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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 14789/2023P

In the matter between:

DEMOCRATIC ALLIANCE	APPLICANT
and	
MSUNDUZI MUNICIPALITY	FIRST RESPONDENT
COUNCIL OF THE MSUNDUZI MUNICIPALITY	SECOND RESPONDENT
MUNICIPAL MANAGER OF THE MSUNDUZI MUNICIPALITY	THIRD RESPONDENT
ROYAL AM FOOTBALL CLUB	FOURTH RESPONDENT
LULAMILE MAPHOLOBA	FIFTH RESPONDENT
KWAZULU NATAL MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	SIXTH RESPONDENT

ORDER

The following order is granted:

1. The decisions taken by the second respondent on 19 July 2023 are declared to be unlawful and invalid and are reviewed and set aside. The decisions include the following:

1.1.1 to approve a sponsorship agreement between the first respondent and the fifth respondent, a Premier Soccer League club (as it was then), for a three-year period commencing in the 2023/2024 financial year;

1.1.2 to approve the payment of R9 million rand per annum, excluding VAT, to the fifth respondent in terms of the sponsorship contract;

1.1.3 to approve the first respondent being held liable under the sponsorship contract for the annual maintenance of the Harry Gwala Stadium to ensure compliance with the standards prescribed by the Premier Soccer League; and

1.1.4 to authorise the third respondent to sign the sponsorship contract; and

1.1.5 the decision by the third respondent to sign and enter into the sponsorship contract on behalf of the first respondent.

2. The payment of any money to the fourth respondent under the sponsorship contract is declared to be unlawful and is reviewed and set aside.

3. All payments made by the first respondent under the sponsorship contract to the fourth respondent must immediately be repaid to the first respondent with interest from the date of this judgment.

4. The costs of this application are to be paid jointly and severally by the first to third respondents, on scale B.

JUDGMENT

Mlaba J

Introduction

[1] The applicant seeks, among other things, an order declaring that the decisions taken by the second respondent to sponsor the fourth respondent to be unlawful and irrational, and reviewable and set aside.

Background

[2] The first and second respondents decided to sponsor a football club for a three-year period. A three-year sponsorship agreement with Maritzburg United Football Club (MUFC) was entered into in 2014. The sponsorship agreement was renewed several times since then, but it was terminated when MUFC was relegated from the Premier Soccer League (PSL). The first and second respondents thereafter considered it appropriate to sponsor the fourth respondent, Royal AM Football Club (Royal AM).

[3] During or about June 2023, after MUFC had been relegated, the third respondent presented a report to the second respondent for consideration, in which he motivated for the sponsoring of Royal AM. The following recommendations were made to various committees within the first respondent:

'7.1 Council notes the opportunity to enter into a sponsorship agreement with the Royal AM Football Club (RAFC).

7.2. Council grants approval for the sponsorship agreement between the Msunduzi Municipality and the Royal AM Football Club for a period of three years commencing in the 2023/2024 financial year.

7.3 The amount for the proposed sponsorship agreement for a period of three years is the amount of R9 million rand per annum (VAT exclusive) plus CPI in the two outer years.

7.4 In addition to the cash sponsorship, the agreement will include the cost for the annual maintenance of the Harry Gwala Stadium in order to keep it in compliance with PSL standards.

7.5 The City Manager is authorised to sign the sponsorship agreement between the Msunduzi Municipality and the Royal AM Football Club for a period of three years, commencing in the 2023/2024 financial year.'

[4] On 19 July 2023, the second respondent deliberated on the matter at a council meeting and approved the recommendations. A resolution to award the sponsorship to Royal AM was taken. On the following day, 20 July 2023, the third respondent, on behalf of the first respondent, entered into a sponsorship agreement with Royal AM, the effective date being 20 July 2023. The agreement would be for a period of three years, in which the first respondent would grant Royal AM an amount of R9 million annually and further appoint a service provider to maintain the Harry Gwala Stadium, which would be Royal AM's home ground to use as its training facility, together with its offices and changing

rooms. As part of Royal AM's commitments in terms of the agreement, Royal AM would ensure the following:

'(a) Ensure that the players shall wear T-shirts bearing the sponsors logo on the sleeve of the official match jerseys while engaged in games in a manner which shall receive television exposure in all games throughout the premier Soccer League isn't and on all supporter replica jersey on sale;

(b) Provide the sponsor with two perimeter advertising boards at all home PSL matches on the field of response home stadium

