IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 159/2021
SCA CASE NO: 1112/2019
LP CASE NO: 01/2014(LP)

In the matter between:

MERIFON (PTY) LTD — Applicant (Plaintiff *a quo*)

and

GREATER LETABA MUNICIPALITY — First Respondent (First Defendant *a quo*)

HOUSING DEVELOPMENT AGENCY — Second Respondent (Second Defendant *a quo*)

APPLICANT'S HEADS OF ARGUMENT

1.

INTRODUCTION:

1.1 The applicant seeks leave to appeal against the judgment and order of the Supreme Court of Appeal ("SCA"), in terms of which the applicant's appeal against the judgment and order of the Limpopo High Court (court *a quo*) was dismissed.[1]

[1] Judgment of the SCA in Volume 8, pp. 708 – 725.

1.2 It was found by both the SCA and the court *a quo* that a contract[2] for the sale of land[3] ("the contract") concluded between the applicant and the first respondent was null and void based on an illegality for want of compliance by the first respondent of peremptory provisions of sections 15 and 19 of the Local Government: Municipal Finance Management Act, No 56 of 2003 ("the MFMA").

1.3 For the considerations dealt with below, the applicant submits that a proper case exists for leave to appeal to be granted by this Honourable Court and for the appeal to be upheld.

2.

CONSIDERATIONS FOR GRANTING LEAVE TO APPEAL:

2.1 The decision of the SCA (and that of the court *a quo*) relates to a constitutional matter.

2.2 It relates to the interpretation and application of sections 15 and 19 of the MFMA and the application of the Legality Principle in relation to the validity of the contract.

[2] The contract appears from Volume 7, pp. 642 – 656. See also par 3.1, Vol 7, pp. 603 – 604.

[3] The property which was the subject–matter of the sale agreement was identified and earmarked by the Provincial Government, the Housing Development Agency and the Municipality (first respondent) as a result of a dire need for low-cost housing in the municipal area of the first respondent.

2.3 The application for leave to appeal to this Honourable Court[4] involves the following issues and related issues, which are submitted to be constitutional matters:

2.3.1 The interpretation of sections 15 and 19 of the MFMA in their context, in order to ascertain their purpose and to determine whether these provisions applied *in casu* at all, given the context and background of the contract coming into being and considering the nature and effect of an undertaking dated 6 March 2013 [5](and in turn its context) given by the Department of Co-Operative Governance, Human Settlements & Traditional Affairs of the Limpopo Provincial Government ("COGHSTA").

2.3.2 The interpretation entails the question whether the first respondent was to spend money on a capital project and whether the buying of the immovable property amounted to a capital project as is envisaged in section19 of the MFMA, considering the context and the surrounding circumstances.

2.3.3 If section 19 was applicable, whether it has not been complied with following a resolution of the council of the first respondent

[4] Volume 7, pp. 597 – 641 (excluding annexures)
[5] Volume 1 p. 35.

on 22 March 2013 approving the undertaking by COGHSTA and whether the municipal manager, Ms Mashaba, acted *intra vires* when she signed the contract on behalf of the first respondent following the resolution of 22 March 2013.

2.3.4 If there was no compliance with sections 15 and/or 19 of the MFMA, whether such non–compliance affected the validity of the contract. This issue also entails an interpretation of the provisions in the broader context of the MFMA and the purpose of the particular provisions and effect of the non-compliance on contracts and to what extent the non–compliance amounted to an irregularity that was remediable without affecting the validity of the contract.

2.3.5 Whether the non–compliance of the said provisions was not in the nature of internal mechanisms aimed to regulate and enforce financial discipline upon political office bearers and officials of municipalities, but that it could not be reasonably and fairly be expected from a private contracting party acting in good faith to investigate whether there was compliance with all the provisions and delegations and whether a private individual, such as the

applicant, was entitled to rely on estoppel and on the Turquand Rule.[6]

2.3.6 The *pacta sunt servanda est* principle which is in itself a constitutional principle [7] and its application in the context of this matter, especially where an Organ of State contracts with a *bona fide* private party as seller of the property who seeks to enforce the contract against an Organ of State (the first respondent).

2.3.7 Whether there was a duty in the circumstances on the first respondent to review its own conduct in concluding the contract based on illegality and to take such steps without unreasonable delay and not to wait four years before relying on illegality as a ground in order to avoid the contract by way of a counter-claim.

2.3.8 Whether, the issue of the payment of the purchase price in the context of this matter flowed from the constitutional principles of co-operative government as the contract was created by virtue of such cooperative government between organs of state namely the Provincial Government, the Housing Development

[6] As was the case in matters such as **National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) and Potchefstroom Stadsraad v Kotze 1960(3) SA 616 (A)**

[7] As stated in **Beadica 231 CC and Others v Trustees, Oregon Trust and Others** 2020(5) SA 247 (CC).

Agency ("HDA")[8] and the first respondent and consequently the payment undertaking to the first respondent to be made to the seller on its behalf by COGHSTA.

2.3.9 Put differently, would the legality and validity issue have arisen if the payment was made in terms of the undertaking and when it was not made, was it not a matter where the first respondent should have invoked and applied the principles of co-operative government in order to secure payment and to honour the contract.

2.4 It is submitted that it is in the interests of justice that leave to appeal be granted. It is submitted that reasonable prospects of success exist that this Court will reverse the decision of the SCA considering the merits of the applicant's argument in these Heads of Argument. The constitutional matter is one of substance deserving the attention of this Honourable Court. The issues and the constitutional matter are of public importance, and go wider than the interests of the parties in the present dispute.

[8] As an organ of state acting in terms of its mandate and functions in terms of the Housing Development Agency Act, No 23 of 2008.

Condonation:

2.5 The application for leave to appeal was filed one court day out of time. The applicant seeks condonation for the late-filing by way of an application and the applicant has tendered the costs thereof on an unopposed scale.[9]

2.6 The first respondent condoned the late-filing and does not oppose the application. [10]

2.7 It is submitted that a proper and reasonable application has been given by the applicant in the founding affidavit of the condonation application and that there could be no prejudice to the first respondent.

3.

THE CONTEXT AND FACTUAL BACKGROUND TO THE CONCLUSION OF THE CONTRACT:

3.1 A court interpreting a contract has to consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and

[9] Volume 7, pp. 579 – 596.
[10] Volume 7, p. 596.

the knowledge at the time of those who negotiated and produced the contract.[11]

3.2 The surrounding context is particularly relevant for two seasons. Firstly, to determine whether the validity of the contract is affected by the provisions of sections 15 and 19 of the MFMA and to determine whether these provisions applied as peremptory statutory prescripts *in casu* that had to be complied with by the first respondent before the conclusion of the contract with the applicant.

3.3 In turn, the contextual exercise also involves the context and intention of the undertaking by COGHSTA in favour if the first respondent given on 6 March 2013.

3.4 Secondly, the context of the resolution adopted by the Council of the first respondent on 22 March 2013 in relation to the undertaking given by COGHSTA on 6 March 2013 and before the municipal manager at the time, Ms Mashaba, signed the contract on behalf of the first respondent (according to her evidence), and whether she acted *intra vires* her authority and powers.

The Context:

[11] **University of Johannesburg v Auckland Park Theological Seminary and Another** 2021(6) SA1 (CC) at paras [64] to [66]. See also **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at par [18].

3.5 On 4 April 2011 the mayor of the first respondent at the time addressed a letter to the MEC of the Department of Local Government and Housing seeking assistance to purchase farms suitable for the development of integrated human settlement.[12]

3.6 One of the farms that was recommended in this letter was the Farm Mooiplaats of which the remaining extent and portions 5 and 6 thereof, later became the subject-matter of the sale in the contract concluded in March 2013 between the applicant and the first respondent.

3.7 It was inter-alia stated in this letter that the development of the municipalities has been negatively affected and the municipality could not make use of a number of developmental opportunities due to the lack of available land particularly around the Ga-Kgapane area.

3.8 The serious need for land for residential purposes was affirmed in the evidence of Ms Mashaba.[13] A resolution was taken by the council of the first respondent to the effect that COGHSTA be requested to buy land. [14]

[12] Volume 2, pp. 112 – 113.
[13] Volume 6, pp 490 – 491.
[14] Volume 6, p.491 lines 15-17.

3.9 On 12 April 2011 the provincial department responded to the letter of the mayor and advised that the request has been referred to the office of the Head of the Department.[15]

3.10 During 2012 COGHSTA obtained independent valuations of the property.[16] One of the valuations commissioned by COGHSTA and performed by Wizz Property Valuations on 10 January 2012 forms part of the record.[17] The purchase price was later negotiated with the applicant based on the valuations obtained.[18]

3.11 It further appears from a memorandum of the HDA (second respondent) dated 8 February 2013 to the HOD of COGHSTA that the HDA was instructed on 14 December 2012 to acquire the property for human settlements development purposes within the Letaba Municipality.[19]

3.12 The HOD of COGHSTA at the time, Ms Manamela testified as to the role of the HDA namely to facilitate the whole transaction.[20]

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[15] Volume 2, pp. 114.
[16] Volume 2 p. 159 par 6.
[17] Volume 2 pp. 127 – 142.
[18] Volume 2 pp. 159 – 160.
[19] Volume 2 p.157 line 28. The purpose of the memorandum was to propose to the Department of COGHSTA to consider the acquisition of the properties that later became the subject matter of the sale in terms of the contract between the applicant and the first respondent.
[20] Volume 5, p.365 line 29-30.

3.13 The HDA (second respondent) performs its functions and powers in terms of the Housing Development Agency Act, No 23 of 2008 ("the HDA Act "). [21]

3.14 Following the involvement of the HDA meetings and negotiations were held during January 2013 with the applicant's representative, representatives of the HDA and representatives of the Provincial Department of Public Works,[22] recommendations were made by the HDA to the Head of Department of COGHSTA to consider the acquisition of the relevant properties. The HDA was clearly satisfied with the negotiated purchase price of the properties.

