THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 6189/2019

In the matter between

THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**FIRST APPLICANT**
THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS, FORESTRY AND FISHERIES	**SECOND APPLICANT**

and

B XULU & PARTNERS INCORPORATED	**FIRST RESPONDENT**
THE SHERIFF OF THE HIGH COURT FOR PRETORIA CENTRAL, MR T F SEBOKA NO	**SECOND RESPONDENT**
STANDARD BANK OF SOUTH AFRICA	**THIRD RESPONDENT**
FIRST NATIONAL BANK OF SOUTH AFRICA	**FOURTH RESPONDENT**

Coram: Rogers J
Heard: 12 & 13 December 2019
Delivered: 30 January 2020

JUDGMENT

Rogers J

[1] The first respondent, B Xulu & Partners Inc ('BXI'), is an incorporated firm of attorneys, the principal member of which is Mr Barnabas Xulu. On 6 June 2019 this court (per Steyn J) made a purported settlement agreement concluded between BXI and the first applicant, the Department of Agriculture, Forestry and Fisheries ('DAFF'), an order of court. The purported settlement agreement was concluded on 12 April 2019. I shall refer to this document as the settlement agreement though its validity is contested.

[2] When the DAFF failed to make payment in accordance with settlement agreement, BXI levied execution. This caused the DAFF on 5 August 2019 to launch an urgent application in part A whereof it sought to have the writs and attachments of monies suspended pending determination of the relief claimed in part B. As subsequently amended, the relief claimed in part B, insofar as relevant to this judgment, comprises orders reviewing and setting aside a service level agreement purportedly concluded between the DAFF and BXI on 23 May 2017 ('the SLA'); reviewing and setting aside the settlement agreement; rescinding the order of 6 June 2019; and setting aside the writs of execution and notices of attachment.

[3] The second respondent is the Sheriff of the High Court for Pretoria Central, being the sheriff who effected the impugned attachments ('the sheriff'). The third and fourth respondents are Standard Bank of South Africa ('Standard Bank') and First National Bank of South Africa ('FNB') respectively. The sheriff and the banks have not opposed the application or participated in the proceedings.

[4] At all material times the DAFF's Director-General has been Mr Mzamo Mlengana. He and some of his officials had a fraught relationship with the former minister of the department, Mr Senzeni Zokwana. The Deputy Director-General: Fisheries Management, Ms Siphokazi Ndudane, had Minister Zokwana's support. This resulted in conflict between Mr Mlengana and Ms Ndudane.

[5] Following the change in presidency in late May 2019, there was a reorganisation of portfolios which gave rise to the establishment of the second applicant, the Department of Environmental Affairs, Forestry and Fisheries ('the DEA'). Mr Zokwana was replaced by Ms Barbara Creecy, the minister with responsibility for the DEA. Most of the DAFF's functions have been transferred to the DEA but the DAFF continues to exist until the transfer is complete. The DEA was joined without objection. For convenience I shall refer simply to the DAFF or the applicant, a term which covers one or both applicants according to the context.

[6] The Marine Living Resources Act 18 of 1998 ('the Marine Act') provides in s 10 for the continued existence of a fund called the Marine Living Resources Fund ('MLRF'). Section 11 states that the MLRF shall provide for the administration of the provisions of the Marine Act. In terms of s 10 the MLRF is administered by the Director-General ('DG') in consultation with the Minister in accordance with estimates of revenue and expenditure approved by the Minister with the concurrence of the Minister of Finance in respect of each financial year. The DG is the MLRF's accounting officer. In terms of s 36(2)(*a*) of the Public Finance Management Act 1 of 1999 ('the Finance Act') the DG is also the accounting officer of the DAFF.

The appointment of BXI

[7] On 25 October 2016 a memorandum of understanding ('MoU') was concluded between the DAFF and Emang Basadi Legal and Forensic Services (Pty) Ltd ('EBL') in terms of which EBL was engaged to provide legal advisory services. According to the applicant, this was part of a move by the Zokwana faction to get rid of the State Attorney in Cape Town so as to enable private law firms to extract excessive fees from the department.

[8] On 6 January 2017 EBL wrote to BXI stating that EBL had been instructed by the DAFF to appoint BXI as attorneys to assist in pending litigation in which Viking Inshore Fishing (Pty) Ltd was suing the DAFF. According to BXI, the DAFF recommended that BXI apply to be added to the MLRF's supplier database so that EBL could be dispensed with as an intermediary.

[9] The DAFF's Chief Director: Legal Services, Ms Kanthi Nagiah, who had no complaint with the quality of service rendered by the State Attorney, did not approve the latter's sidelining. Although Mr Mlengana (who was appointed DG from outside the department with effect from 1 July 2016) had signed the MoU, he wrote to EBL on 2 February 2017 to say that proper supply chain management ('SCM') processes had not been followed in EBL's appointment, rendering the contract invalid. He wrote this letter after conferring with (among others) Ms Nagiah.

[10] BXI says that it continued working on the Viking case because it was unaware of the termination of EBL's services. Mr Mlengana complains that despite the termination, Ms Ndudane continued to use EBL's services and to approve payments to it.

[11] In the meanwhile Minister Zokwana was promoting BXI's engagement to assist in the DAFF's litigation against Arnold Bengis and others. (Some of the

history of that matter appears from the reported judgment in *Bengis & others v Government of South Africa & others* [2016] ZAWCHC 14; [2016] 2 All SA 459 (WCC).) On 3 April 2017 Minister Zokwana wrote to the Deputy Minister in the Department of International Relations and Cooperation ('DIRCO') to say that the DAFF had mandated BXI, working with an Advocate N Memani, to initiate and facilitate the restitution of money due to the South African government in the Bengis case. He asked DIRCO to assist BXI in meeting with various foreign authorities. Minister Zokwana provided DIRCO with BXI's contact details. According to BXI, Ms Memani was a legal adviser to Minister Zokwana.

[12] On 14 April 2017 BXI was registered on the MLRF supplier database. Although the registration may have been irregular for lack of a current tax clearance certificate, no relief in respect of such registration is claimed in the present proceedings.

[13] Slightly more than a month later the SLA was purportedly concluded. The preamble recorded that the DAFF had already appointed BXI in the Bengis case, an appointment said to stem from a mandate Minister Zokwana had given to BXI, and that the SLA was being concluded to regulate the relationship between the parties and to ensure the achievement and maintenance of high quality performance and standards.

[14] The SLA defined 'Delegated Authority' as meaning the Deputy Director-General of the department, ie Ms Ndudane. The significance of this lies in the fact that clause 2.2 recorded that BXI had accepted appointment on the understanding that, for purposes of the SLA, DAFF would be represented by the Delegated Authority, who would be the 'first point of interface' in all matters pertaining to the services. Clauses 4.3 and 4.4 stipulated that BXI would only accept instructions from the Delegated Authority and was prohibited from accepting

instructions from any other DAFF officials or employees. In terms of clause 14 disputes were to be referred to the Delegated Authority for resolution. So the draftsman was careful to bypass the DG, Mr Mlengana.

[15] Clause 10.1 stated that because of the wide geographical spread of the 'project' (defined in the preamble as meaning the Bengis project), all service providers were required to bill the DAFF in US dollars, 'as this is the currency in which restitution is being claimed. Remarkably, this applied to BXI itself. Annexure B to the SLA set out hourly rates in US dollars for counsel and for attorneys of different seniority within BXI. Payment was to be made within 30 days of receipt of invoices.

The attacks on the SLA

SLA not signed on behalf of DAFF

[16] The first ground of attack on the SLA is that it was not duly signed on behalf of the DAFF. It purports to have been so signed by Mr Mlengana in Cape Town. Although he does not dispute that the signature is his, he denies that he knowingly signed it. According to his diary, he was in Cape Town on 23 May 2017 and met with Minister Zokwana. He surmises that the last page of the document (p 19, which contained no contractual terms) was placed before him as part of a document of a different character.

[17] Circumstances which lend support to Mr Mlengana's allegation are the following.

(a) A few months previously, Mr Mlengana had contested the validity of EBL's appointment on the basis that SCM processes had not been observed. This was equally true of BXI's appointment.

(b) It was Minister Zokwana who was promoting BXI's appointment and had already given it a mandate.

(c) The relationship between Mr Mlengana and the minister was frayed (shortly after the purported execution of the agreement, the minister placed Mr Mlengana on suspension).

(d) Mr Mlengana's signature purports to have been witnessed by Ms Memani, the advocate who was a legal adviser to the minister. Mr Mlengana says that she was not present when he met with the minister and could not have witnessed his signature. He alleges that she has orally confirmed this but refuses to give an affidavit.

(e) Although Ms Memani's initials appear on each page of the agreement, including the attachments, Mr Mlengana's do not.

(f) Mr Mlengana alleges that he became aware of the SLA in late July 2018, and that on advice he thereafter reported his signature on the SLA to the Hawks as a fraud.

[18] Because Mr Xulu and his witness were not present when Mr Mlengana signed, they cannot from personal knowledge dispute what he says. If Mr Xulu tried to get an affidavit from Ms Memani, he was as unsuccessful as the DG. This leaves the former minister as a potential witness. On 8 November 2019 BXI filed an affidavit by Mr Zokwana in which the latter deals with various matters but not with Mr Mlengana's allegations concerning his signature on the SLA.

