CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 159/21

In the matter between:

MERIFON (PTY) LIMITED	Applicant
and	
GREATER LETABA MUNICIPALITY	First Respondent
HOUSING DEVELOPMENT AGENCY	Second Respondent

Neutral citation:	*Merifon (Pty) Limited v Greater Letaba Municipality and Another* [2022] ZACC 25
Coram:	Kollapen J, Madlanga J, Majiedt J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgments:	Mlambo AJ (unanimous)
Heard on:	1 March 2022
Decided on:	4 July 2022
Summary:	legality — enforceability of agreement — section 19 of the Local Government Municipal Finance Management Act 56 of 2003 — peremptory statutory provisions innocent third parties — doctrine of estoppel — turquand rule

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Limpopo Division, Polokwane) the following order is made:

1. Leave to appeal is refused.
2. Merifon is ordered to pay the Greater Letaba Municipality's costs, including the costs of two counsel.

JUDGMENT

MLAMBO AJ (Kollapen J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ concurring)

Introduction

[1] An important foundation of our constitutional democracy is the doctrine of legality, a subset of the rule of law. This Court, as well as the Supreme Court of Appeal, has stressed in a number of decisions that the exercise of public power must strictly comply with ordained prescripts, and that failure to observe this contravenes the doctrine of legality.[1]

[2] Before us is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal in which an appeal by the applicant, Merifon (Pty) Limited (Merifon), against a judgment and order of the High Court of South Africa,

[1] See for example *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20. See also*MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC); *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) and *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

Limpopo Division, Polokwane (High Court), was dismissed. Merifon had claimed payment of an amount of R52 million against the first respondent, the Greater Letaba Municipality (Municipality). At the heart of the matter is the interpretation and application of statutory provisions on an agreement concluded between the Municipality and Merifon for the acquisition of land for human settlement development purposes.

Background

[3] On 4 April 2011, the mayor of the Municipality addressed a letter to the Member of the Executive Council (MEC) of the Department of Local Government and Housing (Provincial Department), seeking assistance to purchase land suitable for integrated human settlement development. The objective of this correspondence was to resolve the Municipality's inability, over a long period, to secure land, coupled with a lack of necessary funds for this purpose. The unavailability of land in particular had deprived the Municipality, over several years, of the allocation of funds from the Limpopo Provincial Government to build low-cost housing for residents within its area. The mayor further mentioned that the public housing programme of the Municipality under the Reconstruction and Development Programme (RDP) had been negatively affected by the lack of available land, particularly around the Ga-Kgapane area. She recommended the purchase of certain land and farms, one of which was the Farm Mooiplaats, to unlock the Municipality's development potential and contribute to the expansion of the Municipality's revenue base.

[4] The MEC was willing to assist and engaged the second respondent, the Housing Development Agency[2] (HDA), for assistance. The intervention of the HDA yielded positive results, as it was instrumental in the identification of Portions 5 and 6 and the Remaining Extent of the Farm Mooiplaats 434 LT (the property), situated in Ga-Kgapane to the north eastern side of Modjadjiskloof within the Municipality's

[2] The Housing Development Agency is a national housing entity established in terms of section 3 of the Housing Development Agency Act 23 of 2008, primarily to acquire land required for human settlements development purposes.

jurisdiction. Subsequently, negotiations with a representative of the prospective seller commenced.

[5] On 10 January 2012, a valuation report for the property was obtained at the instance of the Provincial Department. The owner, City Blox (Pty) Limited, sold the property to Merifon on 18 April 2012 for an amount of R14.5 million. The property was transferred into Merifon's name on 22 August 2012. At this stage, the approval by the Municipality of the establishment of a township on the property had been obtained for 1174 residential stands and 17 industrial stands. In the valuation report, the recommendation was that any offer for the sale of the property should not exceed R85 million.