3.15 Following the memorandum of the HDA, the HOD of COGHSTA advised the HDA in letter dated 27 February 2013 that the Department was satisfied with the offer on the purchase price of the properties and gave permission to the HDA to finalise the acquisition of the properties.[23]

3.16 Following this letter the HDA advised the municipal manager of the first respondent by email of the permission obtained from COGHSTA to proceed with the acquisition of the property. The email also stated: "*We*

[21] The objects of the HDA and its role appear from sections 4 and 5 of the HDA Act.
[22] See memorandum, Vol 2 pp. 159 line 20; p. 159 - line 14; p. 160 and the evidence of Ms Manamela , Vol 5 pp 365 – 369. .
[23] Volume 2, p. 161.

would like to urgently finalise signature of the deed of sale forwarded to yourselves ASAP". [24]

3.17 Between 4 March and 2013 and 6 March 2013 emails were exchanged between all the relevant parties i.e. the applicant, the first respondent, COGHSTA and the HDA regarding the draft sale agreement and amendments to the draft with the legal department of the first respondent being involved.[25] Ms Mashaba testified she was kept abreast of all these further communications including the draft agreement and after amendments ultimately satisfied with the terms of the contract. [26]

3.18 By 6 March 2013 the legal official of the first respondent appeared to be satisfied with the version of the agreement, but alluded to the fact that the commitment letter from COGHSTA had not yet been received.[27] This suggested that the required commitment letter would give the green light for the first respondent to enter into the proposed contract.

3.19 On 6 March 2013 the HOD of the provincial department of COGHSTA confirmed in writing addressed to the municipal manager that the department has budgeted for the required purchase price of the property in the amount of R 52 million (excluding VAT) required for

[24] Volume 2, p.162.
[25] Volume 2, pp. 163 – 170.
[26] Volume 6, p. 499 line 23 – p.502 line 5.
[27] Volume 2, p. 168.

human settlements development and that 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. Furthermore, the department would also pay the transfer and registration costs amounting to R 209 892.90.[28]

3.20 When clause 5 of the contract is considered, all other arrangements were in place for purposes of the residential development of the property including installation of service in terms of a prior service level agreement. The property was clearly suitable for the purpose of housing development, which was desperately needed by the first respondent for some years.

3.21 There was some dispute in the evidence whether the municipal manager had signed the contract after 22 March 2013 and after a resolution of the council of the first respondent or whether the contract was signed already on 7 March 2013 when the applicant signed it at the offices of the HOD of COGHSTA. This dispute is dealt with later.

3.22 Given the aforesaid context the following was evident at all times prior to the conclusion of contract:

3.22.1 That although the first respondent was in need of land for housing development in its area it could not acquire and buy

[28] Volume 1, p.35.

the land itself and was dependent upon the provincial government to do so on its behalf and for its benefit.

3.22.2 In turn the provincial government department of COGHSTA instructed the HDA to facilitate the acquisition of the property earmarked for housing development.

3.22.3 The transaction was structured so that the provincial government department of COGHSTA would spend the money in order to buy the property in terms of its budget.

3.22.4 The money to be paid for the purchase price was to be paid directly into the trust account of the transferring attorneys and would not be paid to the municipality (first respondent). This effectively meant that the money would not be withdrawn from the first respondent's bank account and the first respondent would not incur the expenditure. In this regard, Ms Mashaba also testified that the municipality did not have to appropriate the money in the municipal account budget. [29]

3.22.5 Importantly Ms Mashaba also testified that only if the purchase price was to <u>be paid into the municipal account</u> by COGHSTA then the amount of R 52 000 000.00 would have to be catered for in the new budget and in such event it would still be

[29] Volume 6, p 504, lines 20 – 25; p. 506 lines 5 – 14 and p. 508 at lines 3 – 15.

possible to include it in the budget for the ensuing financial year and then would have complied with section 19. [30]

3.22.6 It was never contemplated that the first respondent had to budget for purposes of expenditure to be incurred for the acquisition of the property and to spend money on a capital project. It was the intention of the provincial government through its department of COGHSTA to do so. The municipality would merely become the beneficial owner of the property with the contract price being paid by COGHSTA on its behalf as buyer. These were the arrangements between the three Organs of State namely: the first respondent, COGHSTA and the HDA concluded on how the acquisition of the property would be structured.

3.22.7 As far as the applicant was concerned it was not privy to all the arrangements and undertaking given by COGHSTA to the first respondent and it had merely concluded a contract with the first respondent who promised to perform in terms of the contract. [31]

3.23 Considering the aforesaid context and the manner in which the acquisition of the property was structured between the said Organs of

[30] Volume 6, p. 534, lines 10 – 25.

[31] Performance may be made on behalf of a contracting party by a third party despite the fact that the third party is not bound by the contract to perform. If the third party does not perform, the party who promised that the third party would perform remains liable in terms of the contract – See: The Law of Contract in South Africa, RH Christie, 7th Edition, at page 471.

State, the question arises whether section 15 and section 19 of the MFMA was applicable. We submit not, for the following reasons:

3.23.1 Considering the provisions of section 15 of the MFMA the municipality would not incur the expenditure for purposes of the acquisition of the property. It was the provincial government that would incur the expenditure in terms of its budget.

3.23.2 Furthermore, considering the provisions of section 17 of the MFMA the municipality would not have to appropriate the expenditure for the budget year under the different votes of the municipality;

3.23.3 Considering section 19 of the MFMA, the provision was also not applicable as the municipality was not to spend money on a capital project. The money was to be spent by COGHSTA. This was also conceded by Ms Mashaba in her evidence with reference to direct questioning on section 19.[32] Ms Mashaba also testified that with reference to section 19(1)(a) would not have to be appropriated in the capital budget.[33]

3.23.4 Furthermore, there were evidently no other costs envisaged to be incurred by the municipality that required approval by the

[32] Volume 6, p 536 lines 15 -20.
[33] Volume 6, p. 536 lines 20 -25.

council with reference to section 19(1)(b). The money to be spent by COGHSTA *"was reflecting the overall amount that was going to be spent".* [34]

3.23.5 As far as section 19(1)(c) of the MFMA was concerned, Ms Mashaba also did not think that section 33 of the MFMA was applicable.[35] Objectively viewed this was correct.

3.23.6 The purchasing of the properties as capital assets, did not equate to the meaning of a capital project[36] embarked upon by the municipality at the time of conclusion of the contract as envisaged by section 19 which would entail incurring of costs in the future. The municipality would only benefit as owner of the properties to fulfil the need for providing housing and the selling of the already demarcated stands to prospective homeowners.

3.23.7 It was more likely a capital project of COGHSTA for the benefit of the municipality where the groundwork and planning was done by COGHSTA in conjunction with the HDA including valuations done by COGHSTA of property that were no longer mere farmland but which property was already township land and re-zoned for this purpose.

[34] Volume 6, p. 537 lines 1 – 9.
[35] Volume 6, p. 537 lines 17 – 23.
[36] The SCA erred in equating the acquisition of a capital asset with a capital project.

3.24 It is submitted that considering the context of the contract the provisions of section 15 and 19 were not applicable and affecting its legality and validity. To conclude otherwise would divorce the contract from its broader context before its conclusion.

3.25 Ms Mashaba could not have lacked “proper authority” to sign the agreement on 7 March 2013 due to alleged non-compliance with Sections 15 and/or 19(1) of the MFMA.

3.26 The onus was on the first respondent to prove illegality which nullified the contract in the court a quo. It is submitted that the first respondent has failed to discharge this onus.

3.27 It is submitted that, on this ground alone that sections 15 and 19 of the MFMA were not applicable *in casu* , the appeal should be upheld and the judgment and order of the SCA be set aside and judgment as prayed for by the applicant in the court *a quo* be granted and the counter-claim of the first respondent should be dismissed.

THE RESOLUTION OF THE COUNCIL OF 22 MARCH 2013 AND ITS CONTEXT:

4.1 The evidence of Mr Mangena on behalf of the applicant and that of the HOD of COGHSTA, Ms Manamela, to the effect that when Mr Mangena signed the contract on 7 March 2013 at the offices of the HOD, it had already been signed on behalf of the first respondent [37], was disputed by Ms Mashaba.

4.2 Ms Mashaba was adamant that she signed the contract after 22 March 2013 and after a resolution of the council as the council had to consider the acquisition of the property first. [38] She signed the contract leaving the date and place open.[39]

4.3 Ms Mashaba further testified that she requested that the consideration of the acquisition of the property be placed before the council before she signed the contract, mentioned this to the mayor and wrote a memorandum.[40] Prior to the meeting of the council the matter had to be considered by the executive committee.[41] The minutes of that meeting

[37] Evidence of Ms Manamela at Volume 5, p. 375 lines 20 -25. Evidence of Mr Mangena, Volume 5, p. 421 lines 8 -11.
[38] Volume 6, p.468 – 469 and at p. 474 lines 23 – p. 475 lines 1 – 8.
[39] Volume 6, p. 477.
[40] Volume 6, p.510. The memorandum was not discovered by the first respondent.
[41] Volume 6, p. 512.

were also not discovered. The executive committee submitted the recommendation to the council. [42]

4.4 The item that was placed on the agenda for the meeting of the council referred to the acquisition of the properties in question. [43]

4.5 Following the meeting of the council Ms Mashaba was satisfied that that she had authority to sign the contract. [44]

4.6 Ms Mashaba testified that the council (which meeting she attended) approved the purchase of the land [45] and that COGHSTA was going to purchase the land for the municipality. [46] The sources of funding were considered by the council and were not committed for other purposes if section 19(1)(d) was applicable.[47]

4.7 Considering the evidence of Ms Mashaba and the context of the resolution of the council on 22 March 2013, the council not only approved the commitment letter of COGHSTA but gave consideration to the acquisition of the property of which the agreement was already finalised and signed by the applicant. It was intended to give the go – ahead to the municipal manager and to authorise her to sign the contract based on a satisfaction by the council that COGHSTA would

[42] Volume 6, p. 513, lines 20 -23.
[43] Volume 6, p. 516 lines 1 – 15 and Volume 2, p. 182.
[44] Volume 6, p. 517 and at p. 531 line 10.
[45] Volume 6, p. 518, lines 1- 20 and p. 519 lines 8 – 12.
[46] Volume 6, p. 520 – lines 15 – 21.
[47] Volume 6, p. 483, lines 7 -9 and at p. 538 lines 1 – 10.

pay the purchase price for the acquisition of the property by the municipality.

