IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

**NOT REPORTABLE**

Case No.: CA106/2023

In the matter between:

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| **SPECIAL INVESTIGATING UNIT** | Appellant |
| and | |
| **KWANE CAPITAL (PTY) LIMITED** | First Respondent |
| **MCEBISI MLONZI** | Second Respondent |
| **AMAHLATHI LOCAL MUNICIPALITY** | Third Respondent |

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**JUDGMENT**

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**EKSTEEN J:**

[1] The appellant, the Special Investigating Unit[1] (SIU), acting in terms of s 5(5) of the SIU Act[2] claimed payment of R92 487 183,12 (ninety two million four hundred and eighty

[1] Established in terms of s 2 of the Special Investigating Units and Special Tribunals Act, 74 of 1996 (SIU Act).

[2] Section 5(5) provides: 'Notwithstanding anything to the contrary in any law and for the performance of any of its functions under this Act, a Special Investigating Unit may institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law.'

seven thousand one hundred and eighty three rand and twelve cents) together with interest, from the first respondent, Kwane Capital (Pty) Limited (Kwane), and the second respondent, Mr Mcebisi Mlonzi, a director of Kwane, jointly and severally. The claim arose from a 'Hire Purchase Agreement'[3] (HP agreement) that had been concluded between Kwane,[4] represented at the time by Mr Mlonzi, and the third respondent, the Amahlathi Local Municipality (the municipality) in respect of the purchase of road construction vehicles (white plant) and plant and equipment (yellow plant), which the SIU contended had been unlawfully concluded and was therefore void, *ab initio*. Pursuant to the HP agreement, the white and yellow plant (referred to jointly as the fleet plant and equipment) had been duly delivered to the municipality and it had had the use and enjoyment thereof for more than two years before the SIU advised that the transaction was unlawful. It was accordingly cancelled, and the fleet plant and equipment repossessed. The amount claimed represented the sum paid by the municipality, in terms of the HP agreement, during this period. The municipality did not enter an appearance to defend, although a number of officials in the employ of the municipality, and an elected councillor, testified at the trial. The High Court, Makhanda, dismissed the SIU's claim and refused an application for leave to appeal. The appeal is with leave granted on petition to the Supreme Court of Appeal.

[2] Extensive evidence was led at the trial of the events and circumstances leading up to and surrounding the conclusion of the HP agreement. The material features thereof, for purposes of this judgment, are as follows: The municipality serves a large area that includes numerous towns, including Keiskammahoek, Great Kei, Cathcart, and Tsomo. In order to establish and develop road infrastructure within its area of jurisdiction it received annual Municipal Infrastructure Grants (MIGs)[5] from the National Government, but it also had a limited fleet of plant of its own for maintenance of existing roads. Towards the latter part of 2013 the engineering department in the municipality noted that it was failing in its

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[3] An installment agreement as defined in s 1 of the National Credit Act, 34 of 2005.
[4] Kwane had previously been known as Laman Financial Service (Pty) Limited and the contract was initially concluded in the name of Laman. The company is referred to herein as 'Kwane').
[5] Allocations made in terms of s 214(1)(c) of the Constitution, subject to particular conditions for purposes of infrastructure development.

service delivery in respect of construction and maintenance of roads. In September, the engineering manager presented his monthly report to the Executive Committee (Exco) of the municipality, and it considered the report at its meeting of 25 November 2013. He had raised a concern that the municipality had insufficient road maintenance equipment and suggested that it purchase its own construction fleet plant and equipment. The minutes of the Exco meeting reflect the resolutions taken, thus:

> '1. That the report for the month of September 2013 submitted by the Acting Engineering Services Technician be noted and accepted.
>
> 2. That it be noted that there was a concern raised regarding the shortage of machinery, and the matter was referred to the Municipal Manager in order to respond.
>
> 3. That it be noted that the Engineering Department tried to hire machinery in order to fast track the work.
>
> 4. That councillors and community leaders be requested to work collaboratively in order to develop a strategy of monitoring graders in their areas.
>
> 5. It be noted that the issue of purchasing machinery for the Municipality be considered by council.'

[3] The council of the municipality met again on the 31 January 2014, to consider the midyear report for the financial year 2013/2014. The report reflected that the municipality had at that stage spent just 12% of its MIG funds during the first six months and that National Treasury was threatening to withhold further MIG funds due to its failure to perform. This, understandably, placed councillors in an uncomfortable position as they would be held accountable by the community. Thus, at the conclusion of the meeting, the municipal manager, Mr Socikwa, gave an undertaking to the council to devise a turnaround strategy.

[4] Shortly thereafter officials, and the speaker of the council of the municipality, attended a SALGA[6] meeting of all local municipalities in the Amathole Region. Each local municipality was required to deliver its performance report. At this meeting, it emerged that several other municipalities had acquired their own road construction fleet plant and equipment. These municipalities, including Port St Johns, were performing substantially better than the municipality, and the speaker, who testified for Kwane at the trial, said that she was impressed.

[5] At the next council meeting on 25 March 2014, the minutes of the Exco Meeting of 25 November 2013 served before the council. As I have said, the minutes of the meeting reflected a resolution that the council should 'consider the issue of purchasing machinery'. Accordingly, the council resolved that management must begin a process of acquiring road construction machinery for the municipality. I shall revert to the nature of the process.

