IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: **3328/2021**

In the matter between:

LEQUBU SPECIALISED SERVICES (PTY) LTD Applicant

and

MATJHABENG LOCAL MUNICIPALITY Respondent

CORAM: HEFER AJ

HEARD ON: 30 NOVEMBER 2023

DELIVERED ON: 18 JANUARY 2024

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[1] During July 2021 the Applicant launched an application for payment of outstanding fees for services rendered to Respondent. During November 2021 Naidoo J, made an order in terms of which *inter alia*:

"The dispute regarding the quantum claimed by the applicant for work done in terms of appointment letter dated 14 October 2021 is referred to mediation in terms of clause 27 of the General Conditions of Contract issued by National Treasury, as well as Uniform Rule 41A."

[2] During July 2022, the mediator, Mr L Laubscher from Thuso Development Consultants, concluded that the Applicant is entitled to receive a sum of R413,176.60 in respect of the approximately R15,000,000.00 claimed by the Applicant from the Respondent.

[3] The order of Naidoo J further provided as follows:

"In the event of any of the parties being dissatisfied with the outcome of the certification, either party may proceed with litigation limited to the issue of quantification only."

[4] Because the Applicant was dissatisfied with the mediation outcome, the Applicant signified its intention to continue with legal proceedings to determine the quantum of its claim.

[5] The quantum dispute was finally settled when, on 23 December 2022, the parties entered into a settlement agreement in terms of which the Municipality undertook to pay the Applicant R4,000,000.00 in full and final settlement of its claim.

[6] Regrettably, the Respondent refuses to make payment in terms of the settlement agreement. The aim of the present application, which is brought in terms of Rule 41(4), is to obtain judgment against the Municipality in terms of the settlement agreement.

Background facts:

[7] During October 2020 the Respondent appointed the Applicant to undertake an emergency investigation into the Respondent's problematic sewer lines, provide a report and to supervise any necessary civil construction work to resolve any issues that required immediate attention.

[8] The Respondent informed Applicant that its appointment fell within the ambit of emergency procurement as contemplated by the Municipal Finance Management Act 56 of 2003, the applicable emergency provisions in the regulations made under that Act and the Municipality's Supply Chain Management Policy. The Applicant accepted the appointment on that basis.

[9] During January 2021 the Respondent, represented by its director of infrastructure, Mr Ben Toabela, broadened the scope of the Applicant's appointment to include a project feasibility study of the Thabong Waste Water Treatment Works as well as a high-levelled conditional assessment of the Matjhabeng's waste water treatment works. Mr Toabela informed the Applicant

that the Respondent required this assessment report to apply for funding to the Department of Water and Sanitation.

[10] The Applicant performed the emergency investigation and provided the Municipality with its report, conducted a project feasibility study of the Thabong Waste Water Treatment Works and performed a high level conditional assessment of the Matjhabeng's waste water treatment works. It submitted a total of seven fee claims to the Respondent for the professional services that it rendered. The Respondent only paid two of these fee claims (apparently only the first two fee claims), leaving the remaining five claims unpaid. The total of such claims amounts to approximately R15 million.

[11] The Respondent terminated the Applicant's appointment during April 2021. The Applicant's fees were left unpaid and the Applicant brought an application seeking payment of these fees.

[12] The Respondent initially opposed the application but later capitulated to the extent that it acknowledged the Applicant's appointment and the services that it rendered. The true dispute was of the quantum of what was due to the Applicant. The Respondent then consented to an order that the quantum of the fees payable to the Applicant be referred to mediation. This led to the order of Naidoo J referred to. As stated, subsequent to the Applicant being dissatisfied with the outcome of the mediation process, the quantum dispute was then finally laid to

rest when the parties entered into a written settlement agreement during which the Respondent was represented by the then Acting Municipal Manager.

[13] The relevant terms of the settlement agreement are as follows:

(i) The Municipality agrees and acknowledges that Lequbu has rendered professional consulting engineering services to the Municipality;

(ii) The Municipality shall pay the settlement amount of R4,000,000.00 in five instalments as follows:

(a) R1,000,000.00 on or before 31 March 2023;
(b) R500,000.00 on or before 30 April 2023;
(c) R500,000.00 on or before 31 March 2023;
(d) R500,000.00 on or before 30 June 2023;
(e) The full outstanding balance on or before 31 July 2023.