[6] On 14 December 2012, the HDA received an instruction from the Department of Co-operative Governance, Human Settlements and Traditional Affairs (CoGHSTA) to acquire the property. In the meantime, a draft adjusted budget for the Municipality for the 2012/13 financial year was approved by the Municipality's Council (Council). The draft adjusted budget, however, did not make provision for funds necessary for the acquisition of the property.

[7] On 8 February 2013, the CEO of the HDA addressed a letter to the Head of Department (HoD) of CoGHSTA, motivating for the acquisition of the property. The HoD of CoGHSTA responded on 25 February 2013, conveying CoGHSTA's satisfaction with Merifon's offer of R52 million for the property and granted the HDA permission to finalise the acquisition of the property.

[8] On 27 February 2013, the HDA sent an email to the Municipal Manager, Ms Tsakane Mashaba, stating that permission had been obtained from CoGHSTA to proceed with the acquisition of the property. This was followed by a string of emails between Merifon and the Municipality regarding the terms of the agreement. On 6 March 2013, the HoD of CoGHSTA, clearly supportive of the Municipality's

objective of securing the property, addressed a letter (commitment letter) to the Municipality, which read:

> "ACQUISITION OF THE REMAINING EXTENT AND PORTIONS 5 AND 6 OF THE FARM MOOIPLAATS 434 LT LIMPOPO PROVINCE: COMMITMENT TO PAY PURCHASE PRICE: LETABA MUNICIPALITY
>
> We refer to the abovementioned transaction and hereby confirm that the Department in the current financial year ending 31 March 2013 has budgeted the required, R52 million excluding VAT, required to acquire the abovementioned property for human settlement development. The funds will be paid into the trust account of the transferring attorneys after the Deed of Sale between the Municipality and the Seller has been concluded. The Department will furthermore pay the applicable transfer and registration costs amounting to R209 892.00."

[9] On 7 March 2013, a written agreement for the sale of the property was concluded between Merifon, represented by Mr Maboku Mangena, and the Municipality, represented by the Municipal Manager. The agreement stated that the Municipality purchased the "enterprise", which was defined in the agreement as the "Property Development carried on by [Merifon] as a going concern on the Property consisting of the Property and all right, title and interest in and to the Leases". The property was defined as Portions 5 and 6 and the Remaining Extent of the Farm Mooiplaats. The purchase price was R52 million, which was payable by the Municipality directly into the trust account of the transferring attorneys on or before 29 March 2013. The agreement further stipulated that the transfer of the property into the name of the Municipality would be effected as soon as was reasonably possible after payment of the transfer costs and purchase price by the Municipality to the transferring attorneys. The agreement further provided that Merifon warranted that, as at the date of the transfer, it would be the owner of the property and thus able to transfer ownership.

[10] At a special Council meeting of the Municipality, held on 22 March 2013, the commitment letter was placed before Council. Council passed a resolution approving the commitment letter. The Council resolution read:

> "COUNCIL RESOLUTION FOR SPECIAL COUNCIL MEETING HELD ON THE 22nd MARCH 2013, GA-KGAPANE SUB – OFFICE
>
> A:1038 ACQUISITION OF REMAINING EXTENT AND PORTIONS 5 AND 6 FARM MOOIPLAATS 434 – LT
>
> That the commitment letter from the Department of Cooperative Governance, Human Settlements and Traditional Affairs to purchase portions 5 and 6 of the farm Mooiplaats 434-LT is approved."

[11] It subsequently transpired that CoGHSTA had, on 18 October 2012, applied to the Provincial Treasury, seeking authorisation to disburse the amounts mentioned in the commitment letter. On 27 March 2013, the Provincial Treasury had declined the request on the basis that the purchase price was excessive. It pointed out that the property was initially valued at R7.5 million when Merifon purchased it for R14.5 million, and then offered to sell it to the Municipality for R52 million. In the Provincial Treasury's view, there were no appreciable improvements on the property justifying the 259% price increase. The Provincial Treasury was unhappy that the HDA had failed to take advantage of the low valuation and, in its view, the asking price of R52 million was simply exorbitant. The Provincial Treasury accordingly informed CoGHSTA that it declined its funding request and recommended a renegotiation of the price to secure value for money.