[6] It was common cause that the council had no budget for the purchase, and the speaker, Ms Magxaza, said that they had no financial report before them at this meeting relating to their financial ability. However, she was aware of earlier reports that had concluded that they could not afford to buy equipment. She explained that they did not really understand how other municipalities had managed to buy their own equipment, but at that stage they were faced with significant underspending of MIG funds earmarked for infrastructure development, and the process had to be fast tracked.

[7] By this time the director of engineering in the municipality, and Mr Socikwa, had envisaged not only expanding its fleet for road maintenance purposes, but increasing the fleet to build inhouse capacity to a point where it could undertake road construction itself. The intention was to claim against the MIG allocation, as roads were built, to make payment of instalments on the purchase of the plant.

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[6] South African Local Government Association.

[8] Pursuant to the resolution of 25 March 2014, Mr Socikwa proceeded to sign a letter of appointment in favour of Kwane dated 3 April 2014 in the following terms:

> 'HIRE PURCHASE FACILITY FOR FLEET PLANT EQUIPMENT
>
> We hereby confirm that LAMAN financial Services are hereby appointed by Amahlathi Municipality to provide Hire Purchase Facilities for the purchase of Fleet Plant and Equipment from Barlow World/Bell.
>
> The Hire Purchase Contract payment shall be in terms of the Hire Purchase with an initial payment of **R10 388 639 excluding vat** by the 04 April followed by 33 equal payments **R3,317,553.00 excluding vat** equal instalments. The first installment would be end of May 2014 as per the signed agreement.
>
> Kindly confirm acceptance of this appointment within seven (7) days of receipt of this letter by a letter addressed to the Municipal Manager, Amahlathi Local Municipality.'

[9] As I have said, the letter was dated 3 April 2014, but the agreement and the letter of acceptance signed by Mr Mlonzi reflect the date of signature as 1 April 2014. The evidence established that the delivery of heavy plant and equipment to the municipality had already commenced on 1 April 2014, to the dismay of the supply chain management department, which had played no role in the procurement process. None of the supply chain management staff, nor the engineering department, had been involved in any planning in respect of the delivery of a large fleet of plant and equipment. No safe storage facility had been prepared and no provision had been made for insurance of the equipment, or the purchase of diesel to operate the equipment. Much of the equipment required specialised operators, and employees of the municipality had not been trained in anticipation of the delivery.

[10] Mr Cilliers, the senior finance manager, received a letter of demand from Kwane for the initial payment[7] which was due on 4 April 2014. He declined to make payment as

[7] The R10 388 639.00 referred to in the letter of appointment.

the amount had not been budgeted for. He also contended that it was not competent to make payment from MIG funds in respect of capital purchases. Hence an urgent council meeting was called for 8 April 2014. The minutes of the meeting record:

> '**REPORT ON THE PURCHASE OF INFRASTRUCTURE PLANT EQUIPMENT**
>
> - An explanation was given by the Municipal Manager regarding the need to fast track Service Delivery and Expenditure on MIG which led to the conclusion of the hire purchase agreement with Laman Financial Services to purchase Infrastructure Plant equipment.
>
> - It was advised to Council that a new agreement be concluded with Laman(i) Financial Services taking into consideration the issue of affordability whilst at the same time ensuring that each cluster has enough Infrastructure Equipment as already identified by Management at its meeting held in East London, however, it was indicated that the Council has already resolved on the matter.
>
> **It was resolved**
>
> 1. That the 3 year Contract entered into by Management and Laman(i) Financial Services **BE CONDONED.**
>
> 2. That Management should ensure the initial deposit as contained in the agreement is **PAID** with immediate effect.'

[11] Pursuant to this meeting and resolution the cost of the agreement was to be renegotiated. Mr Cilliers was instructed to pay the initial deposit, which had been renegotiated to R8 950 372,56. He did so under protest.

[12] As I have said, the fleet plant and equipment was received and used by the municipality. Kwane provided staff and training to operate the plant, and additional staff were employed. The initial payment, which had not been budgeted for, was made from cash reserves held by the municipality, and Mr Socikwa said that he performed a juggling

act, moving money from one vote to another to provide for the running costs. It was nearly two years later when newspaper articles began to circulate that questioned the lawfulness of the transaction. The President issued a proclamation that authorised the SIU to investigate the matter. They conducted various interviews, which led them to conclude that the municipality had not engaged in a competitive tender process, but rather had purported to rely on a deviation provided for in regulation 32 of the supply chain management regulations (SCM regulations)[8]. I shall revert to regulation 32, but suffice it for present purposes to record that they concluded, as I have explained, that the transaction was unlawful and therefore null and void.

***The Pleadings***

[13] I turn to consider the relevant portions of the pleadings that are material for purposes of the judgment. The case for the SIU was that the HP agreement was unlawful and therefore null and void, *ab initio*. It contended that the agreement was concluded in contravention of s 217 of the Constitution[9], and the municipality's supply chain management (SCM) procedures and policies that were binding on the municipality in terms of Chapter 11 of the MFMA.[10] In addition, it alleged that the HP agreement did not comply, and was in conflict, with regulation 32(1) of the SCM regulations.[11] Regulation 32 provides for the procurement of goods and services under contracts that were secured by other organs of state, under certain prescribed conditions. Thus, it is colloquially referred to as 'piggybacking'.

