THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 483/2013

Reportable

In the matter between:

THE MEC: DEPARTMENT OF POLICE, ROADS AND TRANSPORT, FREE STATE PROVINCIAL GOVERNMENT **APPELLANT**

And

TERRA GRAPHICS (PTY) LTD t/a TERRA WORKS **FIRST RESPONDENT**

SSI/TSHEPEGA JOINT VENTURE **SECOND RESPONDENT**

Neutral Citation: *MEC v Terra Graphics* (483/2013) [2015] ZASCA 116 (10 September 2015).

Coram: Navsa, Ponnan, Leach, Saldulker and Zondi JJA

Heard: 20 August 2015

Delivered: 10 September 2015

Summary: Sub-contract to provide environmental consultancy services in relation to the Free State Province's Road Rehabilitation Programme – work done and services rendered both by principal contractor and by the first respondent, a subcontractor – benefit of work accepted and retained – after effecting partial payment,

Province refusing to pay the main contractor the balance – basis for refusing to pay the balance was that the Road Rehabilitation Programme was allegedly not budgeted for and that effecting payment in those circumstances would be in contravention of various statutory provisions – defence held to be fallacious – further defence of lack of privity of contract rejected as diversionary – always contemplated that for the subcontractor to be paid, main contractor had to be paid – first respondent claiming in the alternative that the amount owing to the main contractor be paid and that it in turn be ordered to pay sub-consultant – no resistance to this by main contractor – in circumstances it would be artificial and strained to not order direct payment.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Matlapeng AJ sitting as court of first instance).

The following order is made:

1. Save to the extent set out in paragraph 2 hereof, the appeal is dismissed with costs.
2. The order of the court below is altered by substituting the amount of R1 540 123.54 in paragraph 1 with the amount of R1 436 880.21.

JUDGMENT

Navsa JA (Ponnan, Leach, Saldulker and Zondi JJA concurring):

[1] This case is about a provincial government behaving unconscionably. As will become apparent, in its dealings culminating in the present appeal, the Free State Provincial Government conducted itself without any integrity and failed to be transparent and accountable as enjoined by our Constitution. In short, after the Province had awarded a tender in relation to a road infrastructure programme and concluded a written agreement with the main contractor, the second respondent, to supply engineering services for a total remuneration package of R69 million and sanctioned the appointment of the first respondent as the subcontractor to provide environmental protection services for payment in an amount of R1 593 997.95 and after they had both completed the work and received some payment, the Province refused to pay the balance owing, on the spurious basis that the work had not been budgeted for. Notwithstanding that the Province had received the benefits of the labour of the two contractors, it contended that the failure to budget for the contemplated road works in the year in which the written agreement with the main contractor was concluded and in several budgetary periods thereafter amounted to contraventions of applicable regulatory statutory provisions and it was therefore entitled to refuse to be held to its obligations in terms of the concluded agreements. Ironically, it relied on the principle of legality to avoid honouring agreements that it had authorised. It hardly requires any imagination to consider what members of the public would make of such behaviour. The detailed background and the reasons for the conclusions reached in the first two sentences of this paragraph are set out hereafter.

[2] During 2009/2010 the Free State Provincial Government, represented in the present litigation by the appellant, the Member of the Executive Council: Free State Provincial Government: Department of Police, Roads and Transport (the MEC),

embarked on a road infrastructure programme, the purpose of which was to promote accessibility, mobility and a safe road infrastructure network in the Province that would be environmentally sensitive and would stimulate socio-economic growth. The programme encompassed 23 roads located throughout the Province. In accordance with its own procurement policy and the applicable regulatory statutory provisions, the Free State Department of Police, Roads and Transport (the Department) called for tenders to be submitted to it for the provision of, amongst others, engineering related services. The second respondent, SSI/Tshepega Joint Venture (SSI), submitted a tender and subsequently, on 19 April 2010, the Department concluded a written agreement in terms of which SSI was to render services as follows:

'Assist the Department of Police, Roads and Transport, to manage the implementation of the road repairs and rehabilitation programme for the Free State road network. Your appointment is limited to Road 12 to Road 23 as per the Department's priority list. Your appointment will be with immediate effect and for the duration of the contracts.'