(c) Provide the sponsor with television exposure value of perimeter boards for all games throughout the season;

(d) Drive social welfare and CSI projects in partnership with the sponsor;

(e) Provide the sponsor with 30 presidential suite tickets for all PSL home matches at the Harry Gwala stadium and 3000 tickets to distribute for 12 PSL home matches it is specially recorded that the 3000 tickets will not be made available for category A games;

(f) Identify local talent within the entire jurisdiction of the ongoing global district municipality through team trials;

(g) Arrange and host training seminars and classes for aspirant coaches covering areas identified in (f) above;

(h) Arrange and host an annual Royal AM schools tournament to be held within the jurisdiction of the Msunduzi Municipality as part of development and talent identification;

(i) Undertake to comply with and abide by all legislative prescripts that govern this agreement and in particular to comply with the provision of section 67 of the Local Government Municipal Finance Management Act number 56 of 2003 insofar as those provisions are applicable to the terms and conditions of this agreement;

(j) Guest appearances: the sponsor shall ensure that the players shall for the duration of this agreement, and subject to their availability on at least 30 days' notice from the sponsor make up 10 individual player coach appearances per year and three team appearances for the sponsors promotion and advertising purposes;

(k) The sponsor shall strive to provide the Honourable Mayor of the sponsor and any other official (political and/or administrative) marketing and public relations opportunities with the sole aim of promoting both the sponsor and the sponsee.'

Applicant's submissions

[5] The applicant contended that the decision to sponsor Royal AM was unlawful and unconstitutional. The decision constituted the exercise of public power, and as such, the first and second respondents were required to comply with the principle of legality. The first and second respondents failed to do so and therefore the decision was reviewable. The challenge to the decision to sponsor Royal AM is based on the grounds that it was taken in breach of the following:

(a) Section 217 of the Constitution, which requires the first respondent to contract in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;

(b) The Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA), which requires the first respondent to implement its preferential procurement policy by following a preference points system;

(c) The Preferential Procurement Regulations, 2022 (the PP Regulations),[1] which require the first respondent to publish tender documents and apply a preference point system;

(d) Section 33 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA), which regulates contracts like the Royal AM sponsorship contract that impose financial obligations on the first respondent beyond the three years covered by the first respondent's annual budget for the relevant financial year;

(e) Section 112 of the MFMA, and the first respondent's supply chain management policy, which required the Royal AM sponsorship contract to be awarded through a bidding process that is fair, equitable, transparent, competitive and cost-effective; and

(f) Regulation 10 of the Municipal Cost Containment Regulations[2] and the first respondent's Cost Containment Policy, which provide that the municipal manager must ensure that sporting events are not financed from the first respondent's or municipal entity's budgets or by any suppliers or sponsors. The sponsorship decision directly allocated public funds from the first respondent to support the operations and activities of Royal AM, the provision of services related to Royal AM's participation in PSL soccer matches, and the maintenance of the Harry Gwala Stadium, which serves

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[1] Preferential Procurement Regulations, 2022, GN 2721, *GG* 47452, 4 November 2022.

[2] Municipal Cost Containment Regulations, 2019, GN 317, *GG* 42514, 7 June 2019.

as the home venue for Royal AM's soccer matches. The public funds ultimately facilitate the hosting and promotion of these sporting events.

[6] The applicant further submitted that in answer to parliamentary questions posed by the applicant's representative in the KwaZulu-Natal Provincial Legislature, the sixth respondent confirmed that the timing of the decision on the sponsorship might have been unreasonable, mainly due to legislative processes that the first respondent had not yet fulfilled.[3]

[7] In their answering affidavit, the first to third respondents produced a letter sent by the Chief Director: Local Government Budget Analysis at National Treasury (the Chief Director) on 7 July 2023, less than two weeks prior to the sponsorship decision being made to the erstwhile municipal manager. It confirmed that the first respondent was in a perilous financial position and that its financial sustainability was at risk. The Chief Director implored the first respondent to reduce its planned expenditure, as failure to do so would result in the adjustments budget being unfunded.[4] This letter was not disclosed at the council meeting and the first to third respondents have failed to explain the reason for such failure. The applicant submitted that the letter was not considered when the decision on the sponsorship agreement was taken and as such, the first to third respondents acted irrationally in making the decision.