[14] These averments were met with a bare denial on behalf of Kwane and Mr Mlonzi and it was pleaded on their behalf that Kwane was entitled to assume that the regulation 32 process, as envisaged in the SCM regulations, had been duly followed as it had been informed by the municipality that the HP agreement had been concluded pursuant thereto.

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[8] Municipal Supply Chain Management regulations, published in GN868 of 30 May 2005 in terms of s 168 of the Local Government: Municipal Finance Management Act, 56 of 2003 (the MFMA).
[9] Act 108 of 1996.
[10] Section 112 of the MFMA requires each municipality to have and to implement a Supply Chain Management Policy which gives effect to Chapter 11 of the MFMA.
[11] Promulgated under s 168 of the MFMA.

[15] The SIU was not satisfied with the response and further particulars were requested on their behalf. In their particulars for trial Kwane and Mr Mlonzi recorded:

> 'The First and Second Defendants admit that the conclusion of the Hire Purchase Agreement constituted the procurement of goods, but not in contravention of the terms of Section 217 of the Constitution. It is to be noted that Section 217 of the Constitution does not preclude deviations from regular procurement procedures. Deviations are allowable in terms of, among others, Regulation 32 of the Municipal Finance Management Act, regulations and provisions contained in other legislation such as the Provincial Finance Management Act, Supply Chain Management Policies and the like.'

Their pleadings clearly reflect that Kwane and Mr Mlonzi had at all times been led to believe, and understood, that the HP agreement had been concluded pursuant to regulation 32.

[16] However, at the trial, after the SIU had closed its case, Mr Socikwa testified on behalf of Kwane and Mr Mlonzi. He acknowledged that it was not competent for the municipality to have procured the fleet plant and equipment under regulation 32 and denied that he had done so. Accordingly, counsel for Kwane and Mr Mlonzi sought to amend their plea and their further particulars to conform with the evidence of Mr Socikwa. The application to amend was opposed, but the trial court allowed the amendment. The essence of the amendment was to abandon all reliance on regulation 32 and to withdraw the allegation that it had been advised by the municipality that the HP agreement had been concluded in terms thereof.

[17] In the amended particulars for trial, it was now contended:

> '1.2 The detail of the specific procurement procedures and processes undertaken by the Third Defendant is not known to the First and Second Defendant. The First Defendant understood that no competitive bidding process preceded its

appointment and that its appointment consequently happened as a result of a deviation from the standard procurement procedures and processes.'

[18] It proceeded to explain the new stance thus:

'1.3.1 The First Defendant partook in a competitive bidding process in respect of the procurement of similar fleet plant and equipment, which equipment was to be supplied to the Port St. John's Local Municipality.

1.3.2 The First Defendant was the successful bidder in respect of the Port St. John's Local Municipality tender.

1.3.3 The Third Defendant thereafter sought to procure fleet plant and equipment through a deviation pursuant to Regulation 32 of the Municipal Finance Management Act. The Regulation 32 procurement process was pursued by the Third Defendant and the First Defendant was requested to consent to this process.

1.3.4 It transpired that the Regulation 32 procurement process could not be utilised by the Third Defendant. The Third Defendant then resorted to the deviation pursuant to Section 63 of the Third Defendant's Supply Chain Management Policy and in particular Section 63(1) of the said policy.'

[19] The effect of the amended pleading was that Kwane and Mr Mlonzi accepted, as Mr Dörfling did on their behalf, that no competitive bidding process as envisaged in s 217 of the Constitution had occurred, but it contended that the deviation from such a process was justified in terms of the municipality's SCM policy. The deviation contended for was the "sole supplier" provision.

[20] Mr Buchanan, on behalf of the SIU, argued that the trial court erred in granting the amendment and accepting the evidence of Mr Socikwa. He contended that the reliance on the sole provider deviation was an afterthought that arose during the course of the litigation once it had become clear that regulation 32 was not open to the municipality.

The argument is, on the face of it, compelling, but the trial court had the benefit of seeing the witnesses, and it came to its conclusions on an acceptance of the evidence of Mr Socikwa. Generally, the court would be slow to interfere on appeal with factual findings made by a trial court, particularly if the factual findings depend upon the credibility of witnesses who testified at the trial.[12] For purposes of this judgment, I shall accept the credibility findings made by the trial court in this regard. This matter must, accordingly, be decided on the amended pleadings.

***The Municipality's Supply Chain Management Procedures and Policy***

[21] As I have said, it was the SIU's case that the HP agreement had been concluded in contravention of the SCM procedures and policy. It is, accordingly, necessary at this juncture to consider the general scheme of the SCM procedures and policy and the legislative structure in which it applies. The objectives of the policy[13] are, *inter alia*, to give effect to s 217 of the Constitution and to comply with all applicable provisions of the MFMA. In addition, a further objective of the policy is to ensure consistency with all other applicable legislation, including the Local Government Municipal Systems Act[14] (the Systems Act).

[22] In terms of the Systems Act[15] each municipal council is required, at the commencement of its elected term, to adopt a single, inclusive and strategic plan for the development of the municipality (the IDP) which aligns the resources and capacity of the municipality with the implementation of the plan. Once adopted, the IDP is the principal strategic planning instrument that guides and informs all planning and development and all decisions with regard to planning, management and development in the municipality, and it binds the municipality in the exercise of its executive authority, save where the IDP is inconsistent with national or provincial legislation.[16]

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[12] *Makate v Vodacom Limited* 2016 (4) SA 121 (CC) paras 36-40.
[13] As recorded in the policy.
[14] Act 32 of 2000.
[15] Section 25(1).
[16] Section 35(1) of the Systems Act.