[3] In effect, SSI was the engineering firm that was appointed the project manager for the road repair and rehabilitation programme set out in the agreement referred to above. The total contract value was approximately R69 million.[1] Clause 5.1.3 of the agreement reads as follows:

'Where the client has required the Consultant to appoint selected consultants as the Consultant's sub-consultants, fees owed to those sub-consultants shall be due to the Consultant in addition to the Consultant's own fees.'

I shall refer to that agreement as the main agreement. In this judgment the terms sub-consultant and subcontractor are used interchangeably.

[4] The main agreement contemplates the appointment, with the approval of the Province, of sub-consultants. Environmental services are specifically mentioned in the main agreement. When the services of an environmental sub-consultant were required the approval of the Province was obtained and tenders to that end were invited. Terra

[1] This appears to be a small part of a much larger initiative that was described by the Minister of Finance in correspondence that formed part of the record as a multi-year R4,2 billion project.

Graphics (Pty) Ltd, a company that trades as Terra Works (TW), submitted a bid and subsequently a written agreement with the approval of the Province was concluded between TW and SSI. I shall refer to that agreement as the sub-consultancy agreement.

[5] The sub-consultancy agreement was concluded on 22 October 2010. The contract value was R1 593 997.75, excluding VAT and disbursements. Monthly payment terms were stipulated. It is common cause that both SSI and TW performed their obligations in terms of the aforesaid written agreements. TW received two payments from SSI in the amounts of R80 925.94 and R76 191.60 on 30 September 2011 and 12 December 2011, respectively. A total of approximately R13,7 million was paid by the Department to SSI, with the last payment being made on 6 October 2010.

[6] After the Province had failed to pay SSI the balance still owing, the latter instituted action in the Free State Division of the High Court, claiming payment of an amount of R44,7 million. That litigation has not yet run to a conclusion. I pause to record that in that litigation the Province's defences are substantially the same as in this case. It also unsuccessfully raised an exception to an alternative claim by SSI that was based on unjust enrichment.

[7] Since SSI had not been paid, it could not pay TW the balance due to the latter for the work done and services rendered in terms of the sub-consultancy agreement. Consequently, TW applied in the Free State Division of the High Court for an order that the MEC pay an amount of R1 540 123.54 for work done and services rendered. Alternatively, TW sought an order that the MEC be ordered to effect payment of the amount mentioned to SSI, and that it, in turn, be ordered to immediately and by no later than 7 days after receipt thereof, effect payment to TW. In addition, TW sought interest on the amount claimed and costs of suit.

[8] In resisting TW's application, the MEC admitted that the Province had invited tenders that resulted in the conclusion of the agreements referred to above. The MEC did not dispute that the work had been done and that services had been rendered by

SSI and TW in terms of the main and sub-consultancy agreements. In resisting TW's application in the court below, the first point taken by the Province was that the application was premature, because the sub-consultancy agreement provided for arbitration in the event of a dispute which TW was bound by and which it had not resorted to. The second point was that the application was ill-fated since TW had failed to comply with the notice provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. These defences were clearly entirely without substance and were rightly abandoned by the MEC during the hearing in the court below.

