IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

28/7/2011 DATE

SIGNATURE

29/7/2011

Case No. 34373/10

VALOR IT CC

vs

THE MINISTER OF TRADE AND INDUSTRY — 1st Respondent

THE DIRECTOR GENERAL: DEPARTMENT OF TRADE AND INDUSTRY — 2nd Respondent

CIPRO — 3rd Respondent

CHIEF EXECUTIVE OFFICER: CIPRO — 4th Respondent

JUDGEMENT

DE VOS, J

1. In this application the applicant Valor IT CC seeks a declaratory order against the Minister of Trade and Industry (First Respondent); The Director General, Department of Trade and Industry (Second Respondent); Cipro (Third Respondent) and the Chief Executive Officer of Cipro (Fourth Respondent) to the effect that an oral settlement agreement was concluded between the Applicant and the first and second Respondents on 25 November 2010 and that such agreement be declared valid and binding between the parties. No relief is sought against the 3rd and 4th Respondents as they were merely sighted as interested parties. Further ancillary relief is also sought in the form of a declaratory order emanating from the aforesaid agreement as set out in the notice of motion i.e.

" 2. that the said agreement was concluded between the Applicant and the 1st Respondent in respect of the disputed cancellation of the so called ECM contract,

3. that the said agreement finally disposes of a dispute under case N. 34373/2010 and that it was more specifically agreed that:

3.1 That the 1st Respondent was liable to pay the applicant an agreed amount of R13 900 000(thirteen million, nine hundred thousand Rand) in respect of the early cancellation of the ECM contract.

3.2 That the 1st Respondent was liable to pay the Applicant an agreed amount of R3.4 million (three million four hundred thousand Rand) in respect of retained fees in terms of clause 30.7 of the ECM contract.

3.3 That the 1st Respondent agreed to pay the Applicant an amount of R10.8 million (ten million eight hundred thousand Rand) in respect of outstanding invoices previously rendered to the 3rd Respondent in respect of work completed, subject to a joint verification exercise to be conducted by the representatives of the Applicant, after which case No 47412/2010 would be withdrawn by the Applicant.

3.4 There would be no order as to costs.

4.1 Ordering the First Respondent to pay the total amount of R28.1 million (twenty eight million one hundred thousand rand) as agreed

Alternatively

"4.2 Ordering the 1st Respondent to pay the Applicant the agreed amount of R17.3 million (seventeen million three hundred thousand rand) representing the amounts referred to in 3.1 and 3.2 above and

4.3 Referring the termination of the exact amount payable in terms of 3.3 above to a suitable qualified arbitrator...

5. Interest on the above amounts *temporae morae."*

2. The relief set out above emanates from an application brought on a semi-urgent basis under case number 34373/2010 which was heard by Zondo J on 25 November 2010. In the application before Zondo J, the Applicant sought an interim interdict against the Respondents for what it termed an ultimately and/or unlawful cancellation of a contract better known as an" Enterprise Wide Contract Management" (the ECM contract) on 10 June 2010.

3. It is common cause that the contract referred to above was awarded to the Applicant during 2007. The Applicants' main business is the provision of information communication and technology services ("ITC") and software to the public and private sectors. During 2007 the 3rd Respondent invited tenders to supply the 3rd Respondent with a comprehensive "ECM" system which deals with the registration of all companies and close corporations in the RSA. The Applicant's bid was accepted and the Applicant and the 3rd Respondent concluded the Master ECM contract which is contained in Bundle 'B' before the Court. The duration of the contract was from 8 February 2007 until 8 February 2010. The total contract amount was approximately R153 million (hundred and fifty three million Rand).

4. The contract was duly implemented. On 10 June 2010, some 7 months before the expiry date the 2nd Respondent cancelled the contract unilaterally. According to the Applicant's version this cancellation is unlawful. The process and modus operandi in affecting the cancellation and the grounds relied upon appears in the correspondence contained in bundle 'B'. Bundle 'B' also contains the Applicants' protestations against the said premature cancellation. The Respondents in term refused to reverse the cancellation as requested. The Applicant then brought an urgent application under case no.34377/10 to enforce its contractual, administrative and constitutional rights. (This was the genesis of the Application brought under case no.34373/2010.)

