

Dispute Resolution

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SOUTH AFRICA

Liability of municipal officials for unauthorised, irregular, fruitless and wasteful expenditure



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**DISPUTE RESOLUTION
ALERT**

Liability of municipal officials for unauthorised, irregular, fruitless and wasteful expenditure

Municipalities have original constitutional powers and are directly responsible for the management of their affairs. They are required to comply with the norms and standards imposed on them by national legislation. The Municipal Finance Management Act 56 of 2003 (MFMA) was enacted to “*secure sound and sustainable management of the financial affairs of the municipalities*”, and “*to establish treasury norms and standards for the local sphere of government*”. One of the ways it does this is by recognising the possibility that expenditure may not occur in a manner that illustrates sound and sustainable management and by creating liability and recovery mechanisms around that recognition to minimise financial exposure for municipalities.

In particular, section 32 imposes liability on municipal officials and political office bearers, and creates an obligation on municipalities to recover money that through expenditure that was either unauthorised, irregular, or fruitless and wasteful (the “*unsecure expenditure*”). Each of these three categories has its own definition and thresholds (mainly centred around intention and negligence) and, to prevent rigidity and strict liability, has its own processes for condonation. In *Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality* [2024] ZASCA 151, the Supreme Court of Appeal (SCA) had an opportunity to consider and interpret section 32 of the MFMA.

The case related to the liability of a number of municipal officials who were employed by the Nelson Mandela Bay Metropolitan Municipality (Municipality) under section 32 of the MFMA. They had all contributed to the appointment of a service provider in breach of the applicable legislation and in contravention of the Municipality’s supply chain management policy. As a result, the Municipality **irregularly** paid an amount R7,638,177.10 to an unlawfully appointed service provider. In an effort to comply with its obligations under section 32 of the MFMA and recover the money, the Municipality instituted proceedings in the High Court, whereby it sought a declaration that the appointment was unlawful and invalid and also sought monetary relief against the municipal officials and the service provider for an amount of R7,638,177.10 in terms of a claim for unjustified enrichment and a claim in delict on the basis of fraudulent misrepresentation. The High Court granted the Municipality the relief it sought and the defendants (the municipal officials and the service provider) appealed the judgment to the SCA.

SCA’s findings

The appeal centred around the correct interpretation of section 32 of the MFMA. The SCA confirmed the refined approach to interpretation that it set out in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA. In that case, the SCA held that the term “*liable*” in section 32 must be interpreted to include monetary liability and not just accountability in the broad sense. With respect to liability it also held that liability arises as soon as an official intentionally or negligently incurred the unsecure expenditure.

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Furthermore, even though municipal officials are protected against liability to third parties for loss and damages that result from the *bona fide* exercise of a power or the performance of a function under section 175 of the MFMA, that does not prevent the Municipality from recovering losses or damages that have been caused by the deliberate or negligent acts of municipal official in terms of section 32 of the MFMA. The SCA held that section 32 is a self-standing provision that imposes statutory liability on municipal officials and political office bearers for unsecure expenditure.

In addition, it held that section 32 makes it mandatory for municipalities to take steps to recover any unauthorised, irregular, or fruitless and wasteful expenditure. A municipality need not establish loss or damage before it institutes recovery proceedings against liable municipal officials or political office bearers for the unsecure expenditure.

With respect to the internal condonation provisions in section 32, the SCA held that even if the expenditure is certified as being irrecoverable and is then written off by a municipal council it "*is no excuse in criminal or disciplinary proceedings against the person who incurred that expenditure*".

Conclusion

The importance of this judgment is that it adds a layer of clarity in respect of the fiscal affairs of municipalities. Further, it enhances the level of accountability for municipal officials and political office bearers, who will have to think quite hard about the risks of acting in a manner that deliberately or negligently causes loss to a municipality when it comes to expenditure. At the time of publishing this alert, it was not apparent whether the judgment may be further appealed to the Constitutional Court.

Vincent Manko, Imraan Abdullah, Kelo Seleka, Charles Green and Albertina Adivhaho Munyai

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Imraan Abdullah

Director:
Dispute Resolution
T +27 (0)11 562 1177
E imraan.abdullah@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Denise Durand

Director:
Dispute Resolution
T +27 (0)11 562 1835
E denise.durand@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Nastascha Harduth

Sector Head: Corporate Debt,
Turnaround & Restructuring
Director: Dispute Resolution
T +27 (0)11 562 1453
E n.harduth@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara

Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Nomlayo Mabhena-Mlilo

Director:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Sentebale Makara

Director:
Dispute Resolution
T +27 (0)11 562 1181
E sentebale.makara@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Khaya Mantengu

Director:
Dispute Resolution
T +27 (0)11 562 1312
E khaya.mantengu@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Sector Head:
Consumer Goods, Services & Retail
Director: Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Marelise van der Westhuizen

Director:
Dispute Resolution
T +27 (0)11 562 1208
E marelise.vanderwesthuizen@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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