[23] As adumbrated earlier, one of the objectives of the SCM policy is to comply with all the applicable provisions of the MFMA. The object of the MFMA is to secure sound and sustainable management of the fiscal and financial affairs of municipalities.[17] These include the establishment of norms and standards and requirements for budgetary and financial processes and supply chain management.[18] In pursuit of these objectives, the mayor is obliged to table an annual budget at a council meeting at least 90 days before the start of the budget year.[19] The IDP forms the policy framework and general basis upon which the annual budget is based.[20] Thus, the municipality is obliged to review its IDP annually, to the extent that the changing circumstances demand, and it is required to do so in terms of a procedure prescribed by regulation.[21] When the annual budget is tabled it must be accompanied by any proposed amendments to the IDP flowing from the annual review.[22] Thus, the budget is integrally tied to the IDP.

[24] The annual budget must be divided into a capital and an operating budget in accordance with international best practice as may be prescribed by regulation.[23] A municipality may not spend money on a capital project unless the money for the project has been appropriated in the capital budget.[24] A transaction that contemplates the acquisition of a capital asset is a capital project as envisaged in s 19 of the MFMA.[25] Irrespective of the nature of the expenditure, save where it is otherwise provided in the MFMA, a municipality may not incur expenditure unless it occurs in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget.[26] Where expenditure is incurred other than in accordance with an approved budget such expenditure is 'unauthorised'[27].

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[17] The objectives are recorded in s 2.
[18] Section 2(c) and (f).
[19] Section 16(2) of the MFMA.
[20] Section 25(1)(c) of the Systems Act and s 17(3) of the SCM policy.
[21] Section 34 of the Systems Act.
[22] MFMA s 17(3)(d) and s 21(2)(a) and (b).
[23] MFMA s 17(2).
[24] MFMA s 19(1)(a).
[25] *Merifon (Pty) Limited v Greater Letaba Municipality and Another* [2021] 4 All SA 356 (SCA) para 22.
[26] MFMA s 15.
[27] Definition of unauthorised expenditure in s 1 of the MFMA.

[25] A municipality is entitled to revise its approved budget, so as to authorise expenditure that would otherwise be unauthorised, by means of an adjustments budget,[28] but it does not have an unfettered discretion to do so. The power to pass an adjustments budget is circumscribed by s 28 of the MFMA. It may appropriate additional revenues which have become available over and above those anticipated in the annual budget, but only to revise or accelerate spending programs already budgeted for.[29] Similarly, it may authorise the utilisation of projected savings in one vote towards spending under another vote.[30] Only the mayor may table an adjustments budget and he may only do so within prescribed limits as to timing or frequency.[31] When he does so, he is required to provide an explanation of how the adjustments budget affects the annual budget and the impact of any increased spending on the annual budget and the annual budgets for the next two financial years.[32] Where the adjustments budget involves a deviation from the IDP it requires the simultaneous adoption of a resolution approving changes to the municipality's IDP.[33]

[26] I revert to the SCM policy. The municipality's SCM policy outlines the process to be followed in the acquisition of goods and services. It begins with a needs assessment that must ensure that the requirements are linked to budget.[34] The SCM policy explains that a demand management system must include timely planning and management processes to ensure that all goods and services required by the municipality are quantified and budgeted for.[35] The process involves the integration of the SCM in the strategic planning process, linking the requirements to budget and conducting a market/industry analysis.[36]

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[28] MFMA s 28.
[29] MFMA s 28(2)(b).
[30] MFMA s 28(2)(d).
[31] MFMA s 28(4).
[32] MFMA s 28(5)(a) and (c).
[33] MFMA s 28(7) as read with s 24(2)(c)(iv).
[34] Section 15.1(c) of the SCM policy.
[35] SCM policy s 17(2)(a).
[36] SCM policy s 18(2)(a), (e) and (j). Section 21(1)(b) requires the accounting officer to establish an acquisition management system to ensure that expenditure on goods and services is incurred in terms of the approved budget with specific reference to s 15 of the MFMA.

[27] Goods and services above a transaction value above R200 000.00 (VAT included) and long term contracts may only be procured through a competitive bidding process and goods and services above the estimated value of R200 000.00 (VAT included) may not deliberately be split into parts or items of lesser value merely for the sake of procuring the goods or services otherwise than through a competitive bidding process.[37]

[28] There may, however, be instances where the circumstances of a particular case make the use of a public call for tenders inappropriate. The SCM policy therefore provides for deviations (exceptions) to the prescribed use of tenders in limited circumstances. Mr Socikwa said that he had invoked the provisions of s 63(1)(b)[38] of the SCM which permit a municipality to dispense with the procedures governing procurement generally and to adopt any convenient process, including direct negotiations, if the goods that it sought to procure are produced or are available from a single provider only. When a municipality invokes the provisions of s 63(1), strict compliance with procedures reflected in its SCM manual must be adhered to.[39] In the event that it chooses to proceed by direct negotiations, as Mr Socikwa did, it is obliged to maintain minutes of such negotiations for record purposes[40] and if it is resolved to procure goods by way of negotiation from a source that it believes to be a single provider, it must be advertised for a period of fourteen days prior to the procurement in order to ensure transparency and fairness.[41]

