days to finalise the business plan.
- [63] As to the value of the project, it was to be determined by the amount of funding, if any, which was to be received by the Department. An amount of R26 million was requested, in the business plan, by the Service Provider. It follows that it would mean that if the application had been fully successful, the Service Provider would be entitled to charge fees of up to ten percent of that amount, which would have amounted to R2.6 million.
- [64] According to Mr Msweli, what then happened is that a meeting was convened by the Department in September 2018. He stated, somewhat vaguely, that at this meeting he was informed that there were “*tentative indications*” by the Department about the approval for funding. He provided no other details about the meeting. The arbitration was not told where the meeting took place, who attended it, whether any figures were mentioned and what purpose could have been served by the Department convening a meeting to merely inform the Municipality of the “*tentative*” approval. There was no correspondence, agenda or minutes to corroborate the alleged meeting. Decisively, as with most of Mr Msweli’s evidence in respect of this charge, the September 2018 meeting was not put to any of the witnesses of the Municipality. One plausible inference to be drawn is that this assertion was yet another untruth told in an ill-conceived attempt to explain the fact that the following month he would transmit a communication to the Service Provider instructing it to perform work (see below).
- [65] Mr Msweli testified that the next stage in the process (after the September 2018 meeting), would have been for the Director General to have considered the request for funding. Thereafter, presumably only if the Director General was satisfied, would he then make a recommendation to Treasury for the

funding to be approved. Mr Msweli did not say as to when this would occur but he did say that confirmation of funding would only be received the following year.

- [66] On 17 October 2018, Mr Msweli transmitted a letter to Mr Nkabinde of the Service Provider recording as follows:

“Your letter of appointment for the REFURBISHMENT AND UPGRADING OF THE MUNICIPAL ELECTRICAL INFRASTRUCTURE AND NETWORK (sic) LOCATED IN CRADDOCK AND MIDDLEBURG DATED 18 July 2018 has the reference.

This letter serves to inform you that you are permitted to resume with the pre-engineering and implementation as you possible can,

Background

Commercial Development and other peripheral services have resulted in large power requirements and as a High Demand Season the NMD is exceeded which results in heavy penalties imposed by Eskom.

Thanking you in advance in anticipation of your prompt response in this regard.”

- [67] This communication, which Mr Msweli contended was an instruction to the Service Provider to perform work in terms of the agreement with the Service Provider, is problematic on two levels. Firstly, it records that the appointment for the project was initially made on 18 July 2018. It seems that it was thereafter, on an unidentified date, held in abeyance until 17 October 2018. This was before the appointment of the Service Provider on 24 July 2018 to compile the business plan. It would seem further that it was even before the decision purportedly taken in terms of Regulation 36. No explanation was given for this contradictory state of affairs which raises the possibility that the Service Provider was engaged even before the alleged decision on the

deviation, although this issue was, admittedly so, not traversed by any party in the arbitration or in the papers before this Court. I thus do not intend to say anything more about it.

[68] Secondly, as at 17 October 2018, no funding had, on Mr Msweli's own version, been confirmed let alone received. In short, Mr Msweli instructed the Service Provider to perform work where there was no approved budget. This instruction was clearly unlawful. It laid the basis for unauthorised expenditure. The instruction was also unlawful because it was in breach of the contract with the Service Provider which stipulated that it was only once funding had been received that it would be permissible for the Municipality to engage the Service Provider on the projects contemplated by the contract.

[69] What thereafter happened is that just under two weeks later, the Service Provider submitted an invoice for an amount of R688 896.00. The payment of the invoice was authorised by Mr Msweli on 13 November 2018. The authorisation was however "*cancelled*" by the CFO on the same day, who was shocked to discover the existence of the extraordinary contract.

[70] Tellingly, when the CFO stopped the payment there was not so much as a semblance of an objection by Mr Msweli. He did not, by way of illustration, confront the CFO and inquire from him as to how he, as junior employee reporting to him, could effectively "*override*" him. He also did not attempt to justify his conduct with reference to Regulation 36. He did not even mention it. In short, he acted as one would expect an official to act who has been caught red handed engaging a service provider without having followed any SCM procedures. Mr Msweli, remarkably so, also testified that he and the CFO met the Service Provider and explained to it that the contract could not be honoured because no SCM procedures were followed. The Service Provider, without any ado, accepted that its appointment was unlawful and indicated that it would not take the matter any further. Thereafter, a new consultant was appointed and there was no prejudice to the Municipality.

[71] Confirmation of the funding was only received half a year later, on 10 May

2019, in the form of an official communication from the Director General which I quote:

“CONFIRMATION OF THE 2019/20 FINANCIAL YEAR ALLOCATION AND CONDITIONS FOR TRANSFERS.

This letter serves to confirm that Inxuba Yethemba Local Municipality has been allocated R10,773,000.00 for the implementation of the electrification projects. The Department of Energy will transfer the allocated funds into the municipality's primary bank account as verified by National Treasury on the 15th of July 2019, 15th of November 2019 and on the 15th February 2020.

The first transfer of July 2019 will be made on condition that the municipality has submitted a signed contract for the implementation of the electrification projects for the 2019/20 financial year together with a projects list and project implementation plan. The Municipality should also submit proof that they have appointed the service provider or in the process of finalizing the appointment of a service provider in line with clause 6.3 of the contract between the Department of Energy and the municipality for the 2019/20 financial year.

The transfer for November 2019 and February 2020 will be made on condition that the municipality has spent 80% of the previous transfer and have complied with the reporting requirements in terms of Section 12(2) and 12(4) of the 2019 Division of Revenue Act and in terms of section 71 of the Municipal Finance Management Act (MFMA).

Should the municipality not comply with the above mentioned conditions for transfer, the municipality will be subjected to the withholding of funds in terms of section 18, stopping of an allocation in terms of section 18 and reallocation of funds in terms of section 20 of the 2019 Division of Revenue Act.”

- [72] Two observations can be made. The first is that the funding was in the nature of a conditional grant. It may have been withdrawn or stopped. No monies may have been transferred at all. This would make the contract entered into with the Service Provider unworkable because that contract was premised on the provision of unconditional funding. In short, given the nature of the funding which was to be received, the condition in the contract about funding could not, as a matter of fact and law, have been met.

Analysis of Mr Msweli's evidence

- [73] The CFO, testifying on behalf of the Municipality, explained that a competitive bidding process should have been followed when it came to the appointment of the Service Provider. He explained that a tender should have been published before any appointment could be made so that interested parties were afforded an opportunity to compete for the work. The “*bids*” would then be evaluated and adjudicated, culminating in an award being made.
- [74] As to the regulatory framework, Regulation 19 stipulates that a municipality may procure goods or services above a transaction value of R200 000.00 (inclusive of VAT) and long term contracts only through a competitive bidding process³⁹. In terms of Regulation 35 an accounting officer of a municipality may procure consulting services, taking into account Treasury guidelines. A contract for the supply of consultancy services (such as those for which the Service Provider was engaged) must be procured through a competitive bidding process, if the value of the contract exceeds R200 000.00 or the duration of the contract exceeds one year. Regulation 22 requires that advertisements for competitive bidding be advertised for at least 14 days before closing date, however, the accounting officer is permitted to stipulate a shorter closing date if the shorter period can be justified on the basis of

³⁹ No requirement for goods or services above an estimated transaction value of R200 000.00 may deliberately be split into parts or items of a lesser value merely for the sake of procuring the goods or services otherwise than through a competitive bidding process. Regulation 12 provides that when determining transaction values, a requirement for goods or services consisting of different parts or items must as far as possible be treated and dealt with as a single transaction.

urgency or emergency or any exceptional circumstances, where it is impractical or impossible to follow the official procurement process.

- [75] Mr Msweli conceded, under cross-examination, that he was acutely aware of the applicable SCM procedure:

“MR NZUZO: Do you mind sharing with us, with the tribunal, what is that procedure, that process, that needs to be followed in appointing consultants?”

