



**IN THE HIGH COURT OF SOUTH AFRICA,
(GAUTENG DIVISION, JOHANNESBURG)**

Case No.: 21725/2018

(1)	REPORTABLE:	NO
(2)	OF INTEREST TO OTHER JUDGES:	NO
(3)	REVISED:	NO
3/11/2022		<i>H. Constantino</i>
DATE		SIGNATURE

In the matter between:

METROPOL CONSULTING (PTY) LTD

Applicant/Plaintiff

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent/First Defendant

MATHIPANE TSEBANE INC. ATTORNEYS

Second Respondent/Second
Defendant

JUDGMENT HANDED DOWN ELECTRONICALLY ON MICROSOFT TEAMS BY
CIRCULATION TO THE PARTIES AND/OR LEGAL REPRESENTATIVES BY EMAIL,
AND BY UPLOADING ONTO CASELINES

JUDGMENT

Date and time for hand-down is deemed to have been on: 03rd November 2022

CORAM: CONSTANTINIDES AJ:

INTRODUCTION

1. This is an application by the Applicant ("Metropol") for leave to amend its Declaration dated the 2nd August 2019 by deleting of the Declaration in its entirety and substitution with a Declaration annexed to the Plaintiffs' Notice of Amendment in terms of Rule 28 dated the 24th May 2021.
2. The First Respondent ("the City") has opposed the aforesaid application on the following grounds:

"1. The Plaintiff served its declaration in this action on 2 August 2019.

2 On 1 November 2019, the City delivered a notice in terms of the rule 23(1) calling on the plaintiff to remove causes of complaint identified in its declaration....

3. The City complained that Claim A of the declaration did not disclose an enforceable cause of action against the City. The complaint was that:

3.1 Claim A did not disclose a claim in contract against the City

despite purporting to do so. The Plaintiff was not a party to the Service level Agreement ("SLA") referred to in paragraphs 2.15 – 2.16 of the declaration and the SLA could therefore not confer the rights the plaintiff sought to enforce. The City was not a party to the alleged agreement between the plaintiff and the second defendant ("Mathipane") referred to in paragraphs 2.17 – 2.18 of the declaration and that agreement therefore could not confer the obligations the plaintiff sought to enforce.

3.2 Accordingly, the claim was not supported by any of the contracts referred to in the declaration.

3.3 The plaintiff's oblique reliance at paragraph 10.10 of the declaration on "direct contractual privity" between it and the City was unsustainable as the plaintiff did not allege a trilateral contract between all the parties or a bilateral contract between it and the City that conferred any right on the plaintiff or obligation on the City of the kind the plaintiff sought to enforce.

3.4 The plaintiff's reliance on the City's conduct in relation to the alleged agreement between Mathipane and the plaintiff fell short of disclosing a contractual basis for any obligation on the City of the kind that the plaintiff sought to enforce.

3.5 Even if it were found that the declaration disclosed a

contractual cause of action against the City, the declaration fell short of the requirements of rule 18(6) as the declaration did not state whether the contract was written or oral and/or when, where and by whom on behalf of each party it was concluded.

3.6 *Even if it were found that the declaration disclosed a cause of action against the City, and complied with the Rule 18(6), the declaration failed to disclose an enforceable cause of action against the City because the plaintiff did not allege that the City paid Mathipane the claimed amount in circumstances where, on its own version, the plaintiff was only entitled to demand receipt of payment after Mathipane had received payment from the City.*

4. *The City contended that Claim A lacked averments necessary to sustain a cause of action or was vague and embarrassing.*

5. *The City also complained that Claim B, pursued against Mathipane and in the alternative to Claim A, did not disclose an enforceable cause of action. The City's complaint was that:*

5.1 *Claim B relied on fictional fulfilment by Mathipane of an alleged condition precedent of its agreement with the plaintiff in circumstances where the obligations that Mathipane bore under the agreement and that allegedly gave rise to the condition precedent were self-evidently*

not condition precedents to the non-fulfilment of which could be fictionally fulfilled;

5.2 *Even if it were found that the Mathipane's obligations were a condition precedent to the agreement (between plaintiff and Mathipane), in breach of rule 18(4), the declaration failed to set out any facts from which a conclusion that Mathipane deliberately and intentionally frustrated fulfilment of the condition could be drawn.*

6. *The City contended that Claim B did not comply with rule 18(4) and, by virtue of rule 18(12), constituted an irregular step that fell to be set aside in terms of rule 30(1).*

7. *in response to the City's rule 23(1) notice, on 24 January 2020, the plaintiff delivered a notice in terms of rule 28(1) in which it conveyed its intention to amend its declaration by replacing it entirely with the declaration attached to the rule 29(1) notice.*

BACKGROUND

3. It is common cause that this is the second application that Metropol has launched to obtain leave to amend its declaration of the 2nd August 2019. In the first application for leave to amend, which was argued before Opperman J, Metropol sought to amend its Declaration to introduce the claim for specific performance of a tacit agreement that it had allegedly concluded with the City.