(iii) Should the Municipality fail to make any of the payments when they become due, such amount shall accrue interest at the rate of 10.5% per annum, calculated from 23 December 2022 to date of payment.

[14] Because the Respondent failed to make payment of the first R1,000,000.00 instalment, this propelled the Applicant to seek an order from the Court to make the settlement agreement an order of court, during June 2023.

[15] After having heard arguments by counsel on behalf of the parties, Musi JP, however at that stage, found that there was no proper application before Court because the Applicant's application was not supported by a founding affidavit. As a result, Musi JP removed the matter from the roll and ordered each party to pay its own costs.

[16] It needs to be mentioned at this stage that in opposing the application at that stage, the Respondent has filed an opposing affidavit which has also been placed before me in the present application. I will refer to the relevant portions of the June 2023 opposing affidavit as far as it may be relevant and necessary.

Respondent's opposition in the present application:

[17] In its present opposing affidavit dated 20 September 2023, the Respondent firstly raises a point *in limine* namely the existence of a dispute of fact. According to the Respondent, given the court orders by Naidoo J and Musi JP, the Applicant should not have persisted with the present application but rather followed the action procedure.

[18] In this regard the Respondent refers to the contents of the order of Naidoo J which contains *inter alia* the following:

"4. *Applicant will, upon request by the mediator, provide whatever as supplementation and/or explanation required regarding its itemized FEE CLAIMS.*

5. *The mediator may do whatever is necessary to satisfy him or herself of the amount or item claimed, including but not limited to conducting an inspection in loco.*

6. *The mediator certified the amount owed and the amounts as certified shall be the amount owing by respondent to applicant in respect of the FEE CLAIMS."*

[19] During the mediation the mediator requested further documentation which according to the Respondent were not forthcoming. For that reason the mediator has made his finding to the effect that the Applicant is entitled to receive the sum of approximately R400,000.00 already referred to.

[20] It is the Respondent's contention that the Applicant was, alternatively should reasonably have been aware of the status of the matter. The only logical inference according to the Respondent to be derived from the Applicant's conduct is that it is not in a position to substantiate its claim. Against this background, according to the Respondent, it is clear that oral evidence will have to be presented to establish the true nature of the settlement agreement which was subsequently concluded during December 2022.

[21] The Respondent then provides certain information regarding the signing of the agreement. According to the Respondent, the agreement was signed by the then Acting Municipal Manager, Dr Vuyo Adonis (**"Adonis"**), after being informed by the legal team of the Respondent. According to the Respondent "*it bears mentioning that Adonis only acted as Municipal Manager for a month, which makes the timing of the signing of the settlement agreement extremely suspicious*".

[22] According to the Respondent, Adonis signed the agreement acting on the strength of advice received by Mr V Mtutuzeli and Mr B Maritz, believing he was acting in the best interest of the Respondent. Furthermore, according to the Respondent, Adonis signed the agreement in order to resolve four other pending cases pertaining to the then sewerage problem within the Municipality. The agreement was also signed to avoid any further delays in fixing the problems and to avoid further fruitless and wasteful expenditure.

[23] It is the Respondent's case that the settlement agreement *"once signed immediately became a contract and the defences available to the agreement is also available to the Respondent. Defences the Respondent indeed intend raising should the Applicant issue summons on the strength of the agreement or the matter being referred for oral evidence*". Furthermore, the Municipality also intends seeking judicial review of its decisions *"which informed this or other claims"*.

[24] The Respondent then proceeds as follows in its opposing affidavit:

"34. I wish to state as follows:

34.1 The procurement processes of municipalities have until recently been categorised by substantial irregularities which require that a proper application be brought to seek the invalidation of various awards and contracts (contracts such as these) concluded which formed the basis of the orders obtained by contractors against municipalities.

34.2 Currently missing and/or stolen, therefore unavailable, are vital documents and records of the municipality which informed the procurement decisions awarding various tenders to the contractor and the underlying basis for the claims against the municipality. Several legislative and policy prescripts, especially the provisions of the National Archives and Record Service of South Africa Act No 43 of 1996, are contravened by the improper management of the municipality's records which are relevant to the decisions awarding contracts and forming the basis for these impugned claims.