MR MSWELI: You are appointing a consultant, you will have to advertise, call for proposals for the consultants to be appointed by the municipality and then upon receiving their responses, you evaluate, you award, then you issue an appointment letter. Summarily that is what gets to be done.

MR NZUZO: So that is the procedure. Yes, I agree, that is competitive bidding.

MR MSWELI: Yes.”

- [76] Mr Msweli, however, contended that the circumstances which confronted him were exceptional and warranted a deviation as contemplated by Regulation 36. That was the reason for the complete disregard of the SCM procedures, so he protested. He also repeatedly stated that the issue with his conduct was not non-compliance; rather it was partial compliance. Hence his refrain, in his evidence, that he had not “fully” complied with the SCM procedures.

- [77] As I have stated above, in my view, the entire account about acting in terms of Regulation 36 was a clumsy, but deceptive, postscript thought up at the eleventh hour, purely for reasons of expediency to justify the appointment of a pre-selected consultant (the Service Provider) over an extended period without a competitive tender process. For this reason alone, it should be dismissed outright. This aside, the evidence of Mr Msweli about the alleged

Regulation 36 decision was entirely unsatisfactory in a number of respects, which I detail below.

- [78] The first thing that is strange about it is that there is no trace of the deviation decision allegedly made by Mr Msweli, not even some type of internal note or *aide-mémoire*. What conventionally happens when it comes to deviations is that the end user directorate puts in a request and provides a motivation for a deviation. This is then scrutinised by the SCM unit which either recommends it or does not give its approval. It then crosses the desk of the CFO who would give his input and refer it to the municipal manager for final decision. As stated, in this matter, there is however no record whatsoever of the deviation. On the contrary, when the appointment was discussed with the CFO and the Service Provider it was conceded that it was unlawful because no SCM procedures had been followed. It was as if the Regulation 36 deviation did not exist. In fact, Mr Msweli candidly admitted that after the Municipality and the Service Provider parted ways, there was no difficulty in appointing another service provider, presumably following the applicable SCM procedure.
- [79] In the submissions made on behalf of Mr Msweli an attempt was made to place the blame on his predecessor who, it was submitted, must have been guilty of poor planning. For that reason, Mr Msweli had been placed under pressure. This narrative however has little or no foundation in the evidence. Mr Msweli did not even explain as to how and when he became aware of the need to apply for funding. It was clear from Mr Msweli's evidence that he simply assumed that the Municipality would forfeit funding, on two occasions, testifying that "*surely*" the Municipality would lose funding. He also contended that the Municipality had, the previous year, forfeited funding worth R7 million. However, on closer scrutiny, his evidence in this regard was that the Municipality had forfeited funding because it did not implement its electricity program and thus supposedly forfeited R7 million (presumably as a result of the operation of provisions contained in the conditional grant); not because it had not timeously applied for funding. When the CFO of the Municipality was cross-examined, Mr Msweli put to him that the cut-off was

30 July 2018 (a date which conveniently was only two days after the business plan was submitted), yet when he testified, he was adamant that the deadline was 6 July 2018 and the Municipality was late with its business plan. No explanation was given as to why the substantial failure to comply with the alleged cut-off did not result in the forfeiture of funds.

[80] But even if Mr Msweli was under pressure because of the Municipality's own negligence or maladministration and even if the matter was so critically urgent that there was no time even for an expedited SCM procedure to be followed, in my view it would not be permissible for the Municipality to rely on its own negligence or ineptitude as a basis for flouting SCM procedures. That would be akin to a municipality, which has failed to spend a conditional grant, at the eleventh hour, embarking on a spending spree in terms of the irregular practice of what is commonly known as "*fiscal dumping*" without following SCM procedures.

[81] In *Martin Noel Pietersen v the State*⁴⁰, the Court elucidated as follows:

"52. ... However self-imposed urgency ... does not amount to the sort of urgency or exceptional case contemplated in Regulation 36 which justifies bypassing procurement requirements. Regulation 36 contemplates real emergencies and exceptional situations where it is genuinely impractical or impossible to follow official procurement processes."

[82] In *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*⁴¹ the Court explained the position as follows:

"[79] What emerges from the instruments that I have discussed is that generally speaking when the value of the tender exceeds R500 000 a competitive, open, procurement process must be followed. It

⁴⁰ Case Number: A309/2017 as handed down on 6 February 2019 in the Western Cape Division of the High Court

⁴¹ [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP)

*is only in exceptional circumstances that deviations from this norm will be justified. Those circumstances are urgent cases and cases of emergency. Poor planning cannot make a case an urgent one or an emergency.*⁴² *In this matter, the RAF has conceded that the expiry of the tender validity period before the process was completed was brought about as a result of poor planning: the time that was required was hopelessly under-estimated. As a result, the decision to award the tender is reviewable in terms of s 6(2)(a)(i) of the PAJA in that the RAF had no authority to follow the ‘closed bid’ process that it claimed to have followed, with the result that no valid tender decision was taken. The decision is also reviewable in terms of s 6(2)(b) of the PAJA because ‘a mandatory and material procedure . . . prescribed by an empowering provision was not complied with’.*” (own emphasis)

- [83] It is revealing to quote some passages of the evidence of Mr Msweli. Reference is made first to one of his responses to a question from his legal representative:

“MR MSWELI: But further I just need to note, highlight this, Mr Ntshebe, through you Commissioner, that in terms of clause 2 of that particular section, it makes provision that I should have submitted a report to council indicating the reasons for the deviation and I must admit that owing to the pressure of time and a lot of other things that really overwhelmed us during the process around this matter, we could not fully comply with that provision, because that is what should have happened, but unfortunately we could not do it.” (own emphasis)

- [84] Mr Msweli’s mantra that he had not “fully” complied with the SCM procedures is misleading because it, by necessary implication, misrepresents that there

⁴² *CEO, SA Social Security Agency & others v Cash Paymaster Services (Pty) Ltd* (note 18); *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA) – an example of where improper planning gave rise to false urgency; Phoebe Bolton ‘Grounds for Dispensing with Public Tender Procedures in Government Contracting’ (2006) 9 PER 2

was partial compliance. It cannot be overemphasised that this was not a case of partial compliance. There was not an iota of compliance. Mr Msweli did not follow any SCM procedures whether expedited or otherwise. When he contrived to act in terms of Regulation 36, he, on his own version, inexplicably failed to do the most important thing i.e. to disclose to the Council the drastic step which he had taken. Although it was not expressly covered at the arbitration, it is clear that he also did not include a note to the annual financial statements on the deviation as required by Regulation 36(2).

[85] The failure by Mr Msweli to report the deviation and the reasons underpinning it to Council is as baffling as it is incomprehensible. It would have taken no more than a few minutes for Mr Msweli to have recorded the reasons for the deviation. How could it be that Mr Msweli had time to compile a comprehensive offer of appointment spanning some five pages (allowing the Service Provider seven days within which to respond and 14 days within which to draw up the plan); yet he was not able to spare a moment to jot down the reasons for the deviation so that he could account to the Council. Mr Msweli appointed the Service Provider on 24 July 2018. He was suspended on 28 May 2020. He was thus attending Council meetings for a period of almost two years and during that period he did not bother to report the deviation to Council.

[86] The fact that the Municipality did not honour the agreement with the Service Provider did not absolve him (as he appeared to suggest during his evidence) of his obligation to report the deviation to Council. The obligation to report to Council arose as soon as the Regulation 36 decision was made. It could not then subsequently fall away. The contention that, after the Municipality decided not to honour the contract, he did not have to disclose the deviation makes a mockery of the imperatives of transparency and accountability and the fact that the obligation to report deviations is one of the mechanisms to curb SCM abuse. One would have thought that if a deviation was contentious and the contract which it birthed had been aborted, then this would be all the more reason for a municipal manager to own up to it and to disclose it to the Council.