[8] The applicant submitted that in light of the above grounds for review, it was entitled to a declaratory order under s 172(1)*(a)* of the Constitution that the sponsorship decision is unlawful and invalid. It further submitted that it is entitled to the relief sought in terms of prayers 1 to 3 of the notice of motion which read as follows:

'[1] The following decisions are declared to be unlawful and invalid, and are reviewed and set aside:

1.1 the decisions taken by the second respondent on 19 July 2023 to:

1.1.1 approve a sponsorship agreement between the first respondent and the fifth respondent, a Premier Soccer League club (as it was then), for a three-year period commencing in the 2023/2024 financial year;

[3] The record at page 454.

[4] The record at pages 565-566.

1.1.2 approve the payment of R9 million rand per annum, excluding VAT, to the fifth respondent in terms of the sponsorship contract;

1.1.3 to approve the first respondent being held liable under the sponsorship contract for the annual maintenance of the Harry Gwala Stadium to ensure compliance with the standards prescribed by the Premier Soccer League; and

1.1.4 to authorise the third respondent to sign the sponsorship contract; and

1.1.5 the decision by the third respondent to sign and enter into the sponsorship contract on behalf of the first respondent.

[2] The payment by the first respondent of any money to the fifth respondent under the sponsorship contract to be declared to be unlawful, reviewed and set aside. All and any payments made by the first respondent to the fifth respondent under the sponsorship agreement be immediately repaid by the fifth respondent to the first respondent with interest ex tempore morae calculated from the date on which they were paid.

[3] The costs of this application are to be paid jointly and severally by any respondents opposing it, including Mr Lulamile Mapholoba in his personal capacity in the event that the third respondent opposes it.'

Respondent's submissions

[9] Although the first to third respondents (who will collectively be referred to as 'the municipal respondents') argued that the decision sought to be reviewed by the applicant was not administrative, as contemplated in terms of the Promotion of Administrative Justice Act 3 of 2000, they conceded that it was reviewable under the principle of legality, as it was an executive decision. They argued, however, that the decision was lawful and rational. The first respondent was mandated to approach the forth respondent and he thereafter made recommendations to the second respondent, and the matter was debated, a motion was passed, and a resolution taken after councillors had voted in a democratic process. The sponsorship agreement brought huge benefits to the city and the province of KwaZulu-Natal. The municipal respondents took all relevant factors into account when the decision was made. It was further argued that the letter from National Treasury dated 7 July 2023 was not a directive, and it would not have made a difference, even if it had been disclosed to the second respondent. National Treasury and the Auditor General had not raised any issues with the sponsorship agreement.

[10] It was further submitted that the sponsorship agreement did not fall within the category of goods and services and therefore did not have to go through a procurement process, as contemplated in s 217 of the Constitution and other legislative prescripts. The sponsoring of a football club was not unique to the first respondent, for example, the eThekwini Municipality had sponsored the Sharks, Comrades Marathon, etc.

[11] The municipal respondents further submitted that the applicant was using the sponsorship issue as a political playground to serve its own political interests. They maintained that the decision was taken in a democratic manner, and that the applicant was part of the council meeting in which this decision was taken. The applicant was defeated in that process but it now wants a second bite at the cherry and wants to subvert a democratic decision. The municipal respondents accepted that the first respondent was in a difficult financial state, and like all municipalities, it had service delivery challenges but that did not mean it could not fulfil other municipal objectives. The allegations by the applicant were therefore wild and unsubstantiated. The sponsorship agreement was catered for in the first respondent's adjustments budget and to date, an amount of R9 million had been paid to Royal AM. The municipal respondents submitted that s 33 of the MFMA was not applicable, as the sponsorship agreement would not extend beyond 30 June 2026. The three years were calculated as follows:

(a) 20 July 2023 to 30 June 2024;
(b) 20 July 2024 to 30 June 2025; and
(c) 20 July 2025 to 30 June 2026.

[12] In his submission, counsel for the municipal respondents submitted that the decision to sponsor Royal AM was because the city and its citizens had, in the past, derived major benefits from the sponsorship of MUFC. In summary, these benefits included promotion of the socio-economic development of the city as set out in s 152 of the Constitution; unity and social cohesion of the people of Msunduzi brought about by football; promotion of the city as the capital of KwaZulu-Natal; bringing of tourism to the people of Msunduzi; provision of employment and business opportunities; showcasing of local talent; and bringing about gender equality, as the owner of Royal AM is a woman.

[13] The municipal respondents submitted that even if the court would find that section 172(1)*(a)* is applicable, it cannot set aside the decision. Counsel for the respondents sought that the application be dismissed with costs, including the costs of two counsel on scale C.