5. On 25 November 2010 the hearing of the Matter commenced before Zondo J in Court 'B' at the Palace of Justice. Each party was represented by a team of 3 counsels on each side, with each team made up of two juniors led by senior counsel. Also present were the attorneys representing each side. Mr Chowe, the State attorney briefed and instructed Respondent's counsel. Mr Josias Molele the executive chairman of the Applicant was also present. Mr Johan Strydom ("Strydom") the senior legal advisor in the Department of Trade and Industry (The DTI) (The 2nd Respondent) also attended the hearing.

6. It appears that two issues were raised before Zondo J. Firstly Applicants' counsel argued that a report called the SSG report was not furnished by the Respondents which amounted to a prima facie violation of the well established *audi alteram partem rule,* which would render the cancellation unlawful. Thereafter the Respondent's counsel replied thereto,

Closer to the lunch break and during argument it emerged that the entire ECM contract had come to a standstill pending the resolution of the dispute between the parties. It also became clear that the implementation of the new Companies Act was in jeopardy as it would be difficult to administer the new Companies Act in practise without the ECM system being developed. I may add that at that stage it was envisaged that the new Companies Act would be implemented on 1 April 2011. At some stage during these arguments Zondo J recommended that the parties should consider settling the matter in the Public Interest. The Court then adjourned and the parties engaged with each other in formal settlement negotiations.

7. The Applicant's contention before me is that an oral settlement agreement was in fact reached between the parties as more fully appears from the prayers contained in the Notice of Motion. The Respondents deny that such a settlement agreement was reached. It follows that if an agreement was in fact concluded, the Applicant will be entitled to the relief sought and if not that the application should be dismissed.

8. To be successful the Applicant must first prove that I can reach a decision on the papers before me and that there exist undisputed facts substantiating it's contention. On the other hand if there exist disputed facts which can not be decided on the papers, the Application must fail on the basis that the Applicant should have instituted an action as opposed to motion procedure.

9. It appears from the papers before me that after Zondo J's remarks the Court adjourned for lunch at about 13:00. Both legal teams, the clients and the representatives proceeded to the nearby Tribecca Restaurant for the purpose of having lunch and simultaneously embarking on settlement negotiations. During these negotiations proposals were made, followed by counter-proposals.

10. The Applicant's case is that during these negotiations the parties reached a settlement which is binding on the Respondents. The 1st and 2nd Respondents deny this allegation and Mr Chowe, the State Attorney representing both the 1st and 2nd Respondents states the following in paragraph 15.1 of the Respondents opposing affidavit "The Respondent's legal representatives, Mr Strydom and myself at the outset advised the Applicant that whatever terms of settlement the parties were going to come up with, such terms would have to be reduced to writing to be sent to the DTI for consideration and approval by the 1st and 2nd Respondents. This is so, as the Respondents' legal team, Mr Strydom and myself had no necessary authority to settle the matter on any specific terms without getting authorisation from the 1st and 2nd Respondents."

11. The Applicant contends that this Court must make a finding in its favour based on the following probabilities.

11.1 A report, called the SSG forensic report formed the basis on which the Respondents relied to affect cancellation of the contract.

a) That the Respondents refused to furnish the Applicant with the SSG report.

b) That at the commencement of the hearing Zondo J indicated that having read the papers and subject to the persuasion by counsel, he was inclined to agree with the Applicant's contention that the non-furnishment of the crucial SSG report by the Respondents to the Applicant amounted to a *prima facie* violation of the well established *audi alteram partem rule*, which would render the cancellation unlawful. As a result of this the Respondent's counsel were fielding questions from the bench in regard to Respondent's failure to furnish the applicant with a copy of the SSG report, having been specifically requested to do so by the Applicant.