[87] It has been held by the Supreme Court of Appeal that the obligation to report a deviation is of a “material” not a “formal” nature.⁴³ In *CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd*⁴⁴ the Court stated that the rationale for providing reasons was “obvious”. The Council and its committees as well as the Auditor General have investigative powers and self-evidently one of the purposes of reporting deviations to the Council would be so that it is in a position to investigate any suspicious deviations and thereby monitor the performance and conduct of a municipal manager. As a result of the fact that Mr Msweli did not report the deviation, the Council was deprived of the opportunity of investigating and scrutinising it, so too the Auditor General. In my view, the conduct of Mr Msweli was disgraceful. What he as the accounting officer in effect did, was to conceal from his boss (the Council), for a period of almost two years, that he had appointed the Service Provider on a contract worth potentially millions of Rands, without following any SCM procedures.

[88] In a spurious attempt to defend the indefensible, Mr Msweli stated, for the first time in his evidence in chief, that the Mayor at the time was aware of the appointment of the Service Provider. Mr Msweli said that he repeatedly informed the Mayor at the meetings which were regularly held between him and the Mayor of the appointment. This allegation was not put to the Municipality. As his evidence progressed, his version regarding the Mayor metamorphosed from the Mayor having merely been aware of the appointment, to him and the Mayor working on a report to be submitted to the SCM unit, to him having furnished the Mayor with a report. Predictably, neither the report destined for the SCM nor the report which was transmitted to the Mayor were made available at the arbitration proceedings.

[89] By way of amplification, Mr Msweli claimed to be having meetings with the Mayor about the appointment of the Service Provider. Although his evidence

⁴³ *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA) at para [31]

⁴⁴ [2011] 3 All SA 233 (SCA); 2012 (1) SA 216 (SCA)

was at times difficult to understand, he appeared to suggest that these meetings constituted a “step” in the process and that a second “step” would be to approach the SCM unit. To illustrate, I quote the following passage:

“MR NTSHEBE: *So now, when I look at subparagraph 2, it says that the accounting officer must record the reasons for any deviation, in terms of sub paragraph 1A and B and report them to the next council meeting, did you do that?*

MR MSWELI: *Well, Mr Ntshebe, as I have said earlier, I did not fully comply with that provision, with particular subsection of 36, however, the executive mayor, was made aware of that, in terms of the normal meetings that we would have had and what needed to be following thereafter was the processing of the Supply Chain Management report, which ought to have included this particular appointment.*

MR NTSHEBE: *So that provision was not complied with?*

MR MSWELI: *It was not complied fully, yes.” (own emphasis)*

[90] In my view, these meetings with the Mayor, if they did occur, were improper and irregular. It is not ethical for a politician, albeit the political head of a municipality, to become involved, in any shape or form, in the administration pertaining to a procurement process. What cries out for an answer is as to why, if the Mayor was indeed told about the deviation, he did not advise the municipal manager in terms of Section 52(b) of the MFMA of his responsibility in terms of Regulation 36(2).

[91] Whilst under no legal obligation to do so, it is difficult to understand why Mr Msweli, before concluding such an extraordinary contract worth so much money with the Service Provider in what he termed exceptional circumstances, did not, instead confiding in the Mayor, take the sensible and, with respect, obvious step of discussing his intentions with the CFO or the head of the SCM unit. There were other avenues open to him. He could, as it is often done, have approached Provincial Treasury for guidance. He could have sought legal advice either internally from the legal division of the

Municipality or from one of the legal practitioners of the panel of the Municipality.

[92] The other part of this evidence which is objectionable is the contention by Mr Msweli that Regulation 36 could be satisfied if SCM delivered a report which *“included this particular appointment”*. The clear wording of Regulation 36 places the obligation to make the report on the municipal manager not on SCM. This contention is all the more disingenuous because what Mr Msweli did was to exclude the SCM unit from the decision on the deviation. It did not then lie in his mouth to seek to place blame on the SCM.

[93] At one stage, Mr Msweli even sought to place the blame on the Mayor. Reference is made to the following exchange:

“MR MSWELI: *But the only part that was done, is briefing the executive mayor, alerting him of what transpired, because every other report that comes from administration, anyway, goes through the office of the executive mayor, because he is the one that supposed to be processing the report through the mayoral committee and to council. So one part of it was done, but we did not complete the entire process.*

MR NTSHEBE: *But in that clause there is no where it says the mayor must be informed.*

MR MSWELI: *Yes, I know that* [intervenes]

MR NTSHEBE: *It lays out a process that must be followed, it does not refer to a mayor.*

MR MSWELI: *No, I note that, Mr Ntshebe, but however be that as it may, the application of the Supply Chain processes, I mean policy, is supposed to be done in tandem with the provision of the MFMA, in terms of the reporting, because every financial, every period, there are financial reports that are supposed to be submitted to the executive mayor and such reports must include supply chain reports in terms of the appointments done, expenditure that is done, which must be encapsulating this particular appointment so that is required ...*
[intervenes - speaking simultaneously]

MR NTSHEBE: When you are saying you informed. Oh, okay, sorry.

MR MSWELI: So that is why I was saying that there is a provision, the compliance of this particular clause, clause 2 particularly, was not done fully in respect of such.

MR NTSHEBE: But was the report submitted to the mayor?

MR MSWELI: Yes.

MR NTSHEBE: Was there a report?

MR MSWELI: Yes, there was a report submitted to the executive mayor, the former executive mayor, that is.” (own emphasis)

- [94] To borrow a phrase from the American playwright, Tennessee Williams, this exchange has the “*odour of mendacity*”⁴⁵ about it. Mr Msweli first seeks to mislead the Arbitrator by making out as though it is sufficient for him to have reported the deviation to the Mayor. Embarrassingly, he is then caught out by his own legal representative. In an all but unintelligible response, he then appears to bring in SCM to obfuscate issues. To crown it all, he concludes by insisting that he did, at the level of fact, submit a report to the Mayor. I have a little hesitation in finding that the allegation that he submitted a report to the Mayor is a falsehood. The central plank of his defence, up until that statement, had been that he had not had enough time to do a report. He then does a *volte face* and says that he did have time to do a report but he inexplicably submitted the report which is never produced to the Mayor and not to the Council. It is difficult not to get the impression that, stripped of all embroidery, what Mr Msweli was saying was, in effect, that he had delegated his obligation to report to Council to a politician, the Mayor, a state of affairs which is truly shocking. If that was his version, one wonders why, at the municipal meetings which followed, he did not remind the Mayor to notify Council of the deviation.⁴⁶

⁴⁵ A phrase uttered by the character Big Daddy in the play “*Cat on a Hot Tin Roof*” (1955)

⁴⁶ This particular piece of his evidence brought to mind the words of Sir Walter Scott in *Marmion* (1808):

“*Oh what a tangled web we weave
With first we practice to deceive*”.

[95] In conclusion Mr Msweli put forward contradictory versions when it came to his defence contending, *inter alia*, that there was no obligation to follow SCM procedures because the contract was on risk but ultimately settling on his *ex post facto* version that he had acted in terms of Regulation 36. When it came to the Regulation 36 defence, he presented jarringly contradictory scenarios. He stated firstly that, because of time pressures, he had had no opportunity to report the deviation. He intimated that he felt safe in the knowledge that the Mayor was aware of the appointment of the Service Provider. He then stated that he and the Mayor were having meetings discussing the deviation and preparing a report for SCM. At one stage he stated that he thought the Mayor would report the deviation. He then went so far as to say that he had transmitted a report to the Mayor. Lastly, he stated that the obligation to report the deviation fell on the SCM. All things considered, it is not possible to say, with any degree of certainty, what the case of Mr Msweli was when it came to Regulation 36.

