

SOUTH AFRICA / JUDGMENT

Kwende Construction CC v Ditsobotla Local Municipality (604/2024) [2025] ZANWHC 119 (15 July 2025)

[2025] ZANWHC 119

COURT

North West High Court, Mafikeng

BEFORE

Oosthuizen-Senekal

CASE / FILE NUMBER

604/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

CASE

NUMBER: 604/2024

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the counter-application
of:

KWENDE

CONSTRUCTION CC

APPLICANT

(Respondent

in the Main Application)

and

DITSOBOTLA

LOCAL MUNICIPALITY

RESPONDENT

(Applicant

in the Main Application)

In

Re

DITSOBOTLA
LOCAL MUNICIPALITY
APPLICANT
and
KWENDE
CONSTRUCTION CC
RESPONDENT

CORAM:

OOSTHUIZEN-SENEKAL AJ

Date

judgment reserved: 6

June 2025

The judgment was handed
down electronically by circulation to the parties'
representatives via email. The date and time
for hand-down is
deemed to be 15 July 2025 at 10H00am.

ORDER

1.

The Applicant's application dated 9 February 2024 is dismissed
with
costs on the attorney and client scale.

2.

The Applicant is ordered to make payment to the Respondent in
the
amount of R7,518.171.22, including interest thereon a tempore
morae at the legally prescribed interest rate, calculated from 31
January 2024 to date of final payment, which payment is to be made
within 14 days of this order.

3.

The Applicant is ordered to pay the Respondent's costs
on
attorney and client scale in respect of the Applicant's
counter-claim.

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

[1] This matter concerns two related applications between the parties:

- 1) An urgent main application by Ditsobotla Local Municipality ("Ditsobotla"), seeking to interdict Kwende Construction CC ("Kwende") from removing or tampering with its electricity infrastructure;

- 2) A counter-application by Kwende, seeking payment of R7 518 171.22, plus interest, for emergency electrical repair services rendered to Ditsobotla following a total collapse of the municipal electricity

supply.

- [2] For ease of reference, I refer to Ditsobotla as the applicant in the main application and respondent in the counter-application, and to Kwende as the respondent in the main application and applicant in the counter-application.
- [3] On 9 February 2024, the main application came before the court on an urgent basis but was removed from the roll by agreement after Kwende undertook not to remove any equipment pending resolution of the dispute. Importantly, the main application was not withdrawn and therefore remains live on the roll. The main application awaits proper set-down by Ditsobotla for

determination

once it is ready to proceed.

- [4] The principle that the removal of a matter from the roll does not amount to its dismissal, and remains pending until disposed of, was confirmed in *Kekana v Society of Advocates of South Africa*[1], where the court stated:

“The removal of a matter from the roll does not dispose of the matter, nor does it amount to an abandonment of the cause of action or defence. It merely postpones the hearing to a later date or occasion.”

- [5] What is now before the court is the counter-application, which was not postponed nor removed, and it is to this application that this judgment primarily relates. The counter-application

is properly before me and ripe for determination as there is no procedural impediment to doing so.

Background Facts

- [6] On 7 November 2023, Ditsobotla appointed Kwende to urgently restore electricity to six areas within its jurisdiction following a complete power failure. Kwende rendered emergency electrical services and completed the repairs. On 13 December 2023 Ditsobotla certified the completion of the work by issuing a Certificate of Compliance/Completion on 17 December 2023.

- [7] The agreed contract price was R7 698 337,47, of which Ditsobotla made a part-payment of R1 000 000 on 22 December 2023. On the same date, Ditsobotla executed a written Acknowledgment of Debt and Repayment Agreement, explicitly acknowledging its indebtedness to Kwende in the remaining amount of R7 368 171,22, confirming that all internal processes and procurement prescripts were complied with.
- [8] Despite these facts, Ditsobotla refused and failed to pay the outstanding amount. Instead, Ditsobotla launched a main application seeking to interdict Kwende from allegedly threatening to interfere with its electricity infrastructure. It is evident that Kwende's undertaking to refrain from any self-help measures effectively reduced the urgency of the main application.
- [9] Kwende denied any intention of self-help, expressly undertaking in writing on 7 February 2024 to seek any relief only through the courts. Ditsobotla nonetheless proceeded with the main application on 9 February 2024, after accepting Kwende's undertaking.

