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MBAM! Holding Municipal Officials Personally Liable for Unauthorised, Irregular, Fruitless, or Wasteful Expenditure

A lesson to be learned from Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality (272/2023) [2024] ZASCA 151 (08 November 2024)

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09 December 2024

INTRODUCTION

Mr Mbambisa ("**Mbambisa**") was the municipal manager (the head of the administration) of the Nelson Mandela Bay Metropolitan Municipality ("**the Municipality**"). Whilst he was working for the municipality as its head of administration, the municipality unlawfully appointed a service provider to do a marketing strategy at a cost of some R8 million odd, without running a tender process. The municipality took itself to court, along with the officials it believed were liable for having violated the law. The municipality wanted to set aside the agreement with the service provider as being unlawful and recover the amounts the municipality lost in the process from the officials who acted unlawfully and caused the loss.

DIFFERENT CLAIMS BY THE MUNICIPALITY

The Municipality went to court with a number of claims.

1. It wanted to set aside the decision of the municipality to enter into an agreement with the service provider, as unlawful, because no tender process was followed.
2. It wanted to set aside the decision by certain of the defendants (including Mbambisa) to make payment to the service provider, because the whole deal with unlawful. The Municipality also wanted to recover the money unlawfully paid to the service provider, from the defendants who authorized the payments negligently.
3. It wanted to recover money paid to the service provider unlawfully from two other defendants who had unlawfully, negligently and fraudulently drafted a memorandum which aided in the payments being made to the service provider.
4. It wanted to recover some of the payments made by the Municipality to the service provider unlawfully.

THE DEFENCE BY THE DEFENDANTS

- The municipal officials plead that the Municipality had taken unreasonably long to institute action against them, and that for this reason, the Municipality should not be permitted to recover money from them. They also tried to claim that the appointment of the service provider without following a proper tender process was permitted in law. The court dismissed this defence because the type of court case instituted by the Municipality in terms of section 32 of the Local Government: Municipal Finance Management Act, is not subject to any time limits within which the claim must be brought, such as other types of claims (for examples, reviews of decisions brought in terms of the Promotion of Administration of Justice Act, are subject to a 180-day time limit).
- The service provider who had been irregularly appointed plead in defence that it had rendered services to the Municipality, which had benefited from those services, and had received some services for those payments, and so (despite the irregular appointment) it should not be made to pay back the money. The court ultimately held (as explained more fully below) that this defence must fail.
- There was also a claim by the defendants that the Municipality was "double claiming" because the Municipality had received some value for some of the money it paid the service provider. The defendants argued that the Municipality was not legally allowed to recover money from the defendants for this portion – which the Municipality had received some value from the service provider for. [The Municipality paid some R 8m to the service provider; it is not clear how much of this is considered to have been for value received by the Municipality]. The argument was advanced that because the Municipality did receive some value, it did not suffer any real loss and that no amounts could be claimed from the defendants for this loss. The Court also ultimately dismissed this defence (for the reasons more fully explained below).

THE DODGY TENDER

The court held that the Municipality had put forward (adduced) sufficient evidence to prove that the officials cited as defendants had "deliberately or negligently recommended, authorised and supported the impugned appointment and unlawful payments" (paragraph 12). The next consideration was whether the Municipality could recover any of those amounts from any of the persons found to be responsible.

RECOVERING LOSS FROM THE UNHOLY TETROLOGY

This case centred around holding municipal officials accountable for unauthorised, irregular, fruitless or wasteful expenditure by a municipality (these types of expenditure are known in our office as "the Unholy Tetrology" – a fitting name for a scourge of maladministration and fraud which plagues every municipality in the country. The Local Government: Municipal Finance Management Act expressly provides in sections 32(1) that officials who cause expenditure by a municipality deliberately or negligently which results in unlawful expenditure in the nature of the Unholy Tetrology (unauthorised, irregular, fruitless or wasteful expenditure). Subsection 32(2) expressly provides that a municipality *MUST recover this kind of unlawful expenditure from the official who caused it, unless that expenditure is later authorized by an adjusted budget or unless after an investigation the municipality determines that the expenditure is irrecoverable (from that official).*

At paragraph 43 of the judgment, the Supreme Court of Appeal explains that "Section 32(1), on its plain wording, renders municipal officials statutorily liable for unauthorised, irregular or fruitless and wasteful expenditure, in addition to any liability under the common law or any other legislation."

The Court goes on to explain that it is not only officials, but also political office bearers, who can be held liable under section 32. The court held: "The reach of s 32(1) and (2) is not limited to municipal officials, but extends to political office-bearers, who are not involved in the day-to-day running of a municipality."