[19] A criticism of Mr Mlengana's version is that he does not say what he thought the document was. Unless he signed it hurriedly, he ought to have noticed that it purported to be the last page of a contract. Provision was made on the same page for BXI to sign. Nevertheless, in the absence of contrary evidence from the two persons who would have been able to refute Mr Mlengana's version if it were false, *viz* Mr Zokwana and Ms Memani, I cannot reject it.

[20] Counsel for BXI did not apply to have Mr Mlengana cross-examined on the basis envisaged in *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 92F-H, ie on the basis that although the circumstances in which Mr Mlengana signed the document were not within BXI's knowledge, there were reasonable grounds to doubt the correctness of what he claimed. (See also *Khumalo v Director-General of Cooperation and Development & others* 1991 (1) SA 158 (A) at 167G-168C.) I may add that the relevant facts are not peculiarly within Mr Mlengana's knowledge. Mr Zokwana and Ms Memani could provide relevant evidence. I think it may be inferred that BXI had a better relationship with them than Mr Mlengana did. BXI got an affidavit from Mr Zokwana, but he did not deal with the signing of the SLA. BXI does not say that it asked Ms Memani to make an affidavit.

Absence of fair procurement process

[21] The second ground of attack is that BXI was not appointed pursuant to a fair public procurement process. Authority is scarcely needed for the obligations imposed in this regard on public bodies pursuant to s 217 of the Constitution. On the assumption that there were rational grounds to engage private attorneys to handle the Bengis and other cases, such appointment required a competitive bidding process. None was followed. That is common cause.

[22] Item 16A of the Treasury Regulations, promulgated in terms of s 76(4)(*c*) of the Finance Act, requires an accounting officer to develop and implement a supply chain management system that is, *inter alia*, fair, equitable, transparent, competitive, cost effective and consistent with the Preferential Procurement Policy Framework Act 5 of 2000. Various requirements with which such a system must comply are set out. In terms of item 16A.6.4, the accounting officer may deviate from the system where it is 'impractical to invite competitive bids', but then the reasons must be recorded.

[23] Item 16A.6.4 must be read in the light of National Treasury Instruction SCM Instruction Note 3 of 2016/17, issued in terms of ss 6(2) and 18(2) of the Finance Act, and which took effect on 1 May 2016. Para 8.1 thereof states that an accounting officer must only deviate from a competitive bidding process 'in cases of emergency and sole supplier status'. The former is defined as occurring

'when there is a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids.'

'Sole source procurement' may occur

'when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution.'

Para 8.5 provides that any other deviation

'will be allowed in exceptional cases subject to the prior written approval from the relevant Treasury'.

[24] There was no emergency requiring BXI to be appointed. There is no evidence that BXI possessed the 'unique and singularly available capacity' to deal with the Bengis matter or any other cases on which it worked for the DAFF. The applicant challenged BXI to provide evidence that it had any track record in dealing with fishery matters. BXI did not rise to the challenge. There were no exceptional circumstances to justify a deviation, and no prior written approval from National Treasury was sought or obtained. The unlawful departure from proper procurement procedures was every bit as blatant as that dealt with in *Department of Transport & others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC) (see paras 22-23, 99-102 and 108 in the minority judgment, and para 164 in majority judgment, concurring in these respects with the minority judgment).

[25] BXI obviously knew that it was appointed without a competitive process. It is ironic, in the circumstances, that, in subsequent work for the DAFF, BXI criticised officials in the department for having made appointments which did not follow proper procurement procedures.

[26] A refrain in BXI's papers is that it lay within Mr Mlengana's power to regularise the SLA and the mandates by a deviation process. Mr Mlengana is criticised for not having done so. I fail to see, however, on what basis Mr Mlengana could lawfully have requested a deviation, which I take to mean a departure from a competitive bidding process on grounds other than those falling within the 'emergency' and 'sole supplier' exceptions. Such a deviation is only allowed 'in exceptional cases' and is subject to prior written treasury approval. There were no exceptional circumstances here. The 'exceptional cases' basis for deviation is not intended as an *ex post facto* broom for sweeping illegality under the carpet.

[27] The DAFF's conclusion of the SLA was thus unlawful. Because the DAFF itself is seeking to impugn the SLA, its public law attack rests on the principle of legality rather than on the Promotion of Administrative Justice Act 3 of 2000 (*State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC)).

Mandates from Minister Zokwana

[28] A further objection to the SLA is that it had its source in a mandate given to BXI by Minister Zokwana. This mandate was meant to be attached to the SLA as annexure C (no copy of it appears in the record). Later written mandates given by Minister Zokwana to BXI in respect of other matters are dated 5 October 2017, 30 January 2018, 10 August 2018, 3 October 2018 and 3 December 2018. The applicant's counsel submitted that all of these mandates were unlawful, not only

because of the absence of fair procurement procedures, but also because it was the responsibility of the department's DG and accounting officer (Mr Mlengana), and not that of the minister as the department's political head, to incur departmental expenditure. In terms of ss 38(1)(*a*)(iii) and 38(1)(*b*) of the Finance Act, it was the DG's responsibility to ensure that the department had and maintained 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective', and it is he who was responsible for the 'effective, efficient, economical and transparent use of the resources of the department'.

[29] The applicant's counsel submitted, further, that although s 64 of the Finance Act might have entitled Minister Zokwana to give Mr Mlengana a written directive to incur expenditure by appointing BXI, there was no evidence that he had done so. To this I would add that what s 64 envisages is that the expenditure in question will, as a matter of form, be incurred by way of an act performed by the accounting officer, even though, in incurring such expenditure, the accounting officer is giving effect to a directive from the minister. What happened here was that Minister Zokwana simply gave written mandates directly to BXI, bypassing the DG.

[30] Although these submissions have force, the notice of motion does not seek the review and setting aside of mandates given by Minister Zokwana to BXI. The current minister has not been cited as a party. Accordingly, I cannot determine the validity of the mandates in the present proceedings.

Delay and mootness

[31] BXI alleged in its opposing papers that the review, insofar as it is directed at the SLA, was unduly delayed, although no submissions in support of this contention were made at the hearing. Since this is a legality review, the question is

whether there has been an unreasonable delay and, if so, whether the delay should be overlooked (*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) paras 48-62, where the principles governing this enquiry are set out).

[32] In terms of *Buffalo City*, the 'clock starts ticking' (for purposes of assessing whether a delay is unreasonable) when the organ of state becomes aware or could reasonably have acquired knowledge of the impugned act. For purposes of this enquiry, I treat Mr Mlengana, the DG, as the person whose knowledge is relevant. On his version, which has not been properly placed in issue, he became aware of the existence of the SLA towards the end of July 2018.

[33] The review application was launched just over a year later. Although this is quite a long delay, its reasonableness must be assessed in the light of the fact that on 15 August 2018, ie within a couple of weeks of his learning of the SLA, Mr Mlengana notified BXI that its services were terminated with immediate effect. A few days later this was modified after Minister Zokwana's intervention, but only in respect of the Bengis matter, in relation to which relatively little work remained to be done. DAFF, as represented by Mr Mlengana, was placed in a very awkward position by the fact that BXI had strong support from Minister Zokwana, who was at loggerheads with his DG, and who was insistent that a settlement be reached with BXI. Despite the fact that his position was undermined by the minister, Mr Mlengana, and Ms Nagiah, resisted payment to BXI unless and until they were satisfied that the department had received value for money. During the period of delay, BXI could not have thought that reliance on the SLA would be uncontested. The DG was only freed from Minister Zokwana's oversight when there was a 'changing of the guard' in late May 2019.

[34] In the circumstances, I do not consider that the delay was unreasonable. But if it was, I would overlook it for the following reasons. Apart from the considerations mentioned in the preceding paragraphs, there is the nature of the impugned action and the merits of the case, which are relevant factors in terms of *Buffalo City*. Here, a service provider was appointed in flagrant disregard of the constitutional requirements relating to fair procurement procedures. That is not in dispute. The party which benefited from the appointment was well aware that it had been appointed without proper process. BXI must also have been aware that it had no special attributes to justify its appointment, particularly not in the absence of a competitive process. The chronology, from the time the SLA was concluded in April 2017 until the launching of the review application in early August 2019 (including a nine-month period during which Mr Mlengana was under suspension at the instance of Minister Zokwana), has been exhaustively explained in the papers.

[35] BXI has alleged that the review of the SLA is moot because the Bengis matter, which was the cause for its conclusion, has already been finalised. The defence of mootness cannot succeed. BXI alleges that there are substantial amounts owing to it pursuant to the SLA, now read with the impugned settlement agreement.

Events leading up to the settlement agreement

[36] On 21 June 2017 Minister Zokwana placed Mr Mlengana on precautionary suspension pending investigation into allegations of gross misconduct. Disciplinary charges were preferred against him in July. Mr Mlengana’s view is that they were trumped up because he intended taking disciplinary action against Ms Ndudane.