The Charge concerning Mr Msweli's alleged signing of a variation order in excess of his financial delegations

[96] In one sense, it is not necessary to dwell on this charge in the light of the fact that it is clear from the findings above that, irrespective of what I find in respect of this charge, dismissal was clearly the only sanction to be imposed given the misconduct catalogued above.

[97] The nub of this charge is that Mr Msweli, in his capacity as the municipal manager, impermissibly approved a variation order in excess of his financial delegations with the result that there was irregular expenditure in an amount of approximately R150 000.00. Mr Msweli's defence was, in substance, firstly that he did not exceed his financial delegations and secondly, even if he did, it was a *bona fide* error and he was not negligent.

[98] The Arbitrator reasoned as follows:

“Approval of variation order on municipal contract, the amount of which exceeded your financial delegations

29. *It is common cause that as MM, the employee has the financial delegation to approve a variation order on a municipal contract to the value of 20%. Where the parties differ, is whether the 20% is based on the project value or the contract value. It is further common cause that the contract value for this specific project was R8602455.80, as indicated on page 25 of the employee's documents. The project value amounted to R9918000.00, as it included the consultant's fee.*
30. *The MFMA circular no 62 of 2013 regulates the aspect of variation orders (page 156 of employer's documents). Page 7 of the circular (page 162 of employer documents) provides that from the date of the circular, contracts may be expanded or varied by not more than 20% for construction related goods, services and/or infrastructure projects and 15% for all other goods and/or services of the original value of the contract.*
31. *It accordingly follows that that 20% is based on the contract value, and not the project value. Mr Majavu of COGTA, who testified for the employee, confirmed that this is indeed in line with his interpretation of the circular. He explained that the 20% principle was used even before the circular was issued. However, at that time contingencies were also taken into consideration. The issuing of the circular provided clarity in respect of what figures the 20% variation order should be based on.*
32. *The employee argued that the amount that was going to be paid in terms of the variation order was R1254095.63, and not R1872559.38. It is therefore less than 20% of the contract value. This argument loses sight of the wording of the circular, which*

especially refers to variation orders. It does not provide for contingencies. Furthermore, Mr Majavu confirmed that the budget maintenance is included in the project costs, and is not same as the variation order. It follows that the contingencies are already included in the contract value (as confirmed in table 6 of page 25 in the employee's documents), and should not be deducted twice to bring the variation in line with the 20% financial delegation.

33. *In this instance, 20% of the contact value of R8602455.80 amounts to R1720491.16. The employer approved a variation order in the amount of R1872559.36. It exceeded the 20% financial delegation. By his own admission he failed to report to Council before approving the variation order. I accordingly find that the employee breached this rule."*

[99] Again, in my view, the Arbitrator, as per his reasoning above, was on the right track when it came to this charge. I would however record, at the outset, that he appeared to suggest at paragraph 33 that it was permissible for a municipal manager to exceed his financial delegations and to approve the variation order providing only that he reported the matter to Council. That part of the Award is not correct. In terms of the applicable circular⁴⁷ issued by Treasury which was common cause, if there was going to be a variation of a contract in excess of 20 percent then this triggered the application of Section 116(3) of the MFMA. Essentially what this meant was that the change to the terms of the contract would no longer be governed by a variation order but would be regarded as an amendment to the contract itself. The procedure set out in Section 116(3) of the MFMA would then have to be followed.

[100] In my view, the feature of the evidence presented in respect of this charge, something which could have been emphasised more by the Arbitrator, was that it was as clear as daylight *ex facie* the variation order that the amount

⁴⁷ National Treasury MFMA Circular No. 62

which Mr Msweli approved was the amount of R1 872 559.36. Yet Mr Msweli inexplicably, blindly so, persisted with an argument that the variation order was only for an amount of R1 254 095.63. For this reason alone, I am not inclined to accept his evidence that he was acting *bona fide* or that he was not negligent.

[101] Mr Msweli presented arguments which were not only unpersuasive but, in my view, contrived:

101.1 First, he contended that the 20 percent threshold had not been exceeded because the total amount, to which the 20 percent figure should be applied, also included the fees due to the consultant. If the fees of the consultant were added to the contract amount, then it was common cause that the figure of 20 percent would not be exceeded. But this reasoning cannot be correct. The consultant would self-evidently have had its own contract with the Municipality. This argument confuses the cost of the contract with the total cost of the project. The effect of the variation order is to authorise a further payment to the contractor (not the consultant).

101.2 Second, there was the argument which was advanced by Mr Msweli that the contingencies provided for in the contract should be added to the contract price thus augmenting it and only then should the 20 percent calculation be done. This argument too falls to be rejected out of hand because the contract value already included the contingency component.

[102] Whilst I am not convinced that Mr Msweli breached Section 116(3) of the MFMA (as alleged in the charge sheet) it is clear that, without any good reason, he approved a variation order in excess of his financial delegations. As a result irregular expenditure of approximately R150 000.00 was incurred. It is also worth noting that in perpetrating the misconduct which he did in respect of this charge, Mr Msweli, again acted alone without seeking advice from anyone else.

Did Mr Msweli commit financial misconduct

Introduction

[103] The MFMA separately defines “irregular expenditure”, “unauthorised expenditure” and “fruitless and wasteful expenditure”. Each discrete type of expenditure is a term of art and has been carefully defined in the MFMA⁴⁸. In summary, irregular expenditure is expenditure which is unlawful. Unauthorised expenditure is expenditure for which there is no budget. Fruitless and wasteful expenditure is expenditure for which no value is received i.e. expenditure made in vain.

Charge relating to the appointment of the Service Provider

[104] In this charge it was alleged, in substance, by the Municipality, that Mr Msweli had authorised a payment which constituted irregular expenditure. It was further alleged that he had breached Sections 62(1)(f)(iv), 111 and 115(1) of the MFMA. Lastly, it was alleged that he had breached Sections 171(1)(a) and (c) of the MFMA.

[105] Whilst I found that Mr Msweli was not honest when it came to his defence based on Regulation 36, in my view, in any event, the state of affairs which, on Mr Msweli’s own version, confronted him, patently did not meet the requirements of Regulation 36. In *Martin Noel Pietersen*, the Court, in dealing with an analogous situation, employed reasoning which, in my view, applies equally to this matter:

“56. *The circumstances surrounding the appointment of the Service Provider, the manner in which the Service Provider was appointed and the contents of the SLA represent such a marked departure from the requirements of the SCM Policy, and the purported justification*

⁴⁸ See *Mbambisa* at para [44]

for the deviation· is so patently spurious, that the inference is irresistible that the deviation memorandum was mere "window dressing" designed to conceal the irregular appointment of the Service Provider. No experienced municipal manager, as the appellant claims to have been, could have honestly believed that the deviation was a valid and lawful exercise of the power under Regulation 36. The appellant could not seriously have thought that it was correct and proper to conclude the SLA for open-ended, undefined services over a period in excess of 10 months on the strength of a single deviation which was originally motivated by the speaker's request to conduct an urgent investigation and report within 10 days. In all the circumstances the conclusion is inescapable that the appellant acted in the knowledge that the deviation was unlawful, and therefore deliberately contravened the requirements of the SCM Policy."

[106] The decision of Mr Msweli to invoke Regulation 36 was, accordingly, invalid.⁴⁹ As a result, all the expenditure which would have been incurred on the Service Provider would have been incurred in contravention of the SCM Policy and the Regulations. That, in turn, had the consequence that the payments which Mr Msweli authorised would have constituted irregular expenditure, had the CFO not mercifully intervened.

[107] For the sake of completeness, I note further that, on the common cause facts, it is also arguable that Mr Msweli was culpable for instructing unauthorised expenditure to be incurred, given the circumstance that funds necessary to pay the Service Provider had not yet been received (or even confirmed) at the time that he signed the requisition for payment.