The Supreme Court of Appeal confirmed that it is absolutely not optional for a municipality to attempt to recover loss caused by the Unholy Tetrology. It is absolutely essential. At paragraph 46 the court said: "The plain wording of s 32 also makes it clear that recovery of unauthorised, irregular, and fruitless and wasteful expenditure by a municipality, is not optional. Instead, a municipality is enjoined to recover such expenditure from the person liable for it, hence the word 'must' in s 32(2)."

A RIDICULOUSLY SEMANTIC ARGUMENT

The municipal officials tried to argue that the wording of the legislation was to be interpreted to mean that the officials who had acted unlawfully should be held legally accountable – but not that they should be sued to recover the unlawful expenditure. They tried to convince the court that their liability was only "legal" and not "financial" – in other words, that they could be dismissed, or get into trouble for their actions from a labour law perspective, but that they could not be sued for the unlawful expenditure. The court rejected this argument, finding that the plain meaning of the legislation was that officials who acted unlawfully and caused unlawful expenditure could and should be held liable financially by being sued for it. In fact, the Supreme Court of Appeal was insistent that such officials MUST be sued.

LIABILITY FOR MUNICIPAL OFFICIALS WHO INCUR UNLAWFUL EXPENDITURE IN THE NATURE OF THE UNHOLY TETROLOGY

The Supreme Court of Appeal went further and explained that an official who causes unauthorised, irregular, fruitless or wasteful expenditure by a municipality can be held liable in a number of ways. They can be held financially liable, and sued for the loss. They can be held criminally liable if they have broken any laws, and they can also be held legally liable in terms of labour law, and disciplined or "fired" for their unlawful actions. Even if a municipality is not able to recover the loss financially through suing the official (there could be a number of reasons for this happening), this does not mean that the official can escape liability through the other two mechanisms of accountability. For example, if an official is sued, but for some reason manages to get off in court (for example, let's say that the claim has prescribed and the municipality can no longer sue for it because too much time has passed), that same official can still be held liable criminally and through disciplinary action.

DOUBLE DIPPING

The defendants argued that the Municipality had received some value for some of the services provided by the service provider, even if the contract with the service provider and the payments made to the service provider were all unlawful. The defendants argue that this meant that the Municipality did not actually suffer any loss (in monetary terms) and therefore that the defendants could not be held liable (sued) in monetary terms for these amounts, because no actual loss occurred.

The Supreme Court of Appeal said that this was not correct – the Municipality was not "double dipping" by seeking to recover from the defendants amounts which had been paid unlawfully by the Municipality to the service provider – the fact that the Municipality might have received some quid pro quo (some value) for the payments, did not make those payments lawful. The court confirmed that you cannot clothe an unlawful transaction with lawfulness by saying that the Municipality luckily did get some value from the transaction and therefore that the officials who broke the law can't be held accountable for their part in the Municipality having made those unlawful payments in the first place. Those payments remain unlawful and that contract remains unlawful, and those officials remain 100% liable for those unlawful payments – even if the Municipality might have gotten something in return for those unlawful payments – they remain 100% unlawful.

The court summed it up as follows in paragraph 56(a): *"Section 32, construed in the context of that section as a whole and the wider context of the MFMA, makes it clear that the place and function of s 32 is to create personal liability on the part of municipal officials in particular circumstances. The meaning conveyed by the wording of s 32 is clear and unambiguous. Liability arises as soon as an official intentionally or negligently incurs unauthorised, irregular, and fruitless and wasteful expenditure: s 32 is not conditional upon a municipality sustaining loss or damage."*

CONCLUSION

This case speaks volumes to warn municipal officials who are acting unlawfully that they not only can be held liable by the municipality they defraud, mislead, or cause to suffer unauthorised, irregular, fruitless or wasteful expenditure. The law requires more than that – that the municipality MUST hold them liable under section 32 unless the amount is irrecoverable and needs to be written off. In addition, it reinforced that municipal officials can be held liable criminally, civilly (through being sued for the unlawful expenditure) and through disciplinary proceedings – even if the municipality has not "lost" any money. Regardless of whether the municipality suffers any financial loss at the end of the day, or where (for example) the municipality does actually get some quid pro quo for the unlawful payments, the officials who caused the unlawful expenditure can still be held financially liable for those unlawful payments.

Lastly, this case confirms that there is no time limit under section 32 of the Local Government: Municipal Finance Management Act the same way that there is under the Promotion of Administration of Justice Act and that a three-year delay in this case was not unreasonable, because in the circumstances the municipality brought the court action within a reasonable time.

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