11.2 That closer to the lunch break, it had emerged that the whole ECM contract had come to a standstill pending the resolution of the dispute between the parties.

a) That Zondo J recommended to the parties to employ their best endeavours to settle the dispute.

b) That Zondo J impressed upon both parties that it was in the public interest to find an out of court settlement to this dispute.

c) That during the settlement negotiations proposals and counter proposals were made to each other, and that on more than one occasion both Strydom and Chowe (the state attorney) informed the Applicants' legal team that they would have to phone their Principals before responding to a particular proposal or counter proposal, and that it was personally observed by the deponent on behalf of the Applicant that both Strydom and Chowe made numerous telephone calls to some person or persons in-between re-assembling with Applicant's team before giving a response or a counter proposal.

d) That the direct participants on behalf of the 1st and 2nd Respondents Mr Strydom and Chowe were both duly authorised to act on behalf of the 1st and 2nd Respondents.

e) Due to the prolonged negotiations the Court's hearing stood down until 15h00.

f) At approximately 14h45 and after Applicant presented their final monetary figures to the Respondents, Mr Chowe on behalf of the Respondents informed Applicants that they were on the verge of obtaining a mandate and needed one or two more telephone calls to their principal which was seemingly unlikely to materialize before the 15h00 deadline set by the Judge.

g) A joint decision was then taken by the legal teams to attend Court but to beg the judge for a further indulgence to enable the Respondents to obtain a final mandate. All the parties went back to Court. In open Court, senior counsel for the Respondents explained the above position to Zondo J. He specifically indicated that the Respondent's representatives need no more than 20 to 30 minutes before obtaining the final mandate from their principals. At that stage of the proceedings, Zondo J offered the parties the option of standing the matter down or postponing it to the next available date, namely 7, 9 or 10 December 2010 as to allow the parties to consider their positions and to return to Court after either having settled or failing,to continue with the hearing.

   To this Respondent's senior counsel specifically reiterated that they needed no more than 20 to 30 minutes and that the matter could be finalized on that day. The judge then informed both parties counsel that whenever they are ready, they could approach him in his chambers with the outcome. The Court then adjourned.

h) Within the next 15 minutes the Respondent's representatives reverted to the Applicant with the following counter offer as set out in paragraph 33 of the Applicant's founding affidavit

"33.1 The Respondents would pay the Applicant an amount of R13 million(thirteen million Rand) for damages suffered in respect of the early cancellation of the ECM contract.

33.2 The Respondents would pay back the non contentious amounts retained in terms of clause 30 of the ECM contract, totalling R3.4 million(three million four hundred thousand Rand).

33.3 The Respondents would pay the Applicant the amounts it had separately claimed under Case no. 47412/2010 in respect of outstanding invoices for work completed before the cancellation. An amount of R10.8 million (ten million eight hundred thousand Rand) had been claimed. This amount would be subject to a joint verification exercise to be conducted at 10h00 on 26 November 2010 by the Applicant's representatives and the DTI Chief Financial Officer. The Applicant would then take the necessary steps to withdraw case 47412/2010."

i) Mr Molefe on behalf of the Applicant (according to his affidavit) then accepted the offer subject to an acceptable deal regarding costs. Mr Molefe proposed a monetary figure to the Respondents; The Respondents made a counter proposal on the basis that instead of paying costs under a separate heading, the amount of the R13 million(thirteen million Rand) referred to above would be increased by R900 000(nine hundred thousand Rand) to R13.9 million (thirteen million nine hundred thousand Rand). This revised offer made by Respondents was then accepted on behalf of the Applicant by Mr Molefe and was clearly communicated to the Respondent's representatives.

j) Lastly the Respondent's representatives suggested that a settlement agreement should include a joint moratorium on accusatory statements in the mass media by both sides and a withdrawal of negative statements hitherto made by both sides. This was also accepted by Mr Molefe on behalf of the Applicant.

k) The Applicant further contends that the (six) 6 counsel thereafter from both sides proceeded to Zondo J's office – to advise him that the matter has been settled- nothing more or less was stated. The Judge informed them that if they wished to make the agreement an order of Court, they could approach his registrar at 09h30 at any of the ensuing Court days.

l) The parties agreed among themselves that they would prefer to make the agreement an order of Court. The Applicant's legal team volunteered to capture the agreement in writing and to present the other side with a draft order for their comments.

m) On the same day a proposed order, marked JM3, attached to the papers, were prepared by Applicant's cousel and forwarded to the other side by electronic media. The Respondents didn't respond to the draft order in the ensuing days.