Submissions by Kwende

- [10] Kwende submits that it was lawfully appointed by Ditsobotla on 7 November 2023 to perform emergency electrical repairs after a total power failure in six areas of the municipality.
- [11] The agreed remuneration was R7 698 337.47, which was later confirmed by a written Acknowledgment of Debt and Repayment Agreement dated 22 December 2023.
- [12] Kwende completed the work on 13 December 2023, and Ditsobotla issued a Certificate of Completion and Compliance on 17 December 2023, confirming the successful performance of the work.
- [13] Ditsobotla made a partial payment of R1 000 000 but thereafter refused to pay the outstanding amount despite the certificate of completion and acknowledgment of debt.
- [14] Kwende contends that Ditsobotla's opposition to the counter-application is without merit, consisting only of bare denials, and no evidence was advanced to refute the validity of the contract, the completion of work, or the lawful deviation from procurement rules under emergency circumstances.
- [15] Kwende contended further that the emergency procurement was lawful, properly authorised under the Municipal Financial Management Act and Regulations.

Submissions by Ditsobotla

- [16] Ditsobotla contended that the procurement process was irregular and unlawful, and that the matter should be referred to oral evidence to determine the factual disputes around the legality of the appointment and the validity of the contract.

- [17] In this regard, Ditsobotla relied on the principle laid down in *Valor IT v Premier, North West Province and Others*[2], where the Constitutional Court held that contracts concluded in violation of procurement prescripts are invalid and cannot be enforced, even where the other party acted in good faith.
- [18] Ditsobotla argued that the acknowledgment of debt and certificate of compliance cannot override the principle of legality, if the underlying appointment was unlawful, the municipality cannot be compelled to pay.
- [19] Ditsobotla also contended that the founding affidavit in the main application, although unsigned when filed, does not automatically invalidate the application. They relied on the principle that courts may condone such defects if the affidavit was later signed or if the deponent testifies and adopts it.
- [20] Finally, Ditsobotla argued that the amount claimed by Kwende was not properly set out nor substantiated by detailed invoices and supporting documents.

Legal Framework

Emergency Procurement

- [21] Section 217(1) of the Constitution requires that public procurement be fair, equitable, transparent, competitive and cost-effective. However, it permits deviations when authorised by law.
- [22] The authority of a municipality to deviate from ordinary competitive procurement processes in emergency circumstances is expressly provided for in Regulation 36(1)(a)(i) of the Municipal Supply Chain Management Regulations, issued under section 168 of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).
- [23] Regulation 36(1)(a)(i) reads:
- “The accounting officer may dispense with the official procurement processes established by this policy and procure any required goods or services through any convenient process, which may include direct negotiations, but only—(a) in an emergency.”*
- [24] Furthermore, Regulation 36 deviations must also be properly recorded and reported to the municipal council and relevant authorities to ensure transparency and accountability. There was no evidence that such reporting did not occur.
- [25] Section 55 of the Municipal Systems Act 32 of 2000 (“the MSA”) and section 65(2)(e) of the MFMA place a duty on the municipal manager to ensure that the municipality complies with its contractual and financial obligations, and that all monies due are paid within 30 days, unless validly disputed.

[26] In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SASSA*[3], the court recognised that while adherence to procurement rules is vital, deviations are justified when properly authorised and

recorded, as was done here.

[27] In *Valor IT*, however, the court cautioned that even good faith reliance on an invalid appointment cannot cure a contract concluded in breach of procurement laws. But unlike in *Valor IT*, where no evidence of lawful deviation was presented, here the acting municipal manager expressly authorised emergency procurement, the work was completed and certified, and Ditsobotla signed the acknowledgment of debt without raising illegality at the time.

Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)

[28] Ditsobotla did not formally invoke the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) in its pleadings, nor was it properly pleaded or advanced that the acknowledgment of debt, the certificate of completion, or the

appointment of Kwende constituted reviewable administrative action under PAJA. The court therefore did not and could not consider PAJA applicable to the merits of this contractual dispute.

[29] This is because the counter-application concerns an ordinary enforcement of a contractual claim for payment of a certified debt, based on an acknowledgment of debt signed by the municipal manager, rather than a review of an administrative act. In *Oudekraal Estates (Pty) Ltd v City of Cape Town*[4], the Supreme Court of Appeal explained:

“Until the invalid administrative act is set aside by a court in proceedings for judicial review it exists in fact, and it has legal consequences that cannot simply be overlooked.”

[30] Thus, even if there were irregularities in the appointment or contract, which have not been established, the act remains effective and binding until and unless it is reviewed and set aside in proper proceedings under PAJA.

[31] The Constitutional Court later reaffirmed in *Merafong City Local Municipality v AngloGold Ashanti Ltd*[5] following:

“An administrative act remains legally effective until properly set aside by a court on review. An organ of state cannot unilaterally

repudiate or ignore its own decisions without a proper challenge.”