[37] In November 2017 Mr Mlengana launched an application to have his suspension set aside on the basis that a minister does not have authority to suspend a DG. This application succeeded, and on 23 April 2018 Mr Mlengana returned to office. Disciplinary proceedings were not pressed.

[38] He says that during his absence on suspension, Ms Ndudane, assisted by Ms Nazima Parker (the Director: SCM and Acting Chief Director: Financial Management), approved payment of millions of rands to BXI in legal fees. Over the period 3 March 2017 to 12 June 2018 these totalled more than R24,5 million.

[39] On 14 June 2018 Mr Mlengana placed Ms Ndudane on precautionary suspension. The latter alleges that Mr Mlengana was taking revenge for his own suspension. Mr Mlengana says that shortly after Ms Ndudane's precautionary suspension he was confronted by Minister Zokwana who instructed him to withdraw the suspension. Mr Mlengana refused. According to Mr Mlengana, the minister by way of retaliation withdrew all ministerial delegations of authority in favour of the DG.

[40] Ms Ndudane brought legal proceedings to set aside her suspension. The minister intervened, effectively supporting Ms Ndudane. The minister engaged BXI to represent him. Although Mr Mlengana says that Ms Ndudane's application was dismissed with costs, she returned to work on 22 October 2018. Minister Zokwana then launched an application to interdict the DAFF from pursuing disciplinary proceedings against her, Ms Parker and a third official. BXI again represented the minister. The minister placed reliance on classified documentation and alleged that the charges against the officials were based on evidence protected under the Protected Disclosures Act 26 of 2000.

[41] BXI subsequently billed the DAFF around R1 million for representing Minister Zokwana in Ms Ndudane's application. The applicant also alleges that

the costs of the minister's application to halt the disciplinary proceedings, although not separately invoiced, have been 'buried' in other invoices raised against the DAFF, despite the fact that the costs were incurred by the minister, not the department, in litigation which the minister brought against the department as respondent.

[42] In the meanwhile, the then National Director of Public Prosecutions ('NDPP'), Mr Shaun Abrahams, had asked Minister Zokwana to compile a report dealing with alleged acts of undue influence, criminality and maladministration in the DAFF. The minister engaged BXI to produce the report. This document, referred to in the papers as the master report, was submitted to the NDPP on 7 June 2018. The report criticised Mr Mlengana. He has disputed the allegations against him, expressing his belief that the report was cobbled together at the minister's behest in order to discredit him. BXI's charges in respect of this mandate are among the fees for which it says the DAFF is liable.

[43] On 27 July 2018, with Ms Ndudane still on suspension, BXI wrote to the Acting Deputy Director-General, complaining that it was owed R6 381 650 in unpaid fees. On 8 August Ms Nagiah responded, requesting copies of all documents in litigation handled by BXI, copies of the mandates, and detailed bills of cost. On 13 August BXI sought clarity as to why these documents were being sought, as the DAFF had been the recipient of the services and was in possession of all the documents.

[44] According to the applicant, the answer to BXI's question is that Ms Nagiah, despite her position as the DAFF's chief in-house lawyer, had been bypassed in all of BXI's work, just as the SLA envisaged. Ms Ndudane was BXI's sole point of contact, yet the documents which Ms Nagiah requested could not be found in Ms Ndudane's office.

[45] Mr Mlengana wrote to BXI on 15 August 2018, notifying the firm that its appointment to provide legal services was being terminated with immediate effect. BXI was asked to furnish all files and documents in its possession. Failure to cooperate would leave the DAFF with no option but to withhold all monies due for payment to the firm. BXI's reaction, on 18 August, was to ask for a list of the files and documents which the DAFF was requesting. This was followed by another letter from BXI on 21 August to say that the firm would be consulting Minister Zokwana about the purported termination since their mandates had come from his office.

[46] On 20 August Mr Mlengana notified BXI as follows regarding the termination letter of 15 August (emphasis in the original):

> 'You are hereby informed that such termination does not affect the Bengis matter which you are still handling for the department. Therefore, you may continue to provide legal services in respect of [the] Bengis matter <u>only</u>.'

Mr Mlengana says that he wrote this letter following intervention by Minister Zokwana, who insisted that BXI's mandate in the Bengis case should not be terminated as settlement was imminent and the cheque due to the South African government had not yet been received. (The cheque in question, for $7 178 199, was issued in September 2018 and received by BXI at the end of January 2019.)

[47] BXI subsequently notified the DAFF that Minister Zokwana had confirmed that it should proceed with its mandates in general, not only in relation to the Bengis case, and it thus did not heed the termination letter of 15 August. BXI continued to demand payment of fees, threatening legal action. Its claims include fees running to many millions of rands for services rendered after 20 August 2018 in respect of matters additional to the Bengis case. BXI did not supply the documents requested by Ms Nagiah. BXI subsequently claimed that Ms Nagiah was 'highly implicated' by whistleblowers in leaking information and

that BXI was thus under instructions from the minister and law enforcement agencies not to supply her with documents. (Ms Nagiah has comprehensively refuted these slurs.)

[48] On 5 October 2018 Mr Mlengana wrote to Minister Zokwana regarding the latter's request that the DAFF engage private law firms. He set out what he saw as the advantages of using the State Attorney, saying that its performance rivalled that of private firms 'whose fees are exorbitant'. Where the State Attorney briefed counsel, they usually negotiated special rates. The Auditor-General ('AG') had made negative findings about the DAFF's use of private law firms. He said such use could not be justified, and he requested the minister to reconsider his instruction.

[49] Minister Zokwana seems not to have heeded this request. On the contrary, he issued a directive that the DAFF settle BXI's fees. When BXI sought Ms Ndudane's assistance in giving effect to this directive, Mr Mlengana on 13 February 2019 notified Ms Ndudane that, as the MLRF's accounting officer, he had asked the State Attorney to verify BXI's invoices. No payments would be made until this was done. On 15 February BXI, assisted by a letter of 18 February from Minister Zokwana, escalated the matter to National Treasury and to the Public Service Commission ('PSC'). In his letter, the minister said that National Treasury's intervention was needed to ensure that there was 'no systematic abuse of power' by Mr Mlengana as accounting officer. He said that the DAFF's Fisheries Branch, as the recipient of BXI's services, was satisfied with the work performed by BXI and had no reservations in paying its invoices. (One may infer that this was a reference to Ms Ndudane and Ms Parker.)

[50] The first meeting with National Treasury officials was held on 6 March 2019. The minister and Ms Ndudane were present but not Mr Mlengana. The latter did, however, attend further meetings on 19 and 20 March.

[51] On 24 March BXI wrote to the DAFF, apparently at the suggestion of the Acting Accountant-General, again setting out the amount allegedly due. This had now escalated to R25 million, of which more than R2 million was interest. BXI said that it had no objection to the verification of its invoices by a taxing master or the State Attorney, but wanted payment in the meanwhile, on the basis that it would refund any excess disclosed by verification.

The settlement agreement

[52] The upshot was a meeting held in Pretoria on 28 March 2018 under the auspices of National Treasury. Mr Mlengana said that he felt obliged by the minister's letter to National Treasury of 18 February to participate in the discussions and was put under pressure to accommodate BXI. Ms Ndudane, who was also at the meeting, assured the attendees that BXI had rendered the services set out in its invoices. A National Treasury official expressed the view that BXI should be paid R20 million because it was contrary to the Finance Act for invoices to remain unpaid for longer than 30 days.

[53] It is common cause that at this meeting the DAFF agreed to pay BXI R20 million immediately, any balance to be settled after validating the firm's invoices, such validation to be completed by 30 April. Ms Ndudane telephonically conveyed this to BXI, which accepted the terms. On 29 March Mr Mlengana issued a written instruction to Ms Parker that BXI was to be paid R20 million by the MLRF while the balance of its claim was being validated.

[54] According to the Acting Accountant-General, Mr Mlengana indicated at this meeting that he would approach the relevant National Treasury Unit 'for

condonation for the possible irregular expenditure that will arise from the payment of the BXI invoices, based on the appointment of BXI that was through a deviation process'. There is a factual dispute that this was discussed, but the dispute is legally irrelevant. BXI's appointment was not in fact 'through a deviation process', and, for reasons I have given, there was no legal basis on which Mr Mlengana could properly have applied to National Treasury to regularise BXI's appointment.

[55] Mr Mlengana says that he should not have succumbed to pressure and should not have accepted Ms Ndudane's assurances. On 8 April he wrote to Ms Parker to say that no payment should be made to BXI without forwarding the invoices to him for approval. However, BXI appears to have come into possession of Mr Mlengana's directive to Ms Parker, because on 10 April the firm wrote to Mr Mlengana 'reiterating' its acceptance of the settlement reached on 28 March as reflected in the DG's directive of 29 March. This letter ended:

'7. BXI and the relevant authority [ie Ms Ndudane] will attend to the execution of the settlement agreement and to making same a court order.

8. The above measure is taken in order to protect BXI's commercial interests and to avoid further prejudicial exposure as a result of delayed payments by the Department.'

[56] On 11 April the DAFF's Chief Director: Financial Management addressed a memorandum to Mr Mlengana, providing feedback on its assessment of BXI's invoices. The Chief Director stated that SCM processes had not been followed in BXI's engagement. If BXI were paid the amount of R20 million as per the DG's directive of 29 March, such expenditure would have to be declared irregular. Any condonation for irregular expenditure would have to be obtained from National Treasury.

