

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-MOT-GEN-2021/00225

In the matter between:

BERTHA SECURITY SERVICES CC APPLICANT

and

MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF KEETMANSHOOP	1ST RESPONDENT
CHAIRPERSON OF THE MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF KEETMANSHOOP	2ND RESPONDENT
CHIEF EXECUTIVE OFFICER OF THE MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF KEETMANSHOOP	3RD RESPONDENT
SOUTHERN SECURITY CC	4TH RESPONDENT

Neutral Citation: *Bertha Security Services CC v Municipal Council for the Municipality of Keetmanshoop and Others* (HC-MD-CIV-MOT-GEN-2021/00225) [2022] NAHCMD 372 (28 July 2022)

Coram: SIBEYA J

Heard: 21 April 2022

Delivered: 28 July 2022

Flynote: Motion proceedings - Contract law - Termination of the contract to render security services to the Municipal Council - Relief in contract not review - Termination of the contract by the Procurement Committee of the Council - No proof of delegation of authority to the procurement Committee - No proof of ratification of the decision to terminate - Application upheld.

Summary: On 18 July 2020, the Council accepted the applicant's bid to render security services to the council for a period of three years. The parties entered into a written contract.

On 24 March 2021, the Council terminated the applicant's contract. Subsequent to the cancellation of the contract, the Council appointed Southern Security to render security services for a period of three months.

The applicant, therefore, seeks relief to review and set aside the termination of its contract to render security services to the Council and further seeks an order to reinstate the said contract.

This Court is tasked to determine whether there is any merit in the applicant's case. At the heart of the applicant's case is that there was no lawful decision by the Council to terminate the contract and that the Council's Procurement Committee and Exco have no authority to cancel the contract. The respondents' case is that the contract between the applicant and the Council was terminated according to law in terms of clause 2.6.1(f) of the agreement, as the applicant continued to render substandard and sloppy service contrary to the agreement between the parties.

Held that, the Procurement Committee acted *ultra vires* its powers and without the necessary delegation of authority being established and this renders the said decision null and void.

Held that, the decision to terminate was taken by the Procurement Committee beyond its powers and without authorisation, the respondents failed to prove that the Council ratified such decision.

ORDER

In the result, I make the following order in favour of the applicant against the Council (first respondent), The Chairperson of the Municipal Council (second respondent) and the Chief Executive Officer of the Municipal Council (third respondent):

1. That the purported termination of the contract between the applicant and the first respondent is unlawful;
2. The contract between the applicant and first respondent remains binding and enforceable;
3. The first, second and third respondents must, jointly and severally, the one paying the other to be absolved, pay the costs of this application, occasioned by the employment of two legal practitioners;
4. The matter is regarded as finalized and removed from the roll.

JUDGMENT

SIBEYA, J:

Introduction

[1] The first respondent awarded a contract to the applicant to render security services to its properties. The Procurement Committee of the Council terminated the said contract. The decision to terminate formed the genesis of this legal dispute between the parties.

[2] The applicant initially brought the application before court on an urgent basis, as per Part A of the Notice of Motion. Therein, the applicant sought urgent relief to interdict and restrain the respondents from implementing the decision to terminate

the contract between the applicant and the first respondent for the supply of security services and the decision to appoint the fourth respondent to render such security services. The applicant further sought an order to direct the respondents to reinstate or permit the applicant to carry out the contract to render security services. The urgent application was abandoned by agreement between the parties with costs occasioned by the respondents' answering papers being struck out to be determined at the hearing of Part B of the Notice of Motion.

[3] Part B constitutes a review application where the applicant seeks an order declaring the first respondent's decision to terminate the contract for the supply of security services null and void and set aside. The applicant further seeks an order to reinstate or permit the applicant to render security services to the first respondent. The applicant further seeks, on the basis of contract law, a declaration that the termination of the contract in question is unlawful.

[4] The application is opposed by the first to the third respondents.

The parties and representation

[5] The applicant is Bertha Security Services CC, a close corporation duly registered and incorporated as such in terms of the applicable laws with its principal place of business situate at Main Road, Eviluluk Road, Okandjengedi, Oshakati. The applicant shall be referred to as such.