34.3 A special investigating unit (SIU), which is set up in terms of and authorised by the Special Investigating Units and Special Tribunals Act, Act 74 of 1996, have concluded an agreement with the municipality to investigate the procurement irregularities. The agreement between the municipality and the SIU was concluded

only during August 2023. Prima facie evidence suggest that practically all the contractors who have obtained judgments against the municipality derive their authority to act or been awarded the projects, through a manifestly incorrect process.

34.4 The underlying causa of the alleged debts of the municipality to judgment creditors will in due course be impeached and set aside in a proper judicial proceeding.

34.5 Irreparable harm will be occasioned by allowing the judgment creditors to continue with the execution of these judgments which may subsequently be vacated. The municipality is under a constitutional obligation to ensure that public expenditures are valid and consistent with applicable prescripts.

34.6 The procurement irregularities in the municipality especially in connection with the awards which have been made to the defendants and forming the basis of the alleged indebtedness of the municipality to the judgment creditors are also under investigation by the Directorate for Priority Crime Investigation in the South African Police Services (the Hawks) as well as the Auditor General."

[25] The Respondent then further alleges that the Municipality has a constitutional duty to implement fair tender process and redress the intentional breach of section 217 of the Constitution which has resulted in illegality of contractual arrangements. The Respondent then states that it is important to note that it is

not only the circumstances surrounding the signing of this particular settlement agreement that needs to be investigated, but also the preceding tender process.

[26] In answer to the allegation by the Applicant that the dispute was finally settled through the conclusion of the settlement agreement in terms of which the Respondent undertook to pay the Applicant R4,000,000.00 in full and final settlement in its claim, the Respondent answered as follows:

> *"It goes against all logic when a decision from a mediator is made in the amount of approximately R400,000.00, that the respondent would then to its detriment, proceed to settle the dispute in the amount of R4,000,000.00."*

[27] The Respondent then ends off by stating that:

> *"The dispute surrounding the quantum still needs to be proven by the applicant, this was never done."*

[28] The Respondent then asked that the application be dismissed, alternatively that the matter be referred to oral evidence.

Discussion:

[29] Uniform Rule 41(4) provides as follows:

[29] Uniform Rule 41(4) provides as follows:

> *"Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives, but which has not been carried out, may apply for judgment in terms thereof on at least 5 days' notice to all interested parties."*

[30] Mr *Prinsloo* who appeared on behalf of the Respondent, with reference to the matter of **Avnet South Africa v Lesira Manufacturing**[1], argued that the order sought by the Applicant is not competent in that parties are not at liberty to simply approach the Court to make an agreement an order of court where the agreement has not been preceded by litigation.

[31] This argument by Mr *Prinsloo* loses sight of the fact that the present application was indeed preceded by the application which served before Naidoo J under the same case number as the present for payment of the amount of approximately R15 million. This point can therefore not be upheld.

Point *in limine*:

[32] Mr *Prinsloo* submitted that there exists a material *bona fide* dispute which cannot be resolved on the papers. He further argued that the Applicant is seeking payment based on agreement which is not competent in motion proceedings.

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[1] 2019 (4) SA 541 (GJ)

[33] In the first instance, Respondent loses sight of the provisions of Rule 41(4) which makes provision for an application for judgment in terms of a deed of settlement concluded between the parties.

[34] Furthermore, it loses sight of the fact that Naidoo J indeed provided for the event where either one of the parties might have been dissatisfied with the outcome of the certification by the mediator in which event such party may proceed with litigation pertaining to the issue of quantification. The further significance of this part of the order, is also that merely the quantification in regards to the Applicant's claim against the Respondent were to be adjudicated upon if necessary. It appears therefore that the liability of the Respondent towards the Applicant, were not at issue, although it was not ordered nor noted as such.

[35] The most important aspect in this regard, is the fact that the settlement agreement itself was clearly concluded in finalization of the application in terms of which the Applicant claimed payment of the stated amount from the Respondent where the preamble thereto reads as follows:

> *"Whereas the applicant has applied to compel respondent to pay the outstanding amount claimed on R15,842,055.00 for professional services rendered to the respondent in terms of appointment letter – see Annexure 'A' hereto.*

And whereas the Municipality has agreed to resolve the matter amicable out of court in order to allow the holistic repair and upgrade of sewerage pipelines project to be implemented by Bloemwater as appointed by the National Department of Water and Sanitation."