[9] In relation to the merits of TW's claim, first, it was contended on behalf of the MEC that the claim for payment for services rendered lay against SSI and not against the Province. It was submitted that this was so because in terms of both the main and sub-consultancy agreements SSI undertook to pay TW. There was thus no contractual obligation on the part of the Province to make such or any payment to TW. Essentially, the MEC contended that there was no contractual privity between the Province and TW and that TW's claim was therefore fatally flawed. Secondly, and astonishingly, TW's claim was resisted on the basis that the Province had made no budgetary allocation for the road rehabilitation programme in respect of which the written agreements were concluded. As a consequence, so the Province asserted, it was unable to withdraw the requisite funds from the Provincial Treasury to meet the financial obligations it had undertaken in terms of the agreement with SSI. In this regard reliance was placed by the Province on sections 21(1)*(b)*(i) and 24(1)*(a)*(i) of the Public Finance Management Act 1 of 1999 (the PFMA). The following parts of the answering affidavit on behalf of the MEC bear repeating:

'As at October 2010, alternatively, as at any date material to the applicant's claim, no budgetary allocation had been made by the Free State provincial government in respect of the main agreement or any other agreement related thereto. Likewise, no allocation of any significance was made in respect of the two subsequent financial years. This is conveniently summarized in page 374 of the estimates of provincial expenditure that were tabled in the Free State Provincial Legislature with the Appropriation Bill for 2010/2011, a copy of which is attached hereto and marked "AA2".

Accordingly, the requisite funds to meet the financial commitments contemplated in the main agreement could not lawfully be withdrawn from the Provincial Revenue Fund, as contemplated in section 21(1)*(b)*(i), read with section 24(1)*(a)*(i) of the Public Finance Management Act 1, 1999 ("PFMA").'

I shall, in due course, examine the veracity of that statement, more particularly in relation to the annexure marked 'AA2', and I intend to explore the paucity of information supplied on behalf of the MEC in relation to the background leading up to the conclusion of the main and sub-consultancy agreements and events thereafter. I shall, in addition, in due course, record the concessions rightly made before us by counsel representing the Province.

[10] Lastly, in what appears to be a repeat of the second substantive defence set out in the preceding paragraph, the MEC resisted TW's application on the basis that since the main agreement was tainted by illegality because the statutory prescripts referred to above were not complied with, no legal consequences could flow from it and TW was thus precluded from suing on it.

[11] The court below (Matlapeng AJ) considered whether there was any merit to the defence that there was no contractual privity between TW and the Province. He took into account provisions of the main agreement in terms of which SSI was the Province's project manager in relation to the road rehabilitation programme, including being responsible for the financial management of the project. The court below noted that payment due to the applicant for sub-consultancy services had to be made by the Province to SSI. Matlapeng AJ considered that it followed that '[TW] had proved that there was privity between itself and the [Free State Provincial Government].'

[12] Regrettably, the court below was extremely brief in its treatment of the substantive defences recorded in paragraphs 9 and 10 above, namely that because the sub-consultancy agreement was tainted by illegality, TW was precluded from suing on it. The defences were dealt with as follows:

'The first respondent attack[ed] the validity of the main agreement on the grounds that because of its failure to comply with the peremptory provisions of section 66 of 68 of Public Finance

Management Act, no 1 of 1999 and further that no budgetary allocation had been made by the Free State Provisional Government in respect of the main agreement that such an agreement was *void ab initio* and could not satisfy a cause of action. This issue is the subject matter of a pending case in this court under case number 393/2012. As a result I find it improper to pre-empt the decision of another court.'

[13] The court below then, nevertheless, went on to make the following order:

'1. The first respondent is ordered to pay an amount of R1 540 123.54 to the applicant representing payment for work done and services rendered by the applicant to the first respondent.

2. Alternatively the first respondent is ordered to effect payment of the amount mentioned in 1 above to the second respondent and that the second respondent is ordered to immediately and by no later than seven days after receipt of the said amount to effect payment to the plaintiff of the said amount.

3. The first respondent is ordered to pay interest on the amount mentioned in 1 above at the rate of 15,5% per annum a tempore morae calculated from the date of issuing this application until the date of first payment.

4. The first respondent is ordered to pay the costs of this application.'

In truth the court below did not address the defence referred to in paras 9 and 10 above at all.

[14] It is against the order and the conclusions referred to in paras 11, 12 and 13 above that the present appeal, with the leave of the court below, is directed.