[6] The first respondent is the Municipal Council for the Municipality of Keetmanshoop, duly established in terms of section 3 of the Local Authorities Act, No 23 of 1992 ("the Local Authorities Act") with its principal place of business situate at 37 Hampie Plichta Avenue, Keetmanshoop. The first respondent shall be referred to as the Council.

[7] The second respondent is the Chairperson of the Council while the third respondent is the Chief Executive Officer of the Council with offices situate at the principal place of business of the Council. The second and third respondents shall be referred to as the Chairperson and the Chief Executive Officer of the Council

respectively. Where reference is made to the first, second and third respondents jointly, they shall be referred to as the respondents.

[8] Where reference is made to the applicant and first respondent jointly they shall be referred to as the parties.

[9] The fourth respondent is Southern Security CC, a close corporation duly registered as such and incorporated in terms of the applicable laws, with its principal place of business situate at Daan Viljoen Street SC House, Keetmanshoop. The fourth respondent did not oppose the application. No relief is sought against the fourth respondent as it is cited for the interest that it may have in the adjudication of the application. Where reference is made to the fourth respondent it shall be referred to as Southern Security.

[10] Mr Namandje, assisted by Mr Gaeb appears for the applicant while Ms Garbers-Kirsten appears for the Council, the Chairperson and the Chief Executive Officer of the Council.

Background

[11] On 18 July 2020, the Council accepted the applicant's bid to render security services to the council for a period of three years. The parties entered into a written contract.¹

[12] On 24 March 2021, the Council terminated the applicant's contract. Subsequent to the cancellation of the contract, the Council appointed Southern Security to render security services for a period of three months.

[13] The applicant, therefore, seeks relief to review and set aside the termination of its contract to render security services to the Council and further seeks an order to reinstate the said contract. I consider it prudent to cite in detail the relief sought by the applicant which forms part of Part B of the Notice of Motion and which is the subject of this matter where the applicant seeks the following orders:

¹ Annexure SL4 to the founding affidavit.

‘1. The first Respondent’s decision contained in letter (*sic*) dated 24 March 2021 terminating the contract (contract for supply of security services to council properties and assets, procurement reference number No.: NCS/RFQ/KHPMUN-002/2019) between itself and the Applicant be and is hereby reviewed and set aside and is declared null and void and of no force.

2. The first Respondent’s decision communicated in the letter dated 1 June 2021 to Applicant, such decision appointing Southern Security CC to supply security services to Council properties and assets and (*sic*) is hereby reviewed and set aside and is declared null and void and of no force.

3. The first, second and third respondents are directed to reinstate and permit the applicant to carry out the contract to supply of security services (*sic*) to council properties and Assets, procurement reference No.: NCS/RFQ/KHPMUN-002/2019, immediately after the order herein.

4. In the alternative, in contract: -

4.1 An order declaring the termination of the contract by the First Respondent as unlawful.

4.2 An order declaring the contract between the applicant and first respondent as remaining binding and enforceable.

4.3 An order declaring the contract between the first respondent and the fourth respondent as null and void.

5. Any Respondent electing to oppose this application are (*sic*) ordered to pay the costs of this application, occasioned by the employment of two one instructing and one instructed counsel.’

[14] The applicant raised several attacks on the termination of the contract, but during argument it restricted itself to three grounds which are:

- (a) That the respondents did not produce any lawful decision or resolution taken by the Council as contemplated by section 14 of the Local Authorities Act to cancel the contract;

(b) That the decision to cancel the contract by the Council's Procurement Committee and that of the Exco is invalid as the said committees lack the necessary authority to cancel the procurement contract;

(c) That the decision to appoint Southern Security to take over the applicant's procurement contract is unlawful and contrary to section 32 of the Public Procurement Act, 15 of 2015.

[15] The last ground of attack relating to the appointment of Southern Security can be disposed of without breaking a sweat. Southern Security, as alluded to above, was appointed by the Council to render security services to the Council for a period of three months and such agreement has long lapsed. This status *quo* renders the relief sought by the applicant that relates to Southern Security moot and deserving of no further consideration.

[16] The task at hand, is for this Court to determine whether there is any merit in the applicant's case. At the heart of the applicant's case is that there was no lawful decision by the Council to terminate the contract and that the Council's Procurement Committee and Exco have no authority to cancel the contract. The respondents' case is that the contract between the applicant and the Council was terminated according to law in terms of clause 2.6.1(f) of the agreement, as the applicant continued to render substandard and sloppy service contrary to the agreement between the parties.