12. Mr Molefe was unable to see the Chief Financial Officer of the DTI on 26 November 2010 notwithstanding the previous arrangement that such a meeting was scheduled for that day in terms of the agreement. The excuse was that the Chief Financial Officer had a medical appointment.

13. After a week, the Applicant was informed that the Respondents refused to pay the agreed amounts since the amount was too high.

14. Thereafter a meeting was convened by the Applicant's legal team with the Respondent's legal team reducing the principal amount to R20 million (twenty million Rand) as well as other conditions. Although this proposal was conveyed to the Respondents, the Respondents never accepted it. The Applicant has since withdrawn this proposal.

15. On 20 December 2010 Applicant's attorneys demanded payment as "agreed upon" and as set out in a letter of demand attached to the papers as JM5 which was forwarded to the Respondents.

16. On 22 December 2010 the State attorney on behalf of the Respondents replied as is set out in the letter marked JM6 and stated that the initial draft order prepared by the Applicant's legal representatives was subject to two conditions:

"1.5.1 That the settlement negotiations could only be entertained if such settlement negotiations were meant to totally end all pending disputes between the parties.

1.5.2 That the terms of settlement will be reduced in writing and sent to the Department of Trade and Industry for consideration and approval by the Director General and the Minister. The representatives of the DTI namely Mr Johan Strydom, the acting Director Legal Services did not have the necessary authority to settle the matter on any specific terms save for getting authorisation to entertain any settlement proposal and reverting to the executive authority (The Minister) for approval."

17. In the same letter referred to above the State Attorney remarked; On 25 November instant, the parties legal representatives met the judge in chambers and indicated that the matter has in principal become settled and that the terms of the settlement would be reduced into writing and that a judge would subsequently be approached to make the draft order an order of Court. This never happened.

In the same paragraph,(paragraph 1.7) the Respondents attorney further states: "In addition thereto, the applicant raised a new settlement figure of R20 million(twenty million Rand),plus costs which was sent to the Minister for consideration and approval. This proposal was rejected.

18. The said letter further refers to two other important issues.

18.1 There was a note on the original Court file that reads as follows: "By 13h00 the parties had not brought the settlement to chambers. Noted that this matter is settled. J. Zondo 30/11/2010.

The Applicant interprets this note as confirmation of the fact that the matter was indeed settled. The Respondents clearly deny this conclusion. The Respondents contends that it was made abundantly clear to the Applicant that there cannot be any settlement without the approval of the Minister and the Director General as reconfirmed in the letter marked JM6 dated 22 December 2010. The Respondents version is that there would never be any settlement without the Minister's approval.

18.2 The second point raised by the Respondent's attorney is that the draft order received "contains new figures amounting to R7 million(seven million Rand) in respect of maintenance fees", the Respondents deny that such an amount was ever agreed upon.

19. The letter further confirms that the draft order was also rejected by both the Minister and the Director General and that there exist no agreement between the parties.

20. The Applicant brought this Application on a semi-urgent basis and submits that on the probabilities the Court should find in Applicant's favour that an oral agreement was reached between the parties which is binding on the

Respondents. The Applicant submits that there was a meeting of minds and at no stage was it made clear to the Applicant or his legal team that Strydom and or the State attorney lacked the necessary authority to settle the matter on behalf of the Respondents. The Applicant also relies on the note made on the Court file stating that the matter was settled.

21. When the matter was argued before me the original Court file could not be found and a duplicate Court file was handed to me without any notes contained thereon. Subsequent to the hearing of the matter the original Court file was found and brought to my attention. On the original Court file appears the following "25-11-2010 Zondo, J. After argument had started, the parties engaged in settlement negotiations and finally indicated that the matter was settled but they were to bring a settlement agreement to chambers on 26-11-2010." There appears no signature underneath this note.

