

SOUTH AFRICA / JUDGMENT

Curro Holdings Limited and Others v City of Johannesburg Metropolitan Municipality and Another (2023-055416) [2024] ZAGPJHC 1270 (12 December 2024)

[2024] ZAGPJHC 1270

COURT

South Gauteng High Court, Johannesburg

BEFORE

L. Windell

CASE / FILE NUMBER

2023-055416

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case Number: 2023-055416

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE: 12 DECEMBER 2024

SIGNATURE

In the matter between: CURRO HOLDINGS
LIMITED
FIRST APPLICANT
CURRO MERIDIAN, COSMO
CITY SCHOOL
SECOND APPLICANT
CAMPUS AND PROPERTY
MANAGEMENT
COMPANY (PTY) LTD
THIRD
APPLICANT
and
CITY OF JOHANNESBURG
METROPOLITAN
FIRST RESPONDENT
MUNICIPALITY
THE CITY
MANAGER
SECOND APPLICANT

JUDGMENT

WINDELL, J:

Introduction

- [1] This is a dispute about the second applicant’s municipal account and the right of the respondent to disconnect the water supply to the second applicant’s premises situated at 4[...] C[...] City, Extension 5 (“the premises”).
- [2] The first applicant is an independent school provider, Curro Holdings Limited, with its registered address at Durbanville in Cape Town. The second applicant is an independent school managed by the first applicant, namely, Curro Meridian, Cosmo City School with its learning facilities situated on the premises. Campus and Property Management Company (Pty) Ltd, is the third applicant. It owns the premises on which the school is erected. For the sake of convenience, the first, second and third applicants are referred to collectively as (“the applicants”).
- [3] The first respondent is the City of Johannesburg Metropolitan Municipality (“the municipality”). The premises of the second applicant falls within the area of jurisdiction of the municipality. The second respondent is the City Manager, who was cited for purposes of a contempt of court application launched on 15 June 2023. The parties have subsequently agreed that this application does not need to be determined by this court save for the issue of costs.

- [4] Central to the subject matter in these proceedings is a settlement agreement that was allegedly entered into between the parties in terms of which the outstanding amount indebted to the municipality was settled in an amount of R8 555 790.20. The applicants seek an order directing the municipality to pass the requisite journals to reflect the settlement agreement entered into by the parties and, pending the passing of the said journals, interdicting them from disconnecting the water.

Background facts

- [5] During July 2021, the applicants' attorney lodged a dispute with the municipality in terms of section 95(5) read together with section 102(2) of the Municipal Systems Act, 32 of 2000 (the Act), regarding the applicants' alleged indebtedness to the municipality. It was alleged that the third applicant was indebted to the municipality in the sum of R13 094 040.82.
- [6] Thereafter various meetings were held on 13 October 2021, 2 February 2022 and 10 May 2022 between Mr Dali Mantlana ("Mantlana") of Dali Mantlana and Partners, an attorney appointed by the municipality to represent it pertaining to the disputes lodged by the applicants, and the applicant's attorney, Mr Werner Bruyns ("Bruyns").
- [7] Bruyns was notified on 23 June 2022 that Mantlana no longer represented the municipality. Mantlana referred Bruyns to Mr Arthur Mbobo ("Mbobo"), the municipality's regional deputy director, who would now attend to the matter further. Accordingly, Bruyns addressed a letter to Mbobo on 28 June 2022.
- [8] Further correspondence was addressed to Mbobo and Lufano Mashau, ("Mashau") of the municipality, by Bruyns on 28 June 2022, 30 June 2022, 11 July 2022 and 18 August 2022 respectively. No response was received from either Mbobo or Mashau.
- [9] On 18 August 2023, however, Mbobo addressed an email to Mr Selby Rasoesoe ("Rasoesoe"), the deputy director of legal in the employ of the municipality, in which Bruyns was copied. As a result, Bruyns sent correspondence to Mbobo, Mashau and Rasoesoe on 19 August 2022, 29 August 2022 and 5 August 2022 that was disregarded by the municipality. Eventually, Bruyns received an email on 5 September 2022 from Mbobo in which it was stated that all the disputes had been referred to the Rasoesoe.
- [10] Following the interaction between Rasoesoe and Bruyns, the disputes declared on behalf of various entities of the applicants, for example, Curro Midrand, Curro Waterfall and Curro Wilgeheuwel, became settled on 16 September 2022.
- [11] Significantly, the dispute lodged on behalf of the third applicant also became settled on 16 September
2022. The first and third applicant agreed to pay the municipality an amount of R8 555 790.20. The municipality addressed correspondence by way of a letter dated 13 December 2022 from its Interest Reversal Committee to the third applicant wherein it was advised that the municipality accepted the proposed amount in full and final settlement of the account. The

