THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 603/2017

In the matter between:

MADIBENG LOCAL MUNICIPALITY **APPELLANT**

and

PUBLIC INVESTMENT CORPORATION LTD **RESPONDENT**

Neutral citation: *Madibeng Local Municipality v Public Investment Corporation Ltd* (603/2017) [2018] ZASCA 93 (1 June 2018)

Coram: Ponnan, Wallis and Willis JJA, Plasket and Makgoka AJJA

Heard: 17 May 2018

Delivered: 1 June 2018

Summary: Local government – defence that loans raised by a municipality unenforceable for want of prior written consent of Administrator of province – raising of loans to repay other loans not requiring consent – procedure – rule 38(2) – too late for appellant to object to agreement to determine separate issue on affidavit.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Jansen J sitting as court of first instance):

1 The order of the court below is set aside and substituted with the following order:
'1 It is declared that the loans raised by the defendant from the plaintiff are not unenforceable for want of compliance with s 52(2) of the Local Government Ordinance 17 of 1939.
2 The defendant is ordered to pay the plaintiff's costs on an attorney and client scale, such costs to include the costs of two counsel.'
2 The appeal is otherwise dismissed with costs, including the costs of two counsel.

JUDGMENT

Plasket AJA (Ponnan, Wallis and Willis JJA and Makgoka AJA concurring)

[1] The central issue in this appeal is whether, when the respondent, the Public Investment Corporation Ltd (the PIC)[1] lent money to the Brits Town Council (Brits), the predecessor of the appellant, the Madibeng Local Municipality (Madibeng), Brits was authorised to raise the loans. The argument raised by Madibeng is that Brits acted without authorisation, with the result that the loans are unenforceable. In the trial court, the Gauteng Division of the High Court, Pretoria, Jansen J found that there was no merit in this argument. This appeal is before this court with the leave of the court below.

[1] The PIC was established by the Public Investment Corporation Act 23 of 2004. It is a company that is wholly owned by the government, with the Minister of Finance being the shareholder representative. Its main object, in terms of s 4, is to be a financial service provider.

The facts

[2] During the late 1980s and early 1990s, Brits raised a number of short term loans at favourable interest rates from a number of institutions. Its plan was to invest the funds on the capital market in the hope that the returns would outperform the cost of the loans. The profits could then be used for future capital projects.

[3] Matters did not turn out as planned. By 1993, Brits found itself in deep trouble as minutes of its council meetings and reports, that form part of the record, attest. Urgent remedial action was required, not only to deal with the looming fiscal crisis, but also to deal with what appears to have been a serious breakdown in accountable administration in Brits' treasury.

[4] To address the fiscal problem, it became necessary to re-schedule a number of loans, as the loans were of a short-term nature while the underlying investments matured at later dates. To this end, Brits borrowed a large amount of money from the PIC in order to pay its existing short-term loans. On 11 January 1994, in order to repay the loans it had taken from the PIC, Brits issued to the PIC a series of zero coupon stock certificates – essentially promissory notes. It also pledged a number of insurance policies to the PIC.

[5] When Madibeng, which by now had succeeded Brits, failed to timeously repay the PIC, the latter first exercised its rights in terms of the pledged policies. Those were insufficient to cover the full extent of Madibeng's indebtedness. The PIC then proceeded to institute proceedings against Madibeng on the strength of the zero coupon stock certificates.

[6] Three zero coupon stock certificates are in issue in this case. The first, BR 25, is in respect of a loan of R29 306 987.70. With an interest rate of 12.47 percent, it had a face value on maturity of R93 million. The second, BR20, is in respect of a loan of R10 219 836.60. With an interest rate of 13.29 percent, it had a face value on maturity of R37 million. The third, BR26, is in respect of a loan of R26 072 786.40. With an interest rate of 12.47 percent, it had a face value on maturity of R87 million. The value of the others, namely BR17 to BR32, were paid to the PIC upon maturity.

The pleadings

[7] In its particulars of claim, the PIC pleaded that, on 11 January 1994, Brits issued to the PIC three zero coupon stock certificates – BR25, BR20 and BR26 – which were to be redeemed by payments of R93 million, R37 million and R87 million on 30 June 2003, 30 November 2003 and 30 November 2003 respectively.

