THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 8 November 2024

Status: Immediate

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Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality (Case no 272/2023) [2024] ZASCA 151 (8 November 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment, in which it effectively dismissed an appeal against an order of the Eastern Cape Division of the High Court, Gqeberha (the High Court), which held the appellants (defendants), former officials of the respondent, Nelson Mandela Bay Metropolitan Municipality (the Municipality), liable for irregular expenditure in a total amount of R7 638 177.10, in terms of s 32 of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

The case arises from the defendants' appointment of Erastyle (Pty) Ltd (Erastyle) as a consultant in the development of a comprehensive communication and marketing strategy, valued at some R6 million, for the Integrated Public Transport System (IPTS) of the Municipality (the impugned appointment). Erastyle was appointed without a public tender process and in breach of the Municipality's Supply Chain Management Policy (SCM). This resulted in the Municipality making substantial payments to Erastyle in the amounts R5 263 179.89, R1 390 800 and R984 197.21 (the unlawful payments). The Municipality instituted an action in the High Court against Erastyle and the defendants, for an order declaring the impugned appointment unlawful and invalid in terms of s 172(1) of the Constitution; and directing Erastyle and the defendants to repay the unlawful amounts on the basis that they constituted irregular expenditure under the MFMA, for which the defendants were personally liable. After the municipality presented evidence, the defendants chose not to testify and called no witnesses. The High Court declared the impugned appointment unlawful and invalid, and ordered Erastyle and the defendants to repay the impugned amounts to the Municipality.

Three of the defendants appealed against the High Court's order. They argued that the Municipality delayed unreasonably in approaching the court to declare the impugned appointment unconstitutional and invalid; that the High Court's interpretation of s 32 was wrong – the Municipality is not entitled to recover irregular expenditure unless it proves that it

has sustained loss or damage, which it failed to do; and that the Municipality received value in that Erastyle had rendered services to it pursuant to the impugned appointment.

The SCA rejected these arguments. It held that the rule of unreasonable delay does not apply to a municipality's claim for recovery of unauthorised, irregular, and fruitless and wasteful expenditure under s 32 of the MFMA. Section 32 creates personal liability on the part of officials and political functionaries who intentionally or negligently incur such expenditure; is not conditional upon the Municipality sustaining loss or damage; and gives effect to the intention of Parliament – to secure sound and sustainable management of the fiscal and financial affairs of municipalities. The Municipality proceeded by default against Erastyle, and the defendants closed their case without adducing any evidence in rebuttal of the Municipality's case. Consequently, there was no evidence that Erastyle had rendered services to the Municipality.

The SCA corrected the High Court's order to remove duplications, which were neither intended by the Municipality nor consistent with the structure of its claims. In the result, the appeal was upheld in part, and the defendants were held liable, jointly and severally, to repay the unlawful amounts to the Municipality. Save as aforesaid, the appeal was dismissed with costs, including the costs of two counsel.

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