4.8 In this regard, it is submitted that that the SCA erred in its finding that that resolution did not mean that the council resolved to acquire the property. This finding also divorces the resolution and the letter of 6 March 2013 from their context.

4.9 The context as given in the evidence of Ms Mashaba also demonstrates that section 19 and the issue whether the acquisition should be budgeted for was considered, but regarded as not being applicable or that the requirements of section 19 were met considering the contents of the commitment letter which met with the approval of the council. [48] What underscores this inference, is that up to the stage of the filing of the plea and counter–claim in 2017, the defences of non-compliance with section 19 and lack of authority were inexplicably never raised by the first respondent.[49]

4.10 The further upshot of the evidence of Ms Mashaba was that considering the system of delegation, the requirements were met so as to enable her to have the authority to sign the contract on behalf of the municipality. [50]

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[49] Volume 6, p 549 lines 8 – 22.
[50] Volume 6, p. 73.

5.

DID THE NON–COMPLIANCE WITH SECTIONS 15 AND/OR 19 OF THE MFMA AFFECT THE VALIDITY OF THE CONTRACT:

5.1 To determine whether nullity was intended by the legislature is a matter of construction of the statute.[51] It entails a purposive and contextual interpretation.[52]

5.2 The broad formulation in **Schierhout**[53] that a thing done contrary to a statutory prohibition is always a nullity, has been qualified and a more flexible approach has been applied in several later cases.[54]

5.3 A more flexible approach was also applied by this Honourable Court in a local government matter, in **Liebenberg N.O. v Bergrivier Municipality** 2013 (5) SA 246 (CC).[55]

5.4 Assuming that sections 15 and 19 of the MFMA were statutory prerequisites to be complied with before a municipality incurs a contractual obligation to spend money on a capital asset or capital project, does the non–compliance render a contract concluded with an innocent party invalid?

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[51] LAWSA , Vol 9, Third Edition, par 335.
[52] **Cool Ideas 1186 CC v Hubbard and Another** 2014 (SA) 474 (CC) at par [28].
[53] Relied upon by the SCA, in par [29] of the judgment , Volume 8, p 724.
[54] **Cool Ideas (supra)** at par [168] and the cases referred to.
[55] At paragraphs [24] – [26].

5.5 Although the SCA *in casu* correctly stated that one of the underlying purposes of section 19 is to prevent municipalities from spending money on a capital project that have not been budgeted for, so as to ensure that transparency and accountability as well to ensure that fiscal and financial discipline are fostered, and that the other provisions of the MFMA alluded to are intended to promote good governance within local sphere of government. However, it is submitted that the matter does not end there.

5.6 It is submitted that a further contextual interpretation with reference to other provisions of the MFMA (in particular the Chapter within which the relevant provisions fall) and other factors are to be considered.[56]

5.7 Important factors that were considered in **Metro Western Cape**[57]**,** despite the provisions being in the public interest, were:

5.7.1 Do the provisions purport to regulate contracts in particular with innocent parties who do not know whether statutory requirements have been complied with?

[56] Such as the court has done in **Metro Western Cape (Pty) Ltd v Ross** 1986 (3) SA 181 (A), See also: **Pottie v Kotze** 1954 (3) SA 719 (A).
[57] Supra at p. 191

5.7.2 Would an interpretation rendering the contract void and unenforceable not cause great inconvenience and injustice to innocent members of the public? Such an interpretation would result that innocent contracting parties, such as the applicant, will be without any contractual remedy.

5.8 We may add another consideration. Should the court in the interpretational exercise not give due weight to the *pacta sunt servanda est* principle, which in itself is a constitutional principle,[58] especially where innocent members of the public contract with Organs of State and the onus is on functionaries of the Organ of State (such as with a municipality), to comply with the fiscal and financial regulatory regime envisaged by the legislation.

5.9 To do otherwise would allow an Organ of State, which has the constitutional duty to comply with legislative conditions, to escape contractual consequences too easily, especially where the other contracting party was innocent and contracted in good faith. An innocent contracting party could not reasonably be expected to investigate compliance with numerous provisions which regulate the Organ of State.

[58] As was stated in **Beadica** (supra) fn 7.

5.10 From a policy consideration perspective, to render the contract invalid in such an instance would potentially place innocent contracting parties at risk and could discourage members of the public to contract with Organs of State and municipalities. This is of particular importance where the contract was designed to fulfil a broader constitutional housing developmental duty, on the part of the municipality, for the benefit of the public.

5.11 It is further submitted, that the contract in the present case is distinguishable from contracts concluded in terms of supply chain management provisions of municipalities which is dealt with in a separate chapter of the MFMA. In such a case the procurement is specifically governed by section 217 of the Constitution, and specific laws have been created which give effect to this provision of the Constitution in various legislative instruments including municipal laws. Generally, procurement requirements are transparently set out in invitations to tender, procurement policies and regulations which prospective bidders have to comply with and acquaint themselves.

5.12 Following the principles of interpretation referred to above,[59] the MFMA defines *irregular expenditure* as expenditure incurred by municipalities in contravention of the MFMA and other laws specifically referred to in the definition clause. It is submitted that expenditure

[59] Paragraph 5.1.

incurred in contravention of section 19 would fall under this definition. As the definition of irregular expenditure envisages, it can be condoned in terms of the MFMA.[60]

5.13 In order to strengthen the fiscal and financial discipline imposed by the MFMA on functionaries, the MFMA imposes certain consequences for responsible officials for contraventions of the MFMA and creates statutory offences with regard to certain contraventions, including the failure to take reasonable steps to prevent unauthorised or irregular expenditure and hold functionaries liable for such conduct. [61]

5.14 Furthermore, section 176 of the MFMA renders a political office bearer or an official of municipalities liable for loss or damage suffered by the municipalities, because of a deliberate or negligent unlawful conduct when performing a function.

5.15 The MFMA further places fiduciary responsibilities on accounting officers (municipal managers) and general financial management functions and obligations on accounting officers.[62]

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[60] In terms of section 170.
[61] See sections 171, 173 and 174. This is comparable with the matter in **Standard Bank v Estate Van Rhyn** 1925 AD 266 at pp. 274 – 275.
[62] Sections 61 and 62.

5.16 Where the municipal legislation intends to nullify a contract as a result of the non-compliance with provisions of the Act it specifically and clearly states so.[63] A similar provision is not found with reference to contracts concluded with outside parties as a result of non-compliance with sections 15 and/or 19 of the MFMA.

5.17 In considering the MFMA's preamble and object, it has a similar purpose and object as the Public Finance Management Act, Act 1 of 1999 ("PFMA"), namely to secure sound and sustainable management of fiscal and financial affairs, with the difference that the PFMA applies to Organs of State on national and provincial levels of government and a number of public entities listed in the act, whereas the MFMA applies to local government.

5.18 Where the PFMA, for instance, seeks to affect a specific contract following the non-compliance with a provision of the act, it specifically makes provision for the resultant effect on the contract.[64] Not all unauthorised expenditure in terms of the PFMA has any express consequences upon a contract. The MFMA does not contain any express provision affecting the binding effect or validity of a contract as a result of non-compliance with a provision by a council or a functionary.

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[63] See sections 54A and 56 of the Municipal Systems Act, No 32 of 2000.
[64] Section 68 of the PFMA and **SA Express Ltd v Bagport (Pty) Ltd** 2020(5) SA 404 (SCA).

5.19 The MFMA also defines *authorised expenditure,* which inter alia refers to expenditure incurred by municipalities other than in accordance with section 15 or 11 (3), and includes overspending of the municipalities' approved budget.

5.20 Section 27(3) places an obligation on the mayor of a municipality upon becoming aware of any non-compliance with provisions of Chapter 4, under which sections 15 and 19 fall. The provision envisages remedial and corrective measures in order to avoid a recurrence and require reporting to the council, the MEC for Finance and National Treasury.

5.21 Section 29 of the MFMA further makes provision for remedial measures in the event of unforeseen and unavoidable expenditure for which no provision was made in an approved budget. It gives the power to the mayor of a municipality to authorise unforeseeable and unavoidable expenditure in exceptional circumstances and provides further for such expenditure to be appropriated in an adjustments budget.

5.22 It is submitted that in this matter, where it was not envisaged by the municipality that the purchase price for the acquisition of the properties would not be paid by COGHSTA, in terms of the commitment letter, and as a result it had to spend the money to honour the obligation in

terms of the contract, the first respondent could have availed itself of the provisions of section 29, in order to avoid the expenditure being unauthorised as not being budgeted for.

5.23 Section 32 of the MFMA caters for the liability of political office bearers and accounting officers of municipalities and the recovery thereof, unless the expenditure is authorised in an adjustment budget or certified by the municipal council as irrecoverable.

5.24 It is submitted that, in the present matter where a provincial department ostensibly, as a result of an internal dispute with its provincial treasury, failed to honour the undertaking in terms of the commitment letter to the first respondent, the invocation of the principles of co-operative government in terms of section 41 of the Constitution read with section 35 of the MFMA, was available to the first respondent so as to avoid the risk of unauthorised or irregular expenditure.

5.25 In conclusion, we respectfully submit that when the aforesaid considerations and factors and the broader context of the provisions of the MFMA referred to above are considered, it would appear that the statutory obligations and prerequisites, are mainly aimed at enforcing internal financial and fiscal discipline and proper financial management within the municipality by its political office bearers and top

management functionaries, with potential consequences for them in the event of contravention of provisions of the MFMA. It is submitted, with respect, that these consequences are not aimed at innocent outside parties, such as the applicant.