There is another note on the Court file dated 30-11-2010: By 13h00 today the parties have not brought the settlement to chambers. Noted that the matter settled and underneath Zondo J. The clear impression that I gained from the first note is that when the matter was dealt with by Zondo J on 25-11-2010, Zondo J was informed that the matter has become settled but that the contents of the settlement had to be reduced in the form of a written settlement agreement. This is corroborated by the Applicant's version that Zondo J informed them that they could bring the formal settlement agreement to his chambers on any of the consecutive days to be made a formal order of Court. The next inscription dated

30-11-2010 was obviously done at 13h00. The note indicates that although the matter has become settled the formal settlement agreement has not been brought to the Judge in question and was therefore not formally made an order of Court.

There exist no evidence that the Applicant's and or Respondent's counsel were present when the second note was made. In fact there exist no evidence as to how and why this note was ever made. Without any evidence placed before me the only inference I can draw from this note is that it merely confirms what was conveyed to Zondo J on 25 November 2010, with the additional comment that the formal agreement was still outstanding.

22. Dealing with the submissions before me the first question I have to decide is whether this matter is in fact urgent. Due to what transpired before Zondo J I will accept for practical purposes that the matter was urgent when it was brought before Court. I will therefore continue with the application as it stands.

23. The next question to be decided is the relevance of the condition that the terms of agreement would be reduced to writing in the form of a formal settlement agreement. It is unclear from the notes on the Court file whether this agreement/order was to be signed or to be accepted by a particular person. The issue is however raised by the Respondents that such proposals and figures were subject to the approval by their principals and be inclusive of all pending disputes.

23.1 There is a direct clash between Applicant's version and the Respondent's version in this regard. On the facts before me I cannot determine whose version is the most probable. Applicant's version is to the effect that Respondent's legal representatives communicated by cellphone to some unknown person or persons during the negotiations and that senior counsel for the Respondents informed Zondo J at about 15:00 on 25-11-2010 that they needed no more than 20 to 30 minutes before obtaining the final mandate from his principals. Very soon thereafter the parties reached a settlement which was to be reduced into writing and such facts were again conveyed to Zondo J by counsel.

23.2 The Respondents do not deny what was reported to Zondo J, but says they made it clear to the Applicants from the start of the negotiations that any agreement reached would be subject to the approval of the 1st and 2nd Respondents who were not available at that stage, and that 1st and 2nd Respondents subsequently refused to accept the settlement. These facts are confirmed by 1st and 2nd Respondents in their personal capacities as is set out in the 1st and 2nd Respondents opposing affidavits.

24. The Applicant's counsel relied on the reliance theory based on what was said in the case of *SONAP Petroleum (SA) Pty (Ltd) vs Pappadogianis 1992 SA 234 A* and which was discussed in the case of *Ridou vs Van der Spuy and Partners 2002 2 121 C at 138 G.* Harms AJA held that even in the absence of subjective consensus the theory of quasi–mutual consent may in appropriate circumstances form an alternative basis for contractual liability.

In this regard it is submitted by the Applicant that the Respondents common intention expressed has led the Applicant, as a reasonable man, to believe that his declared intention represented his actual intention ...notwithstanding the fact that the Respondents actual intention did not conform to the common intention expressed..."To answer this question, a threefold enquiry is usually necessary, namely firstly ; was there a misrepresentation as to one party's intention; secondly, who made the representation, and thirdly was the other party misled thereby?"

24.1 Applicant submits that the undertakings made by the Respondent's counsel before court that the mandate could be procured within 20 to 30 minutes and that his principals were prepared to settle, corroborates the fact that the settlement discussions culminated into an oral agreement.

24.2 The Applicants also submits that the draft order "JM3" prepared by Applicant's counsel after the last visit to Zondo J in his chambers on 25-11-2010, reflects the contents of the oral agreement and articulates an undertaking by the Respondent's representatives namely Mr Strydom and Mr Chowe to settle, thereby committing the Respondents to the settlement as is reflected in the draft order marked"JM3". It is further contended that the Applicant relied on the undertakings made by Respondent's representatives in settling the draft order, acting under the reasonable belief that the order could also still be made an order of court.