[15] At the outset it is necessary to note that the answering affidavit on behalf of the MEC was deliberately vague and evasive. No attempt was made to explain how the Provincial Government could have concluded the written agreement with SSI without having budgeted for the roads programme. Indeed, not even a cursory attempt was made to explain how the road rehabilitation programme came into being and what steps the Provincial Government had taken to fund it. Much more disturbingly, annexure 'AA2', referred to above, was employed by the Provincial Government in a manner that was disingenuous. Annexure 'AA2' does not support the statement made in the

answering affidavit that no budgetary allocation had been made by the Free State Provincial Government in respect of the roads that form the subject matter of the agreement with SSI. Indeed, it demonstrates the opposite. Careful scrutiny of annexure 'AA2', which on the Province's own version of events was an annexure to an Appropriation Bill for the 2010/2011 financial year, reveals that specific amounts for three consecutive financial periods, commencing in 2010, were appropriated by the Province for all the roads that form the subject matter of the written agreement with SSI. The roads in question comprising a total length of 370.8km, are set out in Appendix 4 of the agreement with SSI, and are as follows:

Rouxville – Zastron;
Zastron –Wepener;
Deneysville – Oranjeville;
Oranjeville – Frankfort;
Vredefort – Parys;
Bultfontein – Wesselsbron;
Bothaville – Leeudoringstad;
Hobhouse – Ladybrand;
Ladybrand – Clocolan;
Kroonstad – Vredefort; and
Harrismith – Oliviershoek.

Each of these roads appears in Annexure 'AA2'. This fact was studiously and glaringly omitted by the Province. Moreover, the Province did not, in its answering affidavit, reveal the following very important information, namely, that the Free State Provincial Government subsequently passed an Appropriation Act 3 of 2010. Item 6 of the Schedule to the Appropriation Act in respect of Police, Roads and Transport reflects that a globular amount of approximately R1,078 billion was appropriated in respect of road infrastructure in the Province. When presented with the Appropriation Act, counsel on behalf of the Province rightly conceded that he could not persist in the Province's defence of a failure to appropriate monies in respect of the expenditure contemplated in the main written agreement or sub-consultancy agreement. This concession was

compelled not only because counsel was faced with the Appropriation Act but also because of what is set out in the following five paragraphs.

[16] In its founding affidavit, TW referred to minutes of a meeting held on 13 October 2010 which was attended by officials of the MEC's Department as well as representatives of SSI and TW. These minutes are important. Under the heading 'Project Management Contractual Issues', the following, inter alia, is recorded:

'3.1. Contract documents

The signing of the contract documents remains an issue to be resolved (Thirteen of the 23 contracts have been concluded – signed by Dept. PR&T HOD).[2]

. . .

3.1.6 Taking note of the DG's undertaking that the contractual and budgetary matters will be resolved by the end of Oct. '10, Mr Redman expressed his concern that would be impractical to respond and implement any feedback received from the DG/PR&T before then.'

Under the heading 'Compliance Issues', the minutes reflect the following:

'5.1. Environmental and Health & Safety Auditors

5.1.1. Mr Redman reported that, on instruction of the Dept. PR&T, tenders were obtained from a number of consultants for the above two auditing functions. The tender processes were in-line with PFMA regulations, in that:

Invitations to tender were issued publicly.

The tenders were evaluated fairly and the process contained in comprehensive evaluation reports.

Formal letters of appointment were issued.

It was confirmed that the auditors do not operate in regions where they may be doing relevant work for the contractors.' [3]

Under the sub-heading 'Resolutions', the following appears:

'5.3.1. Mr Redman is to submit a summary of the appointment values of the auditing teams to Ms Mentz, as well as a motivation to extend the appointment scope of SSI/Tshepega.'

---

[2] By this time the written agreement between SSI and the Province had already been concluded.

[3] This relates to the tender that was ultimately awarded to TW in respect of which an agreement was concluded with SSI.