[8] The PIC pleaded that when the zero coupon stocks fell due, Madibeng failed to honour them. When amounts received as a result of the pledge and part payments made by Madibeng were taken into account, the capital amounts that the PIC claimed to be outstanding and to be due were R65 086 208.30 in respect of BR25, R28 993 449.70 in respect of BR20 and R68 560 304.24 in respect of BR26.

[9] The PIC claimed payment of these amounts plus interest at the reduced rate of 10 percent per annum from 1 February 2010 to date of payment.

[10] Madibeng filed a special plea and a plea over. The special plea was a plea of prescription to which the PIC replicated on the basis that the part payments and other unequivocal admissions of liability had interrupted prescription.

[11] In the plea over, Madibeng admitted that it had failed to pay the PIC when the zero coupon stocks fell due. It pleaded that Brits was 'not duly authorised to issue the zero coupon stock certificates and that it is for this reason not in law liable to the plaintiff'; that they were 'invalid, unlawful and unenforceable . . . due to the fact that the defendant was not in law duly authorised to issue them to the plaintiff'; that Brits' authority to issue them derived from the Local Government Ordinance 17 of 1939 (the Ordinance) and that they were issued in contravention of the Ordinance with the result that they were 'invalid, unlawful and unenforceable against the defendant'.

[12] The precise terms of the defence are set out in paragraph 20 of the plea, which states:

'The defendant further pleads that –

20.1 at all material times, and in particular, on 11 January 1994, when the zero coupon certificates were issued, the defendant was a municipality to which the Ordinance applied;

20.2 the zero coupon certificates upon which the plaintiff relies purport to have been issued in terms of section 52 of the Ordinance;
20.3 the issuing of the zero coupon certificates to the plaintiff amounted to raising a loan;
20.4 in terms of section 52(1)(a) and (b) of the Ordinance, the defendant could only raise a loan for purposes of defraying expenditure in the execution of its powers; or repaying an existing loan; or to finance temporarily loan expenditure or expenditure on revenue account incurred in anticipation of receipt of revenue estimated in terms of section 58 and from which the expenditure would have been defrayed;
20.5 In terms of section 52(2) of the Ordinance, the defendant could only raise a loan contemplated in section 52(1) with the prior approval of the Administrator appointed in terms of section 68 of the South Africa Act, 1909;
20.6 the loans allegedly raised by the issuing of the certificates were not raised for any of the purposes contemplated in section 52(1) of the Ordinance and were not raised with the prior written approval of the Administrator. The Administrator could not have validly and lawfully approved the raising of the loans in view of the fact that the purpose of such loans would in any event have been unlawful;
20.7 in the event that it is found that the Administrator gave written approval, such approval would have been *ultra vires* due to the fact that the purpose for which the loans were purportedly raised is not a purpose for which the Administrator could in law have validly and lawfully approved;
20.8 the raising of the loans by the issuing of the zero coupon certificates was accordingly *ultra vires*, did not and could not have created a valid and lawful obligation capable of giving rise to any of the claims upon which the plaintiff relies in these proceedings;
20.9 there is, accordingly, no valid debt owing by the defendant to the plaintiff due to the fact that the basis of the plaintiff's claims is invalid and of no force and effect in law for the reasons stated above.'

[13] The PIC filed a replication in which it pleaded, inter alia, that the raising of the loans was not subject to the Ordinance, that s 52 did not apply and that Madibeng was 'in law liable to make good and repay all the amounts advanced to it by the Plaintiff as a result of the loan agreements/transactions concluded and effected by the parties'.

[14] Madibeng also counter-claimed an amount of R15 million plus interest on the basis of unjust enrichment. The quantum it claimed was the amount it had paid to the PIC in respect of what it termed its 'purported obligations' towards the PIC in respect

of the zero coupon stocks. The counter-claim is not relevant to the issues that arise in this appeal and no more need to be said of it but that it must have felt to the PIC that, in light of the defence raised, insult was being added to injury.