25. The notes made by Zondo J, clearly indictes that no order was made. Both Mr Strydom and Chowe deny the existence of a settlement agreement as it was subject to the personal acceptance by the 1st and 2nd Respondents in their personal capacities. In my view nothing that was said to Zondo J detracts from this supposition. It was clearly the intention of the Respondents to have the agreement reduced into writing and then to hand it to their clients for their rejection and / or acceptance.

26. This is not a matter where it can be said that the state attorney had implied or ostensible authority to settle. He and the legal adviser had no authority to settle, *caedit questio*. Even if the State attorney generally has the authority to settle, this general authority has been repealed by the specific instruction received from the 1st and 2nd Respondents. This condition was disclosed to the Applicants at the start of the negotiations. In my view this case is distinguishable from the case referred to by Applicant's counsel namely *Dlamini vs Minister of Law and Order 1986 4 SA 342 D* where it was held that a State Attorney has the general authority "to instruct counsel to agree, on behalf of the Minister, to a settlement of part of the case....even if the Minister was unaware of the settlement and had not expressly approved it."

27. Similarly the decision in the case *of MEC for Economic Affairs, Environment and Tourism, Eastern Cape vs Kruizenga and another* 2010 4 SA 122 SCA is also distinguishable on the facts from the present case. On the facts before me I cannot conclude that the "oral" settlement constitutes a final and binding agreement as it was an explicit term of the agreement that the terms of the agreement would be reduced into writing. The draft order prepared by Applicants to the exclusion of the Respondents can not constitute a binding settlement agreement without proper acceptance. It is common cause that on 26-11-2010 the Respondent's counsel made a counter proposal in the form of a draft order which was submitted to the Applicants as Annexure "KIC1".

A comparison between the two drafts "KIC1" and "JM3" contains a clear indication that the two drafts are irreconcilable. I say this for the following reason. One of the outstanding features of this type of contract on cancellation would be in my view, who becomes the owner of the software installed on cancellation of the contract, and who will be responsible as service provider and for the proper functioning of the programme. The draft order prepared by the Applicant, "JM3", does not contain any provision in this regard. Even if the Respondents were in the wrong when they cancelled the contract, and were prepared to make payment to the Applicant, I cannot for a single moment think that experienced people, negotiating this type of settlement agreement, would leave out such an important ingredient during settlement negotiations.

28. Mr Chowe on behalf of the Respondents states that the settlement negotiations were premised on a condition that whatever propositions were made, such would be remitted to the Respondent's principals in writing for consideration, approval and / or counter offer if any. Chowe further contends that the Applicant agreed to such a condition as a basis for settlement negotiations. A final settlement could therefore only be reached after 1st and 2nd Respondents have given their instructions and input. On the probabilities and taking the sequence of events into account, the contents of documents JM3 and KIC1 and the Applicant's revised offer of R20 million plus cost, only makes sense on Mr Chowe's version. I must add that the Applicant failed to mention the existence of the draft order prepared by the Respondents. "KIC1" in their founding affidavit thereby creating the impression that the matter was indeed settled, as set out in "JM3" which was not the case. It is therefore my finding that the settlement negotiations that took place on 25-10-2010 were subject to the input and/or instructions and/or acceptance from the 1st and 2nd Respondents which were still to be obtained.

29. In my view the Respondent's contention that the authority of both the 1st and 2nd Respondents was required to settle this matter is also supported by the provisions of the Public Finance Management Act, Act 1 of 1999(hereinafter referred to as "PFMA"). This Act provides that the responsibility to settle a dispute sounding in money lies with the Accounting Officer. In the present application the Minister of Trade and Industry (1st Respondent) acted as an Executive Authority (see section 1 of the PFMA) and the Director General of the

Department of Trade and Industry (2^{nd} Respondent) acted as the Accounting Officer in terms of the provisions of section 36 of the PFMA.