[57] Mr Mlengana says that on the same day he sent this memorandum to Ms Ndudane. On 16 April she responded to the DG with a lengthy narration of BXI's

engagement. Absent from this letter was any indication that BXI had been appointed pursuant to a competitive bidding process or a valid deviation. She said that BXI's appointments emanated from the DAFF's head office through the minister and the DG, and deviations should have been processed through head office. National Treasury, she said, had knowledge of the settlement with BXI.

[58] In fact, BXI had not received mandates from the DG. Ms Ndudane's letter does not disclose circumstances which would have justified a departure from SCM processes. There is also no evidence that National Treasury knew that BXI had not been lawfully appointed or applied its mind to whether there were exceptional circumstances justifying a deviation.

[59] Although Ms Ndudane had on 11 April 2019 received the memorandum from the Chief Director: Financial Management, on 12 April she signed the impugned settlement agreement between BXI and the DAFF, her signature being witnessed by Ms Parker. Clause 7 purported to record an agreement between the parties that BXI and the 'Relevant Authority' (defined as meaning Ms Ndudane) would attend to the execution of the settlement agreement and making same a consent order. In clause 8 the DAFF acknowledged that R20 million was immediately due and payable to BXI. If the DAFF failed to validate the balance of BXI's invoices by 30 April, BXI would issue a new statement and its remaining invoices for immediate payment. Clause 10 provided that, upon signature, BXI would approach the WCHC on an unopposed basis to have the settlement agreement made a consent order. The DAFF was to be liable for the costs of preparing the agreement.

Attacks on the settlement agreement

Ms Ndudane's lack of authority

[60] The first challenge to the settlement agreement is that Ms Ndudane was not authorised to conclude it. This challenge has several components: (a) The signing of a contract of this kind did not fall within the scope of Ms Ndudane's delegated authority and she was not given specific authority to sign it. (b) To the extent that the oral agreement of 28 March gave rise to a binding agreement, it was no part of that agreement that a written settlement would be concluded. (c) The written agreement contained terms which were not agreed at the meeting of 28 March or approved by the DG.

[61] As to (a), there is no evidence refuting the applicant's version regarding Ms Ndudane's lack of authority. Even if the SLA were valid, her status as the 'Relevant Authority' in terms of the SLA did not authorise her to sign the settlement agreement. The settlement agreement was not the resolution of a dispute as contemplated in clause 14 of the SLA, and in any event Ms Ndudane was not purporting to act in terms of that clause. If she thought she had authority, it was because of the meeting of 28 March at which Mr Mlengana approved the settlement. Any belief to this effect, however, would have been dispelled by Mr Mlengana's memorandum to her of 8 April 2019 and by the memorandum of 11 April 2019 from the Chief Director: Financial Management.

[62] In her affidavit in the present proceedings, Ms Ndudane says that before signing the settlement agreement she was instructed by Mr Mlengana on several occasions 'to resolve and negotiate the issue of the non-payment of invoices for legal services rendered by [BXI]'. She also says that after she signed the settlement agreement, Mr Mlengana continued to issue instructions verbally and in writing. Although Ms Ndudane said that she had voice recordings of the verbal instructions, she did not give the dates or provide transcripts thereof. Her version

does not tally with Mr Mlengana's memorandum to her of 8 April 2019 or with the fact that on 11 April 2019 he forwarded to her the memorandum from the Chief Director: Financial Management. But most crucially, she stops short of claiming that Mr Mlengana authorised her to negotiate and conclude a written settlement agreement or to consent to having such an agreement made an order of court.

[63] As to (b), there is no evidence that the officials who attended the meeting of 28 March agreed that a written settlement would be prepared or that the DAFF would be responsible for the cost of preparing it. Mr Mlengana's instruction to Ms Parker of 29 March did not foreshadow a written settlement contract. The high watermark of BXI's case is that the concluding paragraphs of its letter to Mr Mlengana of 10 April said that BXI and Ms Ndudane would attend to executing the settlement agreement. However, this was a unilateral statement, not an invitation to approve a proposal for the conclusion of a written settlement agreement. By this stage Mr Mlengana had already instructed Ms Ndudane that no payments should be made to BXI without his approval, and the day after BXI's letter he received advice from his Chief Director: Financial Management that payment would constitute irregular expenditure.

[64] It is noteworthy that the draft settlement agreement was not submitted to the DAFF's principal in-house lawyers, Ms Nagiah and Ms L Tsegari (the former having responsibility for the DAFF's legal administration as a whole, the latter being the Senior Legal Administration Officer in the Fisheries sub-directorate).

[65] As to (c), the written settlement agreement undoubtedly contains terms which were not discussed at the meeting of 28 March or approved by Mr Mlengana. First, the oral agreement of 28 March was that the payment of R20 million would be made by the MLRF, not by the DAFF. Ms Ndudane's sphere of

responsibility was confined to the department's Fisheries Branch, and BXI's services were solely in matters emanating from the Fisheries Branch. She could not conceivably have had authority to bind the department in general. This deviation from the oral agreement is material in view of the way BXI sought to levy execution. The width of the settlement agreement in this respect may be explicable by the fact that Ms Ndudane knew that there were insufficient funds in the MLRF to meet an immediate payment of R20 million.

[66] Second, the agreement stated that the verification would apply to invoices for amounts exceeding the initial payment of R20 million. The discussion in Pretoria, however, was that all of BXI's invoices would be verified, hence the possibility of BXI having to refund money to the DAFF. Third, there was no discussion at the Pretoria meeting that the settlement would be made an order of court. And fourth, there was no discussion that if the DAFF breached the agreement it would be liable to compensate BXI 'for any direct or indirect losses as caused by such breach' (which is what clause 11.3 stipulated).

[67] In argument BXI's counsel said that the case raised issues of ostensible authority and estoppel in regard to Ms Ndudane's authority. I was not referred to any passages in the opposing affidavits where the question of ostensible authority or estoppel was pleaded. The onus rested on BXI to allege the representations made by the DAFF which created the reasonable impression in BXI's mind that Ms Ndudane was authorised to agree to all the matters she did in the signed settlement agreement. In his supplementary answering affidavit of 11 November 2019 Mr Xulu said that the onus rested on the DAFF to prove that Ms Ndudane lacked authority. That is a reference to actual authority. Without necessarily endorsing Mr Xulu's submission as to the onus, I have found that the DAFF has discharged the onus. In the same part of his affidavit, Mr Xulu says that clause 13 of the settlement agreement contained a warranty that Ms Ndudane was

authorised to execute and perform the agreement. Without necessarily endorsing Mr Xulu's submission as to the ambit of clause 13, I must note that the purported agent's own representation of authority is not evidence of actual authority or of a relevant representation for purposes of ostensible authority or estoppel (*NBS Bank Ltd v Cape Produce Co (Pty) Ltd & others* 2002 (1) SA 396 (SCA) paras 25-26; *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) para 13).

[68] Ms Ndudane's purported conclusion of the settlement agreement was thus invalid. Officials who exercise public power are constrained by the principle, fundamental to our constitutional order and the rule of law, that they may exercise only those powers and perform only those functions which are conferred upon them by law. In this respect the common law doctrine of *ultra vires* is now underpinned by the constitutional doctrine of legality (*Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 173). On matters with financial implications, officials are obliged to act in accordance with the prevailing system of delegations (ss 45(d) read with s 44 of the Finance Act).

Invalidity of BXI's appointment

[69] The second challenge flows from the attack on BXI's appointment. If the SLA was invalid, this could not be regularised by a settlement agreement which effectively acknowledged that BXI was owed money pursuant to the SLA (cf *Buffalo City supra*, paras 33 and 97-98). Since I am not able in these proceedings to rule on the validity of the mandates which Minister Zokwana gave to BXI, I cannot conclude that there were no valid mandates which could have been the subject of a settlement agreement. Although the settlement agreement records that BXI 'has a valid contract in place' with the DAFF, there is no express reference to the SLA. In the circumstances, this ground of attack cannot be upheld.

Oral settlement agreement?

[70] What I have said thus far applies to the written settlement agreement which Ms Ndudane purported to execute. The applicant, it seems, does not accept that the written settlement agreement was preceded by an oral settlement agreement. In their heads of argument the applicant's counsel submit that no settlement offer was made to BXI by Mr Mlengana in his capacity as an accounting officer; Ms Ndudane simply relayed to BXI what had been discussed. BXI, on the other hand, adopts the position that it accepted terms proposed to it.

[71] The notice of motion does not seek an order reviewing and setting aside any settlement agreement which might have been concluded orally or by way of correspondence. Accordingly, I refrain from making any finding as to the existence or validity of any such agreement. My judgment is confined to the written settlement agreement signed by Ms Ndudane.

The Steyn J order

[72] On the same day as the settlement agreement was signed, BXI issued an application to have the settlement agreement made an order of court. Mr Xulu's founding affidavit repeated the statement contained in the settlement agreement that the parties had agreed that BXI and Ms Ndudane would attend to executing a settlement agreement and having it made an order of court. Ms Ndudane made a confirmatory affidavit.