***The application of the SCM policy and the legislative framework***

[29] The effect of the SCM policy and the legislation is that the IDP, as amended from time to time, forms the foundation of all budgetary processes. Capital projects require the approval of council before money may be spent, and the municipality, including council,

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[37] SCM policy s 29(1) and (2).
[38] The material portion of s 63(1) provides:
'The procedures governing procurement in this policy may be dispensed with and any required goods … may be procured through any convenient process, which may include direct negotiations, but only:
(a) …
(b) if such goods … are produced or available from a single provider only;
(c) …
(f) in any other exceptional circumstances where it is impractical or impossible to follow the official procurement process, … .'
[39] Section 63(4) of the SCM policy.
[40] Section 34(3) of the SCM policy.
[41] Section 63(2)(c) of the SCM policy.

may not incur expenses that have not been budgeted for unless it is rectified by means of an adjustments budget.

[30] No evidence was led in respect of the IDP, but the sequence of the events and the timeline of the transaction are explained earlier.[42] The ineluctable conclusion to be drawn therefrom is that the capital project embarked upon was not provided for in the IDP and no attempt had been made to amend the IDP. It is common cause that there was no budget provided for either the initial payment in respect of the HP agreement or the consequential expenses incurred in respect of additional staff, insurance, diesel and other incidental expenses.

[31] The resolution of council on 25 March 2014 to begin a process of acquiring plant and machinery for the municipality could only legitimately refer to a legal process in compliance with the SCM and the MFMA. It required the commencement of a process to amend the IDP, in accordance with the prescribed procedure, to provide for the acquisition of fleet plant and equipment and the in-house construction of roads, and for the inclusion of the expenditure in respect thereof in the budget, alternatively, if permitted, in an adjustments budget. Unless and until the expense has been budgeted for the HP agreement would be in contravention of s 15 and 19 of the MFMA and the expenditure unauthorised.

[32] Mr Dörfling argued that the difficulty was cured by the resolution on 8 April 2014, where the council of the municipality had condoned the HP agreement and authorised payment of the initial deposit as contained in the agreement. He contended that insistence upon an adjustments budget seeks to place form above substance. The argument cannot be sustained. I have set out in some detail the provisions of the MFMA and of the SCM policy earlier herein to demonstrate the central role of budget and budgetary planning. The evidence tendered, and the timeline of events set out earlier, reflect a total absence of any considered planning in accordance with the SCM policy.

[42] Mr Socikwa said that the IDP for the following year was adjusted, but no mention was made of the IDP for 2013/2014.

The idea of an acquisition of fleet plant and equipment utilising MIG funds first arose in February 2014 and delivery of the first plant occurred on 1 April 2014. There was a total disregard for the provisions of the SCM which I have set out earlier, and the initial payment was not budgeted for. In a circular, National Treasury[43] sought to provide clarity on the procedures when dealing with unauthorised expenditure. The circular emphasizes that a valid expenditure decision can only be made by council in terms of a budget or an adjustments budget. Only council may authorise instances of unauthorised expenditure and they may do so only through an adjustments budget. The principle is confirmed in s 32(2)(a)(i) of the MFMA, as read with regulation 25 of the Municipal Budget and Reporting Regulations, which states that unauthorised expenditure must be authorised by the municipality in an adjustments budget that is approved by the municipal council. As adumbrated earlier, it can only be tabled by the mayor, and he is required to provide various explanations together with the motion. This did not occur. The purported *ex post facto* condonation of the contract and an unbudgeted expenditure was not competent, unless it is accompanied by an adjustments budget and an appropriate amendment to the IDP.

[33] For the reasons set out earlier, the HP agreement constitutes a capital project, and the initial payment is an expense as envisaged in s 19 of the MFMA. It had not been reflected in the capital budget, and, absent an adjustments budget, it was not competent for the council to authorise payment thereof. The trial court failed to have regard to any of these provisions, and in that respect it erred.

***Sole supplier***

[34] As adumbrated earlier, Mr Socikwa sought to rely on a deviation that entitled him to dispense with tender procedures because, so it was argued, Kwane was a sole supplier. He explained how he had become aware of the Port St Johns experience at the SALGA meeting in February 2014, and their tender processes enjoyed much attention at the trial.

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[43] MFMA circular number 68.

[35] Mr Dörfling argued that the context of this case, the chronology of the events, and the Port St Johns experience demonstrate that an open bidding process was impractical and nonsensical because no one else outside of Kwane offered an HP finance facility that enabled municipalities to obtain full sets of yellow and white plant equipment while awaiting claims against the MIG.

[36] Port St Johns had advertised the tender for an HP facility for the procurement of fleet plant and equipment in order to build in-house capacity for the execution of certain infrastructure projects instead of outsourcing them. The tender was awarded to 'Sci-Tech Engineering/SIQTECH'. The evidence did not disclose how many other tenders had been received. However, Sci-Tech failed to deliver, and the contract was cancelled. Thereafter, in July 2013, Port St Johns readvertised the tender. The new advertisement attracted three tenders. One was disqualified because it had offered a rental contract, as opposed to an HP contract that Port St Johns had required. A second was disqualified as it tendered to supply the fleet plant and equipment by way of a direct sale. Kwane was the only remaining tender and the contract was awarded to Kwane. The Port St Johns HP agreement provided for the purchase price to be paid over a period of three years and for Port St Johns to become the owner of the fleet plant and equipment upon the payment of the final instalment. The payment of the instalments for the fleet plant and equipment would be sourced through claims under the MIG process from the National Treasury.