Analysis

[14] There was consensus between the parties that the decision was reviewable under the principle of legality. As was held in National Student Financial Aid Scheme and another v Moloi and others[5],it is a trite principle of administrative law that public power must be sourced in the law and the Constitution, courts must review the exercise of public power to ensure compliance with this principle. The principle of legality requires that the exercise of executive power must be rationally related to the purpose for which it is conferred. The same was also observed by the court in *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd* and others[6].

[15] The issue to be decided is whether the decision to sponsor Royal AM was unlawful and irrational, and if so, whether the payments already made by the first respondent to Royal AM under the sponsorship agreement must be repaid, with interest. Another issue is whether a punitive costs order against the third respondent must be granted due to his breaches of his constitutional and statutory duties.

[16] The first respondent's financial status at the time of the sponsorship decision is an important factor to consider in determining the rationality of the decision. The sixth respondent confirmed on 6 November 2023 that, after the sponsorship agreement was entered into in July 2023, the first respondent was still under administration and further that it had regressed from an unqualified audit opinion with findings to a qualified opinion.

5 National Student Financial Aid Scheme and Another v Moloi and Others [2024] ZASCA 66; 2024 (6) SA 422 (SCA) para 38

6 Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) para 30.

The sixth respondent stated that although the first respondent had improved from an unfunded budget to a funded one, there was still room for improvement, as it was still servicing debt for Umngeni Water and Eskom through payment plans.

[17] In her comment on the sponsorship of Royal AM, the sixth respondent stated that the ministerial representative had not yet allowed the first respondent to incur any expenditure on the sponsorship of a soccer club until the necessary processes were followed. The first respondent was still under provincial intervention in terms of s 139(1)*(b)* of the Constitution. While the second respondent still retained its legislative authority, the first respondent was still bound to comply with s 152 of the Constitution. The ministerial representative believed that the timing of the second respondent's decision on the sponsorship agreement might have been unreasonable due to the first respondent not fulfilling legislative processes.[7]

[18] Against the above-mentioned financial status of the first respondent, over a period of three years with effect from July 2023, the first respondent would pay Royal AM a total amount of R27 million. Further to that, the first respondent would pay a service provider to maintain the stadium for the benefit of Royal AM, in exchange for, among others, marketing and advertising opportunities for the first respondent.[8]

[19] This financial obligation was incurred at a time when the first respondent was already in dire financial distress. The letter of 7 July 2023 issued by the Chief Director had implored the first respondent to tighten expenditure. This letter was issued to the third respondent, prior to the council meeting of 19 July 2023 but the third respondent did not disclose it at the council meeting. The resolution was therefore taken without the knowledge of the directive from Treasury to tighten expenditure.

[20] The decision constituted an exercise of public power for the use of public funds, and, therefore, the municipal respondents were enjoined to comply with the principle of legality. If one considers the sixth respondent's answers to parliamentary questions, as

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[7] The record, parliamentary answers by MEC: COGTA, at pages 453-454.
[8] Sponsorship agreement, at page 85-91.

well as the letter from the Chief Director, one is inclined to agree with the sixth respondent that the decision to enter into any sponsorship agreement at that time was unreasonable and irrational. The sixth respondent stated that as the first respondent was under administration, the ministerial representative had not yet allowed the first respondent to incur any expenditure on the sponsorship of a soccer club until the necessary processes have been followed. This suggests that as of 6 November 2023, when the sixth respondent made these findings, such necessary processes had not yet been followed. It follows, therefore, that the first respondent did not have permission to enter into the sponsorship agreement from the ministerial representative.

[21] Based on the above, it is this court's considered view that the decision on the sponsorship of Royal AM was unreasonable, unlawful and irrational. Section 172(1)(b) of the Constitution provides that the court may make an order that is just and equitable. It is therefore on the basis of s 172(1)(b) that I disagree with counsel for the municipal respondents that this court may not set aside the decisions that have been declared unlawful and invalid. This court has a true discretion to exercise in this regard as was confirmed in *Special Investigation Unit v Phomella Property Investments (Pty) Ltd and another*[9] that *"This court has confirmed that the discretion exercised under s 172(1)(b) is a true one".*

The court went on to state the following:

" The exercise of a remedial discretion under s 172(1)*(b)* of the Constitution . . . constitutes a discretion in the true sense. It may be interfered with on appeal only if [the appeal court] is satisfied that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. Put simply, the appellants must show that the High Court's remedial order is clearly at odds with the law."[10]

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[9] *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) para12

[10] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA) ([2022] 2 All SA 626; [2022] ZASCA 54) (*Central Energy Fund*) para 43.