The separation of issues

[15] Two days before the trial was to commence, Madibeng gave notice that it wished to have the issues – namely the enforceability of the loans, prescription and the counter-claim – separated, with only the enforceability of the loans being decided.

[16] At first, the PIC was opposed to the separation of issues. It was, however, persuaded to agree to the separation. It was also agreed, apparently at the suggestion of Jansen J, that rather than oral evidence being tendered, the parties would each file affidavits in which they would set out their contentions. They were both free to refer to documents in the trial bundle, which is now part of the appeal record. On this basis, the issue of the enforceability of the loans was determined, with the other issues being postponed sine die.

[17] In Madibeng's affidavit, deposed to by Mr N E Mmbengwa, its manager for legal services, the defence that was pleaded in respect of the separated issue was set out fully and consistently with the plea: the loans were unenforceable because they were raised without the written consent of the Administrator in terms of s 52(2) of the Ordinance. The PIC dealt with the issue in its answering affidavit, deposed to by its attorney, Mr M P C Manaka. Madibeng had the opportunity to, and did, reply.

[18] In her judgment, Jansen J concluded that 'the zero coupon certificates issued by the defendant are valid and that the defence of the defendant is without merit and a mere dilatory defence'.[2] She agreed with counsel for the PIC that a 'punitive costs order' should be made against Madibeng 'given the fact that it knew that the point of authority was without merit, and a mere delaying tactic'.[3] She accordingly made the following order:

[2] Paragraph 37.
[3] Paragraph 39.

'The separate issue regarding the alleged invalidity of the zero coupon certificates is dismissed with a punitive costs order, such order to include the costs of two counsel.'

The issues

[19] While I said in the opening paragraph of this judgment that the principal issue in this appeal is whether the loans are enforceable, two further issues also require consideration. The first is Madibeng's contention that the procedure adopted by the high court was irregular with the result that the proceedings should be set aside and remitted to the high court. The second is the propriety and form of the costs order. I shall deal with them after considering the principal issue.

The enforceability of the loans

[20] It is clear from the plea that the point that Madibeng took in order to sustain the defence of the unenforceability of the loans was that the loans required the written consent of the Administrator of the Transvaal and that consent was never granted, with the result that Brits acted without authority when it raised the loans.

[21] In what follows, I shall assume (without deciding), in favour of Madibeng that the Ordinance applies.

[22] Section 52 of the Ordinance provides:

'(1) Subject to the provisions of this Ordinance, a council may by special resolution –

(*a*) raise a loan for –

(i) defraying expenditure incurred in the execution of its powers; or

(ii) repaying an existing loan: Provided that –

(*aa*) the loan shall not exceed the amount outstanding on the original loan; or

(*bb*) the period within which the loan is redeemable shall not exceed the unexpired portion of the period within which the original loan is redeemable;

(*b*) raise a short term loan, including a loan at call, in order to finance temporarily –

(i) loan expenditure; or

(ii) expenditure on revenue account incurred in anticipation of the receipt of revenue estimated in terms of section 58 and from which the expenditure would have been defrayed; or

(*c*) obtain overdraft facilities from a bank.

(2) A council shall not raise a loan contemplated in paragraph (*a*)(i) or (*b*) of subsection (1) without the prior written approval of the Administrator or obtain overdraft facilities as contemplated in paragraph (*c*) of that subsection without such approval, and the Administrator may grant such approval subject to such terms and conditions as he may determine . . .

(3) Where a loan contemplated in subsection 1(*a*) is raised by the issue of stock, the provisions of the Johannesburg Municipal Borrowing Powers Ordinance, 1903 (Ordinance 3 of 1903), except section 51, shall apply *mutatis mutandis*.'

[23] The point can be disposed of easily. The facts establish that the loans that Brits raised were for the purpose of paying back other loans. They are loans contemplated by s 52(1)(*a*). In terms of s 52(2), such loans do not require the prior written approval of the Administrator. There is, accordingly, no merit in the point. This means that in respect of the separated issue, Jansen J arrived at the correct conclusion.