5.26 Furthermore, the MFMA foresaw that in certain circumstances there could be non-compliance and it then caters for remedial corrective measures in order to avoid or limit financial prejudice to the municipality.

5.27 It is submitted, that considering all of the aforementioned that the mere non-compliance with provisions of the MFMA in particular Chapter 4, under which sections 15 and 19 resort, does not automatically render a contract following such non-compliance, concluded with members of the public and particularly with innocent parties automatically null and void. To do so would cause "*greater inconveniences and impropriety"* to borrow from the words of Solomon JA in **Estate van Rhyn**. [65]

6.

THE STATUTORY REQUIREMENTS ARE INTERNAL IN NATURE, THE TURQUAND RULE AND ESTOPPEL:

[65] **Standard Bank v Estate Van Rhyn** (supra) fn 60.

6.1 It is important to distinguish between an act beyond or in excess of legal powers of a public authority (the first category), on the one hand, and the irregular or informal the exercise of power granted (the second category).

6.2 In the second category, 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 the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with.[66]

6.3 When the irregularity falls in the second category the innocent contracting party is not precluded from invoking the *Turquand* –rule and estoppel.[67]

6.4 It is submitted that an expenditure incurred and not budgeted for in conflict with the prerequisites of sections 15 and/or 19 and a contract is concluded with an innocent third party (as is the case in the present matter) and although non –compliance with the provisions are irregular, the irregularity falls in the second category.

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[66] **City of Tshwane Metropolitan Municipality v RPM Bricks** 2008 (3) SA 1 at paragraphs [11] and [12] and **SA Express Ltd v Bagport (Pty) Ltd** (supra) at paragraphs [52] and [53].
[67] **SA Express** (supra) at par [53] and **RPM Bricks** (supra) at par [12]

6.5 In this regard, it is submitted that statutory prescripts pertaining to budgets and capital projects are internal mechanisms placing obligations on the political office bearers and functionaries, in particular on accounting officers in order to promote and secure sound financial management and it aims to hold such functionaries accountable for an unauthorised or irregular expenditure.

6.6 It is submitted that, it cannot reasonably be expected of an innocent outside party before contracting with a municipality to ensure that all the prerequisites for the incurring of the expenditure by the municipality for purposes of the contract have been complied with and that it has been appropriated in a budget. That is the internal duty of the functionary. Such party is entitled to presume that the prerequisites for the incurring of the expenditure have indeed been complied with.

6.7 It is submitted, that this is even more so in the present case, where a contract was drafted so as to make provision for the municipal manager, as the accounting officer and head of the administration of the municipality[68], to sign and conclude the contract on behalf of the municipality.

[68] Section 55 of the Municipal Systems Act.

6.8 It is submitted that the applicant was therefore entitled to rely in this matter on estoppel and the *Turquand*–rule and that such reliance has been adequately established in this case.

7.

THE DELAY IN RAISING ILLEGALITY BY THE FIRST RESPONDENT:

7.1 The first respondent addressed illegality in order to escape the consequences of the contract for the first time in its plea and counter - claim filed in April 2017, which was four years after the contract was concluded. This was despite two letters of demand issued in 2013 in which the applicant claimed specific performance. The applicant instituted its action in the beginning of 2014. Illegality was also not raised as a defence in a subsequent application for summary judgement brought by the applicant in March 2014.

7.2 This state of affairs results in an iniquitous and prejudicial situation for a contracting party, who was in the meantime entitled to conduct his affairs on the strength of a valid contract and who is also bound by such a contract.

7.3 A public functionary is constitutionally duty bound to act in order to correct any unlawfulness within the boundaries of the law and the

interests of justice. Public functionaries are vested with the responsibility to respect, protect, promote and fulfil the rights in the Bill of Rights and as bearers of this duty and in performing the functions in the public interest when faced with an irregularity in the public administration, it must seek to redress it.[69]

7.4 A legality review (which was in substance what the plea and counter – claim amounted to) in this matter, must be initiated without undue delay and the courts have the inherent power to refuse a review application in the face of an undue delay. In the exercising of the court's discretion it must be informed by the values of the Constitution. The expeditious and diligent compliance with constitutional duties is a constitutional obligation in itself and this principle is a requirement of legality.[70]

7.5 Where there is no explanation for the delay the delay will necessarily be unreasonable. [71]

7.6 In this matter, the only witness called by the first respondent, Ms Mashaba, testified during cross-examination that she could not tell when the defence with reference to section 19 and her lack of authority came to light, despite being the municipal manager until the end of July

[69] **Khumalo v MEC for Education, KwaZulu–Natal** 2014(5) SA 579 (CC) at paras [35] – [36]
[70] **Khumalo v MEC for Education, KwaZulu–Natal** (supra) at paras [44] – [46]
[71] **Buffalo City Metropolitan Municipality v Asla Construction** (Pty) Ltd 2019 (4) SA 331 (CC) at par [52]

2017. When she could not explain this aspect, it was put to her that the defence was an afterthought. [72]

7.7 The standard against which a State litigant's conduct is measured is high, and ought to accord with the prescripts of the law.[73]

7.8 It is submitted that in the circumstances of this case of the failure by the first respondent to the institute a legality review in order to set the contract aside or to declare it null and void, was an unreasonable and inordinate delay, where it was raised four years after the conclusion of the contract knowing that the applicant claimed specific performance and the contract was not cancelled as a result of such breach.

7.9 It is open to a court to raise the issue of inordinate delay in bringing a review application *mero motu*.[74] The issue of delay is not a defence to be raised and can be raised in argument.[75]

7.10 It is submitted that *in casu* and considering the nature of the contract aimed to give effect to the developmental duties of the first respondent and where the applicant contracted in good faith and sought to enforce specific performance and compliance from the outset, the unreasonable delay on the part of the first respondent by means of a

[72] Volume 6, p. 549 line 8 – p. 550 line 10.
[73] **Buffalo City** (supra) at par [61].
[74] **Camps Bay Ratepayers' and Residents' Association v Harrison** 2011 (4) SA 42 (CC) at paragraph [53] – [54] .
[75] **Mostert v Registrar of Pension Funds** 2018 (2) SA 53 (SCA) at par [33] – [37].

legality review which should have been brought sooner, should in the interests of justice not be countenanced in this case. It is submitted that the first respondent should be precluded from raising it for the first time in its plea and counter-claim four years after conclusion of the contract.

7.11 Therefore, it is submitted that on this ground alone the plea and counter - claim should be dismissed by this Honourable Court.

8.

CONCLUSION:

In the premises, this Honourable Court is requested to grant an order in the following terms:

8.1 That the late-filing of the application for leave to appeal is to be condoned and the applicant is to pay the costs of the application on an unopposed scale;

8.2 That the application for leave to appeal is granted with costs including the costs of two counsel;

8.3 That the Appeal is to be upheld with costs, which costs include the costs of two counsel;

8.4 That the order of the Supreme Court of Appeal is to be set aside and be substituted with the following order:

8.2.1 *The appeal is upheld;*

8.2.2 *The order of the court a quo is set aside and substituted with the following order:*

"An order is granted in terms of prayers 1 to 9 of the Plaintiff's Particulars of Claim, which costs include the costs of two counsel. The first defendant's counter–claim is dismissed with costs, which costs include the costs of two counsel."

SIGNED AT PRETORIA ON THIS 18th DAY OF JANUARY 2022.

C A DA SILVA SC

AT LAMEY

Counsel for the Applicant

IN THE CONSTITUTIONAL COURT
REPUBLIC OF SOUTH AFRICA

CCT CASE NUMBER: 159/2021
SCA CASE NUMBER: 1112/2019
LP CASE NUMBER: 01/2014 (LP)

In the matter between:

MERIFON (PTY) LTD Applicant
(Appellant in the Court below)

and

GREATER LETABA MUNICIPALITY First Respondent
(First Respondent in the Court below)

HOUSING DEVELOPMENT AGENCY Second Respondent
(Second Respondent in the Court below)

FIRST RESPONDENT'S FILING NOTICE

DOCUMENTS FILED: FIRST RESPONDENT'S:

1. **INDEX TO HEADS OF ARGUMENT;**
2. **HEADS OF ARGUMENT;**
3. **PRACTICE NOTE;**
4. **LIST OF AUTHORITIES.**

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FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

(1) This is an application for leave to appeal the judgment and order of the SCA, dismissing the applicant's claim for specific performance of an agreement of sale of certain immovable

properties entered into between the applicant and first respondent, represented by the municipal manager.

(2) The SCA dismissed the applicant's claim for specific performance. The SCA had no difficulties in interpreting sections 15 and 19 of the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') and found that they were indeed applicable to the agreement of sale, that the first respondent did not comply with provisions of section 19 (8/722 par 25), that the first respondent never resolved to acquire the property as was required by section 19 (8/721 par 24), that the conclusion of the agreement was invalid because it amounted to an act beyond or in excess of the first respondent's statutory powers implicating the doctrine of legality (8/723 par 27) and that to uphold the applicant's defence of estoppel would be tantamount to giving its imprimatur to an illegality (8/724 par 29).

(3) In his application for leave to appeal the applicant disputes the decision of the SCA on two grounds: The applicant's first ground is that the SCA misconstrued section 19 of the MFMA.

The applicant argued that upon a proper construction of section 19, with due regard to the provisions of sections 26 and 27 of the MFMA, the SCA should have found that non-compliance with section 19 did not envisage the unenforceability of a contract concluded with the first respondent by a bona fide third party. (7/611 par 3.22.2). The applicant's second ground is that section 19 exclusively deals with internal procedures, that the applicant was unaware of the first respondent's non-compliance with its internal procedures and by reason of which the SCA should have applied the Turquand rule to protect a bona fide third party from the municipality's internal irregularities. (7/608 par 318 to 7/610 par 3.19).