Point in limine

[17] The respondents raised a point *in limine* that the applicant's review application lacks merit as the decision to cancel the contract does not constitute reviewable administrative action. The respondents contend that the agreement was terminated in terms of the contract particularly as the applicant breached clause 2.6.1(f) of the agreement and therefore not reviewable but contractual.

[18] Ms Garbers-Kirsten laid great store on the Supreme Court decision of *Permanent Secretary of the Ministry of Finance v Ward*² for the argument that a

² *Permanent Secretary of the Ministry of Finance v War* 2009 (1) NR 314 (SC).

security service contract is a service contract and cancellation of such agreement does not constitute administrative action as there is no exercise of public power, to the contrary, it is a cancellation in terms of the agreement between the parties.

[19] It is not an easy task to determine if cancellation of a contract particularly by an entity that renders public service constitutes an administrative action or acts under contract law. The answer mostly depends on the facts of each case. It is not the functionary that determines whether an action carried out by a public body constitutes administrative action or not. It is the nature of the power utilized that is determinant of the question whether it is an administrative action or not. The respondents argued that the source of power utilized to terminate the contract *in casu* is the terms of the contract which were allegedly breached by the applicant. For purposes of this matter, I am inclined to accept the argument of the respondent alluded to above that, the action of the respondents was based on contract law and nothing more.

[20] I find that Ms Garbers-Kirsten was on the correct side of the law in her argument that the applicant's application for review is a wrong remedy. The applicant's remedy lies in contract and therefore where the applicant relies on review for its relief, it is barking the wrong tree, so to speak.

[21] When Mr Namandje was faced with this point *in limine*, he offered no counter argument but proceeded to rely on the applicant's alternative relief sought that is couched in a manner that relies on the contract.³ This argument pours water on the mighty argument raised by the respondents that a wrong remedy is sought by the applicant as there is another relief in the alternative. With the relief squarely within contract, the question that remains is whether the applicant's application has merit or not.

[22] I will in no particular order, address the relevant issues raised for determination in this matter.

³ Paragraph 64 of the founding affidavit.

The Procurement Committee and Exco

[23] It is the applicant's case that the decision to terminate the contract between the applicant and the Council to render security services was made by the Procurement Committee and Exco. The applicant argues that both the Procurement Committee and Exco lacked the necessary authority to terminate the said agreement.

[24] The respondents argue contrariwise. They argue that the decision to terminate the agreement in question was made by the Procurement Committee and escalated to the Council meeting of 24 March 2021 where the Council agreed with the cancellation of the agreement and resolved that the Procurement Committee should further deal with the matter.⁴

[25] The respondents argue further that Exco did not purport to cancel the agreement as intimated by the applicant. Quite far apart from it, Exco, at its meeting of 12 April 2021, was informed by the Chief Executive Officer that legal advice was obtained from a legal practitioner to the effect that the agreement with the applicant was terminated due to the applicant's conduct. The respondents contend that the agreement was terminated in terms of section 2.6.1.(f) of the General Conditions of contract by the Procurement Committee.

[26] It is important to better appreciate the reasons for the termination of the agreement which are set out in the Council's letter addressed to the applicant dated 08 April 2021⁵as follows:

- (a) Failure to provide quotation to the Council for CCTV cameras upon being requested to do so on 16 November 2020;
- (b) Taking no action against a security guard who was reported to be under the influence of intoxicating liquor while at work on 08 February 2021;

⁴ Paragraph 45 of the answering affidavit.

⁵ Annexure SL7 to the founding affidavit.

- (c) On 19 February 2021, the security officers at KEBU Technical offices refused KEBU officials access to the said offices;
- (d) On 03 March 2021, two batteries of the Council's skyjack, valued at N\$14 000 were reported stolen from KEBU but no update was received;
- (e) On 04 March 2021, a security guard and employee of the applicant was found to be under the influence of intoxicating liquor and reported to the applicant. No feedback was received;
- (f) Attempts by the Council to discuss the above shortfalls with the applicant proved futile.

[27] Clause of 2.6 of the agreement provides for termination of the agreement between the parties.

