



CONSTITUTIONAL COURT OF SOUTH AFRICA

Merifon (Pty) Limited v Greater Letaba Municipality and Another

CCT 159/21

Date of Judgment: 4 July 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 4 July 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal, which dismissed the applicant's appeal against the judgment and order of the High Court of South Africa, Limpopo Division, Polokwane (High Court). The crux of the appeal was the validity and enforcement of an agreement for the sale of property entered into between the applicant, Merifon (Pty) Limited (Merifon), and the first respondent, the Greater Letaba Municipality (Municipality), which did not comply with *inter alia* section 19 of the Local Government Municipal Finance Management Act 56 of 2003 (MFMA).

The agreement was entered into on 7 March 2013, by Merifon, represented by Mr Mangena, and the Municipality, represented by Ms Mashaba, the Municipal Manager. The agreement was for the sale of land, consisting of three immovable properties situated at Farm Mooiplaats. 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 agreement further stipulated that the transfer of the property into the name of the Municipality would be effected as soon as reasonably possible after payment by the Municipality to the transferring attorneys of the transfer costs and the purchase price.

However, the Municipality did not pay the purchase price and it later transpired that the Provincial Treasury had declined the request for funding, on the basis that the purchase price was excessive.

Determined to enforce the agreement, Merifon addressed a letter of demand to the Municipality, giving it 14 days within which to pay the purchase price and transfer costs, failing which, it would face legal proceedings. This notice was not heeded by the Municipality. On 2 May 2013 the municipal manager replied to Merifon, indicating that the agreement was conditional upon funding authorisation by the Provincial Treasury.

In 2014, Merifon instituted an action in the High Court against the Municipality and the second respondent, the Housing Development Agency, a national housing agency established to assist in the acquisition of land required for human settlements development purposes, which had been instrumental in identifying the property. The High Court dismissed the action and granted judgment in favour of the Municipality, declaring the agreement “null and void and unenforceable”. The Court in essence found that the Municipality’s representative, Ms Mashaba, lacked the authority to sign the agreement because the Municipality’s Council had at no stage resolved “to acquire the property”.

Merifon appealed to the Supreme Court of Appeal which dismissed the appeal. The central question for determination before it was whether it would be appropriate, in the context of the facts of this case, for the Supreme Court of Appeal to grant an order for specific performance in favour of Merifon. The Supreme Court of Appeal held that the doctrine of legality and the rule of law lie at the heart of the Constitution, and that the fundamental truism is that the exercise of all public power derives from the Constitution. Accordingly, no organ of state or public official may act contrary to or beyond the scope of their powers as laid down in the law. The Supreme Court of Appeal concluded that the High Court was correct to conclude that the agreement was legally unenforceable on account of the Municipality’s non-compliance with section 19. This is the section that made it obligatory that a Municipal Council resolution be adopted authorising the transaction as it involved a capital project.

The Supreme Court of Appeal also considered whether the agreement could be “validated” by estoppel. Based on its finding that the provisions of the MFMA were peremptory, the Court held that to remedy the transaction by estoppel would “render the relevant provisions of the MFMA nugatory”.

In this Court, Merifon submitted that the matter is a constitutional matter and engages this Court’s constitutional jurisdiction because it concerns the interpretation and application of sections 19, amongst others. On this score, Merifon submitted that the Supreme Court of Appeal erred insofar as it found that non-compliance with section 19 rendered the contract null and void and unenforceable. Merifon further argued that persons contracting in good faith with a statutory body or its agents are not required, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, and are entitled to assume that all the necessary arrangements or formalities have indeed been complied with. Merifon argued that the Supreme Court of Appeal should have applied the *Turquand* rule and/or estoppel. Accordingly, Merifon submitted that it was entitled to claim specific performance and the Municipality ought to have been estopped from relying on its own non-compliance with section 19.

The Municipality argued that neither this Court’s constitutional nor general jurisdiction was engaged. The Municipality contended, in line with the finding of the Supreme Court

of Appeal, that neither the doctrine of estoppel nor the *Turquand* rule can displace statutorily imposed requirements. It also argued that section 19 is an empowering provision, and a municipality cannot act outside of that power. The Municipality contended that this case was about whether, as matter of law, there was compliance with the relevant legislation which is the source of the power exercised. And because there was non-compliance with an empowering provision, the agreement is null and void and the question of specific performance does not arise. The Municipality further contended that Merifon's argument, that section 19 fell within the second category referred to by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28 (*RPM Bricks*), is misplaced. The first category referred to in *RPM Bricks* is an act beyond or in excess of statutory powers conferred on a municipality as a public authority, and the second category is a decision of a municipality which constituted an irregular or informal exercise of power granted to it as a public body.

In a unanimous judgment penned by Mlambo AJ, this Court found that its constitutional jurisdiction was engaged because it could not be said that Merifon did not raise the validity and enforceability of the agreement in its pleadings, therefore properly raising legality. The Court also found it correct that Merifon denied the applicability of section 19. Further, because the High Court and the Supreme Court of Appeal decided the matter on the basis of the principle of legality, this Court found that its constitutional jurisdiction was engaged.

Having accepted that this Court's jurisdiction was engaged, the Court had to determine whether it was nevertheless in the interests of justice that leave to appeal be granted. The Court found that there were no reasonable prospects that Merifon would succeed on appeal, thus leave to appeal was refused. The Court reasoned that the authorities which underscore the principle of legality, and which were cited by the Supreme Court of Appeal, are uncontested and settled. The Court also agreed with the Supreme Court of Appeal, in that section 19 was applicable.

Regarding Merifon's submission based on *RPM Bricks*, the Court found Merifon's argument, that section 19 fell within the second category distilled in *RPM Bricks* misplaced. The Court held that, absent a resolution by the Municipality sanctioning the transaction, any agreement entered into by an agent of the Municipality is plainly impermissible. The Court therefore agreed with the Supreme Court of Appeal's finding that the Municipality's decision fell within the first category distilled in *RPM Bricks*, being that the agreement amounted to an act beyond or in excess of statutory powers of the Municipality as a public authority.

Regarding the applicability of estoppel and the *Turquand* rule, the Court found these to be of no application because it is trite that, first, void acts cannot be resuscitated through the *Turquand* rule and, second, the *Turquand* rule is a species of estoppel and thus cannot be raised to cure an action that is *ultra vires*, as opposed to one that is *intra vires*, but suffers some other defect.

Therefore, leave to appeal was refused and Merifon was ordered to pay the Municipality's costs.