[17] It is clear from what is set out in the preceding paragraph that, at the very least, both written agreements that are at the centre of this litigation were approved by the Department. The minutes show that budgetary concerns were being addressed by officials of the Province. That fact and the other facts dealt with in the immediately preceding paragraphs, lend a lie to the highly improbable and clearly contrived explanation by the Province that the work had not been budgeted for.

[18] At this stage it is necessary to deal with yet a further disturbing aspect of the Province's case. It will be recalled that in resisting TW's claim the MEC relied on the Province's failure to comply with the provisions of s 21(1)*(b)*(i), read with s 24(1)*(a)*(i) of the PFMA. Section 21(1)*(b)*(i) of the PFMA provides:

'(1) The provincial treasury of a province is in charge of that province's Provincial Revenue Fund and must enforce compliance with the provisions of section 226 of the Constitution, namely that –

. . .

(b) no money may be withdrawn from the Fund except –

(i) in terms of an appropriation by a provincial Act; or

(ii) as a direct charge against the Fund when it is provided for in the Constitution or a provincial Act.'

The relevant part of s 226 of the Constitution read as follows:

'(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a Provincial Revenue Fund only –

(a) in terms of an appropriation by a provincial Act; or

(b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.'

Section 24(1)*(a)*(i) of the PFMA provides:

'(1) Only a provincial treasury may withdraw money from a Provincial Revenue Fund, and may do so only –

(a) to provide funds that have been authorised –

in terms of an appropriation by a provincial Act; or

. . .'

The disturbing aspect flows from the following, stated by the principal deponent on the MEC's behalf:

'The financial commitments purported to have been made in the appointment of the contractors of the 23 projects and the second respondent thus fell within the purview of the definition of "irregular expenditure" in section 1 of the PFMA.'

'Irregular expenditure' is defined in s 1 of the PFMA, as follows:

'"irregular expenditure" means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including –

(a) this Act; or

(b) the State Tender Board Act, 1968 (Act 86 of 1968), or any regulations made in terms of that Act; or

(c) any provincial legislation providing for procurement procedures in that provincial government.'

Section 81 of the PFMA renders an accounting officer for a department liable to disciplinary proceedings for wilfully or negligently making or permitting irregular expenditure. Section 86, which deals with offences and penalties in relation to the PFMA, makes an accounting officer guilty of an offence, liable to a fine or imprisonment for a period not exceeding 5 years, if that accounting officer willfully or in a grossly negligent way fails to comply with the provision of sections 38, 39 and 40. Section 38 sets out, in general terms, the duties of an accounting officer for a department which include ensuring that there is an effective, efficient and transparent system for financial and risk management and internal control. Section 39 obliges an accounting officer for a department to ensure that expenditure is in accordance with the vote of the department and to take appropriate and effective steps to prevent unauthorised expenditure.

[19] On the MEC's asserted version of events, namely, that such payments as had been made to SSI (which amount to approximately R14 million) were irregular payments, one would have expected that the persons responsible for those payments would have been subject to disciplinary action and that criminal charges would have been brought. That does not appear to have been done. In any event, as demonstrated above, the main and sub-consultancy agreements were approved and the Province's

own documentation prove that it had in fact appropriated funds for the repair and rehabilitation of the relevant roads. In its replying affidavit, TW attached a letter dated 5 October 2012 from the then Minister of Finance, Minister Gordhan, to a Member of Parliament which addresses concerns about the validity of agreements concluded by the Province with construction companies in relation to the Oliviershoek-Harrismith road project. The existence and contents of the letter were never contested. That letter, dealing with the failure of the department to comply with the PFMA, the Borrowing Powers of Provincial Governments Act 48 of 1996, as well as with the Preferential Procurement Policy Framework Act 5 of 2000, explained that the Provincial Government in consultation with National Treasury would continue engaging with the Department and the subcontracted companies involved to find a mutually agreeable compromise on fair value amounts in relation to work done by those construction entities. We are not called upon to deal with the validity of agreements in relation to construction companies or with all the provisions of the statutes referred to. However, it does appear that the Free State Provincial Government behaved irresponsibly in certain instances, including the transactions in question, without due regard to the rights and hardships faced by those with whom it had concluded written agreements on behalf of its citizens and that in the face of National Treasury's asserted willingness to assist the Province to meet its obligations towards the subcontracted companies and others with whom written agreements had been concluded. It appears that in relation to SSI and TW the urgings of the then National Minister of Finance were ignored.