The lawfulness of the decision or resolution taken

Applicant's case and Argument

[28] The applicant's main qualm with the termination of the contract is that the respondents failed to produce a lawful decision or resolution taken by the Council at a properly requisitioned and convened meeting in terms of section 14 of the Local Authorities Act. It was argued by Mr Namandje that the consequence of failure to comply with section 14 of the Local Authorities Act by the Council when it meets, means that all resolutions taken at such meeting constitutes a nullity.

[29] To emphasize his argument, Mr Namandje quoted the following paragraphs from *National African Federated Chambers of Commerce and Industry and Others v Mkize*,⁶ a judgment of the Supreme Court of Appeal of South Africa where it was remarked that:

⁶ *National African Federated Chambers of Commerce and Industry and Others v Mkize* [2015] 1 All SA 393 (SCA).

[4] The central issue for determination is whether the December 2012 meeting was lawfully convened. If not, all resolutions emanating from it are invalid and of no force and effect. The main resolutions passed thereat are the election of a new President (purportedly to replace Mr Mavundla) and the removal of the 3rd to 8th appellants from the NAFCOOC Exco for a variety of reasons which need not be repeated here. Mr Mavundla's position as NAFCOOC President also requires determination since it has a direct bearing on the outcome of the case.'...

[37] To summarise and in conclusion: the December 2012 meeting was unlawfully convened since only the NAFCOOC President Mr Mavundla or, in his absence, its Deputy President, Mr Skhosana, had the requisite constitutional power to convene a NAFCOOC Council meeting. As a consequence, all the resolutions passed at the December 2012 meeting are invalid and of no force and effect....'

[30] It was argued for the applicant that despite challenging the Council to produce all lawful decisions or resolutions taken to terminate the contract, no decision, lawfully taken by the Council, was produced.

[31] When challenged that it failed to produce a Council resolution properly and lawfully taken at a meeting convened in accordance with section 14 of the Local Authorities Act, the respondents remarked in the answering affidavit deposed by the Chief Executive Officer of the Council that:

'96.1. No Council resolution was necessary. The contract was terminated under the general conditions of Contract for non-consultancy Services in terms of the Public Procurement Act and not under the Local Authorities Act.

96.2. Council has on 24 March 2021 at its properly constituted meeting took (*sic*) note of the decision of the Procurement committee to cancel the agreement and agreed therewith as is evident from Item 3 part C of the supplementary review record alluded to earlier and resolved that the matter be further handled by the Procurement Committee...'

[32] The respondents further allege that the Council ratified the decision of the Procurement committee to cancel the contract.

Analysis

[33] I find it opportune to lay bare the provisions of clause 2.6.1(f) of the contract as the respondent contend that the contract between the parties was terminated in terms of that clause. 2.6.1(f) reads that:

'2.6 Termination

2.6.1 By the Employer

The Employer may terminate this Contract, by not less than thirty (30) days' written notice of termination to the Service Provider, to be given after the occurrence of any of the events specified in paragraphs (a) through (d) of this Sub-Clause 2.6.1: ...

(f)Notwithstanding the above the Employer may terminate the contract for its convenience after giving a prior notice of 30 days.'

[34] On 24 March 2021, the Chief Executive Officer crafted a termination letter addressed to the applicant with the following relevant content:

'We hereby notify you of the termination of the Agreement concluded between ourselves under the aforesaid reference number in accordance with Clause 2.6.1(f) of the General Conditions of Contract for Non-Consultancy Services (issued in terms of section 7(1)(i) of the Public Procurement Act, 2015). The effective date of the said termination is 31 May 2021.'

[35] The minutes from the Procurement Committee of the Council of 15 March 2021 provides that the Procurement Committee discussed the supply of security services by the applicant to the Council together with the incidents raised against the applicant. The minutes further provide that the contract between the applicant and the Council be terminated in accordance with the general conditions of the contract for non-consultancy services.

[36] On 24 March 2021, the Council convened a meeting and discussed, *inter alia*, the concerns raised regarding security services rendered by the applicant, including

incidents of security guards being on duty while under the influence of intoxicating liquor and theft of council properties. The Council considered that Exco took the decision to terminate the agreement with the applicant in accordance with the Public Procurement Act. The Council then agreed that this is a matter that should be handled by the Procurement Board and that Council only took note of the intention of the Procurement Board to terminate the contract.