[32] Ditsobotla has not launched review proceedings under PAJA or sought to set aside its own acknowledgment of debt or the underlying procurement decision. Its opposition in the counter-application rests on vague assertions of irregularity rather than a formally instituted review, which is procedurally impermissible.

[33] In *Kirland Investments (Pty) Ltd v Minister of Medical Aid and Others*[6], Cameron J observed the following:

“The decision, until properly set aside, exists in fact and has legal consequences. Public authorities must respect and enforce it. They cannot simply ignore it because they consider it defective.”

[34] The debt claimed here flows from services performed, certified, and acknowledged in writing. Those instruments remain valid and binding until a competent court, in properly instituted review proceedings, declares them invalid. PAJA therefore has no application in the counter-application for payment of a contractual debt.

[35] Furthermore, the counter-application does not fall within the ambit of “administrative action” as defined in section 1 of PAJA, which excludes contractual disputes[7] In *Gijima*, the Court states:

“PAJA does not apply to the exercise of public power that does not constitute administrative action as defined. Here the claim

arose ex contractu and not ex lege.”

[36] In the present matter, I am of the view that Kwende’s claim rests squarely on the acknowledgment of debt, the completed and certified work, and the contractual undertakings made by Ditsobotla. It is not founded on any public-law duty. Accordingly, PAJA does not apply to the present dispute.

Evaluation

[37] On the evidence, the main application remains alive but is not before me for determination. Ditsobotla’s reliance on its unsigned founding affidavit in the main application does not assist it here. While procedural defects in affidavits can be cured if promptly addressed in terms of Rule 6(5)(b) and by appropriate application to the court, no such application was made here.

[38] Even if curable, the defective affidavit and lack of authority to launch proceedings, as discussed in *Ganes and Another v Telecom Namibia Ltd*[8], raise serious questions about the bona fides of the main application.

[39] The main application was removed from the roll by agreement after Kwende undertook not to remove its equipment, pending resolution of the dispute. In terms of *Kekana*, the main application remains live, but there is no evidence that Kwende has breached its undertaking or threatened unlawful conduct

since then.

[40] Turning to the counter-application, the evidence shows:

- 1) The emergency procurement was authorised under Regulation 36(1)(a)(i) by the acting municipal manager.

- 2) The work was completed and certified as compliant by the municipality on 17 December 2023.
 - 3) Ditsobotla signed an acknowledgment of debt on 22 December 2023.
 - 4) Ditsobotla paid R1 000 000,00 but refused to pay the outstanding R7 518 171.22.
- [41] Ditsobotla now seeks to impugn its own contract and acknowledgment of debt by alleging illegality. But no concrete evidence has been presented to suggest that the emergency was fabricated or that the deviation was unauthorised. In *Steenkamp v Provincial Tender Board, Eastern Cape*[9], the Constitutional Court stressed the importance of respecting finality in certified public works unless fraud or gross irregularity

is shown.

- [42] While Valor IT recognises the principle of legality, the facts here are distinguishable: Ditsobotla itself invoked emergency procurement, certified the work, and signed the acknowledgment of debt. It cannot now rely on its own dereliction to escape liability[10].
- [43] The request for referral to oral evidence is without merit. As held in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[11], such referral is justified only when there is a genuine, material factual dispute incapable of resolution on the papers, which is absent here.
- [44] Ditsobotla's bare and unsubstantiated denials fall far short of creating a genuine dispute of fact. In *Wightman t/a JW Construction v Headfour (Pty) Ltd*[12], it was held:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has seriously and unambiguously addressed the fact said to be disputed."

- [45] Similarly, the argument that the amount claimed was not set out in sufficient detail is contradicted by the appointment letter, the certificate of compliance, and the acknowledgment of debt specifying the amount. The certificate of completion is prima facie proof of proper performance and remains unchallenged by any credible evidence.
- [46] The municipality's refusal to pay despite its acknowledgment of debt, certificate of completion, and the statutory obligation under s 65(2)(e) of the MFMA, amounts to a blatant breach of its duties. The MFMA obliges municipalities to pay undisputed debts within 30 days, a duty clearly ignored here without lawful justification.

Conclusion

- [47] In view of the evidence and the legal framework, I find that the main application remains alive, but there is no evidence to justify interdictory relief at this stage, given Kwende's undertaking and the absence of any threat.

[48] Furthermore, that the counter-application is meritorious. The emergency procurement was lawful; the work was completed and certified; the debt was acknowledged; and no valid defence has been raised.

Costs

[49] The award of costs is discretionary and must be exercised judicially, taking into account the particular circumstances of the case.