[12] Merifon, however, was determined to enforce the agreement, and, through its attorneys, addressed a letter of demand to the Municipal Manager on 23 April 2013, informing her that the Municipality was in breach of the agreement of sale as it had failed to pay the purchase price and transfer costs on 29 March 2013. The letter called on the Municipality to remedy the breach within seven days, failing which Merifon would institute legal action. On 2 May 2013, the Municipal Manager replied to the letter of demand, stating that Merifon was at all material times aware that the agreement was conditional upon CoGHSTA financing the transaction, which had not materialised. Based on this response, on 27 September 2013, Merifon dispatched a second letter of demand to the Municipality, calling upon it to make payment of the purchase price

within 14 days. This letter of demand similarly came to naught. It must be noted that this letter specifically stated that the Municipality had complied with section 19 and the budgetary requirements of the Local Government: Municipal Finance Management Act[3] (MFMA), based on the funds committed by CoGHSTA as well as through the Council resolution.

Litigation history

High Court

[13] Merifon subsequently instituted an action against the Municipality and the HDA in the High Court, asserting a claim for specific performance, in accordance with the agreement, and a claim for payment of the purchase price and transfer costs. In the particulars of claim, Merifon alleged that the Municipal Manager, was "properly authorised, alternatively [acted] with ostensible authority" to conclude the agreement on behalf of the Municipality. The Municipality resisted the claim in its plea and counterclaim on several grounds including that—

(a) its representatives did not have the requisite authority – actual, ostensible or otherwise – to enter into the agreement;
(b) the agreement was "illegal and null and void" for want of compliance with section 19 of the MFMA, because the subject-matter of the sale constituted a capital project;
(c) the Council "never approved the purchase of the property including the total costs thereof"; and
(d) the Municipality was precluded from incurring expenditure otherwise than in accordance with "an approved budget and within the limits of the amounts appropriated . . . in the budget".[4]

[3] 56 of 2003.

[4] *Merifon (Pty) Ltd v Greater Letaba Municipality*, unreported judgment of the High Court of South Africa, Limpopo Division, Polokwane, Case No 01/2014 (18 July 2019) (High Court judgment) at para 16.

[14] In its replication, Merifon denied that section 19 was applicable and that the agreement was illegal and null and void. It pleaded that a valid and binding agreement had in fact been concluded. Merifon also noted that section 19 provided that "a Municipality may spend money on a capital project if the sources of funding have been considered, are available, and have not been committed for other purposes". This was in reference to the commitment of funds for the purchase price of the property by CoGHSTA. In the alternative, Merifon pleaded that, in the event it was found that section 19 was applicable, the Municipality had considered the availability of funds before concluding the agreement and these funds were not committed for any other purpose.

[15] The High Court found the agreement to be null and void and dismissed the action, granting judgment in favour of the Municipality.[5] The Court, with specific reference to section 19, reasoned that: the acquisition of the property was a capital project; there was no resolution of the Council authorising the acquisition of the property; and no funds to purchase the property had been appropriated in the relevant financial year. The High Court concluded that the Municipal Manager lacked the requisite authority to sign the agreement because the Municipality had at no stage resolved "to acquire the property". The High Court held that failure by a statutory body to comply with provisions that are prescribed for the validity of a specified transaction renders the transaction unlawful and *ultra vires* (beyond one's legal power), and such failure cannot be remedied by estoppel, as that would validate a transaction which is unlawful and *ultra vires*.

Supreme Court of Appeal

[16] Merifon appealed to the Supreme Court of Appeal. It sought to persuade the Supreme Court of Appeal that the High Court had erred in its findings, especially regarding the applicability of section 19. Merifon also argued, relying on the

[5] Id at para 89.

commitment letter and the Council resolution, that the transaction complied with section 19.