(4) In his heads of argument the applicant deviated to a certain extent from the grounds raised in his application: The applicant disputes the decision of the SCA and argues that the SCA should have found the following: The municipal manager acted *intra vires,* because 1) sections 15 and 19 were not applicable, given the factual matrix of the case and if sections 15 and 19 were applicable, then 2) the first respondent indeed resolved to acquire the property, 3) the non compliance with sections 15

and 19 did not render the agreement void on a proper interpretation of the MFMA, 4) the non compliance by the first respondent of the provisions of sections 15 and/or 19 constituted an irregular or informal exercise of power, as opposed to an act beyond or in excess of the first respondent's statutory powers, which entitled the applicant as an innocent party to rely on the Turquand rule and estoppel.

(5) We shall for ease of reference refer to the parties by name, ie to the applicant as 'Merifon', to the first respondent as 'the Municipality' and to the second respondent as 'HDA'.

(6) We shall refer to the record as follows:

Volume/page number/line(s) eg 2/45/1-10 = Volume 2, page 45, lines 1 - 10.

CONDONATION

(7) The applicant filed his application for leave to appeal one court day out of time and has tendered the costs thereof on an unopposed scale. We respectfully submit that the applicant's explanation is reasonable and no prejudice has been suffered by the first respondent. In view hereof, the first respondent does not oppose the application for condonation.

JURISDICTION.

(8) It appears from the founding affidavit that the application is brought on the basis that is raises a constitutional issue (7/611/ par 3.22.1) as well as a non-constitutional issue (7/612/par 3.22.4).

(9) In terms of section 167(3)(b)(i) and (ii) of the Constitution the Above Honourable Court has jurisdiction to decide constitutional matters and any other matter (non-constitutional matters), if the above Honourable Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered. In terms of section 167(3)(c) of the Constitution, the above

Honourable Court has the final say as to whether it has jurisdiction.

(10) In determining jurisdiction, the proper approach is to have recourse to the pleadings in the court of first instance, from which it must be clear that a .constitutional issue or an arguable point of law of general public importance which ought to be considered was raised. (*General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 13 paras 38 to 42)

(11) For a constitutional issues to arise, the claim advanced must require the consideration and application of some constitutional rule or principal in the process of deciding the matter. (*Jiba* par 38). The mere fact that a matter is located in an area of the common law that can give effect to a fundamental right does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of the law and not merely involves the application of an uncontroversial legal test to the facts. (*Jiba* par 47 citing *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) par 33).

(12) In *Fraser v Absa Bank* 2007 (3) SA 484 (CC) par 38 the following was stated:

'This Court has held that a constitutional matter is presented where a claim involves: (a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.'

(13) In *Fraser* par 40 it was also stated that it is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question and that an issue does not become a constitutional matter merely because an applicant calls is it one.

(14) For the above Honourable Court's jurisdiction to be engaged in constitutional matters, the interests of justice must warrant the granting of leave. (*General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 13 par 35). The interest of justice enquiry involves the weighing up of various factors, which include a reasonable prospects of success which, although not determinative, carry more weight than other factors. (*Jiba* paras 35 and 36).

(15) In non constitutional matters, the first jurisdictional requirement has two facets: The first facet is that the point must be a point of law and not of fact. The second facet is that the legal point must be arguable. If the legal argument advanced is demeritorious, without substance or without some degree in the merits or without a measure of plausibility or without prospects

of success on appeal, it cannot be said to be arguable. (*Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) paras 20 to 24 and par 23 for examples of arguable matters). Whether a point of law is arguable is a value judgment, which depends on the particular circumstances of each case. (*Paulsen* par 23).

(16) The second jurisdictional requirement in non constitutional matters, namely that the arguable point of law must be of general public importance, is that the issue must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public. (*Paulsen* par 23).

(17) The last jurisdictional requirement in non constitutional matters also invites the interests of justice factor, which aims to ensure that the Above Honourable Court does not entertain any and every application for leave to appeal brought to it. If it is not in the interests of justice, then that point is not one that ought to be considered by the Constitutional Court. (*Paulsen* par 30)

(18) The first respondent respectfully submits that not one of the arguments advanced by the applicant has crossed the aforesaid jurisdictional thresholds for the reasons set out below.

LITIGATION HISTORY

(19) Merifon instituted action against the Municipality, for, amongst other things, payment of an amount of R52 million against transfer of three immovable properties based on a written agreement of sale. (1/1-24).

(20) The Municipality opposed the action and took issue with the authority of the municipal manager as well as the validity of the agreement. Regarding the latter, the Municipality filed a counterclaim for a declaratory order. (1/25-35).

(21) The matter was heard by Ledwaba AJ during the week of June 2019 and judgment was handed down on 18 July 2019. The action was dismissed and judgment was granted in favour of

the Municipality, declaring the agreement null and void and unenforceable. (8/662-705).

(22) Merifon applied to the Court of first instance for leave to appeal. Makgoba JP on 30 September 2019 granted leave to appeal to the SCA. (8/706-707).

(23) On 22 April 2021 the SCA dismissed the appeal with costs. (8/708-726).

(24) Merifon subsequently brought an application to the Above Honourable Court for leave to appeal the order of the SCA. (7/579-8/750). The above Honourable Court on 2 December 2021 issued directions setting down the application for hearing on 1 March 2022. (8/751-752).

THE PLEADINGS IN THE HIGH COURT

(25) Merifon, ie a private company, instituted action against the Municipality, for, amongst other things, payment of an amount

of R52 000 000.00 against transfer of three immovable properties, ie the Remaining Extent as well as Portions 5 and 6 of the farm Mooiplaats 434, all of which were situated in the Registration Division LT, Limpopo Province, (henceforth jointly referred to as 'the immovable property') into the name of the Municipality.

(26) Merifon's claim was for specific performance of a written agreement that was entered into on 7 March 2013 between Merifon, represented by Mr Mangena, and the Municipality, represented by its municipal manager, ie Ms Mashaba.

(27) Merifon alleged that the municipal manager was *properly authorised* to conclude the agreement, alternatively that she was acting with *ostensible authority* alternatively that she was acting with the *usual authority* of a municipal manager. (1/7 par 5). In short, Merifon relied on the municipal manager's actual or ostensible authority.

(28) The Municipality defended the action and denied that the municipal manager was properly authorised or that she had the

ostensible authority or the usual authority as alleged by Merifon. (1/26 par 3.2). Thus, the Municipality denied the positive allegations made by Merifon regarding the nature of the municipal manager's authority.

(29) In amplification to the Municipality's denial that the municipal manager was authorised, the Municipality alleged that the purchase of the property was a capital project as provided for in section 19 of the MFMA and that there was non-compliance with the provisions of section 15 read with section 19 of the MFMA. The Municipality further alleged that in view of the latter provisions, payment of the purchase price to Merifon would constitute an unauthorised expenditure as envisaged in section 1 of the MFMA. (1/26-28).

(30) The Municipality further denied that Merifon was in a position to comply with its obligations in terms of the written agreement as alleged in paragraph 11 of its particulars of claim. (1/30-31).

(31) The Municipality further relied on rectification of the written agreement as an alternative defence. (1/28-29).

(32) The Municipality also filed a counterclaim for, inter alia, a declaration of invalidity of the written agreement. (1/33-34).

(33) Merifon filed a replication and a plea to the counterclaim in which Merifon persisted with its assertion that Me Mashaba had ostensible authority (1/38 par 3.C) and it raised estoppel in the alternative (1/38 par 3.D) and denied that s 19 of the MFMA was applicable, without setting out any grounds upon which this defence was based, save to put the Municipality to the proof thereof. (1/36-53 and more in particular 1/44 par 16).

(34) At the commencement of the trial the Municipality indicated that it was not going to pursue its defence of rectification.

(35) The parties by agreement handed in a number of documents contained in two separate bundles. The authenticity of the documents contained in these bundles were not in dispute.

(36) In the premises Merifon had to prove actual or ostensible authority or, in the absence of actual or ostensible authority,

that the Municipality was estopped from relying on the municipal manager's lack of authority.

BACKGROUND FACTS

(37) Merifon called two witnesses, i.e. Mr Mangena of Merifon and the HOD of CoGHSTA, ie Ms Manamela and the Municipality called one witness, ie Ms Mashaba, the erstwhile municipal manager.

(38) Based on the contents of the court bundles and the evidence led by both parties, the following relevant facts (in chronological order) can safely be taken as common cause between the parties, either because they were indeed common cause between the parties or not seriously contested by either party:

(39) On 14 December 2007 a company by the name of Under The Boardwalk Prop 52 Pty Ltd purchased the Remaining Extent for R2 508 000. (2/99/20), which property was transferred to it on 27 March 2008. (2/140/19).

(40) On 13 June 2008 ABSA Bank, for mortgage loan purposes, valued the Remaining Extent in extent 428.3869 ha for about R50 million. At that point in time the property was in the process of being established as a township and it was valued as such. (2/103/42-45).

(41) In the meantime and on 31 August 2010 the Municipality's council approved certain delegations of powers as envisaged in section 59 of the Local Government Municipal Systems Act 32 of 2000. Of relevance is item 755 and item 788 of the document titled 'Delegation of Powers'.

Item 755 reads as follows: 'Power - Considering the acquisition of land and other fixed property for the municipality; Delegating authority – Council; Delegated body – none; Conditions – Subject to receiving and considering a report and recommendations from the Executive Committee'. (3/199/28-30).

Item 788 of the same document reads as follows: 'Power – Signing, authenticating and/or executing documents relating to the transfer or acquisition of immovable property; Delegating authority –

Council; Delegated body – Municipal Manager; Conditions – [none]'. (3/200/20-21).