[22] Accordingly, having found the decisions of the second respondent to be unlawful and invalid, it is my finding that they fall to be reviewed and set aside. The fourth respondent benefited from an unlawful and invalid contract and, there is no evidence that any of the benefits that the municipal respondents sough to gain from the sponsorship contract were actually gained. It is just and equitable therefore that the funds paid to the fourth respondent under the sponsorship contract be repaid to the first respondent.

Breaches of section 217 of the Constitution, PPPFA, PP Regulations, sections 33 and 112 of the MFMA, First respondent's Cost Containment and SCM Policies

[23] It is common cause that the first respondent did not follow any procurement procedures prior to entering into the sponsorship agreement with Royal AM. The third respondent simply made recommendations, and a resolution was taken at a council meeting. The first respondent ought to have followed s 217 of the Constitution, as well as the procurement procedures but it decided not to do so. Section 217 of the Constitution provides as follows:

"(1) When an organ of state in the national, provincial or local sphere of government, or any institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

[24] Having considered what the municipal respondents expected from Royal AM in exchange for the sponsorship (see paragraph 4(a) to (k)), it appears that the municipal respondents sought its marketing, promotion and/or public relations services from its association with Royal AM. These are services that any other soccer club based in KwaZulu-Natal could have been interested in, in light of the benefits that they would gain from the sponsorship contract. The opportunity was however not made available to other KZN soccer clubs. The submission by counsel for the municipal respondents was that Royal AM was the only club that was identified but no reasons were given as to why it was Royal AM in particular that was identified. This was therefore not in line with section 217 of the Constitution which ought to have been complied with taking into account that the municipal respondents sought public relations services from its association with Royal AM. It is this court's considered view that the process of sourcing such services was not transparent, competitive and fair.

[25] The first respondent had failed to fulfil its executive mandate, hence the intervention by the ministerial representative in terms of s 139 of the Constitution. The first respondent was still in a financial recovery process and the decision to incur expenditure in the manner it did with regards to the sponsorship contract ought to have been careful, rational and in line with the principles as enunciated in s 217 of the Constitution. As a council, the second respondent still had its legislative authority, but it still had to comply with s 152 of the Constitution, which outlines its role and responsibilities. In fulfilling its mandate, the first respondent was still enjoined to comply with all other relevant legislative prescripts, including the PPPFA, MFMA its cost containment and SCM policies. I cannot find that the first respondent succeeded in doing so.

Royal AM

[26] Royal AM received sufficient notice of the hearing but elected not to participate, even though the applicant had sought an order against it. The applicant seeks that any funds already paid to Royal AM be paid back to the first respondent. I have no reason not to grant this order, in light of the finding that the decision to sponsor Royal AM was unlawful and irrational.

Costs

[27] The applicant seeks a punitive costs order against the fifth respondent. I am not inclined to grant this order, as the fifth respondent was, at the time, acting in his official capacity as the municipal manager. His failure to disclose the letter from the Chief Director cannot be said to have been correct but there is no evidence to demonstrate that it was mala fide.

Order

[28] In the result, I grant the following order:

1. The following decisions taken by the second respondent on 19 July 2023 are declared to be unlawful and invalid and are reviewed and set aside. The include the decisions:

1.1.1 to approve a sponsorship agreement between the first respondent and the fifth respondent, a Premier Soccer League club (as it was then), for a three-year period commencing in the 2023/2024 financial year;

1.1.2 to approve the payment of R9 million rand per annum, excluding VAT, to the fifth respondent in terms of the sponsorship contract;

1.1.3 to approve the first respondent being held liable under the sponsorship contract for the annual maintenance of the Harry Gwala Stadium to ensure compliance with the standards prescribed by the Premier Soccer League; and

1.1.4 to authorise the third respondent to sign the sponsorship contract; and

1.1.5 the decision by the third respondent to sign and enter into the sponsorship contract on behalf of the first respondent.

2. The payment of any money to the fourth respondent under the sponsorship contract is declared to be unlawful and is reviewed and set aside.

3. All payments made by the first respondent under the sponsorship contract to the fourth respondent must be immediately repaid to the first respondent with interest from the date of this judgment.

4. The costs of this application are to be paid jointly and severally by the first to third respondents, on scale B.

[redacted]

MLABA J

APPEARANCES

Date of hearing: 28 February 2025

Date of Judgment: 08 August 2025

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