[17] The Supreme Court of Appeal restated the centrality of the doctrine of legality and the rule of law in our constitutional democracy. It stressed that state organs and public officials can never act beyond or contrary to their powers as prescribed by law. The Supreme Court of Appeal posed the central question: whether it was appropriate, given the facts, for it to grant an order of specific performance, together with consequential relief, having regard to section 19 of the MFMA. This section was the primary basis upon which the High Court dismissed Merifon's action and it was the anchor that underpinned the Supreme Court of Appeal's reasoning and conclusions.

[18] Section 19 provides:

> (1) A municipality may spend money on a capital project only if—
>
> (a) the money for the project, excluding the cost of feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget referred to in section 17(2);
>
> (b) the project, including the total cost, has been approved by the council;
>
> (c) section 33 has been complied with, to the extent that that section may be applicable to the project; and
>
> (d) the sources of funding have been considered, are available and have not been committed for other purposes.
>
> (2) Before approving a capital project in terms of subsection (1)(b), the council of a municipality must consider—
>
> (a) the projected cost covering all financial years until the project is operational; and
>
> (b) the future operational costs and revenue on the project, including municipal tax and tariff implications.
>
> (3) A municipal council may in terms of subsection (1)(b) approve capital projects below a prescribed value either individually or as part of a consolidated capital programme."

[19] The Supreme Court of Appeal held that the purpose of section 19 is to prevent municipalities from spending money on capital projects which have not been budgeted for, and to promote good governance within the local sphere of government. This, in the Supreme Court of Appeal's view, ensures that transparency, accountability and fiscal and financial discipline are fostered.

[20] The Supreme Court of Appeal found that it was clear that the procurement of land entails the acquisition of a capital asset, and therefore the subject-matter of the sale in question constituted a capital project. Accordingly, section 19 of the MFMA was applicable. The Supreme Court of Appeal held that the High Court was correct to conclude that the agreement, which was the basis of Merifon's claim, was "legally unenforceable" as the Municipality had not complied with section 19. The Supreme Court of Appeal rejected Merifon's reliance on the commitment letter and the Council resolution. The Court found that the resolution constituted a mere recordal that the Municipality approved the commitment letter, and nothing more.

[21] Merifon also invoked an argument based on the doctrine of estoppel, relying on *RPM Bricks*.[6] However, cognisant of the fact that as a general rule estoppel cannot be invoked in circumstances where to uphold it would be tantamount to a court approving an illegality, Merifon subsequently argued that on the facts of this case it was not incumbent on it to enquire whether the Municipality had complied with the necessary internal processes. In its view, it was entitled, as an innocent third party, to assume that these were complied with. The Supreme Court of Appeal rejected this argument on the basis that the Municipality's non-compliance with section 19 fell within the category where the conclusion of the agreement amounted to an act beyond the Municipality's statutorily prescribed powers as a public authority. The Supreme Court of Appeal held that the principle of legality was manifestly implicated because the Municipality's conduct was at odds with section 19 of the MFMA. The Supreme Court of Appeal

[6] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA).

concluded on this score that the doctrine of estoppel cannot validate an agreement where there has been a failure to comply with peremptory statutory provisions.[7]

[22] With respect to Merifon's argument that the Municipal Manager had the requisite authority – actual or ostensible – to enter into the agreement on the Municipality's behalf, the Supreme Court of Appeal held that this matters not, because the agreement itself was unenforceable *ab initio* (from the beginning) for want of compliance with the peremptory prescripts of the MFMA, particularly section 19.[8] As such, Merifon's appeal failed.