The procedural point

[24] It was argued on behalf of Madibeng that the procedure adopted by Jansen J was irregular and that, as a result, her order should be set aside and the matter remitted to the High Court. In my view, there is no merit in this argument for the following reasons.

[25] First, rule 38(2) of the uniform rules allows for evidence to be adduced by affidavit in trial proceedings. The rule provides:

'The witnesses at the trial of any action shall be examined viva voce, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

[26] The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When

that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.[4]

[27] In this case, the parties agreed to place evidence on affidavit before the court on the separated issue. It was, in essence, a law point, and the facts were never in dispute: Madibeng either admitted or did not deny the payment of the loans to it and the issuing of the zero coupon stock certificates. In its plea, no facts were alleged to place in dispute anything that appears in the trial bundle. In these circumstances, I can see no basis upon which it can be suggested that Jansen J exercised her discretion injudiciously.

[28] Once Madibeng agreed to the procedure, it was no longer open to it to object on appeal. I also cannot see what possible prejudice it could have suffered. Indeed, in its reply, it took issue with none of the facts adduced by the PIC in its answering affidavit.

Conclusion and order

[29] In turning to consider the propriety of Jansen J's costs order it is, unfortunately, necessary to say something about the way in which Madibeng conducted its case. It took the money on offer from the PIC in order to avert a crisis of Madibeng's own making. It agreed to a means of repayment. When its debts fell due, it made certain payments. Then, after it had reneged and summons was issued against it, it raised the unenforceability of the loans as a defence.

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[4] See *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T); *Havenga v Parker* 1993 (3) SA 724 (T); *Abraham v City of Cape Town* 1995 (2) SA 319 (C); *Colarrosi v Gerber* ECG 29 July 2004 (case no. 613/03) unreported. See too D R Harms *Civil Procedure in the Superior Courts* (Vol 1) B-278 to B-279.

[30] The conduct of Madibeng was beyond the pale. As an organ of state, it is required to act ethically, and has failed dismally to do so in this matter. Litigation, said Harms DP in *Cadac (Pty) Ltd v Weber-Stephen Products Co & others*,[5] 'is not a game'; organs of state should act as role models of propriety;[6] and they may not behave in an unconscionable manner.[7]

[31] The unconscionable approach taken by Madibeng appears to be the basis for Jansen J granting a 'punitive costs order'. By that, I presume she meant an order of costs on the attorney and client scale. While it was within her discretion, on the strength of Madibeng's unconscionable conduct to award a punitive costs order against it, her order conduces to confusion and cannot be endorsed in its original form.

[32] Jansen J's order in respect of the merits also requires reconsideration. She ordered that the 'separate issue regarding the alleged invalidity of the zero coupon certificates is dismissed'. In my view, it would have been more appropriate for a declaratory order to have issued to the effect that the loans were not unenforceable for want of the Administrator's consent. Thus, despite the appeal failing, both orders cannot stand. They must be set aside and replaced with the orders set out below.

[33] In the result:

1 The order of the court below is set aside and substituted with the following order:

'1 It is declared that the loans raised by the defendant from the plaintiff are not unenforceable for want of compliance with s 52(2) of the Local Government Ordinance 17 of 1939.

2 The defendant is ordered to pay the plaintiff's costs on an attorney and client scale, such costs to include the costs of two counsel.'

2 The appeal is otherwise dismissed with costs, including the costs of two counsel.

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[5] *Cadac (Pty) Ltd v Weber-Stephen Products Co (Pty) Ltd & others* [2010] ZASCA 105; 2011 (3) SA 570 (SCA) para 10.

[6] *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 222.

[7] *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works & another* [2015] ZASCA 116; 2016 (3) SA 130 (SCA) paras 17-18.

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C Plasket

Acting Judge of Appeal

APPEARANCES

For appellant	K Tsatsawane and X Mofokeng Instructed by Gildenhuys Malatji Inc, Sandton Honey Attorneys, Bloemfontein
For respondent	P L Mokoena SC and P Khosa Instructed by Werksmans Attorneys, Sandton Symington & De Kok Attorneys, Bloemfontein