[73] The application came before Goliath DJP, who requested supplementary evidence to satisfy herself that the settlement had been duly concluded. She required service on the National Treasury, the State Attorney, the NDPP, the minister and the DG. Over the period April and May 2019 two affidavits by the Acting Accountant-General in the National Treasury were filed as well as a supplementary affidavit by Ms Ndudane.

[74] Mr Mlengana says that he learnt of the application on 17 April 2019.[1] His explanation for not reacting to it is that he believed the relief sought was unattainable because Ms Ndudane lacked authority to conclude the settlement agreement. He also knew that there was no money in the MLRF bank account. He did not think BXI, which had been advised of this, would persist with the application as it served no purpose. Ms Ndudane's supplementary affidavit in support of the application was not brought to his attention. If it had been, 'it may have been the impetus spurring earlier action'.

[75] It is difficult to reconcile this explanation with a letter he wrote to BXI on 26 April 2019, in which he advised that his office had issued an instruction to make an immediate payment of R20 million and undertook that any remaining amount would be paid upon verification. He also noted BXI's undertaking, in its letter of 24 March 2019, to refund the DAFF if the verification disclosed that BXI had been overpaid. Mr Mlengana claims that he wrote this letter because he was under the impression 'that the matter could be resolved' and that his undertaking 'was sufficient to have averted court processes'.[2]

[76] On 29 April 2019 BXI wrote to Ms Parker to complain that the R20 million had not been paid. She replied that she had received conflicting instructions. BXI pursued this with Mr Mlengana, stating that his conduct was against the spirit of the settlement agreement. Payment was still not forthcoming, and on 27 May BXI again wrote to Mr Mlengana, stating that the DAFF's failure to make payment violated the Finance Act and various National Treasury instructions.

[77] In the meanwhile, BXI had complained to the Judge-President that Goliath DJP's requirements went beyond what was reasonable. Goliath DJP notified BXI

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[1] Para 10 record 1114.
[2] Para 11 record 1114.

on 20 May that in view of this complaint she would no longer be dealing with the case, which BXI could enrol in Third Division in the normal course.

[78] On 6 June 2019 Steyn J granted the order. On the same day, BXI wrote to Mr Mlengana attaching a copy of the order and a certificate of balance for R29 426 054. The DAFF was warned that if payment in full was not received by close of business, further legal action would follow.

[79] Mr Mlengana was at the airport, about to depart on holiday. He telephoned Mr Xulu. The latter evidently recorded the conversation, because belatedly a transcript was attached to his affidavit of 2 December 2019. Mr Mlengana told Mr Xulu that although the two of them had never met, he had got the impression that Mr Xulu was Minister Zokwana's fighting arm. He did not think that they should be suing each other. BXI should be patient because he had made a commitment to pay and would pay. He had given his staff instructions to find the money:

> '[W]e have all agreed that you must be paid R20 million based on those conditions and there is no other person going to stop that. We will do that because we all agreed, what I request you, because they have been processing their things and now I've got this. Withdraw that writ or prescription . . . because we've got to defend that and create a lot of debate. If the money is not paid by the [MLRF] it doesn't matter whether you want to . . . I will just say I don't have money there. . . And if you agree with me therefore withdraw all these legal stuff you are trying to do and take my word.'

Mr Mlengana asked Mr Xulu whether he accepted his 'olive branch'. Mr Xulu said yes.

[80] On 11 June BXI caused a writ of execution to be issued but it was not immediately served. On Friday 14 June, the day Mr Mlengana returned from holiday, Mr Xulu contacted him but was asked to wait until Monday. When Mr Mlengana did not revert, BXI caused the writ to be executed.

Grounds for rescinding the Steyn J order

Invalidity of SLA and settlement agreement

[81] The applicant seeks the rescission of Steyn J's order on several grounds. The first is that if the settlement agreement was invalid, as I have found to be, it could not validly be made an order of court. Related to this proposition, and perhaps more to the point, is that Ms Ndudane did not have authority to represent the DAFF in confirming to the court that the settlement agreement could be made an order. If a court is misled into believing that both parties have consented to the granting of a judgment, the judgment must be set aside (*Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd & others* [2017] ZASCA 54; 2017 (5) SA 508 (SCA) para 17).

[82] BXI's counsel submitted that the DAFF had acquiesced in Steyn J's order. Reference was made to Mr Mlengana's assurance to Mr Xulu that the sum of R20 million would be paid. It seems to me that the only such assurance after the making of the order was during the telephone conversation of 6 June 2019. Mr Mlengana was at the airport, about to leave the country on holiday. Whether he had actually seen the order and settlement agreement by that time is unclear. The transcript certainly does not reflect acquiescence in the signed settlement agreement or in the court order. On the contrary, he said that Mr Xulu should 'withdraw that writ or prescription or whatever … because we've got to defend that and create a lot of debate'.

[83] The DAFF was not represented in court when the consent order was taken. Ms Ndudane did not have authority to represent the DAFF in those proceedings. Had Steyn J been aware of the facts mentioned in the preceding paragraph, she would not have granted the order. The order may thus be rescinded in terms of rule 42(1)(*a*).

Absence of lis

[84] The applicant contends that Steyn J was in any event not entitled to make the settlement agreement an order because there was no *lis* between the parties. The applicant's counsel referred, in this regard, to para 25 of *Eke v Parson* 2016 (3) SA 37 (CC) where Madlanga J, writing for a unanimous court, said the following (footnotes omitted):

> 'This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, "relate directly or indirectly to an issue or *lis* between the parties". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court.'

See also *Buffalo City*, *supra*, para 27, where this statement of the law was repeated.

[85] Reference was made in *Eke* to the decision in *Hodd v Hodd; D'Aubrey v D'Aubrey* 1942 NPD 198, where Selke J said that the court is 'not a mere registry of documents or agreements' (at 204). Selke J in turn cited the refusal by De Villiers CJ in *Ex parte Robertson* (1903) 13 CTR 1003 to make an agreement between the applicant and a municipality an order of court in circumstances where there was no pending litigation.

[86] Now it is so that in *Eke* and *Buffalo City* the court was not dealing with settlement agreements concluded outside of the context of pending litigation, so that strictly speaking the passages relied upon by the applicant are *obiter*. Nevertheless, it would take very powerful counter-arguments to persuade me to depart from what was stated in these cases.

[87] BXI's counsel said that the requirements in *Eke* would be satisfied if, as here, there was an 'issue' between the parties which could have resulted in

litigation if the matter were not settled. Although the expression 'issue or *lis*' appears in the passage I have quoted from *Eke*, Madlanga J was at that point quoting from para 15 of the decision of Van Zyl ADJP in *PL v YL* 2013 (6) SA 28 (ECG). The relevant sentence in para 15 of the latter judgment says that the settlement agreement 'must relate directly or indirectly to an issue or *lis* between the parties <u>that is properly before the court</u> . . .' (my underlining). In *Eke* Madlanga J made the same point in his own words by saying that parties 'contracting outside of the context of litigation' may not approach a court and ask that their agreement be made an order.

[88] Furthermore, and substantially for the reasons given by S Budlender AJ in *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited & another* [2019] ZAGPJHC 72; 2019 (4) SA 541 (GJ), I consider that para 25 in *Eke* correctly reflects the law and that I should follow it. *Avnet*, like the present case, was one where there was a dispute between the parties which was settled without the institution of proceedings.

[89] This challenge to Steyn J's order likewise falls within the scope of rule 42(1)(*a*) since the court lacked legal competence to make the order (*Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & others* 1996 (4) SA 411 (C) at 417H).

Execution and subsequent events

[90] The writ issued on 11 June ('the first writ') instructed the sheriff to attach funds in the 'DAFF Main Account', account 010-149-449 held with Standard Bank in Pretoria, with a view to realising R20 million plus interest as from 6 June 2019. The first writ was executed on 19 June, the attached sum being R2 588 875,90, which was presumably the full balance in the account at that time. On 2 July Standard Bank paid this amount into the sheriff's account, who, after

deducting his costs, transferred R2 585 374,90 to BXI's trust account on 5 July. On the same day BXI transferred the money from its trust account to its business account, and by the end of the day most of it had been disbursed from the business account.

[91] A further writ was issued on 11 July instructing the sheriff to attach funds in DAFF account 011-252-871 held with Standard Bank in Pretoria, with a view to realising R17 411 125 plus interest from 6 June 2019. This was the balance of R20 million (plus interest) after deducting the amount attached pursuant to the first writ. BXI says that this was a reissuing of the first writ, but for convenience I shall call it the second writ. The DAFF account which was the subject of the second writ is an account known as the 'DAFF Animal Identification Account'.

[92] The second writ was executed on 17 July, and R17 624 870 was attached (from which one can infer that the Animal Identification Account had a credit balance exceeding the amount of the writ). On 1 August Standard Bank paid the attached money (which, with interest from the date of attachment, totalled R17 660 768) to the sheriff, who, after deducting his costs, transferred R17 657 098 to BXI's trust account the next day. Over the period 2-5 August substantially the whole amount was transferred out of the trust account, most of it to the business account. By 6 August there was only around R121 000 standing to the credit of BXI's business account.