In this Court

Merifon's submissions

[23] In relation to jurisdiction, Merifon contends that this is a constitutional matter as it relates to the interpretation and application of sections 15[9] and 19 of the MFMA, as well as the principle of legality. On this score, Merifon submits that the Supreme Court of Appeal erred insofar as it found that non-compliance with section 19 of the MFMA rendered the contract null and void and unenforceable. Merifon argues that, given the context and manner in which the acquisition of the enterprise was structured between the parties, sections 15 and 19 of the MFMA were not applicable. The basis advanced by Merifon for this submission is that it was CoGHSTA that would buy the property for the Municipality. This would mean, so the submission went, that the Municipality would not incur the expenditure of acquiring the property, with the consequence that section 15 did not apply. And, because there could be no talk of a capital project, section 19 was also not applicable. Merifon submits that, for this reason, there was no need for the approval of the acquisistion of the property by means of a council resolution.

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[7] *Merifon (Pty) Ltd v Greater Letaba Municipality* [2021] ZASCA 50; 2021 JDR 1214 (SCA) (Supreme Court of Appeal judgment) at para 26.

[8] Id.

[9] Section 15 provides that a municipality may, except where otherwise provided in the MFMA, incur expenditure only (i) in terms of an approved budget; and (ii) within the limits of the amounts appropriated for the different votes in an approved budget.

[24] Merifon further argues, with reference to sections 26, 27, 171, 174 and 176 of the MFMA,[10] that even if section 19 is applicable these provisions do not render a contract between a municipality and a bona fide (good faith) third party unenforceable. In other words, Merifon submits that section 19 does not place the responsibility on the bona fide third party to investigate whether the public authority in question has complied with the provisions which regulate it. To do so, the argument continues, will potentially place innocent contracting parties at risk and it could discourage members of the public from contracting with organs of state and municipalities. In amplification of this argument, Merifon also submits that the MFMA is aimed at "enforcing internal, financial and fiscal disclipline and proper financial management within the Municipality" with particular penal consequences being visited upon any non-compliant functionaries.[11]

[25] Alternatively, Merifon submits that in the event that sections 15 and 19 are applicable, properly construed, purposively and contextually, non-compliance with their prescripts would not have the consequence of nullifying and invalidating the agreement. Merifon contends that the consequences of non-compliance with the prescripts of these sections simply cannot lead to the nullity and invalidity of agreements concluded with innocent third parties.

[26] Merifon further argues that the Supreme Court of Appeal should have applied the *Turquand* rule,[12] and that innocent private parties, like it, are disadvantaged when contracting with municipalities because they lack knowledge of the internal processes

[10] These sections of the MFMA deal with consequences for non-compliance with the provisions of the MFMA and misconduct by municipal officials and officials of municipal entities (see sections 26, 27, 171 and 172). Section 173 creates statutory offences and section 174 provides for liability in the event that a person is convicted of an offence in terms of section 173. Section 176 renders a political office bearer or an official of a municipality liable for loss or damage suffered by the municipality because of deliberate or negligent unlawful conduct when performing a function.

[11] See sections 26, 27, 171, 173, 174 and 176 of the MFMA.

[12] The *Turquand* rule emanates from *Royal British Bank v Turquand* (1856) 6 E & B 327 and protects persons from being affected by a company's non-compliance with an internal formality pertaining to the authority of its representatives.

that may apply. Merifon argues that persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether relevant internal formalities have been satisfied – they are, in fact, entitled to assume that these have been complied with.

The Municipality's submissions

[27] The Municipality argues that this matter does not engage this Court's constitutional or general jurisdiction, and it is not in the interests of justice that leave to appeal be granted. The question whether the Supreme Court of Appeal's interpretation of the Council resolution was correct, is not, the Municipality contends, a constitutional issue.

[28] On the merits, the Municipality argues that neither the *Turquand* rule nor estoppel can displace peremptory statutory requirements. It also argues that because section 19 is an empowering provision, a municipality cannot act outside of the power circumscribed therein. All that is to be determined, so argues the Municipality, is whether: (a) the capital project was approved; (b) the money for the project was appropriated in the "capital budget"; and (c) the money was available.

[29] The Municipality further argues that Merifon, for the first time in this Court, raises the argument that section 19 did not envisage the unenforceability of a contract between a municipality and a bona fide third party. It argues that the applicability of sections 26, 27 and 170 to 174 of the MFMA, relied upon by Merifon, was not raised in the pleadings in the High Court and the Supreme Court of Appeal. Furthermore, the Municipality argues that these sections are of no assistance in interpreting section 19 as the provisions are unrelated.