(42) On 4 April 2011 a letter was written by the Municipality's mayor to the MEC: Local Government and Housing in terms whereof the MEC was requested to purchase land or farms which would be suitable for the development of integrated human settlement. One of the farms that was identified in this letter was 'Farm Mooiplaats 434 LT'. The request was made to unlock the municipality's development potential and to contribute to the expansion of the municipality's revenue base. (2/112-113).

(43) On 12 April 2011 a letter was written by the Department of Local Government and Housing to the mayor of the Municipality acknowledging the previous letter and said that the matter would be referred to the Head of Department. (2/114).

(44) On 29 April 2011 the council approved the budget for the financial year 2011/2012. (2/125/12-14).

(45) The minutes of this meeting contains an example of a council resolution relating to the purchase of immovable property. (2/121/8-15). The latter resolution is minuted as follows:

'That Council approved the purchase of portion 4 of the farm Mooiplaats 434 LT at a maximum amount of R4 million' and 'That Council approves that full settlement of R 4 million for the purchase of Portion 4 of the farm 434LT Mooiplaats in the current financial year 2010/2011.'

(46) In the meantime and on 10 January 2012 a valuation report was done by Wizz Property Valuations at the instance and request of the Limpopo Provincial Government: Department of Cooperative Governance, Human Settlement & Traditional Affairs ('CoGHSTA') in respect of the Remaining Extent (490.7119 ha). (2/127-141). At that point in time the owner of the property was still Under The Boardwalk Prop 52 Pty Ltd. (2/131/1-10). By then the approval of the establishment of a township had been obtained for 1174 residential stands and 17 industrial stands. (2/131/12-18). In this report the recommendation was that the offer should not exceed R 85 million. (2/138/8-10)

(47) On 18 April 2012 Merifon purchased the property from City Blox. The property was described in this agreement as 'the Remaining Extent of the Farm Mooiplaas 434 LP, Province of Limpopo measuring in extent approximately 528 ha including 258 residential stands, 17 light industrial and business stands and ext 3 Kgapane township". (4/338-359 and more in particular 340 par 2.6.6).

(48) In the meantime and on 31 May 2012 the council approved the budget (3/201-276) for the financial year 2012/2013. (2/148/12-21). The capital project, i.e. the purchase of the property relating to the development of human settlement was not appropriated in this budget.

(49) The Remaining Extent measuring 490.7119 ha was transferred into the name of Merifon during 2012. In a report of HDA dated 8 February 2013 the date of acquisition is stated as 22 August 2012 at an amount of R14,5 million. (2/159/28-160/2).

(50) On 14 December 2012 the CEO of the Housing Development Agency ('HDA'), ie a juristic person established in terms of the

Housing Development Agency Act 23 of 2008, received an instruction from CoGHSTA to acquire the immovable properties for human settlement development purposes. (2/157/28-31)

(51) In the meantime and on 24 January 2013 the draft adjustment budget (4/278-337) for financial year 2012/2013 was approved by the council of the Municipality. (2/155). The capital project, i.e. the purchase of the property relating to the development of human settlement was not appropriated in this budget.

(52) On 8 February 2013 the CEO of HDA wrote a letter to Head of the Department: CoGHSTA motivating the acquisition of the Remaining Extent for human development purposes (2/157-160). In this letter HDA explained that the Remaining Extent measuring 490.7119 ha consisted of Extension 3 and 4 townships approved by the Municipality for the development of 1174 residential erven and undeveloped land. It also explained that Portion 6 measuring 37.6749 ha consisted of 258 proclaimed residential erven, 3 business stands and 17 industrial stands and that the owner had expressed an interest to retain 17 industrial stands measuring about 4.9303 ha.

(2/158/24-2/159/3). In terms of this letter a final offer of R 52 million (VAT excluded) was presented by the seller. It also pointed out that the seller had already taken transfer of 490.7119 ha of the total of 528.3868 ha. (2/160/10-26).

(53) On 25 February 2013 the Head of Department: CoGHSTA wrote a letter to the HDA (incorrectly dated 2012 instead of 2013) conveying CoGHSTA's satisfaction with an offer of 52 million and in terms whereof permission was given to HDA to finalise the acquisition. (2/161).

(54) On 27 February 2013 the HDA e-mailed the municipal manager stating that permission had been obtained from CoGHSTA to proceed with the acquisition of property. (2/162).

(55) Hereafter a string of emails followed between Merifon and the Municipality regarding the terms of the agreement. (2/163-170).

(56) On 6 March 2013 the Head of Department: CoGHSTA addressed a letter to the municipal manager with the following contents:

'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 above mentioned transaction and hereby confirm that the Department in the current financial year ending 31 March 2013 has budgeted the required R 52 Million excluding VAT required to acquire the above mentioned 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 R 209 892.90.'

(1/35)

(57) On 7 March 2013 the written agreement (7/642-656) was signed by Merifon in terms whereof the Municipality purchased the 'enterprise' which was defined in the agreement as 'the Property Development carried on by [Merifon] on the Property, consisting of the Property and all right, title and interest in and

to the said Leases' (7/644 clause 2.6.4). The property was defined, inter alia, as Portions 5 and 6 as well the Remaining Extent of the Farm Mooiplaas 434 LT, measuring in extent approximately 528 ha (This is obviously wrong because the combined measurement of the Remaining Extent and Portion 6 alone was 528 ha). In terms of the agreement the purchase price was R52 million payable on or before 29 March 2013, which amount would be paid in cash directly to the transferring attorneys. The amount would be invested in an interest-bearing account for the benefit of the purchaser pending transfer. (7/646/16-23) The agreement further stipulated that the transfer of the property into the name of the Municipality would be affected as soon as is reasonably possible after payment by the Municipality to the transferring attorneys of the transfer costs and the purchase price. (7/649/20-25) In terms of clause 7 of the agreement Merifon warranted that as at the effective date, i.e. the date of transfer, Merifon would be the owner of the property and would be able to transfer ownership. (7/650/16-22) It is in dispute as to whether the municipal manager signed the agreement on this specific date. The municipal manager testified that she only signed the agreement

subsequent to a council meeting that was held on 22 March 2013, which we deal with below.

(58) On 14 March 2013 the Provincial Treasury requested certain information from the Head of the Department: CoGHSTA relating to the acquisition of the property. (2/173).

(59) On 19 March 2013 the HDA addressed a letter to the Head of the Department: CoGHSTA in which the queries of the Provincial Treasury were addressed. (2/174-175).

(60) On 22 March 2013 the council of the Municipality took a resolution, which was minuted as follows:

> 'A.1038 . ACQUISITION OF REMAINING EXTENT AND PORTION 5 AND 6 OF THE FARM MOOIPLAATS 434 LT
> COUNCIL RESOLUTION A. 1038/22/03/2013/ACQUISITION OF THE REMAINING EXTENT AND PORTION 5 AND 6 OF THE FARM MOOIPLAATS 434 LT
> 1. That the commitment letter from Department of Cooperative Governance, Human Settlements and Traditional Affairs to purchase portion 5 and 6 of the farm Mooiplaats 434 LT is approved.'

(2/182)

(61) On 26 March 2013 the Administrator: Provincial Treasury informed the HOD: CoGHSTA of its disapproval of the acquisition of land by the province and requested a renegotiation of the price. (2/184-185).

(62) On 23 April 2013 a letter of demand was sent to the municipal manager. (1/18-19).

(63) On 25 April 2013 City Blox cancelled the agreement with Merifon. (5/432/13-18).

(64) On 2 May 2013 the municipal manager replied that the agreement that was concluded was on condition that the Province would finance the transaction and that everybody was aware of it. No mention was made in the written agreement of the Province's financial assistance. (2/187-188).

(65) On 9 May 2013 there was a letter from the attorney to the Province regarding the commitment given by them and a further demand was made for 14 days. (2/189-190).

(66) City Blox at some stage transferred the property to Merifon.

(67) On 30 May 2013 City Blox issued summons against Merifon for the re-transfer of the property. (8/688/7-11)

(68) On 3 September 2013 default judgment was granted in favour of City Blox against Merifon and Merifon had to re-transfer the property to City Blox. (5/435/3-6).

(69) On 27 September 2013 a letter was sent to the municipal manager from Merifon's new attorneys containing a further demand and plaintiff tendered to comply with all its obligations in terms of the agreement. (1/20-24).

(70) On 9 December 2013 an application was issued for the rescission of the default judgement granted on 3 September 2013. (5/435/7-10).

(71) On 6 January 2014 the summons in this action was issued. The action was instituted by Merifon against the Municipality which contained a tender to comply with its obligations. (1/1-4).

(72) On 26 February 2015 a settlement agreement was entered into between City Blox and Merifon. (3/195/4-7).

(73) On 17 December 2015 City Blox transferred the property to Merifon i.e. the remaining extent and portions 5 and 6. (3/194-198).

LEGAL FRAMEWORK

(74) In terms of s 11(1) of the Local Government: Municipal Systems Act 32 of 2000 ('Systems Act') the executive and legislative authority of a municipality is exercised by the council of the

municipality and the council takes all the decisions of the municipality subject to section 59.

(75) In terms of s 59 of the Systems Act a municipal council may delegate certain powers to, inter alia, its staff members, such as the municipal manager.

(76) In terms of section 3 of the MFMA, the latter is applicable to all municipalities. In terms of s 1 of the MFMA, an expenditure incurred by a municipality otherwise than in accordance with s 15 constitutes unauthorised expenditure.

(77) Section 15 of the MFMA stipulates that a municipality may incur expenditure only in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget.

(78) In terms of s 17(2) of the MFMA an annual budget must generally be divided into a capital and an operating budget.

(79) In terms of s 19(1) of the MFMA a municipality may spend money on a capital project only if, amongst other things, the money for the project, excluding the costs of feasibility studies, has been appropriated in the capital budget referred to in s 17(2), the project, including the total costs, has been approved by the council and the sources of funding have been considered and are available.

(80) In terms of s 19(2) of the MFMA the municipal council must before approving a capital project consider the projected costs covering all financial years until the project is operational as well as the future operational costs and revenue on the project, including municipal tax and tariff implications.