settlement amount excluded the charges of R453 907.15 for December 2022 which amount was due and payable on 23 December 2022. The settlement amount was paid by the first applicant in respect of the third applicant's indebtedness on 22 December 2022.

- [12] Despite the settlement, the municipality disconnected the water supply to the premises of the second applicant on 24 February 2023. The water supply was however restored to the premises on 27 February 2023 after the intervention of Rasoesoe.
- [13] Upon investigation by the applicants regarding the initial disconnection, it became apparent that the municipality had failed to take the necessary steps to pass the credit notes to reflect the settlement agreement reached by the parties. In terms of the agreement, the municipality was required to pass a credit note in favour of the applicants in the sum of R 4 538 250.60.
- [14] The second applicant received a pre-termination notice on 29 April 2023 in which it was alleged that the second applicant was indebted to the municipality in the amount of R4 076 874.25. The receipt of the notice caused the applicants to address correspondence directed to the municipality and specifically to Rasoesoe on 2 May 2023. The applicants recorded their request to the municipality to withdraw the pre-termination notes and sought two additional undertakings: that pending the rectification of the municipal account, that the services rendered to the second applicant by the municipality will not be disrupted again; and that the municipal account will be rectified immediately.
- [15] Upon receipt of the applicants' correspondence of May 2023, Rasoesoe instructed certain municipal officials to "Prepare journals to effect the settlement agreement and Livhu should flag the account until the matter is settled." In addition, Rasoesoe directed that the pre-termination notice be withdrawn to avoid disconnecting services to the second applicant.
- [16] On 30 May 2023, pursuant to the correspondence addressed to municipal employees by Rasoesoe, Bruyns directed a letter to Rasoesoe in which he was to ensure that the required journals were being passed to bring finality to the dispute.
- [17] However, at the municipality's instance, on 8 June 2023, the water supply to the second applicant's premises was again disconnected. On this occasion, after reaching out to Rasoesoe for assistance, the municipality did not restore the water supply to the premises of the second applicant. This act triggered the launch of the applicants' urgent application in this court against the municipality.
- [18] On 9 June 2023, an order was granted by van Nieuwenhuizen AJ in the urgent court in the following terms:

"After hearing the submissions made by the representative for the applicant

IT IS ORDERED THAT:-

1. That this application be enrolled and heard as an urgent application in terms of Rule 6(12) and that the ordinary prescribed time limits, terms and services provided for the Rules be dispensed with.
2. The respondent is ordered to reconnect the water supply at the premises situated at 4[...] C[...] City, Extension 5 by 18h00 on 9 June 2023.
3. Should the respondent fail to adhere to paragraph 2 of this order timeously, the applicant is authorised to instruct a duly qualified service provider to reconnect the water supply to the premises situated at 4[...] C[...] City, Extension 5. The applicants reserve their rights to reclaim the costs associated herewith from the respondent.
4. Pending the finalisation of this application, the respondent is interdicted from disconnecting the water supply to the premises situated at 4[...], C[...] City, Extension 5.
5. The normal timelines specific to applications as set out in Rule 6 of the Uniform Rules of Court shall apply.
6. The order as set out in paragraph 2 shall operate as an interim order with immediate effect and with return date 13 May 2023.
7. The cost of this application is reserved for determination on the return date.

[19] The return date was subsequently extended to 23 August 2024, the date of this hearing.

[20] The court order of 9 June 2023 made provision for the exchange of pleadings in accordance with Rule 6 of the Uniform Rules of Court. The municipality failed to file its answering affidavit in accordance with the time provided by the Rules. The municipality subsequently sought condonation for the late filing of its answering affidavit.