[108] The MFMA provides as follows:

"Appropriation of funds for expenditure

⁴⁹ See Item (d) of the definition of "irregular expenditure".

15. *A municipality may, except where otherwise provided in this Act, incur expenditure only –*
- (a) *in terms of an approved budget; and*
 - (b) *within the limits of the amounts appropriated for the different votes in an approved budget.”*

[109] Thus, any expenditure incurred otherwise than in terms of an approved budget, and within the limits of the amounts appropriated for the different votes in an approved budget, amounts to unauthorised expenditure. In this matter the instruction to pay the Service Provider was given on 13 November 2018; yet the “*budget*” by way of the conditional grant, was only confirmed the following year in May of 2019. In this context, I note that the definition of irregular expenditure excludes unauthorised expenditure, and it would follow that it is arguable that Mr Msweli was guilty of issuing an instruction to incur “*unauthorised expenditure*” and not “*irregular expenditure*”.⁵⁰ Nothing however turns on this given the fact that both offences are equally serious and can amount to criminal offences.⁵¹ It is further trite that an employer is not obliged to formulate charges with the same precision which is required in a criminal court.⁵² It can hardly avail Mr Msweli to contend that he should not be found guilty of authorising “*irregular expenditure*” because he admits to being guilty of authorising “*unauthorised expenditure*”.

[110] Section 62(1)(f)(iv) of the MFMA requires that an accounting officer take all reasonable steps to ensure that a municipality has and implements SCM procedures in accordance with the requisite prescripts. By taking a deliberate decision to flout the SCM procedures, Mr Msweli clearly breached this provision. He also breached Section 115(1) of the MFMA, which is in the same vein. I am not however persuaded that he breached Section 111 of the MFMA, as this section does not place an obligation on the accounting officer.

⁵⁰ Contra *Martin Noel Pietersen* at para [57].

⁵¹ No distinction is drawn between the two types of expenditure for the purpose of Section 173 of the MFMA. The distinction appears to be relevant to Section 32 of the MFMA.

⁵² See generally *Woolworths and Gauteng Department of Education*.

[111] It follows from what I have stated above that Mr Msweli has committed financial misconduct by contravening the MFMA (flouting the applicable SCM procedures) and by instructing an official to incur either unauthorised or irregular expenditure and, in this regard, Section 171(1)(a) and (c) of the MFMA refer.

Charge relating to the variation order

[112] In this charge, it is alleged that Mr Msweli, by approving the variation order, caused unauthorised and/or irregular and/or fruitless and wasteful expenditure. It is further alleged that Mr Msweli acted in breach of Section 171(1)(c) of the MFMA.

[113] As an opening observation, and as per the sentiments expressed in *Martin Noel Pietersen*, given the discrete types of expenditure and the terms of art used to describe them, strictly speaking, they should not have been “lumped” together as part of one count. This observation is, however, more relevant to criminal proceedings than it is to disciplinary proceedings. In my view, there is in any event, no evidence to support the allegation of Mr Msweli incurring either unauthorised or fruitless and wasteful expenditure.

[114] Given that Mr Msweli exceeded his financial delegations, it is however clear that he was guilty of incurring the irregular expenditure which flowed from the unlawful decision to approve the variation order.

[115] As with the Service Provider charge, it is clear that in making himself guilty of this charge, Mr Msweli committed financial misconduct in that he incurred irregular expenditure which is proscribed by Section 171(1)(c) of the MFMA.

Analysis of the Arbitrator’s determination on sanction

[116] The culmination of the Arbitrator’s reasoning on sanction is contained at paragraph 46 of the Award. The Arbitrator reinstated Mr Msweli but, as a

mark of his displeasure at Mr Msweli's misconduct, refused to make such reinstatement retrospective, elaborating as follows:

"On the other hand, the acts of financial misconduct that he was guilty of, cannot go unpunished. The employee was dismissed on 09 April 2021. In my view it would be appropriate to order his reinstatement, but without any back pay or benefits."

[117] The Arbitrator deals with the question of sanction in two paragraphs, namely paragraphs 44 and 45 of the Award. An analysis of each paragraph reveals the flawed reasoning which gave rise to the Award. At paragraph 44 of the Award, the Arbitrator states:

"The Employer based the sanction of dismissal on the findings of guilt on all 4 allegations. I found that the employee was only guilty of approving a variation order in excess of his financial delegations, and appointing Kuhlemcebo Engineers without following the prescribed SCM procedures, which he was forthcoming to admit. These transgressions are still rather serious, as it constitutes acts of financial misconduct. It should be highlighted that he occupied a senior position, and can reasonably be held to a higher standard than a junior employee."

[118] As to the first two sentences, the Arbitrator appears to deduce that, because Mr Msweli was only found guilty on two of the four charges, it followed, axiomatically, that a sanction less than dismissal should be imposed. There is a failure of logic in such reasoning. It overlooks the fact that any single offence committed by an employee may, in and of itself, be sufficient to justify or require the imposition of a sanction of dismissal, irrespective of whether the employee was acquitted of other charges. A finding of not guilty in respect of one charge should ordinarily not be allowed to becloud the

analysis and evaluation of misconduct embraced by another discrete and self-standing charge⁵³.

[119] Each charge, on which an employee has been found guilty, is deserving of a separate evaluation when it comes to sanction. To give an extreme example, if an employee is charged with 100 counts of theft and the employer only proves one count, this would ordinarily still be sufficient for that employer to dismiss the employee. The mere fact that an employer may have “overcharged” an employee in respect of some other misconduct should not be allowed to minimise or detract from the gravity of the established misconduct. An employee must be properly punished for the offences which he has actually committed.⁵⁴ In the result, the Arbitrator did not tackle, head on, as he was obliged to do, two fundamental questions. Was the finding of guilt in respect of the allegation of the municipal manager exceeding his delegation sufficient to justify dismissal? Was the allegation that the municipal manager disregarded the SCM processes sufficient to warrant dismissal?

[120] In this paragraph, the Arbitrator also stated that Mr Msweli was “*in a senior position*”. This epithet suggests that Mr Msweli was but one of a group of senior managers in the employ of the Municipality. Mr Msweli was of course much more than this. As the municipal manager, the Section 56 senior managers reported directly to him. He was required to supervise the senior managers and indeed all the employees in the administration and to lead by example. He was the head of the administration and the accounting officer, the proverbial captain of the ship and the chief executive officer of the Municipality. The statement by the Arbitrator that Mr Msweli occupied what he termed a “*senior position*”, viewed in context, is another manifestation, albeit a subtle one, of his failure to properly apply his mind.

⁵³ It may potentially be different if evidence is led at the arbitration that the findings of guilt on each charge did not individually warrant the sanction of dismissal and the employer conceded that it relied on the cumulative effect of all the charges in coming to a conclusion that dismissal was the appropriate sanction. No such evidence was led in this matter.

⁵⁴ Cf. *Director of Public Prosecutions, Gauteng v Pistorius* [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA) at para [45]

[121] The Arbitrator then proceeds to describe the misconduct as being “*rather serious*”. The expression “*rather serious*” denotes a degree of gravity which is cognisable. The ordinary grammatical meaning of “*rather serious*” implies a level of importance which is above average or noticeable. It needs only to be stated that it would have been more accurate to have described the misconduct of Mr Msweli as very serious.

[122] This brings me to paragraph 45 of the Award which reads:

“The employee has served more than half of his fixed term contract. I am not convinced that the employee was dishonest in his actions. I therefore believe that there is not a complete breach of the trust relationship to the extent that it justified a dismissal. Discipline should be progressive. I accordingly find that the sanction was inappropriate.”

[123] As to the first sentence, it clearly weighed with the Arbitrator that Mr Msweli had served more than half his contract of employment. This was a material misdirection and amounted to a gross irregularity. There can be no rational basis why this fact should elicit sympathy for Mr Msweli or, worse still, somehow rise to the level of a mitigating factor. The gravity of misconduct cannot be ameliorated by the extent of the duration of the remainder of a contract of employment. In short, this factor was strictly irrelevant to the enquiry which had to be embarked upon with a view to establishing the fairness or otherwise of the sanction.