[36] These facts, coupled with the Respondent's own concession that the settlement agreement was indeed signed by the Acting Municipal Manager at the time, representing the Municipality, clearly show that there cannot be any dispute of fact as raised and argued by the Respondent. The point *in limine* in this regard can therefore not be upheld.

[37] The Respondent further opposes the application on two grounds, the first being that the settlement agreement was signed under dubious circumstances. For this contention the Respondent provides no facts or basis but merely alleges that the timing of the signing of the settlement agreement by the Acting Municipal Manager at that stage, was "extremely suspicious". No further facts have been placed before Court in this regard.

[38] As a second ground of opposition, the Respondent raises the spectre of procurement irregularities. Also upon closer scrutiny, these allegations have no factual substance, nor do they implicate the Applicant in any meaningful way.

[39] In respect of the "substantial irregularities', referred to in the opposing affidavit by the Respondent quoted above, the Respondent fails to provide any details of

how they are said to be linked to the Applicant and also does not provide any evidence to support these allegations. In the same breath, reference to "various awards and contracts" broadly implicates an undefined group and does not demonstrate any impropriety that can be laid at the Applicant's door.

[40] Also in respect of the passage quoted above, as contained in the Respondent's opposing affidavit, the Municipality suggest that *prima facie* evidence of procurement irregularities exist whilst it does not provide this evidence much less how it relates to the Applicant.

[41] The Respondent alleges a generic "underlying causa of the alleged debts" without identifying what the *causa* or the debt are and how the Applicant again is implicated. The Respondent also does not provide any facts about the debts, such as the nature, the contractual obligations or how any of these debts implicate the Applicant.

[42] The Respondent's allegation that the debts will "in due course be impeached and set aside in a proper judicial proceeding" is speculative. The Respondent assumes a judicial outcome without providing an iota of evidence to support the allegation. Of significance in this regard is also the fact that since the signing of the settlement agreement during December 2022, the Municipality apparently has taken no steps in regard to such judicial review in particular in regards to the surrounding circumstances pertaining to the signing of the settlement agreement.

[43] In regards to the alleged procurement irregularities, it is not stated by the Respondent which awards constituted such irregularities and again how the Applicant is implicated.

[44] The result of the settlement agreement made an order of court is that a party is precluded from relying on a cause of action or defence that could have been advanced or raised but for the settlement order.[2] This applies with equal force to settlement agreements which do not have the imprimatur of a court order.[3]

[45] The Respondent is therefore similarly precluded from relying on various defences as it now attempts to do.

[46] As correctly argued by Mr *Van Aswegen*, the settlement agreement relates directly to settled litigation, it is not objectional from a legal and practical point of view, it is not at odds with public policy, and it holds a practical and legitimate advantage.[4]

[47] The Applicant is therefore entitled to the relief sought under Rule 41(4).

[48] As far as costs are concerned, whereas the Respondent was unsuccessful in its opposition to the application, the Respondent is to pay the costs of the application.

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[2] Eke v Parsons 2016 (3) SA 37 (CC) at par. [25] – [26]
[3] Jiyana and Another v Absa Bank Ltd and Others (1424/2018) [2020] ZASCA 12 (19 March 2020) at par. [17]
[4] Eke v Parsons *supra* at par. [25] – [26]

Order:

Therefore, I make the following order:

1. Judgment is granted in terms of the Settlement Agreement entered into between the parties on 23 December 2022 and the Respondent is ordered to pay to the Applicant:

    1.1 The sum of **R4,000,000.00**;

    1.2 *Tempore morae* interest on the aforesaid amount at **10.5%** per annum calculated from **23 December 2022** to date of payment.

2. Costs of the application in terms of Rule 41(4).

J J F HEFER, AJ

Appearances on behalf of the Applicant:	Adv WA van Aswegen
Instructed by:	Peyper Attorneys Bloemfontein
On behalf of the Respondent:	Adv WJ Prinsloo
Instructed by:	BMH Attorneys Vereeniging c/o Pieter Skein Attorneys Bloemfontein