Condonation

- [21] In the municipality's condonation application, it explained the reasons for its tardiness in filing its answering affidavit within the prescribed time period. In a nutshell its excuse for the late filing was that municipal employees "had taken leave for the June 16 and the like"; an investigation had to be undertaken by the municipality to determine under what circumstances the settlement agreement was concluded; staff meetings were held with the municipality's employees to ensure that similar agreements were not reached with other account holders; there had been communication with the applicant's attorney of record; as an organ of state, the municipality could ill afford to set aside the substantial amounts sought to be credited to the applicants; and no prejudice had been suffered by the applicants as water was being supplied to the premises of the second applicant.
- [22] It is trite that the relevant factors a court must consider in a condonation application include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation, the importance of the issue and prospects of success.[1]

[23] There are three compelling reasons why this issue should not derail the adjudication of this application. One, the interests of justice favour that the application be properly ventilated. In *Freedom of Religion South Africa*, [2] Mogoeng CJ said that “[t]echnicalities and senseless constraints that come with rigidity should never be allowed to stand in the way of a legitimate and demonstrably desirable pursuit and attainment of justice”. Two, there can be no prejudice to the applicant. The pleadings have been exchanged and the respective heads of argument filed. Lastly, the municipality has provided a satisfactory explanation of the delay in filing its answering affidavit. There is thus no compelling reason why condonation should not be granted.

Status of the settlement agreement

[24] The facts leading up to the conclusion of the settlement agreement are not disputed. In rebuttal of the relief sought by the applicants, the municipality raised two issues: Firstly, Rasoesoe lacked the necessary authority

to conclude the agreement between the second applicant and the municipality and did not comply with ‘the internal processes’

in concluding the settlement agreement. As a result, so it is argued, the settlement agreement was void (“the lack of authority

defence”). Secondly, the settlement agreement was not made an order of court at the time of concluding the alleged unlawful agreement and as a result there is no *lis pendens* between the parties (“the no *lis pendens* defence”).

[25] The municipality’s lack of authority defence is misconstrued for the following reasons. Bruyns first received correspondence from the municipality’s Interest Referral Committee on 13 December 2022 in which it was conveyed that the proposed settlement agreement for payment of R8 555 790.50 was accepted in full and final settlement of the outstanding amount as of 5 December

2022. Additional terms were recorded, namely, that the charges for the month of December 2022 were excluded from the settlement agreement. It is not challenged by the municipality that the applicants had complied with the terms of the settlement agreement.

[26] Secondly, when Rasoesoe signed the settlement agreement on behalf of the municipality it was done in his capacity as Chairperson of the Interest Reversal Committee and not in his individual capacity as Deputy Director: Legal. This issue is crucial to the determination of this application, because it is the municipality’s case that Rasoesoe in his capacity as Deputy Director: Legal did not have the necessary authority to enter into the settlement agreement on behalf of the municipality with the applicants and not that the Interest Reversal Committee had acted outside of its ambit.

- [27] Specifically, the municipality did not assert in its pleadings that the Interest Reversal Committee lacked the authority to consider, accept, and finalise the agreement between the parties, nor did it establish or present a case that the Interest Reversal Committee violated the provisions of the Act and/or the Local Government: Municipal Finance Management Act, 56 of 2003. It also failed to specify which internal procedures were not adhered to or with whom the applicants had to negotiate in order to reach a "binding" agreement, or which procedures had to be followed to achieve that "binding" agreement.
- [28] Thirdly, in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*,^[3] the Supreme Court of Appeal (SCA) had occasion to consider whether or not the doctrine of estoppel may be raised against a statutory body, such as the municipality. In considering the proposition, the SCA found that a distinction must be drawn between acts beyond or in excess of the legal powers of a public authority and the irregular or informal exercise of power granted.
- [29] I agree with the submissions of Mr Hinrichsen, counsel on behalf of the applicants, that the failure by a statutory body to comply with provisions which the Legislature has prescribed for the validity of a specified transaction falls within the first category described above and cannot be remedied by estoppel because that would give rise to a transaction that is unlawful and therefore ultra vires. This is, however, to be distinguished from the failure by a statutory body to adhere to all the relevant internal arrangements and formalities, which falls within the second category described above and in respect of which estoppel may be successfully invoked.^[4]
- [30] The process followed by the Interest Reversal Committee falls within the second category and consequently, and even if there was non-compliance with any of the internal arrangements and formalities, the municipality is estopped from invoking such non-compliance.
- [31] Lastly, in *Hlobo v Multilateral Motor Vehicle Accident Fund*,^[5] the SCA was required to consider a settlement agreement entered into between the Multilateral Motor Vehicle Accident Fund (the Fund) and the plaintiff Mr Hlobo. The Fund approached the court a quo to set aside an agreement on the grounds that the claims handler appointed by the Fund to deal with its attorneys on all aspects of claims lacked the authority to authorise the settlement. The court a quo found the claims handler lacked contractual capacity to conclude the settlement agreement.
- [32] On appeal, the SCA set aside the court a quo's finding and held as follows regarding the claim handler's contractual authority:^[6]