[124] As to the second sentence, the Arbitrator records that he does not believe that the Municipality has established dishonesty and for this reason he concludes that there has not been a “*complete breach*” of the trust relationship. This deduction is a *non sequitur*. It is based on the unsound premise that only misconduct involving an element of dishonesty will destroy the employment relationship. This is not correct. The Arbitrator failed to appreciate that gross negligence or gross dereliction of duties or a material breach of a fiduciary duty will, in appropriate circumstances, be sufficient to

destroy the trust and confidence which forms the bedrock of the employment relationship, particularly where an employer is dealing with the most senior employee in the organisation who does not demonstrate remorse. By way of illustration, in *Delta Motor Corporation v Theunissen*⁵⁵ the Labour Appeal Court was concerned with a scenario where the password of an employee had been utilised in a fraudulent transaction. The Court found, in effect, that even if it was not established that the employee was party to the fraud the circumstance that he was negligent in not keeping his password secret was, in and of itself, sufficient to justify dismissal.

[125] I am, in any event, not persuaded that it can be said that there was no element of dishonesty in the conduct of Mr Msweli. In my view, a proper analysis of the facts reveals that Mr Msweli embarked upon a strategy of concealing his misconduct from the Council, the CFO and the SCM unit. This is particularly so when it comes to the charge relating to the appointment of the Service Provider without following any SCM procedures. There was a strong element of deception which accompanied this misconduct. To put it differently, Mr Msweli demonstrated what the Labour Appeal Court has termed “*dishonest intent*”.⁵⁶ All of this was compounded by the fact that he put up a concocted defence.

[126] The Arbitrator then proceeds, *en passant*, to baldly refer to the well-known principle of progressive discipline. He does not explain why an accounting officer of a municipality who has committed “*rather serious*” financial misconduct should be a candidate for progressive discipline. The statement by the Arbitrator that Mr Msweli had been “*forthcoming to admit*”⁵⁷ about his misconduct in relation to the Service Provider charge, provides a clue as to the reasoning of the Arbitrator. It suggests that the Arbitrator found that Mr Msweli had demonstrated remorse.

⁵⁵ Case number PA9/98 delivered by Nicholson JA on 12 August 1999 at para [16]

⁵⁶ *Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (LAC) [2011] ZALAC 15; [2011] 10 BLLR 963 (LAC); (2011) 32 ILJ 2455 (LAC) at para [38]

⁵⁷ Para [44] of the Award

[127] Insofar as the Arbitrator did make such a finding, I am unable to endorse it. When Mr Msweli cross-examined the witnesses of the Municipality, he did not admit that he had done anything wrong. It was only during his evidence in chief that he purported to admit to some misconduct. But his acknowledgment of wrongdoing fell woefully short of what was required. It is clear that he failed to appreciate the gravity and nature of his wrongdoing maintaining, to the end, that he had partially complied with his obligation to report the purported deviation to the Council. The truth was he disregarded the SCM procedure for deviation altogether. Implying that there was partial compliance was a thinly veiled attempt to downplay or water down his misconduct. He also, as mentioned, put up a disingenuous defence which I am constrained to record was a wholly dishonest one.

New points raised on behalf of Mr Msweli

[128] In his written submissions, Mr Kela, who appeared on behalf of Mr Msweli, devoted much time to making submissions that there were problems with the procedure which had been followed by the Municipality which resulted in the dismissal of Mr Msweli. It was contended, for the first time in heads of argument, that the Municipality did not comply with its obligations in terms of the Regulations governing Financial Misconduct. He protested that there was no investigation and no disciplinary board convened. It was also contended that there were unreasonable delays in the prosecution of the disciplinary hearing and that the Municipality had waived its right to institute disciplinary action.

[129] Leaving aside the fact that these arguments appear to be directed at the legality (not the fairness) of the disciplinary proceedings and it being impermissible for an arbitrator to nullify disciplinary proceedings by way of a declaratory order⁵⁸ and there being doubt as to whether an Organ of State, such as the Municipality, can waive its duty to pursue disciplinary action

⁵⁸ *Tsengwa v Knysna Municipality & Others* (2015) 36 ILJ 2392 (LC) at paras [9], [14] and [16]

against an errant public official⁵⁹, there is not an inch of room, on the papers before the Court, to raise the issue of procedural fairness.

[130] At the arbitration, Mr Msweli's legal representative recorded at the outset that he had no issue with the procedural fairness of his dismissal. This, after the Arbitrator had, correctly so, apprised him of his obligation to raise procedural issues upfront so that the Municipality could deal with them in its evidence. In its opening statement the Municipality recorded that the complaint about procedural fairness, as set out in the referral form, had been "*abandoned*" and that it would accordingly not be addressed. In any event, Ms Zonke, the Mayor at the time of the dismissal of Mr Msweli, gave unchallenged evidence that there was an investigation and that proper procedures were followed before the dismissal of Mr Msweli.

[131] Furthermore, the points so raised are not legal points which do not require the leading of evidence or can be determined on the record without disadvantaging the Municipality. Had these points been properly raised, the Municipality could, for example, have led (further) evidence to explain the alleged delays and it could have led evidence to contradict the assertion that there was no investigation or disciplinary board. The Municipality could also have led evidence on the question of prejudice, if any, suffered by Mr Msweli, it being trite that, in labour law, fairness, and fairness alone, irrespective of non-compliance with contractual or statutory prescripts, is what matters. No purpose will however be served in debating these points which were not issues placed before the Arbitrator for determination and accordingly over which he would have had no jurisdiction.⁶⁰

[132] All things be told, it was only after it dawned on Mr Msweli that the Award may be set aside, that these points were raised. This strategy reminded me of what occurred in *Nyandeni Local Municipality v MEC for Local*

⁵⁹ *Van der Grijp v City of Johannesburg* (2007) 28 ILJ 2079 (LC) at para [61]

⁶⁰ Cf. *PL v YL* 2013 (6) SA 28 (E) at 41F-H

Government and Traditional Affairs and Another.⁶¹ That matter revolved around the so-called *Shifren* principle. The question was whether, given the peculiar circumstances of that matter, a non-variation clause could be relied upon. A dismissed municipal manager had sought to undo the decision by the municipality in question to terminate his employment. He relied on the fact that the municipality had conducted a disciplinary hearing in breach of the applicable contract of employment which required that disciplinary proceedings be conducted by way of pre-dismissal arbitration proceedings as envisaged by Section 188A of the LRA. That same contract contained a non-variation clause. After he had been dismissed, the municipal manager sought to belatedly challenge the procedure followed by the municipality claiming breach of contract and invoking the non-variation clause.

[133] The Court ultimately found that it would be against public policy to permit the municipal manager to enforce the non-variation clause and thus set aside his dismissal given all the water that had flowed under the bridge. What weighed with the Court was that the municipal manager had not raised any issues with the process followed until an unfavourable decision had been received. Furthermore, as in this case, that municipal manager admitted his misconduct and thus reinstating him would have been an exercise in futility at great expense to the public purse.⁶² Similarly, the attempts by Mr Msweli, for the first time, in his legal submissions, to effectively ask that the disciplinary proceedings be nullified where there is no suggestion that he has a *bona fide* defence to the charges, at the very least to the charge concerning the appointment of the Service Provider, cannot be countenanced.

[134] It has been said by the Apex Court that sooner or later litigation must come to an end⁶³. In a different context, Pickering J refused to allow a trial on the merits to be nullified because of a point based on the Compensation for Occupational Injuries and Diseases Act (COIDA) which had been belatedly raised. Essentially the learned Judge stated that there comes time when it is

⁶¹2010 (4) SA 261 (ECM)

⁶² At paras [103] to [108]

⁶³ *Minister of Justice v Ntuli* 1997 (6) BCLR 677 (CC); 1997 (3) SA 772 (CC) at para [29]

no longer possible to “*wipe the slate clean*” and to “*turn the clock back*” rendering all that has occurred before *pro non scripto*⁶⁴.