[93] A further writ was issued on 13 July ('the third writ') instructing the sheriff to attach funds in the 'DAFF Marketing Administration – Trade Incentives Account', account 013-024-175 held with Standard Bank in Pretoria, with a view to realising R11 468 492 plus interest from 6 June 2019, the latter amount being described in the writ as the 'settlement payment in accordance with the certificate of balance issued on 1 July 2019'. The third writ was executed on 17 July 2019. It

appears that the bank account in question had a credit balance exceeding the amount of the writ because the full amount was attached. However, the attached money has not been transferred to the sheriff or to BXI.

[94] Before dealing with the attacks on the writs and notices of attachment, it is convenient to set out further developments up to 13 December 2019.

[95] None of the three accounts in which monies were attached were accounts of the MLRF. Mr Mlengana says that he learnt of the attachments on Thursday 25 July 2019. On Monday 29 July he consulted with the applicant's legal team. On Wednesday 31 July the State Attorney, in the person of Mr N Erasmus, wrote to BXI alleging that the process the firm had followed was unlawful, *inter alia* because of non-compliance with the State Liability Act 20 of 1957. The State Attorney said that there was a dispute between BXI and the DAFF in relation to payment for services rendered. The State Attorney proposed that money already received by BXI be retained in its trust account pending resolution of the dispute and that BXI undertake not to levy further execution. The State Attorney said that it had been instructed to expedite the verification of BXI's claims, and requested supporting documents from BXI. Later that day Mr Xulu replied, asking the basis in law for the undertaking sought.

[96] On the next day, Thursday 1 August, the State Attorney's Mr Leon Manuel met with Mr Xulu. The latter told Mr Manuel that the money attached pursuant to the second writ had not yet been paid to BXI. Mr Manuel reiterated the contents of the State Attorney's letter of 31 July. Mr Xulu refused to give the requested undertaking. At 16:35 on that day Mr Manuel wrote to BXI, stating that the undertaking was requested *inter alia* on the basis that BXI had failed to comply with the provisions of ss 3(4) – 3(8) of the State Liability Act.

[97] On the morning of Friday 2 August Mr Manuel tried without success to contact Mr Xulu to learn whether BXI would give the undertaking. At 14:52 the sheriff paid R17 657 098 to BXI's trust account pursuant to the second writ. At 15:13 Mr Manuel sent an urgent email to BXI. Mr Xulu's assistant advised Mr Manuel that Mr Xulu was consulting out of office but that the correspondence would be brought to his urgent attention. At 16:08 Mr Manuel advised BXI that he had to assume, in the absence of a response, that the firm refused to provide an undertaking.

[98] The present application was launched on the morning of Monday 5 August for hearing at 10:00 on 6 August. It now transpires that by the time the matter came before me in the urgent court, most of the money attached pursuant to the second writ had been disbursed. By agreement the application was postponed to 8 August with an abridged timetable and suitable undertakings by BXI.

[99] By 8 August answering and replying papers had been filed in relation to part A of the application. Among BXI's papers was an affidavit attaching extracts from its trust and business accounts. Following debate in court, I stood the matter down so that BXI could furnish further information about the entries appearing in the extracts, with a view to ascertaining how much if any of the attached funds remained under BXI's control. When proceedings resumed, BXI's counsel handed up an unsworn schedule of explanations. After further debate I postponed the application to 19 August on the basis that BXI would, by close of 8 August, furnish an affidavit confirming the information contained in the schedule. In the light of the information which had emerged, my order also prohibited BXI from causing any movement of funds held in its foreign exchange suspense account with FNB or in the account of a related entity called Setlacorp (Pty) Ltd ('Setlacorp').

[100] Further affidavits were filed by BXI and the applicant in the ensuing days. When the matter served before me on 19 August, I requested the applicant's counsel to clarify what relief was being sought at that stage. Although the applicant's counsel appeared to think that part B of the application arose for adjudication (including rescission of Steyn J's order), this was by no means clear to me. It was also not clear to me that part B itself contained a proper prayer for rescission. If only part A stood to be adjudicated, little if anything needed to be added to the existing orders in order to provide interim protection.

[101] As a result of the ensuing debate (in which BXI's counsel said that he had not understood part B to be before me), the matter stood down. Counsel thereafter approached me in chambers to say that, because of a genuine misunderstanding between counsel, they would like to postpone the application so that part B could be determined. They would present me with a draft order in due course. On 20 August the applicant delivered a notice of application which formally claimed rescission of Steyn J's order. On 21 August an order was made by agreement postponing the application to 29 November 2019. This order contained a timetable for further papers pertaining to the part B relief and rescission. BXI was to furnish documents to the State Attorney so that the latter could verify BXI's invoices, the targeted date for finalisation of verification being 31 October.

[102] The applicant filed supplementary papers on 14 October 2019. Apart from supplementing its case in respect of the matters to be argued on 29 November, the applicant filed notices of application to join the new department (the DEA) as a second applicant and to join Mr Xulu in his personal capacity as the fifth respondent. The Acting DG of the DEA, Mr M Abader, made an affidavit supporting and in some respects amplifying the DAFF's allegations.

[103] The verification process was not completed by 31 October. In accordance with the agreed order of 21 August, the State Attorney filed a preliminary report on 1 November 2019 to explain the delay. In essence, the State Attorney says that BXI's documents were not as organised as BXI had represented when the agreed order was made; that documents had been copied and delivered in dribs and drabs; that there were still many invoiced items for which no supporting documents had been supplied; and that unless BXI could supply the missing documents, verification would have to proceed in the absence thereof.

[104] BXI filed its supplementary answering papers on 11 November 2019. Minister Zokwana's affidavit was among these papers. Also included was an affidavit by a cost consultant, Ms Susan Adonis, to which she attached bills of costs she had prepared in the 11 matters in which BXI had rendered service to the DAFF. The applicant's supplementary replying papers were filed on 18 November.

[105] It then emerged that there was a further misunderstanding between the parties. BXI's counsel had mislaid, and then forgotten about, the rescission application. This oversight was exacerbated when a query to the State Attorney elicited an answer that no further rescission application had been delivered – Mr Manuel himself had forgotten about it. Some days before the hearing, counsel approached me in this regard. BXI's counsel said that his client would not be in a position to file further papers on the question of rescission in time for the matter to proceed on 29 November. Eventually, and by agreement, an order was made postponing the application to 13 December with a further timetable for a final set of affidavits.

Grounds of attack on the writs and notices of attachment

Rescission of Steyn J's order

[106] If Steyn J's order is rescinded on one or more of the grounds I have mentioned, it would follow that the writs and notices of attachment should for this reason be set aside.

Non-compliance with State Liability Act

[107] However, there are grounds of attack which stand independently of the rescission of Steyn J's order. One of these is non-compliance with the State Liability Act. In terms of s 3(1), and subject to the further provisions of s 3 of that Act, no execution or attachment for satisfaction of a final court order sounding in money may be issued against a defendant or respondent in any action or legal proceedings against the State or against any property of the State.

[108] The requirements set out in s 3, and the non-compliance which characterised the present case, are as follows:

(a) Section 3(2): The State Attorney or attorney of record for the relevant department must, within seven days after the court order has become final, in writing inform the executive authority (here, Minister Creecy) and accounting officer (here, Mr Mlengana), and the relevant treasury, of the order. (Because of the way in which the consent order was obtained, the DAFF was not represented by an attorney of record and no such notification occurred. BXI notified Mr Mlengana and National Treasury of the order on 6 June and 12 June 2019 respectively. On 24 June 2019, by which time the first writ had been issued and executed, BXI notified Minister Creecy of the order.)

(b) Section 3(3): A final order must be satisfied within 30 days of its becoming final or within such other period as the creditor and accounting officer may agree. The payment must be charged against the appropriated budget of the department. (Here, the 30 days expired on 5 July 2019 without payment having been made. By that time the first writ had been issued and executed, and BXI had received the proceeds of the attachment.)

(c) Section 3(4): If the final order is not satisfied as aforesaid, the creditor may serve the order on the executive authority, accounting officer, the department's attorney and the relevant treasury, such service to be in accordance with the rules of court. (Here, such service could have been effected as from 6 July 2019. No such service in accordance with the rules of court was effected.)

(d) Section 3(5): The relevant treasury must, within 14 days of service as aforesaid, ensure that the judgment is satisfied or that acceptable arrangements are made to have it satisfied if there are inadequate funds available in the vote of the relevant department. (Because no service was effected in terms of s 3(4), this obligation of the National Treasury was not triggered.)

(e) Section 3(6): If the relevant treasury fails to act as required by s 3(5), the registrar or clerk of the court must, upon written request of the judgment creditor, issue a writ or warrant of execution in terms of the applicable rules of court against movable property owned by the State and used by the department concerned. (Because anterior requirements were not satisfied, BXI was not entitled to request the registrar to issue writs of execution. There is also no evidence that BXI lodged written requests that writs be issued. Furthermore, if the entity liable to BXI was the MLRF, only its movable property could be attached.)