“[8] Against that background I return to the reasoning advanced by the court a quo for setting aside the settlement. As to the first ground (the suggested lack of contractual capacity): the inferences to be drawn from the exchange of correspondence and the terms of Short’s letter of 17 July do not suggest that the settlement was concluded on the strength of Mr Short’s independent initiative. The limits of his authority to settle claims independently (shown to have been limited after 10 July to R150 000) would

not seem to have any bearing on the matter. The court a quo's conclusion that Short did not have the "capacity to contract" in relation to this particular settlement would therefore seem to be at least questionable. But quite apart from this it was, of course, of no significance. The settlement agreement was not concluded between Short and Lowe. It was concluded between Lowe and De la Harpe and on the evidence De la Harpe had been authorised to conclude such an agreement. The debate concerning Mr Short's power to conclude settlements is misplaced."

- [33] The circumstances that gave rise to the conclusion of the settlement agreement have been detailed in the applicants' replying affidavit at paragraphs 16 to 30. The facts giving rise to the settlement agreement are not disputed. I am satisfied that the agreement between the applicants and the municipality was lawfully entered agreement and should be enforced, as demonstrated by the decisions of Hlobo and RPM Bricks.
- [34] As far as the no lis defence is concerned, there is no merit in the municipality's argument. The settlement agreement is a binding agreement. The municipality refused to comply with their obligations in terms of the agreement. The applicants approached the court to enforce the settlement agreement. That is the lis between the parties.

Costs of the urgent application on 15 June 2023

- [35] The municipality had failed to restore the water supply to the second appellant in accordance with the interim order that was obtained by agreement on 9 June 2023. The order specifically stipulated that the water supply should be restored to the second applicant by 18:00 on the same day.
- [36] Bruyns sent numerous correspondences to the municipality and the municipality's attorney of record on 12 June 2023, in order to ensure that the water supply was reconnected to the second applicant. The municipality had not yet complied with the provisions of the order that the applicant had obtained by agreement between the parties by 13 June 2023. Additionally, there was no justifiable explanation provided by the municipality for the noncompliance with the order. Based on these factors, the applicants initiated contempt proceedings.
- [37] On 14 June 2023 at 14:46, the municipality's attorney of record filed a notice confirming the municipality's intention to oppose the contempt application. The municipality only restored the water supply to the second applicant on 14 June 2023 at 17h52.
- [38] It is evident from the preceding sequence of events that the applicants were compelled to bring the contempt application. There is no reason why they should be deprived to the costs associated with it.

Order

- [39] In the result the following order is made:

1. The first respondent is directed to pass the requisite journals to reflect the settlement agreement entered by the parties within 10 days from date of this order and, pending the passing of the said journals, interdicted from disconnecting the water to the premises situated at 4[...] C[...] City, Extension 5.
2. The first respondent is ordered to pay the costs of this application, which include the reserved costs of 17 June 2023, 13 July 2023 and 5 February 2024.
3. The first respondent is to pay the reserved costs of the contempt application of 15 June 2023.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 December 2024.

APPEARANCES

Counsel for the applicants: Advocate D.H. Hinrichsen Instructed by: Couzyn Hertzog & Horak

Attorneys Counsel for the respondent: Advocate E. Sithole Instructed by: Magagula Attorneys

Date of hearing: 23 August 2024 Date of judgment: 12 December 2024

[1] Grootboom v National Prosecuting Authority

[2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 22.

[2] Freedom of Religion South Africa v Minister of Justice and Constitutional Development 2020

(1) SA 1 (CC) at para [18].

[3] 2008

(3) SA 1 (SCA)

[4] At para [11] to [13].

[5] 2001

(2) SA 59 (SCA).

[6] At para [8].

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