Conclusion

[135] Even at a cursory glance, the reader of the Award could be forgiven for wondering whether it was not reviewable *ex facie* the body of the Award itself. The Arbitrator accepted that Mr Msweli had made himself guilty of financial misconduct and that such conduct was “*rather serious*” and could not go “*unpunished*”. The evidence contained in the record puts matters beyond doubt.

[136] Breaches of the SCM procedure applicable within an Organ of State are viewed in a very serious light by the Courts, particularly where a municipal manager, who is tasked with implementing the SCM policy, is the one who is culpable and the conduct is accompanied by an element of dishonesty. I have already referred to the Constitutional Court decision of *Allpay* which addressed the purpose of Regulation 36. In *Martin Noel Pietersen* it was pointed out in a Court sitting on Appeal from a Magistrate’s Court that:

“125. *Irregular procurement practises lie at the heart of the epic levels of corruption which is corroding the moral fabric of our society, not to mention the financial health of our public institutions. The importance of procurement in our constitutional democracy is evident from the fact that it is dealt with in s 217 of the Constitution, which requires that organs of state contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Strict adherence to procurement laws is vital to ensure proper service delivery and a healthy public purse.*”

⁶⁴ As recorded in *PE v Dr Beyers Naude Local Municipality and Another* 2022 (1) SA 560 (ECG) at para [63]

[137] Further, in *Martin Noel Pietersen*, the Court, in the vein of the idiom that the road to hell is paved with good intentions and expressing the sentiment that it is not sufficient for errant municipal employees to put up as a defence that their hearts were in the right place, elaborated as follows:

“126. ... While the appellant's goals might conceivably have been laudable, the end does not justify the means. Officials cannot be permitted to subvert the law in order to achieve personal ambitions or political objectives, however well-intentioned. A strong message needs to be sent that they will be severely punished if they do so. For this reason a custodial sentence must be imposed in this case, and a suspended sentence coupled with a fine, as contended for by appellant's Counsel, would be too lenient.”

[138] A municipal manager must perform his duties within the four corners of the finely tuned and highly regulated legislative environment within which he is required to perform his functions.⁶⁵ Mr Msweli failed dismally in this regard. He acted as though he was exempt from accountability. The rules did not apply to him. As the accounting officer it was his responsibility to ensure that the SCM policy was properly implemented; yet he, being the one who was required to lead by example and to police the SCM policy, treated it with disdain. When he was found out, he came up with a fabricated defence. It cannot be expected of a municipal council to continue working with a municipal manager who conducts himself in this manner. On the evidence before the Arbitrator there is no guarantee that he might not “fully” comply with SCM procedures again.

[139] If Mr Msweli is reinstated and allowed, once again, to roam free in the workplace, unscathed, it would be catastrophic for workplace morale and the corporate culture of the municipality.⁶⁶ How could the marginalised CFO and SCM unit members, who looked on as Mr Msweli was properly dismissed for

⁶⁵ Cf *Theewaterskloof Municipality v South African Local Government Bargaining Council (Western Cape) and Others* (2010) 31 ILJ 2475 (LC); [2010] 11 BLLR 1216 (LC)

⁶⁶ Cf *Fort v COEGA Development Corporation (Pty) Ltd and Others* [2017] ZALAC 50 at para [97]

flagrantly disregarding the SCM policy, now be expected to respect his authority and to seek guidance from him about matters of financial management and SCM procedure?

[140] It has often been stated, in a commercial context, that a successful business enterprise operates on the basis of trust. Dismissal is not an expression of moral outrage or vengeance; it is a sensible operational response to risk management in a particular enterprise.⁶⁷ In my view, such reasoning should apply all the more so, *a fortiori*, where, as in this case, the employer is an Organ of State. This is so because the Constitutional Court has held that an Organ of State has a higher duty to respect the law; “*it must do right; and it must do it properly*”.⁶⁸ The Constitution is the supreme law of the Republic. Where an employee, in the sphere of Local Government which is beset by corruption, makes himself guilty of conduct which breaches the Constitution, his conduct is to be viewed in the most serious light. In such circumstances, a tribunal should not readily and without earnest reflection, second guess a municipality which adopts strict, even harsh measures, to combat the cancer of corruption, patronage and maladministration and to maintain, or seek to rehabilitate, the integrity of its systems of financial management and SCM.

[141] In *Moses Kotane Local Municipality v Mokonyama NO and another*⁶⁹ all that could be demonstrated was that the guilty employee had instructed another employee to photocopy tender documentation without authorisation. This was considered a breach of Section 118 of the MFMA. The employee was given a final written warning by the disciplinary Chairperson. However pursuant to a self-review application, this Court upset that decision, classifying it as a decision to which no reasonable decisionmaker could have come given the nature of the offence. The Court ordered that the appropriate sanction was that of dismissal.

⁶⁷ *Miyambo v CCMA & Others* (2010) 31 ILJ 2031 (LAC) at paras [13] and [14]

⁶⁸ *MEC for Health, EC v Kirland Investments* 2014 (3) SA 481 (CC) at para [82]

⁶⁹ (2018) 39 ILJ 1130 (LC); [2018] 6 BLLR 614 (LC) Leave to appeal was dismissed in *Moses Kotane Local Municipality v Mokonyama N.O and Another* (JR2324/15) [2019] ZALCJHB 196 (14 August 2019)

[142] It was submitted on behalf Mr Msweli that because the Arbitrator had imposed a harsh sanction (it effectively amounted to a sanction of suspension without pay for some five months), that this was, in and of itself, an answer to the contention by the Municipality that the Arbitrator had erred in interfering with the sanction which it had imposed. This line of argument misses the point. Whilst it is true that there is no obligation on an arbitrator to defer to the employer's decision on sanction, an arbitrator, on the other hand, does not have *carte blanche* to consider the question of sanction afresh. Rather, an arbitrator must, independently and objectively, determine whether the sanction imposed by the employer was fair and not whether the arbitrator would have imposed the same or different sanction⁷⁰. For an example where the Labour Appeal Court held that an arbitrator erred in substituting a sanction of dismissal with a sanction of reinstatement without back pay, see *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*⁷¹.

[143] As to whether it can be said that the trust relationship had broken down, there was evidence from Ms Zonke to the effect that there was a unanimous decision by Council, all political parties being *ad idem* that the appropriate sanction to be implemented was that of dismissal. In my view, the gravity of the offences in question is, in any event, self-demonstrative and the misconduct is of the ilk which would not require the employer to have led evidence demonstrating that the employment relationship had broken down.⁷²

[144] In *Martin Noel Pietersen*, a sentence of two years imprisonment was imposed by the Court on a former municipal manager (Mr Pietersen) of the

⁷⁰ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) at para [110]

⁷¹ (2023) 44 ILJ 179 (LAC); [2023] 2 BLLR 125 (LAC)

⁷² See *Department of Home Affairs and Another v Ndlovu and Others* [2014] 9 BLLR 851 (LAC); (2014) 35 ILJ 3340 (LAC) at para [16]. *Theewaterskloof Municipality v South African Local Government Bargaining Council* (Western Cape) and *Others supra* at paras [30] and [38]; *Woolworths (Pty) Ltd v Mabija and Others* [2016] 6 BLLR 568 (LAC); (2016) 37 ILJ 1380 (LAC) at para [21]; *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC) at para [20]; *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC) at para [40]

Oudtshoorn Municipality. In my view, Mr Msweli committed misconduct which was all but identical to the conduct committed by Mr Pietersen. Mr Pietersen deliberately failed to implement the Oudtshoorn Municipality's SCM policy. He did so by abusing Regulation 36, disingenuously claiming that the SCM procedures could not be followed because of urgency. He also failed to take all reasonable steps to prevent prohibited expenditure. In my view, the conduct of Mr Msweli was, if anything, more serious than that of Mr Pietersen, as the Court, in that matter, appeared to accept that Mr Pietersen may have been motivated by good intentions whereas it is my finding that the reliance by Mr Msweli on Regulation 36 was a sham. On the face of it, Mr Msweli was guilty of criminal conduct in that he deliberately failed to implement the SCM Policy and failed to take all these reasonable steps to prevent irregular and/or unauthorised expenditure.⁷³ Indeed, having proper regard to the evidence placed before the Arbitrator, he can consider himself fortunate that he has not been criminally charged. Either way, it is mindboggling to think that an Appeal Court can find that the type of conduct in question is deserving of a two year custodial sentence, yet an arbitrator can take the view that the conduct was not sufficiently serious to warrant dismissal.