[37] Reference to the Procurement Board in the minutes of the Council means the Procurement Committee established in terms of s 25 of the Public Procurement Act 15 of 2015. This is apparent from the minutes of the Procurement Committee of 15 March 2021 where it is clear as day that it is the Procurement Committee that took the decision to terminate the contract and not the Procurement Board. In my view, it is of no moment to suggest that the Procurement Board and the Procurement Committee are two different entities as intimated by Mr Namandje.

[38] The resolution by Council does not reveal that a decision was taken by the Council to terminate the concerned contract, to the contrary, it provides that the decision to terminate the contract was taken by the Procurement Committee. The Council simply took note of such decision. Taking note means just that "taking note", it is not agreeing or disagreeing to a matter but simply taking cognisance of such matter. I shall revert to this subject in due course.

[39] It was argued for the respondents that the Procurement Committee was properly delegated in this matter to take the decision to terminate the contract. Reliance on this argument was placed on sections 25, 31(1) and 31(3) of the Local Authorities Act. For completion sake, the said provision reads:

'31. Delegation of powers by local authority councils

- (1) A [municipal council](#) or a [town council](#) may delegate or assign in writing, in writing and on such conditions as it may determine, to its [management committee](#) or its [chief executive officer](#) or any other [staff member](#), any power conferred or any duty imposed upon it by or under this Act or any other law, except any power -
- (a) to make regulations or rules;

- (b) to approve its estimates or supplementary estimates of revenue and expenditure;
 - (c) to determine rates, charges, fees or other moneys which may be levied under any provision of [this Act](#);
 - (d) to borrow money; or
 - (dA) to appoint, suspend or discharge a [chief executive officer](#) or a head of a department referred to in [section 28](#); or
 - (e) which the [Minister](#) may determine by notice in the Gazette...
- (3) A [management committee](#) may delegate, in writing and with the prior written approval of and on the conditions determined by the [municipal council](#) or [town council](#) concerned -
- (a) any power conferred upon it by [this Act](#); or
 - (b) any power which has been delegated to it under subsection (1),
- to any member of the [municipal council](#) or [town council](#), or to the [chief executive officer](#) or any [staff member](#) of the [municipal council](#) or [town council](#) concerned, or to any two or more of such persons conjointly.'

[40] Section 31 of the Local Authorities Act provides for delegation of powers by the local authorities. What the provision further provides for is the requirement that local authorities may delegate their powers in writing and on the determined conditions.

[41] Where a delegation of power is raised, the onus rests on the party alleging same to prove it.⁷

[42] JR De Ville, in his work: *Judicial Review of Administrative Action in South Africa* discusses delegation of powers and states that:

⁷ *Waterberg Big Game Hunting Lodge v Minister of Environment* 2010 (1) NR 1 (SC) at 12I and 15H-I.

'Statutes often expressly grant the power to a statutory body or official to whom powers are granted to subdelegate such powers.⁸ Such grants of power (of subdelegation) are, however, restrictively interpreted.⁹ Where the express power is granted to delegate powers to a certain body or person the following principles usually apply:

- the body or person which is (validly) subdelegated such power may not further delegate such power (unless this is expressly authorized);
- the powers may not be delegated to anyone else;
- the "fact of a valid delegation must be clear and satisfactorily be established' through documentary proof (where powers are so delegated).'¹⁰
- the original delegee must (where the delegation takes place in the same administrative hierarchy) retain a measure of control over the subdelegee;
- in the case of delegated legislation, the *delegatus* must provide guidelines as to how the powers (to implement such legislation) are to be exercised; and
- other powers (other than those expressly mentioned) may not be delegated.'

[43] Statutes that allow delegation of authority must be restrictively interpreted. The delegation must be clearly proven through documentary evidence and not be left to be second guessed. Where a body exercises powers that are not conferred or delegated to it, it acts *ultra vires* its powers and such acts are null and void.¹¹

[44] Section 31 of the Local Authorities Act authorises delegation in local authorities. The delegation must however be clearly set out and proven.

[45] The respondents alleged that the Procurement Committee was duly delegated the authority to take the decision to terminate the agreement between the parties and was therefore duty bound to prove the existence of the said delegation. It should be apparent from the delegation as to what powers are delegated to the Procurement Committee and it must be clear as to whether the Procurement Committee acted within the confines of its delegation.