[30] Finally, the Municipality contends that Merifon's argument that section 19 of the MFMA falls within the second category referred to in *RPM Bricks*,[13] is misplaced.

[13] *RPM Bricks* above n 6 at para 11.

The Municipality further submits that Merifon's invocation of section 26 of the MFMA, which deals with the consequences of the failure of a municipality to approve a budget before the start of the year, was also misplaced. In this matter, the Municipality had an approved budget and section 26 can have no impact on instances of non-compliance with section 19 of the MFMA.

Jurisdiction

[31] In *Boesak*, this Court dealt with its jurisdiction to hear appeals from the Supreme Court of Appeal. It said:

> "Applications for leave to appeal to this Court are governed by section 167(6) of the Constitution, which provides for appeals from any other court 'when it is in the interests of justice and with leave of the Constitutional Court'.
>
> A threshold requirement in applications for leave relates to the issue of jurisdiction. The issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters."[14]

[32] From the above, it is clear that before leave to appeal will be granted, we must ask the threshold question whether this Court has jurisdiction to hear the matter and, secondly, whether it is in the interests of justice to do so.

Is this Court's constitutional jurisdiction engaged?

[33] In *Jiba*, this Court held that—

> "[t]*he proper approach . . . is to have recourse to the pleadings and interpret them with a view to determine the nature of the claim advanced*. It must be clear from that claim that a constitutional issue or an arguable point of law of general public importance is raised. For a constitutional issue to arise, the claim advanced must require the

[14] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-1.

> consideration and application of some constitutional rule or principle in the process of deciding the matter."[15] (Emphasis added.)

[34] In relation to the Municipality's plea and counterclaim in the High Court, Merifon denied that the agreement was null and void and unenforceable and put the Municipality to the proof of its allegations that it was. In this Court, Merifon suggests that it was not incumbent on it to allege and substantiate the legality or otherwise of the agreement – the onus is on the Municipality to have proved that the transaction was illegal. In this regard, Merifon refers to *Yannakou*,[16] where it was held that when the alleged illegality does not appear *ex facie* (on the face of) the transaction, but arises from surrounding circumstances, these circumstances must be pleaded and proven by the party relying on them.

[35] I have set out in detail Merifon's contentions in the High Court pleadings in relation to the Municipality's assertions regarding the illegality and unenforceability of the agreement based on the applicability of section 19. Based on the pleadings of the parties, including in this Court, it cannot be said that Merifon did not raise the validity and enforceability of the agreement. It is also correct that Merifon denied that section 19 is applicable. In addition, both the High Court and the Supreme Court of Appeal decided the case on the basis of the doctrine of legality. It is the judgment of the Supreme Court of Appeal, which ultimately found that "no court can compel a party to flout the law and, more fundamentally, the principle of legality which is the cornerstone of our constitutional democracy", that Merifon now seeks to appeal. This raises a constitutional issue. For this reason, I am prepared to accept that this Court's constitutional jurisdiction is engaged.

[15] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 38.

[16] *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H.

Is it in the interests of justice to grant leave to appeal?

[36] Having accepted that Merifon's pleadings raise issues which engage the constitutional jurisdiction of this Court, this Court must still decide whether it is in the interests of justice to grant leave. In determining whether it is in the interests of justice to grant leave, this Court considers a number of factors, which include but are not limited to—

(a) the importance and complexity of the issues raised;
(b) public interest in the issues raised;
(c) the position of the applicants in society;
(d) the factual nature of the dispute;
(e) mootness;
(f) prematurity and interlocutory appeals;
(g) abstract challenges;
(h) the ventilation of issues before the lower courts; and
(i) direct appeals.[17]

[37] In *Boesak*, this Court held that an applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that the Court will reverse the appealed decision.[18] My view is that, in the present case, there are no prospects whatsoever that this Court would reverse the decision of the Supreme Court of Appeal. The authorities that underscore the principle of legality, which were cited by the Supreme Court of Appeal,[19] are uncontested and settled. These cases buttress the importance of the principle of legality in the context of local government. The jurisprudence is thus settled and, in my view, provides an unassailable basis that Merifon's prospects of success are virtually non-existent.