[37] Witnesses in the trial differed on the lawfulness of the utilisation of MIG funds in the manner proposed. MIG funds constitute an allocation from National Government pursuant to s 214(1)(c) of the Constitution.[44] These grants are extended on specific conditions and spending of such an allocation otherwise than in accordance with the conditions upon which it is extended constitutes unauthorised expenditure.[45] The particular MIG was never identified in the evidence nor have the conditions upon which it was extended been explained. Accordingly, it is not possible to resolve this issue.

[44] Definition of allocation in the MFMA.
[45] Subsection (e) of the definition of 'unauthorised expenditure' in s 1 of the MFMA.

However, I shall assume for purposes of this judgment that MIG funding could be utilised in the manner envisaged, as Port St Johns allegedly did.

[38] Inspired by the Port St Johns experience, Mr Socikwa requested the formalities in the Port St Johns tender with a view to 'piggybacking' on the Port St Johns tender in terms of s 60(1) of the municipality's SCM policy and regulation 32(1) of the Municipal SCM regulations.

[39] Having satisfied himself of the conditions of the tender, he consulted the director of engineering at the municipality and concluded that the municipality needed substantially more fleet plant and equipment than that purchased by Port St Johns. He realised then that regulation 32 was not competent for the purchase, thus, he said, he resorted to the deviation in respect of the procurement of goods that are available from a single provider only[46] to issue the letter of appointment.

[40] The effect of the change of plan by Mr Socikwa is to render the Port St Johns tender process irrelevant for purposes of this judgment. Suffice it to say that Port St Johns embarked on an open tender process in terms of s 217 of the Constitution. It did not purport to purchase from a sole supplier, and the result of its tender process does not justify the conclusion that Kwane was the only player in the market and therefore a sole supplier in the sense required by s 63(1) of the Municipality's SCM policy.

[41] As I have said, in its pleadings Kwane, and Mr Mlonzi, contended that they had no reason to question the lawfulness of Kwane's appointment, and they were entitled to assume that the appointment was lawful and constitutionally compliant. The argument was, correctly, not persisted with in the appeal. In *Afrisec Strategic*[47] Froneman J explained that the SCM policy of a municipality is 'a public document' and both the municipality, and entities that seek to contract with it, are bound by the terms thereof and

[46] Section 63(1)(b) of the SCM policy.
[47] *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Limited* 2008 JDR 1014 (SE) para 30; [2007] ZAECHC 155 (26 June 2007)

are required to familiarize themselves with the content thereof. It is therefore not necessary to address this issue further.

[42] It was argued on behalf of Kwane, reliant on *SASSA,*[48] that an organ of state is not obliged to comply with its supply chain management policy in the circumstances set out in regulation 16A6.4 of the National Treasury Regulations and the National Treasury Practice Note No. 8 of 2007/2008. Regulation 16A6.4 provides:

> 'If in a specific case it is impractical to invite competitive bids, the accounting officer … may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer … .'

[43] The difficulty with this argument is that regulation 16A6.4 and National Treasury Practice Note No. 8 of 2007/2008 were published in terms of s 76 of the Public Finance Management Act, which does not apply to local government.[49] The discretion afforded to local government to deviate from procurement processes is more limited and is circumscribed in regulation 36 of the SCM regulations, published in terms of the MFMA. It is mirrored in s 63(1) of the Municipality's SCM policy.[50] Mr Socikwa said that he relied on the sole supplier provision, but there was no evidence of any market analysis undertaken.

[44] I revert to sole supplier procurement. In *SASSA* it was emphasised that the reasons for deviation must be rational and objectively verifiable, and not based on what an official subjectively regarded as impractical.[51] The issue for decision in this matter is

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[48] *Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Limited* 2012 (1) SA 216 (SCA) para 21; [2011] ZASCA 13
[49] See s 3 and s 76 of the Public Finance Management Act, 1 of 1999.
[50] Fn 38.
[51] See also *RAiN Chartered Accountants Incorporated v South African Social Security Agency; in re Black Sash Trust and Another v Minister of Social Development and Others (Corporation Watch (NPC) and Another as amici curiae)* 2021 (11) BCLR 1225 (CC) paras 31 and 35; and *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 60; [2008] ZACC 1

whether rational and objectively verifiable reasons to deviate from the prescribed procurement regulations have been established.

[45] The fundamental requirement of a constitutional procurement process is an open and transparent bidding process.[52] Deviations from such a process should be resorted to only in exceptional circumstances where such a process cannot be followed. Sole supplier procurement contemplates a situation where there is only one supplier capable of providing the goods procured. It has been described as 'the most exclusionary form of deviation'[53] and 'the least transparent of all award procedures'.[54] *Volmink,* in a very instructive article, noted that the abuse of sole supplier procurement is well documented and has received much criticism. The State Capture Report described it as 'poorly conceived', 'particularly troubling' and 'open to abuse'.[55] The report recommended that it should be abolished and that it could not be defended on the basis of impracticality of the tender procedures.