⁸ *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC) at para 40-45.

⁹ *Citimakers (Pty) Ltd v Sandton Town Council* (1) 1977 (4) SA 959 (W) at 961A-963C; *SA Airways Pilots Association and Others v Minister of Transport Affairs and Another* 1988 (1) SA 362 (W) at 374B-F.

¹⁰ JR De Ville, *Judicial Review of Administrative Action in South Africa*, 1st Ed, at p 139-140.

¹¹ *Waterberg Big Game Hunting Lodge v Minister of Environment (supra)* at 16B. *Tjirovi v Minister of Lands of Resettlement*, 2018 (2) NR 358 (HC) at 367E.

[46] The respondents produced no documentary proof of the said delegation of powers to the Procurement Committee. It follows, as night follows day that the failure of the respondents to produce the alleged delegation of authority means that the respondents' failed to prove the alleged delegation of powers of the Procurement Committee.

[47] In the answering affidavit deposed to by the Chief Executive Officer of the Council filed on behalf of the respondents it is stated as follows on the termination of the contract:

'110.1 I reiterate that the agreement was cancelled due to applicant's persistent breaches thereof and for al (*sic*) the other reasons already alluded to above. The letter of termination of the agreement in terms of clause 2.6.1(f) of the agreement between the parties (with effect from 31 May 2021) was sent to the applicant on 24 March 2021 by the first respondent's CEO (myself) after the Council has at its meeting earlier that day taken notice of the decision of the Procurement Committee to cancel the agreement, the reasons thereof and after deliberation thereof by the Council members and ratification of the Procurement Committee's decision to cancel.' My underlining

[48] The respondents further argued that the decision of the Procurement Committee was ratified by the Council. The applicant is of a different view.

[49] Section 25 of the Public Procurement Act 15 of 2015 sets out the powers and functions of the accounting officer (the Chief Executive Officer) as follows:

'25. (1) An accounting officer –

- (a) must, in the prescribed manner, set up an internal organisational structure which includes a procurement committee and procurement management unit for the conduct and management of procurement at the public entity; and
- (b) is accountable for the full compliance with this Act and directives and instructions made under this Act.

- (2) The disqualifications referred to in section 14 apply with the necessary changes to persons generally eligible for appointment as members of procurement committees or as staff members of procurement management unit.
- (3) The powers and functions of the internal structures of a public entity are exercised and performed in accordance with the prescribed procedure and processes.
- (4) An accounting officer must –
 - (a) engage in procurement planning, plan each step of the procurement process and prepare annual procurement plan;
 - (b) certify the availability of funds before the commencement of each procurement process; and
 - (c) ensure that the proceedings of the internal structures are properly recorded and kept in a safe and secure place in the prescribed manner.
- (5) An accounting officer must keep and maintain proper record of minutes and other related documentation for a period prescribed by the Archives Act, 1992 (Act No. 12 of 1992).'

[50] There is no indication that the Chief Executive Officer took the decision to terminate the contract between the parties. As a matter of fact, the respondents conceded that the decision to terminate the contract was taken by the Procurement Committee and therefore, the reference to the Chief Executive Officer in argument is neither here nor there.

[51] The Public Procurement Act defines a procurement committee as a procurement committee of a public entity, which public entity includes the Council, constituted in terms of s 25. A procurement contract on the other hand is defined as a contract between a public entity and a supplier resulting from a procurement process. The Public Procurement Act empowers the Chief Executive Officer to establish a Procurement Committee. It is also the Chief Executive Officer who is empowered to, by s 25, deal with procurement matters.

Alleged ratification of the decision of the Procurement Committee

[52] The respondents argue that the Council agreed with the decision of the Procurement Committee to cancel the agreement between the parties and thus ratified the decision of the Procurement Committee. The resolution of the Council, however, reveals a different kettle of fish. In the resolution of the meeting of 24 March 2021, the Council members agreed that the matter should be handled by the Procurement Committee, and not that they agreed to the decision of the Procurement Committee. In as far as the decision to terminate the agreement is concerned they simply took note of it and nothing more.