The general rule in civil litigation is that the successful party is entitled to its costs. As stated in *Zwane v Elias and Another*[13], the principle is:

“The successful party is, as a general rule, entitled to be awarded his costs unless there are special circumstances which warrant a different order.”

[50] The rationale behind the general rule was explained in *Kruger Bros & Wasserman v Ruskin*[14]:

“The rule of our law is that all costs — unless expressly otherwise enacted — are in the discretion of the judge, but that discretion must be judicially exercised upon a consideration of the facts of each case, and, where the proceedings are properly and reasonably taken, the successful party should have his costs.”

[51] While costs ordinarily follow the result, there are circumstances where a court will depart from the ordinary rule and award costs on a punitive scale, such as attorney-and-client costs. This is a measure of the court’s displeasure at a litigant’s conduct and is designed both to penalise the offending party and to indemnify the successful party from being out of pocket.

[52] In *Plastic Converters Association of SA v NUMSA*[15], the Constitutional Court noted:

“Punitive costs are awarded when the conduct of a party warrants disapproval by the court, usually when it has acted frivolously, vexatiously, or in bad faith.”

[53] Similarly, in *Public Protector v South African Reserve Bank*[16], the court held that a punitive costs order is appropriate where a party’s conduct constitutes an abuse of the court’s

process, wastes judicial resources, and unfairly burdens the opponent.

[54] In this matter, Ditsobotla’s conduct warrants such censure:

- 1) It launched an urgent main application on defective and unsigned papers, without genuine urgency, and despite having accepted Kwende’s undertaking not to remove equipment.
- 2) It refused to pay an admitted and certified debt, despite issuing a Certificate of Completion and signing an Acknowledgment of Debt.

- 3) It opposed the counter-application on spurious grounds, raising bare denials unsupported by any substantive evidence.
- 4) It invoked serious allegations of unlawful procurement without producing evidence to substantiate them and raised a request for oral evidence that was speculative and contrived.
- [55] This conduct amounts to an abuse of the court's process, wasted judicial time and resources, and caused unnecessary expense and prejudice to Kwende.
- [56] The court cannot allow its processes to be used as a tactical tool to evade lawful obligations or to harass a counter-party who has lawfully performed its duties.
- [57] Ditsobotla's conduct, launching defective and unnecessary urgent proceedings, refusing to pay an admitted and certified debt, opposing the counter-application on spurious grounds, raising unsubstantiated allegations of illegality, and making a speculative request for oral evidence, amounts to an abuse of the court's process.
- [58] Accordingly, the court is satisfied that this is an appropriate case to mark its disapproval by awarding costs in the counter-application on the punitive scale of attorney-and-client.

Order

[59] In the result, the following order is made:

1. The Applicant's application dated 9 February 2024 is dismissed with costs on the attorney and client scale.
2. The Applicant is ordered to make payment to the Respondent in the amount of R7,518.171.22, including interest thereon a tempore morae at the legally prescribed interest rate, calculated from 31 January 2024 to date of final payment, which payment is to be made within 14 days of this order.
3. The Applicant is ordered to pay the Respondent's costs on attorney and client scale in respect of the Applicant's counter-claim.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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[1]

[1998] ZASCA 54; 1998

(4) SA 649 (T) at 655F–G.

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- [2] [2021] ZACC 39; 2022 (4) SA 1 (CC) paragraphs [28]-[29] and [54].
- [3] 2014
- (1) SA 604 (CC) at paragraph 23.
- [4] 2004
- (6) SA 222 (SCA) at paragraph [29].
- [5] 2017
- (2) SA 211 (CC) at paragraph [41].
- [6] 2014
- (3) SA 481 (CC) at paragraphs [65]–[66].
- [7] *Gijima Holdings (Pty) Ltd v State Information Technology Agency SOC Ltd* 2018 (2) SA 23 (CC) at paragraph [26].
- [8] 2004
- (3) SA 615 (SCA) at paragraph [19].
- [9] 2007
- (3) SA 121 (CC) at paragraph [29].
- [10] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at paragraph [33].
- [11] 1949
- (3) SA 1155 (T) at 1165.
- [12]
- [2008] ZASCA 6; 2008
- (3) SA 371 (SCA) at paragraph [13].
- [13] 1998
- (2) SA 624 (W) at 632D.
- [14] 1918 AD 63 at 69.
- [15] [2016] ZACC 3; 2016 (5) BCLR 578 (CC), paragraph [46].
- [16] 2019] ZACC 29; 2020 (5) SA 487 (CC) at paragraph [144].

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