[20] If in fact, the funds appropriated in terms of the Appropriation Act, referred to above, were insufficient to meet the totality of the Province's obligations in relation to its Roads Infrastructure Programme and it was therefore unable to pay SSI, it does not mean that it would be free to simply avoid its contractual obligations. The outstanding commitment would then fall to be treated as unauthorised expenditure in terms of the PFMA and not irregular expenditure as initially contended for on behalf of the Province. In s 1 'unauthorised expenditure' is defined, inter alia, as overspending of a vote or a

main division within a vote.[4] Section 34, which deals with unauthorised expenditure, provides:

'(1) Unauthorised expenditure does not become a charge against a Revenue Fund except when –

(a) the expenditure is an overspending of a vote and Parliament or a provincial legislature, as may be appropriate, approves, as a direct charge against the relevant Revenue Fund, an additional amount for that vote which covers the overspending ; or

(b) the expenditure is unauthorised for another reason and Parliament or a provincial legislature, as may be appropriate, authorises the expenditure as a direct charge against the relevant Revenue Fund.

(2) If Parliament or a provincial legislature does not approve in terms of subsection 1(a) an additional amount for the amount of any overspending, that amount becomes a charge against the funds allocated for the next or future financial years under the relevant vote.'

Section 34(2) has the effect that the Provincial Treasury would, ex lege, become liable to meet the Province's contractual obligation in terms of the main agreement. That obligation would be met as a first charge upon the Treasury in the subsequent financial cycle. Simply put, there is no statutory impediment preventing payment to SSI and, in turn, TW. On the contrary, there is a legal obligation to pay, even if it meant a delay that extended into the next financial cycle. In the present case a number of financial cycles have passed. It is important to bear in mind that inability to pay was never the MEC's case, nor was it contended that there had been over-expenditure.

[21] It is important that governmental institutions respect the rights of those with whom it transacts. Government should be a scrupulous role model. In this regard the following part of a dictum of the Constitutional Court in *Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa & another intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC) is apposite (para 68):

---

[4] Section 1 *(b)* of the PFMA.

‘South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*:

“In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.”

The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the State bends the law to its own ends . . . . The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully.’(footnotes omitted)

In the present case, the stance adopted by the Province was that it had acted contrary to statutory prescripts, more particularly, that it had failed to appropriate funds. As demonstrated above and as accepted by the Province that was not the case. The Province failed to take any subsequent remedial steps and it completely ignored the hardships it had caused for those with whom it had contracted. Worse still, it accepted and retained the advantages it gained through the work done and services rendered by those contractors and steadfastly refused to take any steps to ensure that they received the compensation that was their due. This position was adopted notwithstanding the exhortation by the then National Minister of Finance to resolve the impasse.

[22] Having made the concession referred to in para 15, counsel on behalf of the MEC maintained that he remained entitled to rely on the lack of contractual privity between TW and the Province. In my view, that defence is diversionary and unhelpful.

It is necessary to have regard to the relevant parts of the main and sub-consultancy agreements in the present case. The following are the relevant clauses in the sub-consultancy agreement:

‘2. The following documents shall be deemed to form and be read and construed as part of this Sub-Consultancy Agreement:

1. The Conditions
2. The Appended Clauses of the Main Agreement

3. Schedules 1 to 4.

3. In consideration of the payments to be made by the Consultant to the Sub-Consultant; as hereinafter mentioned, the Sub-Consultant agrees to perform the Sub-Consultant's Services in conformity with the provisions of the Sub-Consultancy Agreement.
4. The Consultant hereby agrees to pay the Sub-Consultant, in consideration of the performance of the Sub-Consultant's Services, such amounts as become payable under the provisions of the Sub-Consultancy Agreement, within seven days after received money from the Department, at the times and in the manner prescribed by the Sub-Consultancy Agreement.
5. The Sub-Consultant is appointed on instruction of the client, The Department of Police, Roads and Transport. (hereinafter called "the Client").
6. The same payment conditions between the Client and the Consultant apply between the Client and the Sub Consultant.'