(81) Section 18(1) of the MFMA provides that the annual budget may only be funded from realistically anticipated revenues to be collected.

(82) Regulation 10(2) of the Municipal Budget and Reporting Regulations, 2008, ie regulations made in terms of s 168 of the MFMA, provides that realistically anticipated revenues to be

received from a provincial government may be included in the annual budget *only if there is acceptable documentation that guarantees the funds*. It then sets out in detail what constitutes acceptable documentation in 10(2)(a)(i) to (iv), being, in short, the latest available gazetted allocations to the municipality, proposed allocations to the municipality contained in national or provincial budgets, written notification from the relevant treasury subsequent to approved budgets and the previous year's allocations in the approved national or provincial budgets.

THE INTERPRETATION AND APPLICATION OF SECTIONS 15 AND 19 OF THE MFMA AND THE DOCTRINE OF ILLEGALITY.

(83) In interpreting statutory provisions, they should be: 1) given their plain ordinary grammatical meaning, unless it would result in an absurdity, 2) properly contextualised with due regard to the language used in the rest of the statute, the matter of the statute, its apparent scope and purpose and, within limits, its background, 3) construed consistently with the Constitution, ie

where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity and 4) interpreted to give effect to the 'purpose, purport and objects' of the Bill of Rights, which requires that effect should be given to the Constitution's fundamental values, such as, inter alia, human dignity, the achievement of equality, the advancement of human rights and freedom and the rule of law, which implicates the doctrine of legality. (*Chisuse v D-G, Department of Home Affairs* 2020 (6) SA 14 (CC) paras 46 to 59).

(84) The SCA had due regard to all the relevant statutory provisions quoted above, including the scope and purpose of the MFMA and all the surrounding circumstances and found that section 19 of the MFMA was applicable, that the language of section 19 'could not be clearer' (8/720 to 721), that the Municipality did not comply with the provisions of section 19, and, based on the doctrine of legality, found that the agreement was invalid. (8/710 to 725). Thus the SCA's contextual and purposive interpretation of the relevant sections cannot, with respect, be criticised nor can it be argued that the SCA's interpretation did not promote the spirit, purport and object of the Bill of Rights.

(85) The applicant's argument that section 19 did not envisage the unenforceability of a contract between the municipality and a bona fide third party, if due regard is had the provisions of sections 26 and 27 of the MFMA, was never raised in the pleadings.

(86) In any event, sections 26 of the MFMA deals, in short, with the consequences of a municipality's failure to approve the budget before the start of the budget year and the steps to be taken by the provincial executive to ensure that the budget is approved. Section 27 of the MFMA deals, in short, with the municipality's impending non-compliance pertaining to the tabling or approval of the annual budget, the mayor's reporting obligations in this regard and the provincial executive's powers to intervene. By the widest stretch of one's imagination, these sections cannot be called in aid to support the applicant's contention that section 19 did not envisage the unenforceability of a contract. Be that as it may, it appears from the applicant's heads of argument that the applicant does not persist with this argument.

(87) The applicant's invocation of sections 170 to 174 of the MFMA in order to demonstrate that non compliance of section 19 of the MFMA does not result in an invalidity is also a shot in the dark. Section 170 (1) deals with the approval of a departure from a treasury regulation or from any condition imposed in terms of the act. It clearly relates to the pre-approval of any departure. Once a regulation or a condition imposed in terms of the MFMA has been departed from, then and only then does section 170(2) come into play. In terms of section 170(2) the treasury's authority to condone is limited to non-compliance with treasury regulations and conditions imposed by the National Treasury and nothing more. Sections 172 to 174 deal with the financial misconduct by municipal officials, officials of municipal entities, offences and penalties. These provisions do not alter the interpretation of the empowering provisions of the MFMA.

NATURE OF THE REQUIREMENTS OF SECTION 19 OF THE MFMA

(88) The applicant's argument that section 19 of the MFMA fell within the second category referred to in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) par 11 is, with respect, misplaced. This was also the finding of the SCA. (8/723 paras 26 and 27).

(89) In *RPM Bricks* a distinction is drawn between an act beyond or in excess of the legal powers of a public authority (the first category), and the irregular or informal exercise of power granted (the second category). In the second category, 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 the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with. (*RPM Bricks* paras 11 and 12).

(90) In the present case, as in the case of *RPM Bricks*, the authority to conclude an agreement on behalf of the Municipality in terms whereof money would be spent on a capital project must be sought in the provisions of the statute. A resolution by the

municipal council to that effect is prescribed by section 19 of the MFMA as a necessary prerequisite for entering into such an agreement. Absent such a resolution, the agreement entered into by the municipal manager was plainly impermissible. Moreover, no powers were delegated to any person other than the municipal council to resolve to spend money on a capital project. Although the municipal manager had the delegated power to enter into an agreement on behalf of the municipality, he could only have done on the basis of an existing council resolution. In view hereof, the provisions of section 19 falls squarely within the first category.

(91) An act in the second category is an act where the agent has no right against his principal to enter into a contract for and on behalf of the principal without the latter's authority, but there is no illegality if in fact he does so.(*RPM Bricks* par 22).

(92) Invalidity follows uniformly as a consequence of an act in the first category and that consequence cannot vary from case to case. They are either valid or invalid and its validity does not depend on whether or not harshness is discernible in a

particular case. (*RPM Bricks* par 23). This is in conformity with the doctrine of legality being an incident of the rule of law.

APPLICATION OF SECTIONS 15 AND 19 OF THE MFM A TO THE FACTUAL MATRIX.

(93) The applicant's argument that the municipal manager acted *intra vires,* because sections 15 and 19 were not applicable, given the factual matrix, is also without merit.

(94) The issue as to whether sections 15 and 19 were applicable on the particular facts, is a factual issue as opposed to a legal issue, by reason of which the jurisdiction of the above Honourable Court is not engaged.

(95) Be that as it may, the applicant looses sight of the fact that it was the Municipality that incurred the obligation to pay in terms of the agreement. This is exactly the reason why Merifon issued summons against the Municipality. The Municipality's contractual obligation could only be met if the Municipality had

the money to pay. The performance of a monetary obligation by the Municipality had to be reflected in the books of the Municipality. The factual matrix of this case falls undisputedly within the ambit of Regulation 10(2) of the Municipal Budget and Reporting Regulations, 2008, ie regulations made in terms of s 168 of the MFMA, which provides that only realistically anticipated revenues to be received from a provincial government may be included in the annual budget *only if there is acceptable documentation that guarantees the funds*. There was none.

THE INTERPRETATION OF THE COUNCIL'S RESOLUTION

(96) The issue as to whether the SCA's interpretation of the council's resolution was correct or not, is not an issue that qualifies as a constitutional or a non constitutional matter, because the SCA merely applied an uncontroversial interpretative thought process to the facts.

(97) Even if the SCA's interpretation of the councils resolution was incorrect, it does not remove the fact that there was no

compliance with any of the other requirements prescribed by section 19 of the MFMA.

(98) In the premises, nothing turns on this issue.

OSTENSIBLE AUTHORITY, THE TURQUAND RULE AND ESTOPPEL

(99) As already stated, Merifon's case in the pleadings was that the municipal manager had actual or ostensible authority to conclude the agreement. Merifon had to prove it, which is failed to do.

(100) The SCA did not specifically deal with this issue, clearly because of its finding of illegality.

(101) Ostensible or apparent authority is actual authority and is distinguishable from estoppel which is no authority at all, not even by appearance.

(102) With reference to *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) ('*Makate*') we understand the principles underlying the distinction between apparent authority and estoppel to be as follows:

(103) If an agent wishes to perform a juristic act on behalf of the principal, the agent requires authority to do so, for the act to bind the principal. (See *Makate* par 45).

(104) Where the principal has conferred the necessary authority either expressly or impliedly the agent is taken to have *actual* authority. (See *Makate* par 45).

(105) If the principal denies that it has conferred the authority, the party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted itself in a manner that misled the third party into believing that the agent had authority, the principal is precluded from denying that the agent had authority. (See *Makate* par 45).

(106) The essential elements of estoppel in the field of agency are the following: a) a representation made in words or by conduct, including silence or inaction; b) the representation must have been made by the principal to the person who raises estoppel; c) the principal must reasonably have expected that its conduct may mislead the representee; and d) the representee must reasonably have acted on the representation to his own prejudice. (See *Makate* par 49). The elements b), c) and d) above are absent in the case of apparent authority. (See below).

(107) The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be authority of the agent *as it appears to others*. It is distinguishable from estoppel which is no authority at all, (See *Makate* par 46) not even by appearance. (See *Makate* par 52).

(108) The only element that is common to both apparent authority and estoppel is the representation which may take the form of words or conduct. (See *Makate* par 46).

(109) In the case of apparent authority, the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. *Nothing more is required.* The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority and no prejudice has to be alleged (See *Makate* par 47).

(110) Furthermore, in the case of apparent authority, there is no requirement that the principal must have expected that the other party would act on the strength of his representation. In fact, the principal in the case of apparent authority may be held accountable if he had created an impression even though it may not have intended to do so. (See *Makate* par 52).

(111) The approach followed in the case of apparent contract, which does not have consensus as its foundation (the objective theory of contract or reliance theory) and estoppel should also be followed in the case of apparent authority and estoppel. Both apparent contract and apparent authority derive their existence from the conduct of the party to be held liable. Both form part of our law of contract. They come into being *from what reasonably appears to be the position*. Therefore, if a distinction is drawn between estoppel and the objective theory of contract, the same should be the position in respect of apparent authority and estoppel in the contract of agency. (See *Makate* par 74).

(112) Applying the legal position to the facts of this case, the presence of authority would be established if Merifon could show that the Municipality by words or conduct created an appearance that the municipal manager had the power to act on its behalf. Nothing more was required.

(113) To put it differently, Merifon had to show that it reasonably appeared to others that the municipal manager had the authority to bind the Municipality in contract without further ado.