[145] There is one further aspect which was, it would seem, overlooked by the Arbitrator, as well as the parties. It is that where a municipal official has been found guilty of financial misconduct, it is not permissible for the a municipality to re-employ that person for a period of ten years. Section 57A(3) of the Systems Act provides that:

"... a staff member dismissed for financial misconduct contemplated in section 171 of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), corruption or fraud, may not be re-employed in any municipality for a period of 10 years." (own emphasis)

⁷³ Section 173(1)(i) and (iii) of the MFMA

[146] Whilst it is not necessary to consider this point in any depth, it seems to me that there is an argument that the Arbitrator issued an award which was contrary to Legislation or at least contrary to the spirit of Legislation. The mischief which the Legislature sought to eradicate in the above section was the hasty welcoming back of municipal employees (who had been dismissed for financial misconduct) into the fold of Local Government. One might say that it was the intention of the Legislature that employees who are dismissed from a municipality for financial misconduct should take at least ten years, as it were, to rehabilitate themselves before they can be re-employed by a municipality. In this matter, importantly, the Arbitrator did in fact confirm that Mr Msweli was guilty of financial misconduct, yet he ruled that he could return to the Municipality notwithstanding the fact that less than a year had passed since his dismissal.

[147] On the face it, it is arguable that the Award is in direct conflict with a statutory prohibition. The usual consequence of a decision of this nature is that it is a nullity and of no force of effect.⁷⁴ Whilst I accept the Arbitrator reinstated Mr Msweli as opposed to re-employing him, my preliminary view is that a purposive approach to the interpretation of the above provision may mean that what the Arbitrator did was to impermissibly sanction an illegality and that a technical distinction between re-employment and reinstatement should not be relied on to thwart the intention of the Legislature.⁷⁵ If I am correct in this view, then it seems to me that this error would have been, *simpliciter*, sufficient to vitiate the Award. If this reasoning is correct, I would further venture to suggest that the counter application (the application to make the award an order of court) may also then have been refused because a Court will not ordinarily give its blessing or *imprimatur* to an arbitration award which embraces an illegality because that would be contrary to public policy.⁷⁶ Even

⁷⁴ Cf *Schierhout v Minister of Justice* 1926 AD 99

⁷⁵ A counter argument may be that the Arbitrator, in reinstating Mr Msweli, restored the contract of employment, as it were, undoing the dismissal. This submission is, however, not easily reconcilable with the notion that an arbitrator does not set aside or declare invalid a dismissal (cf *Tsengwa and Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC) at para [136]), but leaves it intact and declares it unfair.

⁷⁶ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at paras [9], [53] and [57]

if I am wrong in the above cursory analysis, what Section 57A(3) of the Systems Act does demonstrate is that the Legislature views financial misconduct in a very serious light.

[148] In conclusion, there is an obligation on an arbitrator to properly consider the evidence before him.⁷⁷ Recently in *Gauteng Department of Education v General Public Service Sectoral Bargaining Council and Others*⁷⁸, the Labour Appeal Court explained the position as follows:

“[19] In this matter, the arbitrator failed to have regard to all of the evidence before him, including that which was not disputed, and carefully weigh it up in the required manner. ...”

[149] The Arbitrator in this matter, whilst correct when it came to his findings on the innocence of Mr Msweli in respect of the two allegations of misconduct as described above, abdicated his responsibility to properly evaluate the evidence when determining whether the sanction imposed by the Municipality was fair. There were instances where he failed to mention material facts, failed to deal with issues which had a material bearing on the dispute and committed errors in respect of the evaluation of the facts.⁷⁹ Although gross irregularities may be indicators that the decision is unreasonable to the extent that it cannot stand⁸⁰, they are not dispositive. It must still be demonstrated, with reference to the evidentiary material before the Arbitrator, that the gross irregularities aside, the Arbitrator came to a decision to which no reasonable decisionmaker could have come. There is no evidentiary material which was placed before the Arbitrator which can be relied upon to salvage the Award.

⁷⁷ See *South African Post Office v Commission for Conciliation, Mediation and Arbitration and Others* [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) at paragraphs [31] and [33]. See also the recent decision of *Gauteng Department of Education* (JA141/2022) [2025] ZALAC 2 (22 January 2025)

⁷⁸ (JA141/2022) [2025] ZALAC 2 (22 January 2025)

⁷⁹ This is an appropriate place to note that the Arbitrator, Mr Kayster, is a well-respected member of the labour law fraternity in the Eastern Cape. He has competently issued many arbitration awards which have been upheld by the Labour Court. In *Fortuin I* upheld his award. This judgment should not detract from his standing in the labour law fraternity. Judicial officers reach different conclusions and in terms of the LRA those of the Labour Court prevail.

⁸⁰ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paragraph [21]

Condonation

[150] The Municipality delivered a replying affidavit which did not take the matter any further. It was however out of time. In response, there was a notice of objection from Mr Msweli. In my view, the delivery of this notice was ill-advised. Mr Msweli could not conceivably have been prejudiced by the delivery of the replying affidavit and it is difficult not to gain the impression that Mr Msweli was being unnecessarily obstructive which had the result that further and unnecessary litigation was generated in that the Municipality then applied for condonation. The application was opposed. This Court has, with reference to *Uitenhage v Uys*,⁸¹ previously urged legal practitioners, before noting an objection, to earnestly reflect on whether, in so doing, they will be serving the interests of their client and the proper administration of justice generally.⁸² Insofar as it may be necessary to do so, condonation should be granted for the late delivery of the replying affidavit.

Costs:

[151] This is not a matter where costs should be awarded. Mr Msweli was armed with an award in his favour. He can hardly be criticised for wanting to have his day in Court and for hanging on to the Award in terrier-esque fashion. That is not to say that there do not exist situations where an award is so bad that it is indefensible rendering any opposition to a review application unreasonable and thus warranting a cost order. Each case has to be adjudged on its facts and this is not such a case.

Order:

1. Condonation is granted for the late delivery of the replying affidavit.

⁸¹ 1974 (3) 800 (E) at pages 804 to 806

⁸² *Inxuba Yethemba Municipality v South African Local Government Bargaining Council and Others* (PR41/2020) [2022] ZALCPE 1 (31 January 2022) at paras [55] and [56]

2. The award issued under case number ECD 052101, dated 22 September 2021, is reviewed and set aside.
3. The award is substituted with the following:

“The dismissal of the Applicant (Mr Msweli) by the Respondent (Inxuba Yethemba Municipality) was fair.”

4. The counter-application to make the award an order of court is dismissed.
5. There is no order as to costs in respect of either application.

P. N. Kroon

Acting Judge of the Labour Court of South Africa

Appearances:

For Applicant : Adv S Nzuzo
Instructed by : NE Mbewana Incorporated Attorneys

For First Respondent: Adv D Kela
Instructed by : Ndumiso Voyi Incorporated Attorneys