(f) Section 3(7): The sheriff must execute the writ and may attach, but must not remove, movable property owned by the State and used by the department concerned, sufficient to satisfy the judgment debt. The sheriff and the accounting officer may in writing agree on particular movable property that may not be attached because its removal would severely disrupt service delivery, threaten life or put the security of the public at risk. (Money in bank accounts constitutes incorporeal movable property. Because, however, anterior requirements were satisfied, the sheriff was not entitled to execute and attach money in the DAFF's bank accounts. And because of such non-compliance, the sheriff and Mr Mlengana as the accounting officer did not have occasion to reach agreement as to whether any movable property should be excluded from attachment. The applicant says that the attachments in the present case significantly impeded the DAFF's operations.)

(g) Section 3(8): If, following attachment as aforesaid, 30 days expire without payment, the sheriff may remove and sell the attached movable property in execution of the judgment debt. (Because anterior requirements were not satisfied, the sheriff was not entitled to remove the DAFF's money from its accounts and pay it to BXI. If anterior requirements had been satisfied, money could not – having regard to the various time periods specified in the section – have been removed from DAFF's account and paid to BXI until around 19 August 2019 at the earliest.)

[109] BXI's counsel submitted that there had been substantial compliance with the requirements of the State Liability Act but understandably he did not press the argument. None of the requirements of the Act were heeded.

The third writ

[110] There is an independent attack on the third writ. That writ was issued in order to claim the 'settlement payment' contemplated in clause 8.4 of the settlement agreement. However, the amount, if any, to which BXI was entitled in terms of that clause did not appear from the settlement agreement. Although BXI apparently issued a certificate of balance on 1 July 2019, the settlement agreement did not provide for the settlement payment to be quantified in this way. Although clause 8.5 stated that BXI would issue the DAFF 'with a new statement and the remaining invoices for the immediate payment', this falls short of an agreement that the DAFF would be bound by such statement. There was thus, in relation to the settlement payment, no order which could be executed. In the absence of

agreement with the DAFF, further proceedings were needed to quantify the obligation (cf *De Crespigny v De Crespigny* 1959 (1) SA 149 (N) at 150F-152B; *Du Preez v Du Preez* 1977 (2) SA 400 (C) at 402H-403C); *Le Roux v Yskor Landgoed (Edms) Bpk & andere* 1984 (4) SA 252 (T) at 257F-G).

Relief against BXI

[111] The SLA and settlement agreement will be declared invalid, reviewed and set aside. Steyn J's order of 6 June 2019 will be rescinded. The writs and notices of attachment will be declared invalid, reviewed and set aside.

[112] In relation to the review of the SLA, BXI's counsel submitted that if the review succeeded I should follow the same course as the Constitutional Court did in *Gijima supra* and *Buffalo City supra* in order to preserve accrued rights, where the contracts in question were declared invalid but not set aside. Whether this should be done depends on what is just and equitable within the meaning of s 172(1)(*b*) of the Constitution. In my view, the facts of the present matter are very different from those in the cases cited.

[113] In *Gijima* the applicant, a public body (referred to in the judgment as Sita) had appointed Gijima as a service provider. The contract was extended on several occasions. From the outset Gijima was anxious to be assured that Sita had complied properly with its procurement processes. Gijima not only received an assurance (false, in the event); a warranty to this effect was inserted in the contract. Only when a payment dispute arose a year and a half later did Sita take the point that the contract was unlawful for non-compliance with s 217 of the Constitution.

[114] In *Buffalo City* the same senior municipal official who had in September 2014 granted what turned out to be an unlawful contract extension (a certain Mr Pillay) did a *volte-face* in August 2015 by notifying the contractor that the

contract was unlawful because it had been concluded without a lawful procurement process. There was no explanation for Mr Pillay's conduct. Even after August 2015 the municipality was content to allow the contractor to continue and complete the work (the building of low-cost houses).

[115] There is no evidence in the present case that BXI showed the slightest concern as to whether or not its appointment complied with proper procurement processes. The SLA was carefully designed to bypass the DG and the DAFF's senior legal officials. On the evidence, Mr Mlengana did not knowingly conclude the SLA and then make a *volte-face*. Although he did not, upon becoming aware of the SLA, immediately contend that it was invalid, he did endeavour to put an end to the rendering of services by BXI. Mr Mlengana was not the person who was overseeing the rendering of legal services by BXI. Indeed, so faithfully were the terms of the SLA adhered to that the DAFF could find no documents relating to the work done by the firm, not even in Ms Ndudane's office.

[116] This does not mean that BXI will necessarily be denied any form of recovery for services rendered. Although Minister Zokwana's mandates are vulnerable to the very same attack as the impugned SLA, the validity of those mandates is not before me. Even if those mandates are in due course declared invalid and set aside, BXI might have a claim for unjustified enrichment. BXI might also, in terms of the law of unjustified enrichment, have one or more valid defences to any attempt by the DAFF to recover money already paid.

[117] What would be expected to follow from the orders summarised above is that BXI must refund to the applicant the amount of R20 242 472,90, being the amounts transferred into BXI's trust account by the sheriff pursuant to the first and second writs. BXI's counsel submitted, however, that such an order would not be just and equitable in terms of s 172(1)(*b*) of the Constitution. An order for

repayment would ruin BXI, which (so it was submitted) has undoubtedly done work for the DAFF, for which it is entitled to remuneration. Any order for repayment should be suspended pending finalisation of the applicant's verification exercise of BXI's invoices and files.

[118] If BXI's only problem were non-compliance with the State Liability Act, I might have been persuaded to defer repayment so as to give BXI opportunity to follow a proper process of execution. However, I have found that Steyn J's order should be rescinded and that the settlement agreement, which formed the basis of that order, should be reviewed and set aside. I will also be setting aside the SLA. There is little prospect of BXI obtaining an executable judgment against the applicant in the near future.

[119] Another consideration which weighs with me is that BXI is very much the author of its own misfortune. The greater part of the amount it will be obliged to refund – R17 657 098 – is money with which BXI parted after it had been notified that execution was invalid due to non-compliance with the State Liability Act. With this knowledge, BXI disbursed the proceeds of execution with almost indecent haste. (I deal with this more fully below in relation to Mr Xulu's personal position.) Even in respect of the earlier amount of R2 585 374,90, BXI – as a firm of attorneys working for the State – could reasonably have been expected to be familiar with the provisions of the State Liability Act and thus of the defect in the execution it had levied.

[120] As against these considerations, there is the fact that the mandates given to BXI by Minister Zokwana, although contested by the applicant, are not the subject of any review relief claimed in the present proceedings. For the time being, therefore, those mandates stand, even though their legal frailties may be self-evident. There is the further fact that at the meeting of 28 March 2019 Mr

Mlengana – even if he succumbed to pressure – agreed that BXI would be paid R20 million pending verification of its invoices. He subsequently held out to Mr Xulu that this money would be paid, including in his letter of 26 April 2019 and during the recorded telephone conversation of 6 June 2019. Whether there was an oral settlement agreement, and if so whether such settlement is valid, are not issues which have been presented to me for decision, but there is certainly a factual foundation for BXI to assert the existence of a settlement agreement independent of the written document signed by Ms Ndudane.

[121] Also relevant is that on 28 March 2019 the DG was willing for there to be a process of verification. This was subsequently repeated in the order which I made by agreement on 21 August 2019. This reflects that the applicant is open to the possibility that BXI has rendered services of value to the department for which it might be fair to remunerate the firm.

[122] I must also record that the conduct of the DG, Mr Mlengana, has not been above reproach. Of course, the party seeking review relief is the DAFF, not Mr Mlengana, and the legal merits of the review may not depend to any great extent on what he did or failed to do. However, in considering the relief that would be just and equitable, I take into account that the DG has vacillated on the question of payment to BXI. I would also have expected a DG, acting in the best interests of his department, to react promptly and decisively when BXI's letter of 10 April 2019 foreshadowed a written settlement agreement and the making of such agreement an order of court. Likewise, it was totally unacceptable for Mr Mlengana, when on 17 April 2019 he learnt of the pending application to have the settlement made an order of court, to sit on his hands in the belief that the court would not grant the order.

[123] As a matter of practical reality, it is unlikely that BXI will be able to refund the full amount immediately. To order immediate repayment would be a *brutum fulmen*. Balancing the various factors mentioned above, I think it would be just and equitable to give BXI a generous period of grace, sufficient to allow the applicant to complete the process of verification.

[124] It does not follow that the applicant will be obliged to pay BXI for all work duly verified. The usual source for such an obligation would be a contractual mandate, and the question whether BXI has ever had valid contractual mandates is disputed. The applicant may yet apply to have Minister Zokwana's mandates set aside. The applicant has also foreshadowed the possibility that it might draw a distinction between work done before and after the termination letter of 15 August 2018. My order will simply require the applicant to report to BXI the result of its verification and to state whether it tenders to pay BXI anything more than it has already paid. If there is such a tender, this could be set off against BXI's liability.

[125] If the applicant does not tender to pay anything to BXI following such verification, BXI will have to refund the full amount and pursue any claims it believes it has against the applicant by way of separate proceedings.