[53] For ratification to occur the principal must have intended to confirm the unauthorised act of its agent carried out on its behalf.¹²

[54] No decision or resolution of the Council was tendered in this application where the Council ratified the decision of the Procurement Committee. In the absence of such decision or resolution by the Council, it cannot be said convincingly that the decision of the Procurement Committee was ratified by the Council. As a result, I find that the applicant's argument that the decision of the Procurement Committee to terminate the contract was ratified by the Council lacks merit.

[55] As I draw curtains to a close in this matter, I observe that the respondents stated that the decision to terminate the agreement between the parties was taken by the Procurement Committee. But the question remains, what exactly did the Procurement Committee say to signify the termination of the agreement? The Procurement Committee at its meeting of 15 March 2021, after deliberating on the rendering of security services to the Council by the applicant resolved that the contract of the applicant be terminated in accordance with the General Conditions of the contract.

[56] It is plain from the wording of the resolution that the Procurement Committee said that the contract be terminated which, is akin, to a suggestion or recommendation to another person or body that the contract be terminated. Part of

¹² See *Miller and Others NNO v Prosperity Africa Holdings (Pty) Ltd* 2019 (4) NR 905 (SC).

the arguments made by the respondents is that the Procurement Committee carries out ground work for the Council. This argument, in my view, finds alignment with the resolution of the Procurement Committee as it appears that the Procurement Committee resolved to recommend the termination of the contract to a superior body.

[57] I further find it unsurprising that the Council in its resolution of 24 March 2021, decided to take note of the intent of the Procurement Committee. They did not take note of the decision of the Procurement Committee to terminate the contract but took note of the intention of the Procurement Committee to cancel the contract. In my view, this supports the position that the Procurement Committee did not terminate the contract but suggested that the contract be terminated.

Conclusion

[58] In the circumstances, I am of the considered view that, if it is to be accepted that a decision was made by the Procurement Committee to terminate the contract between the parties, then the Procurement Committee acted *ultra vires* its powers and without the necessary delegation of authority being established and this renders the said decision null and void. I further find that after the decision to terminate was taken by the Procurement Committee beyond its powers and without authorisation, the applicant failed to prove that the Council ratified such decision.

[59] It follows, therefore, that it has not been established that the Council, and even by extension, the Chief Executive Officer, terminated the contract between the parties. The termination of the contract is therefore unlawful. As a matter of consequence, I find that the contract between the applicant and the Council is binding and enforceable.

[60] I accordingly find and hold that the applicant should therefore succeed in terms of the relief sought.

Costs

[61] It is trite law that costs follow the event. The respondents' answering papers were struck out for lack of authorization at the hearing of the urgent application. Mr Namandje seeks wasted costs for the day resulting from the striking out of the answering papers. Ms Garbers-Kirsten argued that at the hearing of the urgent application, the urgency was abandoned by agreement between the parties and therefore opposed the argument to hold the respondents liable to pay the applicant's wasted costs for the said day.

[62] When an answering affidavit is struck out for lack of authorization, no doubt, it should be kept in mind that more often than not, the opposing party will have to prepare based on the answering affidavit, take instructions and file a replying affidavit. This results in the party reacting to the answering affidavit to incur unnecessary costs. In the exercise of my discretion, I find that the respondents must pay the wasted costs of the applicant occasioned by the filing of the answering affidavit. An appropriate order will be issued.

[63] In respect of the costs for the main application, no compelling reasons were placed before the court to demonstrate why the principle that costs should follow the event should be departed from and no persuasive reasons could also be gathered from the record to that effect. As a result, the applicant is awarded costs.

Order

[64] In the result, I make the following order in favour of the applicant against the Council (first respondent), The Chairperson of the Municipal Council (second respondent) and the Chief Executive Officer of the Municipal Council (third respondent):

1. That the purported termination of the contract between the applicant and the First Respondent is unlawful;
2. The contract between the applicant and first respondent remains binding and enforceable;

3. The first, second and third respondents must, jointly and severally, the one paying the other to be absolved, pay the costs of this application, occasioned by the employment of two legal practitioners;
4. The matter is regarded as finalized and removed from the roll.

O S Sibeya
Judge

APPEARANCES:

APPLICANT:

S Namandje
assisted by K Gaeb
Of Sisa Namandje & Co Inc,
Windhoek.

1ST TO 3RD RESPONDENTS:

H Garbers-Kirsten
Instructed by Fisher, Quarmby & Pfeifer,
Windhoek.