30. Sections 38 and 39 of the PFMA Act deals with the Accounting Officers Responsibilities. To achieve the obligations imposed in section 38 and 39 of the PFMA Act, the Accounting Officer ought to report to the Executive Authority as envisaged by section 39 (2) of the Act.

Section 46 (1)(2)of the PFMA provides that :

> " (1) Any directive by an Executive Authority of a Department to the Accounting Officer of the Department having Financial implications for the Department must be in writing.
>
> (2) If implementation of the Directive is likely to result in unauthorised expenditure, the Accounting Officer will be responsible for any resulting unauthorised expenditure unless the Accounting Officer informed the Executive Authority in writing of the likelihood of that unauthorised expenditure."

31. Settlement of disputes by State Organs is governed by section 76 (1)(h) of the PFMA read with regulation 12.2.1 of the Treasury Regulations. Section 76 (1)(h) provides that:

"(1) The National Treasury must make regulations or issue instructions applicable to departments concerning - (h) the settlement of claims by or against the State;

(2) If implementation of the directive is likely to result in unauthorised expenditure the Accounting Officer will be responsible for any resulting unauthorised expenditure unless the Accounting Officer informed the Executive Authority in writing of the likelihood of that unauthorised expenditure."

32. Regulation 12.2.3 of the Treasury Regulations provides that "except when an institution has accepted liability in terms of paragraph 12.2.1, an amount paid by the institution for losses, damages or claims arising from an act or omission of an official must be recovered from the official concerned if the official is liable in law to compensate the institution."

33. Regulation 12.2.4 provides that:" The State attorney may only obligate funds of an institution with the prior written approval of the Accounting Officer."

34. There can be little doubt that the State attorney must have written authority to settle matters. The amount involved in this case is prodigious. It is highly improbable that such amount will be approved over a telephone. Annexure "DG9" pages 404-407 , Bundle "B" of the main application, sets out processes put in place when the D.T.I procures services in excess of R10 million Rand .

Under such circumstances the authority of the Director General must be obtained.

35. Chapter 7 of the PFMA Act deals with the responsibilities of Executive Authorities as more clearly defined in section 63. Section 63 (2) provides that the Executive (The Minister) must exercise control to ensure public entities complies with the PFMA Act and the financial policies of the Executive. This also applies to the Minister's Executive Authority over the D.T.I (2nd Respondent) and CIPRO (3rd Respondent) .

Section 64 (3) more specifically deals with executive directives having financial implications and provides that the decision of the Executive Authority (The Minister) must be in writing and the Accounting Officer (The Director General) must promptly file a copy of the document with the National Treasury and the Auditor General.

The 1st and 2nd Respondents are not accountable unto themselves. See in this regard section 65 of PFMA. This function is overseen to a large extent by the Auditor General and Parliament (See in this regard section 195 of the Constitution).

36. The version of the State Attorney as well as the senior State law advisor to the Department acting for the Respondents is that they explicitly made it clear to the Applicant at the start of the negotiations that any agreement to be reached would be subject to it's acceptance by the 1st and 2nd Respondents. Their version is in

line with a legitimate governmental purpose that intended to achieve the goal of regulating the Financial Management of the Department of Trade and Industry. The Minister and the Director General has to ensure that all revenue, expenditure, assets and liabilities of the Department of Trade and Industry are managed efficiently and effectively. Having regard to the above it can be concluded that on the facts of this specific case, and especially the amount involved (R28.1 Million Rand) that the State Attorney (Chowe) and the senior legal advisor of the D.T.I (Strydom) had no authority to settle the matter without the mandate of the 1st and 2nd Respondents and that no binding oral agreement was concluded between the Applicant and the Respondents. In my view the reliance theory cannot be applied in this case as the facts before me doesn't allow such an application.

In the final result I make the following order:

1. The matter is heard as a matter of urgency.
2. The application is dismissed with costs.
3. The applicant is ordered to pay the costs of this application including the costs of one senior and two junior counsel.

H J DE VOS
JUDGE OF THE NORTH
GAUTENG HIGH COURT