[126] In a notice of application dated 26 November 2019, BXI requested, in prayer 1, an order staying the execution of any order I might make until I have considered what ancillary order would be just and equitable in terms of s 172(1)(*b*) of the Constitution. The orders I propose to make regarding repayment and verification deal with this aspect of BXI's application.

[127] In prayer 2 of the said application, BXI asks that the applicant be ordered to attend to the taxation of BXI's bills of costs (ie those prepared by Ms Adonis) on the attorney/client scale. Such an order presupposes that a valid contractual relationship exists between the applicant and BXI in regard to the performance of

the work set out in the 11 bills of costs. Since I will be setting aside the SLA, and since the validity of Minister Zokwana's mandates is contested, I decline to make the requested order.

[128] BXI sought an order for the joinder of Mr Mlengana with a view to a personal costs order against him. Since I will not be making any costs order in favour of BXI, there is no need to consider Mr Mlengana's joinder.

The Viking Fishing costs order

[129] In addition to repayment of the aforesaid amounts, the applicant belatedly claimed a further R1 million. This claim was based on a disclosure by Mr Xulu, in BXI's supplementary opposing papers filed on 11 November 2019, that BXI had successfully recovered costs in the Viking litigation of R1 million, and on material contained in the DAFF's supplementary replying papers, filed on 18 November 2019, to the effect that although Viking's attorneys had paid this money to DAFF on 2 November 2018, BXI had not accounted to the DAFF in respect thereof.

[130] An amended notice for relief, incorporating a claim for R1 million, was served on BXI on 25 November 2019. On 2 December 2019 BXI filed its supplementary affidavit on the question of rescission. Mr Xulu did not deal with the part of Mr Manuel's affidavit dealing with the Viking costs recovery.

[131] Since this claim was raised at a very late stage in the proceedings, and since there is no urgency in the matter, I do not think it would be just to adjudicate it in the present proceedings. I cannot be confident that BXI has had a full opportunity to consider and respond to the claim.

Joinder of Mr Xulu

[132] The applicant seeks Mr Xulu's joinder with a view to making him jointly and severally liable with BXI for repayment of R20 242 472,90. The applicant relies on piercing the corporate veil at common law and in terms of s 20(9) of the Companies Act 71 of 2008.

[133] I reject the applicant's reliance on piercing the corporate veil. I accept that Mr Xulu is BXI's controlling mind, but this of itself does not show that there has been any unconscionable abuse of BXI's corporate personality. Mr Xulu chose to conduct an incorporated legal practice, as permitted by law. The legal services provided by his firm were rendered by BXI, not by Mr Xulu personally. It was to BXI that Minister Zokwana issued his mandates, and it was with BXI that the DAFF purported to conclude the SLA. The arrangement arrived at by the officials at the meeting of 28 March 2019 was that money would be paid to BXI, not to Mr Xulu personally. If there were legal remedies for unpaid fees, these vested in BXI, not in Mr Xulu personally.

[134] The applicant's counsel made reference to s 19(3) of the Companies Act. In terms of that section, the directors of a 'personal liability company' (BXI is such a company) are personally liable for liabilities and debts 'contracted' during their period of office. In *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) it was held that the similar language of s 53(*b*) of the Companies Act 61 of 1973 was confined to consensual debts. Obligations arising from delict and unjustified enrichment were not encompassed by the word 'contracted'. The lawmaker must be presumed to have been aware of this interpretation when using the same language in s 19(3) of the 2008 Act (*Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* [2013] ZASCA 173; 2014 (2) SA 518 (SCA) para 18).

[135] The applicant may have a delictual claim against Mr Xulu. In the absence of deliberate wrongdoing, his liability would require an investigation as to whether, in his individual capacity, he owed a legal duty to the DAFF to exercise care in BXI's levying of execution (ie wrongfulness) and, if so, whether he was negligent. Since he is an attorney, it may not require much to show that he was negligent, since he could reasonably be expected to have been aware of the provisions of the State Liability Act. The question of wrongfulness is not straightforward, and I do not feel that it was sufficiently canvassed in argument.

[136] If Mr Xulu knowingly caused BXI to act unlawfully in pursuing execution, ie if there was *dolus*, wrongfulness in his personal capacity would cease to be problematic. In that regard the following facts appear to be relevant. On Wednesday 31 July 2019 the State Attorney notified BXI explicitly that the writs and attachments were invalid, *inter alia* by virtue of non-compliance with the State Liability Act. We know from Mr Xulu's reply, sent at 15:26 on the same day, that he received the letter.

[137] Mr Manuel has stated under oath that he repeated these assertions at a meeting with Mr Xulu on Thursday 1 August. And later that afternoon Mr Manuel sent Mr Xulu an email confirming that the basis on which the DAFF was seeking an undertaking was BXI's failure to comply with ss 3(4)-(8) of the State Liability Act. In that email Mr Xulu was referred to the Constitutional Court's decision in *Provincial Government: North West Province & another v Tsoga Developers CC & others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC) paras 28-29 and 44-45, where the provisions of the State Liability Act in relation to the principle of legality were discussed.

[138] The sheriff paid the amount of R17 657 098 – the proceeds from execution of the second writ – into BXI's trust account on Friday 2 August. It was thereafter

that Mr Xulu caused substantially the whole amount to be transferred to his business account, from which it was disbursed. By 5 August 2019 only R203 515,97 remained in the trust account and by 6 August only R117 200,25 remained in the business account (though R3,4 million is available in the frozen forex account).

[139] It is difficult to avoid the conclusion, in relation to the amount of R17 657 098, that Mr Xulu caused BXI to part with the money despite knowing that the writ and attachment pursuant to which that money had been received were invalid. If he did not bother to look at the State Liability Act, he would seem to have acted in reckless disregard of the legality of BXI's actions, ie at least with *dolus eventualis*.

[140] In oral argument, BXI's counsel, who also represented Mr Xulu in the joinder application, contended that if he were joined with a view to imposing personal liability on him, he should be given an opportunity to answer the case against him. I think the fairest course would thus be to join Mr Xulu and issue a rule nisi calling on him to show cause why he should not be jointly and severally liable for the amounts refundable by BXI.

Conclusion and order

[141] It is a matter of concern that writs were issued in this case without an enquiry into compliance with the State Liability Act. I consulted with the court's chief registrar. It seems that the registrars in this division may not be alert to the provisions of the Act. There is no standard form for the written request contemplated in s 3(6) of the Act. Attorneys who seek writs against national or provincial government departments must not make such requests unless there has been compliance with the Act, and registrars should not issue writs unless so satisfied. In practice, this seems to me to require the attorney, in the written

request, to state (a) when the period contemplated in s 3(3) expired; (b) that after expiry of that period, due service was effected on each of the persons contemplated in s 3(4), and the dates of such service; and (c) that 14 days have expired from such service without payment having been effected and without acceptable arrangements for satisfaction of the debt having been reached.

[142] It also appears that the sheriff in this case did not pay proper heed to the provisions of ss 3(7) and (8). Had the sheriff observed the 30-day holding period specified in s 3(8), the loss of the DAFF's money might have been avoided.

[143] The applicant has asked for the costs of three counsel. In my view the case was not so complex and vast as to justify such an order.

[144] I make the following order:

(a) The service level agreement, purportedly concluded between the applicant and the first respondent ('BXI') on 23 May 2017, is declared invalid and is reviewed and set aside.

(b) The settlement agreement, purportedly concluded between the applicant and BXI on 12 April 2019, is declared invalid and is reviewed and set aside.

(c) The order granted on 6 June 2019 by Steyn J under the present case number is rescinded.

(d) All writs of execution and notices of attachment issued and effected pursuant to the said order of 6 June 2019 are declared invalid and are reviewed and set aside.

(e) BXI is ordered to pay to the applicants, by Thursday 30 April 2020, the amount of R20 242 472,90 which it received pursuant to the invalid writs of execution and notices of attachment, subject to any set-off arising from para (g) below.

(f) The applicants are directed to proceed with the verification of BXI's invoices and to report the results of such verification to BXI in writing by Thursday 9 April 2020.

(g) The said written report shall also specify the amount, if any, which the applicants tender to pay BXI for services rendered in addition to the payments BXI has already received.

(h) BXI is ordered to pay the applicant's costs, including those attendant on the employment of two counsel.

(i) Mr Barnabas Xulu ('Mr Xulu') is joined as the fifth respondent.

(j) A rule nisi is issued calling on Mr Xulu to show cause, on Thursday 12 March 2020, why he should not be ordered to pay the said amount of R20 242 472,90 jointly and severally with BXI.

(k) If Mr Xulu intends to oppose the making of such an order on the return day, he must:

(i) deliver a notice of opposition by Friday 7 February 2020;

(ii) deliver his opposing affidavits by Friday 28 February 2020.

(l) If Mr Xulu files opposing papers as aforesaid, the court on 12 March 2020 will determine a timetable for the further conduct of the claim against him.

O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Applicants	N Bawa SC (with her B Joseph SC and J Williams) Instructed by State Attorney 4th Floor, 22 Long street Cape Town
For First Respondent	M J M Bridgman (with him C Smart) Instructed by Millar Reardon Attorneys, Durban c/o B Xulu & Partners Inc 9th Floor, 113 Loop Street Cape Town