[46] Nevertheless, deviation on this ground remains permissible and is universally accepted. However, a decision to deviate and to dispense with procurement procedures cannot be justified on the basis of inconvenience or a superficial market analysis. It should be used only as a measure of last resort where no other alternative is available.[56] Even where a thorough market analysis leads to the conclusion that there is only one supplier, the SCM policy still requires advance public notice to ensure transparency and fairness.[57] This provision is a salutary precaution that accords with article 34(5) of the *UNCITRAL Model Law 2011* and it serves as a control measure to ensure that it is only

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[52] *Buffalo City Metropolitan Municipality v Asla Construction* 2019 (4) SA 331 (CC) para 91; [2019] ZACC 15

[53] *Peter Volmink: Deviations and Variations in South African Public Procurement [A note on SCM instruction 3 of 2021/2022]* published in (2022) 9 *African Public Procurement Law Journal at 52.*

[54] *Bolton: The Law of Government Procurement in South Africa* p170.

[55] *Volmink* at 65 and *State Capture Report* Part 1 Volume 1 734.

[56] *Guide to the Enactment of the UNCITRAL Model Law on Public Procurement* 2011, at 220. Referred to by *Volmink* at 65.

[57] Section 63(2)(c) of the SCM policy provides:

'For purposes of the interpretation of section 59(1):

(a) …

(c) to ensure transparency and fairness, any goods or services that can only be obtained from a single provider must be advertised for fourteen (14) days prior to procurement.'

The reference to subsection 59(1) is erroneous and refers back to subsection 63(1).

used where no alternative is available. Thus, clear and persuasive evidence is required to establish a rational conclusion that only one supplier exists.

[47] In seeking to defend the decision to deviate, Mr Dörfling emphasized the municipality's dire financial position and the absence of a budget to fund the acquisition of such a volume of fleet plant and equipment, and he argued that it required a financier who would be prepared to offer an HP facility. The experience in Port St Johns was that only one bidder had tendered to provide an HP agreement. Thus, he contended that the evidence had established that Kwane was indeed the only supplier able to offer a single HP facility that would enable the municipality to obtain full sets of yellow plant and white plant equipment while awaiting claims against the MIG.

[48] I have explained earlier that the municipality sought a financier who was prepared to offer them an HP facility (an instalment agreement) to fund the purchase of the fleet plant and equipment. The municipality contended that their creditworthiness was such that the Development Bank of South Africa (the DBSA), as well as other commercial banks, were unwilling to provide the necessary finance for the acquisition of equipment. Mr Socikwa said that the municipality engaged with the DBSA at the beginning of 2014. They were advised of the dire need to acquire plant and equipment and the lack of resources. The municipality requested the DBSA to assist them to acquire the plant and equipment. After careful scrutiny of the municipality's financial documents the DBSA advised that the municipality was a high risk and that they would not be in the position to assist them.

[49] These discussions occurred at the beginning of 2014, apparently before the SALGA meeting. There was no evidence to suggest that any discussion relating to an instalment agreement had occurred, or that the DBSA had been advised of the availability of MIG funds, already committed by National Government, which could serve to buttress their ability to pay instalments. The evidence suggested that the discussions were directed at securing a loan and it did not establish what the attitude of the DBSA might have been had they been advised of the availability of MIGs. In respect of the commercial

banks, Mr Socikwa said that the municipality had wanted to purchase an SUV vehicle for the mayor earlier in that year, but due to the financial constraints of the municipality, First National Bank, Absa Bank and Nedbank declined their application for financing. Various other witnesses testified to the general reluctance of commercial banks to fund high risk municipalities. This does not establish that the commercial banks, or other finance houses, would have been reluctant to bid if the tender invitation were to disclose that MIG funds, committed by National Government, could be claimed from time to time in order to fund the instalments due. The disclosure of the availability of monies that could be claimed under the MIG, as roads were constructed, clearly provides a totally different perspective on the creditworthiness of the municipality.

[50] Mr Sethuse, a former executive in charge of fleet and asset finance for Bidvest Bank, testified on behalf of Kwane. He said that at the time of his appointment, Bidvest Bank did very little business with poor municipalities and black owned fleet management businesses. One of his sales managers, employed with Bidvest Bank, informed him of a business model that he had been exposed to by Mr Mlonzi and he suggested that Bidvest Bank should consider it. Essentially, the model sought to assume the risk of finance through the strength of the municipality's balance sheet, while the municipalities would claim from MIG funds. He had never seen this in his experience as a banker, and he spent some time considering the impact thereof. Upon consideration of the MIG process Bidvest Bank was willing to finance Kwane to the amount of R90 million to enable it to finance three municipalities. His evidence demonstrates the impact that the disclosure of the MIG funding model had had upon Bidvest Bank.

[51] Mr Sethuse said that he had previously worked with Standard Bank, and at Absa, and these commercial banks had not understood the model. However, he acknowledged that there was no reason in principle why any commercial bank could not do so in future. He said that he had never in his banking career seen an invitation to tender formulated on the strength of the model and was unable to say what the response would be. The result is that one simply does not know what bids may or may not have been submitted if

it had been made known that the municipal coffers would be replenished from MIGs already committed by National Government.

[52] The trial court found that Kwane was the only supplier that met the tender requirements as a supplier of a hire purchase facility, payable for a period of thirty-six months, listing a full set of equipment (white plant and yellow plant). The finding is curious as there was no tender. I have explained earlier that the tender process in Port St Johns is irrelevant to the enquiry whether Kwane was a sole supplier, and it was common cause that the municipality did not embark on a tender process in this case. There is nothing peculiar about an HP facility (installment agreement) over a period of thirty-six months.