(114) We respectfully submit that any reasonable person dealing with a municipality must know that a municipality is a statutory body which is subject to the provisions of the Constitution and various other pieces of legislation and that the decision making body of any municipality is its municipal council and that the municipal council consists of councillors duly elected by the electorate. Any third party dealing with a municipality should know that no municipal manager has the power to take a decision against the wishes of the municipal council. The words or conduct which creates the appearance as to the authority of the municipal council or a municipal municipal manager is to be found in legislation which is widely published and accessible.

(115) In *S v De Blom* 1977 (3) SA 513 (A) it was stated that a person who involves himself in a particular swear should keep himself informed of the legal provisions which are applicable to that particular sphere and that such a person cannot rely on the

excuse of 'ignorance of the law'. (Headnote). Thus no person dealing with a municipality should be regarded as an innocent person relating the the statutory requirements pertaining the the conclusion of contracts.

(116) The application of the principles relating to apparent authority to agreements concluded between a private entity and a municipality without reference to the appearance created in published legislation will give any corrupt municipal manager the potential power to destroy a municipality financially. Such an application will indisputable undermine the fundamental values of the Constitution and this in turn will effect basically every human right contained in Chapter 2 of the Constitution.

(117) In the premises we respectfully submit that a municipal manager does not have the ostensible authority to conclude an agreement for the purchase of immovable property.

(118) We have already stated that the Municipality neither by words nor by conduct created the appearance that the municipal manager had the power to act on its behalf, which means that

one of the essential elements of estoppel, ie a representation, is missing and in view of which Merifon's reliance on estoppel must also fail.

(119) In any event, the effect of allowing estoppel to operate would be to breathe life into that which has yet to come into being. If the agreement were to be validated by the operation of estoppel, the Municipality would be precluded from exercising the powers specifically conferred upon it and it would deprive the ultra vires doctrine of any meaningful effect. (*RPM Bricks* paras 17 and 18).

LEGALITY REVIEW

(120) If the municipal manager's action was unlawful, it is invalid and this was a case in which the Municipality was duty bound not to submit to an unlawful contract but to oppose Merifon's attempt to enforce it. This it did by way of its opposition to the action by seeking a declaration of unlawfulness of the agreement in its counter-claim.

(121) 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. The Municipality's failure to bring a formal review proceedings, if applicable, is, with respect, no reason to dismiss the counterclaim. (See *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA) par 26).

(122) We respectfully submit that it was in any event not necessary to bring a legality review, because no decision was taken by the municipal council to enter into the agreement. Thus there was no decision to review. The municipal manager's execution of a resolution which did not exist was not a decision as envisaged in PAJA.

SUMMARY

(123) It is respectfully submitted that above Honourable Court does not have jurisdiction to for the following reasons:

(124) The applicant's case in the court of first instance was squarely based upon the municipal manager's actual or ostensible authority. The issue regarding the interpretation the MFMA, whether it was in law applicable, whether the procedures prescribed in section 19 of the MFMA fell within the second category etc were not pleaded. Thus a constitutional issue or an arguable point of law of general public importance which ought to be considered was raised in the pleadings

(125) The issue as to whether the SCA's interpretation of the council's resolution was correct or not, is not an issue that qualifies as a constitutional matter, because the SCA merely applied an uncontroversial interpretative thought process to the facts. It is also not a non-constitutional matter, because it is not an arguable point of law, because it has no merits and thus not in the interest of justice to entertain same.

(126) The issue as to whether sections 15 and 19 were applicable to the particular facts does not raise any constitutional issues, nor does it qualify as a non-constitutional, because it is a factual

issue as opposed to a legal issue, and thus does not raise an arguable point of law.

(127) The applicant's argument that section 19 did not envisage the unenforceability of a contract between the municipality and a bona fide third party, if due regard is had the provisions of sections 26, 27 and 170 to 174 of the MFMA, was never raised in the pleadings. Furthermore, these sections are of no assistance in interpreting section 19, because they deal with totally different subject matters. This argument has no prospect of success on appeal in view of which it will not be in the interest of justice to entertain this argument.

(128) The applicant's criticism of the the SCA's contextual and purposive interpretation of the relevant sections and its findings that section 19 was applicable and its application of the doctrine of legality has with respect no prospect of success on appeal and thus not in the interest of justice to hear his argument.

(129) The applicant's argument that section 19 of the MFMA fell within the second category referred to in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) par 11 is, with respect, misplaced and thus not in the interest of justice to be heard.

CONCLUSION

(130) In the premises we respectfully submit that the application for leave appeal should be dismissed with costs, including the costs consequent upon the employment of two counsel

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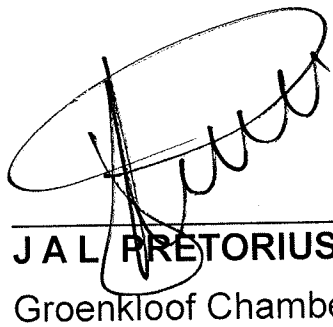

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IN THE CONSTITUTIONAL COURT
REPUBLIC OF SOUTH AFRICA

CCT CASE NUMBER: 159/2021
SCA CASE NUMBER: 1112/2019
LP CASE NUMBER: 01/2014 (LP)

In the matter between:

MERIFON (PTY) LTD Applicant
(Plaintiff in the Court below)

and

GREATER LETABA MUNICIPALITY First Respondent
(First Defendant in the Court below)

HOUSING DEVELOPMENT AGENCY Second Respondent
Second Defendant in the Court below)

FIRST RESPONDENT'S PRACTICE NOTE

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1. **PARTICULARS OF COUNSEL FOR THE PARTIES:**

For Applicant :

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2. **NATURE OF THE PROCEEDINGS:**

Application for leave to appeal the judgment and order of the SCA, dismissing the Applicant's claim for specific performance of an agreement of sale of certain immovable properties entered into between the Applicant and first Respondent, represented by the municipal manager.

3. **ISSUES TO BE ARGUED:**

- Whether the the above Honourable Court has jurisdiction.

- Whether the pleadings reveal a constitutional issue.

- Whether there is an arguable point of law of general public importance which ought to be considered.

- Whether the interests of justice warrant granting of leave to appeal. The interpretation and application of sections 15 and 19 of the MFMA. Whether the municipality resolved to purchase the property.

- Whether Merifon can rely on ostensible authority.

- Whether the Municipality was bound to launch a legality review.

4. **PORTIONS OF RECORD NECESSARY FOR DETERMINATION OF THE MATTER:**

It is not necessary to consider Volume 4 pages, 278 – 337 of the record. The remainder of the record requires consideration.

5. **ESTIMATE OF DURATION OF ORAL ARGUMENT:**

For the Respondent: 2 hours

6. **SUMMARY OF ARGUMENT:**

It is respectfully submitted that above Honourable Court does not have jurisdiction for the following reasons:

- The applicant's case in the court of first instance was squarely based upon the municipal manager's actual or ostensible authority. The issue regarding the interpretation the MFMA, whether it was in law applicable, whether the procedures prescribed in section 19 of the MFMA fell within the second category etc were not pleaded. Thus a constitutional issue or an arguable point of law of general public importance which ought to be considered was not raised in the pleadings

- The issue as to whether the SCA's interpretation of the council's resolution was correct or not, is not an issue that qualifies as a constitutional matter, because the SCA merely applied an uncontroversial interpretative thought process to the facts. It is also not a non-constitutional matter, because it is not an arguable point of law, because it has no merits and thus not in the interest of justice to entertain same.

- The issue as to whether sections 15 and 19 were applicable to the particular facts does not raise any constitutional issues, nor

does it qualify as a non-constitutional, because it is a factual issue as opposed to a legal issue, and thus does not raise an arguable point of law.

- The applicant's argument that section 19 did not envisage the unenforceability of a contract between the municipality and a bona fide third party, if due regard is had the provisions of sections 26, 27 and 170 to 174 of the MFMA, was never raised in the pleadings. Furthermore, these sections are of no assistance in interpreting section 19, because they deal with totally different subject matters. This argument has no prospect of success on appeal in view of which it will not be in the interest of justice to entertain this point.

- The applicant's criticism of the the SCA's contextual and purposive interpretation of the relevant sections and its findings that section 19 was applicable and its application of the doctrine of legality has with respect no prospect of success on appeal and thus not in the interest of justice.

- The applicant's argument that section 19 of the MFMA fell within the second category referred to in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) par 11

is, with respect, misplaced and thus not in the interest of justice to be heard.

7. LIST OF AUTHORITIES

See annexure **"A"** attached hereto.

DATED AT PRETORIA ON THE 25th of JANUARY 2022.

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Annexure FA1

IN THE CONSTITUTIONAL COURT
REPUBLIC OF SOUTH AFRICA

CCT CASE NUMBER: 159/2021
SCA CASE NUMBER: 1112/2019
LP CASE NUMBER: 01/2014 (LP)

In the matter between:

MERIFON (PTY) LTD Applicant
(Appellant in the Court below)

and

GREATER LETABA MUNICIPALITY First Respondent
(First Respondent in the Court below)

HOUSING DEVELOPMENT AGENCY Second Respondent
(Second Respondent in the Court below)

FIRST RESPONDENT'S TABLE OF AUTHORITIES

CASE LAW

1. *Chisuse v D-G, Department of Home Affairs* 2020 (6) SA 14 (CC)
2. *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA)
3. Fraser v Absa Bank 2007(3) SA 484 (CC)

4. *General Council of the Bar of South Africa v Jiba and Others* [2019] (8) BCLR 919 (CC) ([2019] ZACC 23

5. *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC)

6. *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC)

7. *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA)

8. *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*

9. *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC).

10. S v De Blom 1977(3) SA 513 (A)

ACTS

11. Local Government: Municipal Systems Act 32 of 2000

12. Local Government: Municipal Finance Management Act 56 of 2003

REGULATIONS

13. Municipal Budget and Reporting Regulations, 2008