In the present instance, TW performed work for the benefit of the Department, for which it invoiced SSI, which, in turn, invoiced the Department for the same amount, in respect of the same work. It is perhaps necessary to reiterate, that the Province knew that environmental services could only be provided by a sub-consultant. It approved the appointment of that particular sub-consultant. In terms of clause 5.1.3 of the main agreement, the Province had undertaken to SSI to pay the subconsultant's fees in addition to its (SSI's) own fees. It received the benefit of the services of TW. It is also not without significance that the MEC represents a government department, which in terms of constitutional prescripts, is required to be accountable. SSI has been joined in these proceedings, which it has chosen not to oppose. All interested parties were therefore before this court. The MEC has failed to raise any justification for its failure to pay TW through the conduit of SSI. The court below ordered the MEC to effect payment of the sum of R 1 540 123.54 to TW (paragraph 1 of its order). And, in paragraph 2 (albeit wrongly couched as an alternative to paragraph 1) it ordered that such payment be effected via SSI. There is therefore no reason in principle to interfere with those orders of the high court.

[23] It is necessary to deal briefly with the manner in which the litigation leading up to and including this appeal was conducted. The present appeal was postponed on a prior

occasion to enable the parties to arrive at a settlement which, I must repeat, was the outcome recommended by the National Minister of Finance nearly three years ago (see para 19 above). No such settlement was reached. In addition, as stated earlier, the answering affidavits were vague and evasive. And, right up until the hearing, the MEC was firm in his stance that the financial commitments under the sub-consultancy agreement firstly, constituted 'irregular expenditure' in terms of the PFMA (as noted at para 18 above), and secondly, were in contravention of s 66(2) of the PFMA, in that certain prescribed formalities regulating 'future financial commitments' had not been complied with. However, at the hearing, upon being pressed to justify these conclusions based on the facts before the court, and to explain how this state of affairs had arisen and what steps the Province was taking to hold those responsible to account, counsel for the MEC accepted the court's offer to take further instructions from his client, and following this abandoned both arguments. Having finally arrived at the end of this protracted process, it is likely that the cost of the litigation in the court below and before us probably approximates the total amount claimed by TW. The litigation was a waste of public money. It should never have occurred.

[24] Finally, there is one brief aspect that requires to be addressed. As stated earlier, in the founding affidavit, it appears that the total remuneration for the sub-consultancy services, was R1 593 997.75. It also appears that TW received two payments, namely, R80 925.94 and R76 191.60. If the latter two amounts are deducted from the amount of R1 593 997.75, a total amount of R1 436 880.21 is due. This is less than the amount claimed in the court below and provided for in that court's order. Counsel on behalf of TW accepted that, if we were inclined to dismiss the appeal the order of the high court should be amended to allow for the payments hitherto received by his client, but not considered by the court below. I stress that this point was raised by this court *mero motu*. The order of the court below will therefore be altered accordingly.

[25] Following on the conclusions set out above, the following order is made:

1. Save to the extent set out in paragraph 2 hereof, the appeal is dismissed with costs.

2. The order of the court below is altered by substituting the amount of R1 540 123.54 in paragraph 1 with the amount of R1 436 880.21.

_____

M S Navsa

Judge of Appeal

APPEARANCES:

FOR APPELLANT:	L T Sibeko SC (with him V September) Instructed by: State Attorney, Bloemfontein.
FOR FIRST RESPONDENT:	S Grobler Instructed by: Peyper Sesele Attorney, Bloemfontein