[17] Cohen "The Jurisdiction of the Constitutional Court" (2021) 11 *Constitutional Court Review* 474-5.

[18] *Boesak* above n 14 at para 12.

[19] In particular, *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[38] The Supreme Court of Appeal found that section 19 of the MFMA was applicable.[20] This finding is correct. Clearly the Municipality's argument that the transaction counternanced in the agreement entailed a capital project cannot be gainsaid. The agreement recorded that the Municipality purchased an enterprise, which was defined to include not just the land but the entire property development carried on by Merifon, which consisted of the property as well as the right, title and interest in and to the relevant leases. The property was identified as ideal for human development settlement puposes by way of townships consisting of low cost housing. This leads to the conclusion that the procurement entailed the acquisition of a capital asset and thus a capital project, as provided for in section 19.[21]

[39] Additionally, in relation to Merifon's submissions based on the commitment letter and Council resolution, we should not lose sight of another factor that testifies to the applicability of section 19, i.e., that in terms of the agreement, it is the Municipality that incurred the obligation to pay, not CoGHSTA. This is the reason Merifon issued summons against the Municipality. Clearly the contractual obligation to pay was possible only if the Municipality had made provision for the required budget and which, importantly, would have had to be authorised by its Council through a proper resolution. There can therefore be no question of section 19 having been complied with based on the commitments made by CoGHSTA.

[40] I must also consider Merifon's submission based on *RPM Bricks*. Merifon contends that section 19 does not envisage the unenforceability of a contract between a municipality and a bona fide third party. Merifon argues that section 19 falls into the second category distilled in *RPM Bricks*, which is that the Municipality's decision constituted an irregular or informal exercise of power granted to it as a public authority.[22] This submission is clearly misplaced as found by the Supreme Court of

[20] Supreme Court of Appeal judgment above n 7 at para 22.

[21] Id.

[22] *RPM Bricks* above n 6 at paras 11-2.

Appeal.[23] Absent a resolution by the Council sanctioning the transaction, any agreement entered into by an agent of the Municipality is plainly impermissible. Even if the Municipal Manager had the authority to enter into the agreement on the Municipality's behalf, she could only have done so on the basis of a properly adopted resolution by its Council.

[41] The Supreme Court of Appeal found that the Municipality's non-compliance with section 19 fell within the first category dealt with in *RPM Bricks*, which is that the agreement amounted to an act beyond or in excess of the statutory powers of the Municipality as a public authority.[24] Plainly, this finding is correct. The principle of legality is manifestly implicated because the Municipality's conduct was at odds with the prescripts of section 19.[25] This Court, as well as the Supreme Court of Appeal, have, in a number of cases, said that the performance of any act or exercise of public power that does not comply with applicable prescripts is invalid and null and void.[26]

[42] This brings me to another submission advanced by Merifon, namely, its reliance on the doctrine of estoppel and the *Turquand* rule. Does the *Turquand* rule apply in respect of municipalities and where innocent third parties are involved? It is trite that void acts cannot be resuscitated through the *Turquand* rule. It is also trite that the *Turquand* rule is a species of estoppel and therefore cannot be raised to cure an action that is *ultra vires*,[27] as opposed to one that is *intra vires* (within one's legal powers), but suffers some other defect. The doctrine of legality is applicable and decisively trumps Merifon's argument. Furthermore, *Fedsure*,[28] as referred to by the Supreme Court of

[23] Supreme Court of Appeal judgment above n 7 at para 27.

[24] Supreme Court of Appeal judgment above n 7 at para 27.