[53] The trial court appears to have been influenced by the fact that the municipality wanted to purchase both white plant and yellow plant under a single HP facility. Save for considerations of convenience, no compelling reason was advanced for this requirement. What the trial court failed to recognize is that custom designed contracts are the most common strategy to defeat competition.[58] In essence, what the municipality sought was finance to obtain the fleet plant and equipment. The evidence did not establish any material financial benefit that could arise from a single contract as opposed to two separate contracts. As I have said, in terms of the municipal SCM policy, even if a deviation has been decided upon, advance notice must be published for fourteen days to ensure transparency and fairness. That did not occur. The SCM policy requires minutes to be kept of the negotiations which occurred. While this is merely a formal requirement for record purposes, it is significant that no record of the negotiations were produced. The trial court had no regard to these provisions of the SCM policy and, in my view, it erred in concluding that rational and verifiable reasons had been advanced to justify a conclusion that Kwane was the sole provider able to provide the finance that the municipality sought.

[58] See *Bolton* 137.

[54] Accordingly, the HP agreement was unlawful and inconsistent with the Constitution both for its failure to comply with the MFMA in respect of the budgetary requirements and with s217 of the Constitution and the SCM policy.[59] The consequences thereof is that the agreement is invalid, in terms of s 172(1)(a) of the Constitution, and must be set aside.[60]

***The Relief***

[55] Mr Buchanan argued that Kwane and Mr Mlonzi were complicit in maladministration and impropriety, at least to the extent that they were aware, or should have been aware, that the contract concluded with the municipality was patently unlawful and did not comply with the Constitutional, statutory and supply chain management provisions. Hence, the submission that it would be just and equitable, in terms of s 172(1)(b) of the Constitution that they be ordered, jointly and severally, to repay to the SIU the sum of R92 487 183,12.

[56] In terms of s 172(1)(b) of the Constitution the court is authorised to make any order that is just and equitable pursuant to a declaration of constitutional invalidity.[61] It has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances of the case. However, the Constitutional Court has developed two guiding principles for crafting an appropriate remedy in cases where a contract is set aside. In *Central Energy Fund* the Supreme Court of Appeal summarised these guiding principles as follows:

> 'The first is the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists.'[62]

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[59] See *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 56 and 58; and *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para 38 to 40; *Govan Mbeki Municipality v NICN* 2021 (4) SA 436 (SCA) at 456.
[60] *Gijima* para 52; and *Buffalo City* para 101.
[61] C*entral Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA) para 36; and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29.
[62] *Central Energy Fund* para 39.

and

'The second guiding principle is the "no-profit-no-loss" principle which the court articulated as follows:

'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract."'[63]

[57] In this matter, by virtue of the conclusion to which the trial court came, it did not consider an appropriate remedy under s 172(1)(b). The SIU provided a hypothetical calculation to demonstrate that Kwane had derived exorbitant profits from the HP agreement. Mr Dörfling did not challenge the arithmetical correctness of the calculation, but effectively demonstrated, what he contended to be material flaws in the underlying assumptions made in the calculation. On behalf of Kwane evidence was led in support of the contention that the assumptions underlying the SIU's calculation were significantly flawed. However, Mr Mlonzi was the only potential witness who could explain the costs structures utilised to determine the contract price, and he did not testify.

[58] In this regard, in *Allpay*[64] the Constitutional Court noted the guiding principles and added:

'… [A]ny benefit that [Cash Paymaster] may derive should not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in Cash Paymaster's hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract. …'

[63] *Central Energy Fund* para 41.
[64] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) para 67.

[59] Similarly, there was a dearth of evidence in respect of the financial benefit that the municipality derived from the contract during the period that it enjoyed the use of the fleet plant and equipment.

[60] Accordingly, counsel agreed that it would be appropriate, if the contract were invalidated, to refer the matter back to the trial court to hear any further evidence which the parties may wish to tender, and argument, in respect of the appropriate remedy.

[61] Accordingly:

1. The appeal is upheld with costs, the costs of counsel to be taxed on Scale C in rule 69(7) of the rules of court.

2. The order of the trial court is set aside and substituted with the following:

   (a) The “Hire Purchase Agreement” concluded by the first defendant and the third defendant is declared to have been unlawful and void *ab initio*.

   (b) The first and second defendants jointly and severally, the one paying the other to be absolved, are ordered to pay the plaintiff’s costs of the action, together with interest thereon, calculated at the legal rate from the date of taxation to the date of payment. The costs of counsel are to be taxed in terms of Scale C set out in rule 69(7) of the rules of court.

3. The matter is referred back to the trial court to hear further evidence and argument in respect of an appropriate order to be made in terms of s 172(1)(b) of the Constitution.

**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

ZILWA J:

I agree.

**P H S ZILWA**

**JUDGE OF THE HIGH COURT**

POTGIETER J:

I agree.

**D O POTGIETER**

**JUDGE OF THE HIGH COURT**

Appearances:

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|---|---|
| For Appellant: | Adv R Buchanan |
| Instructed by: | Whitesides Attorneys |
| | MAKHANDA |
| | |
| For 1st & 2nd | |
| Respondents: | Adv D Dörfling SC and Adv L Mokwena |
| Instructed by: | Wheeldon Rushmere & Cole Inc |
| | MAKHANDA |
| | |
| Date Heard: | 26 August 2024 |
| | |
| Date Delivered: | 22 October 2024 |