[25] Id.

[26] See cases cited above in n 1.

[27] *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (WCC) at para 25; *Insurance Trust and Investments v Mudaliar* 1943 NPD 45 at 50–4; *Service Motor Supplies (1956) (Pty) Ltd v Hyper Investments (Pty) Ltd* 1961 (4) SA 842 (A) at 467; and *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 15.

[28] *Fedsure* above n 19 at para 56.

Appeal, remains decisive authority especially in relation to acts in the local government sphere.

[43] The conclusions of the Supreme Court of Appeal regarding the applicability of section 19, and the force of the principle of legality, are based on settled jurisprudence of this Court. Merifon has advanced no persuasive argument why the judgment of the Supreme Court of Appeal is liable to be reversed. Simply put, the transaction for the acquisition of the property entailed a capital project as it implicates the acquistion of a capital asset. The MFMA's provisions, in particular sections 15 and 19, are peremptory and they required that the Municipality comply with them before concluding the agreement with Merifon.[29]

[44] It is not necessary to deal with the submission regarding the Municipal Manager's authority to conclude the agreement on behalf of the Municipality as nothing turns on this and, in any event, it invites a factual investigation, which it is neither permissible nor desirable for this Court to conduct.[30]

[45] I now consider an argument raised by Merifon regarding the failure of the Municipality to review its conduct after concluding an invalid agreement. Whilst I agree with the criticism levelled against the Municipality for its inordinate delay in taking steps to deal with its conduct in concluding an invalid agreement, this has no bearing on the eventual outcome of the matter. The unexplained long delay in reviewing its unlawful conduct does not cure the invalidity and unenforceability of the agreement. Inexcusable as it is, the long delay and failure by the Municipality to review its unauthorised conduct also does not automatically deprive it of the option of a reactive challenge. Since *Merafong* and *Tasima*,[31] it is now clear that a reactive challenge

[29] *National Education Health and Allied Workers Union v Minister of Public Service and Administration; South African Democratic Teachers Union v Department of Public Service and Administration; Public Servants Association v Minister of Public Service and Administration; National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration* [2022] ZACC 6; (2022) 43 ILJ 1032 (CC); 2022 (6) BCLR 673 (CC).

[30] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 45-6.

[31] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

"should be available where justice requires it to be"[32] and that an organ of state is "not disqualified from raising a reactive challenge merely because it is an organ of state".[33] I agree with the analysis by the Supreme Court of Appeal in *Qaukeni*, where it was held that—

> "[i]f the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counterapplication. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form."[34]

[46] For these reasons, I am not persuaded that the interests of justice demand that leave to appeal be granted. After all is said and done, it is clear that Merifon has virtually no prospects of success in the appeal and the interests of justice clearly militate against the granting of leave. Leave to appeal must therefore be refused and there is no need to consider the merits of the matter any further.

Costs

[47] It is trite that, in civil litigation, costs follow the result. In this case, Merifon's case has been based on contract from inception and even though constitutional issues had to be considered, this did not change the case advanced by Merifon. Furthermore, even though I find that this matter engages this Court's constitutional jurisdiction, in my view, Merifon's goal was primarily to assert a specific performance claim located in contract. For this reason, I can find no basis to apply the *Biowatch* principle.[35]

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[32] *Merafong* above n 26 at para 55.

[33] *Tasima* above n 31 at para 140.

[34] *Municipal Manager Qaukeni Local Municipality v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) at para 26.

[35] This principle provides that where individuals litigate against the state in order to vindicate constitutional rights and are successful, they are entitled to a costs award. See *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Order

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

1. Leave to appeal is refused.
2. Merifon is ordered to pay the Greater Letaba Municipality's costs, including the costs of two counsel.

For the Applicant:	C Da Silva SC and A Lamey instructed by Mathopo Moshimane Mulangaphuma Incorporated
For the First Respondent:	A B Rossouw SC and J A L Pretorius instructed by NP Mohale Incorporated