4. According to Metropol, it had provided certain debt collection services on behalf of the City and was claiming payment of R266 095 033.60. The aforesaid application was dismissed with costs by Opperman J who found that Metropol was relying on an illegal Agreement.¹
5. Thereafter, Metropol was unsuccessful in seeking leave to appeal to the Supreme Court of Appeal and the Constitutional Court. The City now argues that :

“6. ... Opperman J’s Judgment is definitive of Metropol’s inability to pursue a claim for specific performance of the tacit agreement.

7 The claim that Metropol seeks to introduce by amendment on this occasion is materially the same as the claim it sought to introduce by amendment before Opperman J. The current proposed claim is still a claim for specific performance of the tacit agreement Metropol alleges the parties concluded.

8. Crucially, Metropol relies on the same facts and circumstances as it did in its previous proposed declaration to establish the tacit agreement.

9. The difference in Metropol’s approach on this occasion is that, firstly, Metropol has selectively omitted certain allegations that are known to be true and that are fatal to its case, and,

¹ Judgment, p. 001-129, paragraph 25.

secondly, Metropol has alleged that the tacit agreement was concluded pursuant to a 'deviation' permitted by the City's Supply Chain Management Policy ("SCMP").

10. Therefore, the main issue in this application is whether the proposed declaration is substantively different from the proposed claim that Opperman J rejected on the ground that it was unenforceable."

6. The present application is a second application for leave to amend its declaration and claim specific performance of the tacit agreement allegedly concluded pursuant to a deviation allegedly permitted by the City's SCMP.
7. According to the city this proposed amendment cannot be distinguished from its predecessor, and it seeks an order that the Court dismiss this application in order to ensure that Metropol does not pursue a claim determined finally by our Courts to be unenforceable.
8. The City persists in its argument that there is no substantive difference between the two proposed Declarations as the present proposed Declaration does not disclose a cause of action that can be enforced.
9. In the present matter, the new allegation made by Metropol is that the parties have concluded a tacit agreement **pursuant to a valid deviation**. The City complains that the proposed amendment relying on an alleged deviation does not raise a triable issue and is pursued in bad faith.²

² Paragraph 16 of the First Defendant's Heads of Argument. (054-23)

(emphasis added)

10. As stated in the introduction above, the litigation history of Metropol's claim is detailed in the City's Notice of Objection.³
11. This Court, by agreement between the parties, had referred Metropol's original application to trial on the 13th May 2019. Metropol in its Declaration initially sought to enforce its alleged claim against the City based on a tacit Agreement in terms of which it claimed that it was entitled to payment for certain debt collection services which it had allegedly performed for the City.
12. The City objected to the proposed amendment in which Metropol has claimed specific performance of an alleged tacit agreement.
13. Metropol's Counsel aptly summarises the basis upon which the City opposes the order sought by the Plaintiff as follows:

*"4.3 In essence, the First Defendant contends that for the reasons advanced by it, the application is not bona fide, does not raise triable issues and the First Defendant will be prejudiced if the amendment is granted."*⁴

14. Metropol submits that:

"5.3 Whilst the cause of action is still founded on the tacit agreement, the amendment now sets out the basis upon

³ Notice of Objection (001-40)

⁴ Plaintiff's Heads of Argument. (054 -9)

which the procurement provisions were lawfully deviated from and which renders the tacit agreement legal, as it does not contravene the procurement provisions.

5.4 *The issue as to whether a deviation from the procurement provisions occurred or not, will, depending upon the pleaded facts, be a factual issue to be determined by the trial court at a hearing in due course and after viva voce evidence has been heard and documents presented and furnished to the trial court.*

5.5 *The issue to be considered in determining this application is whether on the pleaded facts in the proposed declaration, a cause of cause of action is made out to the effect that the tacit agreement is legal and therefore, does not contravene the procurement provisions*

...

5.9 *The First Defendant's contention that the Plaintiff is acting in bad faith by pursuing the same claim which has already been found to be unenforceable, by deliberately omitting the material facts in order to 'sidestep' the issues, makes no sense whatsoever. As stated ..., the issue is whether on the facts as now pleaded, a triable issue has been created in the sense as set out above. If so, the fact that previously omitted facts were excluded is irrelevant to the determination*

of the application.⁵

15. The City's first objection was that:

"12.1 The City is an Organ of State and is therefore subject to the peremptory procurement provisions of the Municipal Finance Management Act 56 of 2003 and the Public Finance Management Act 1 of 1999, all of which give effect to section 217 of the Constitution;

12.2 The allegations in the proposed amendment were that the parties conspired to circumvent the City's procurement process in that the allegations established that the plaintiff together with officials within the City devised a scheme by which the plaintiff would receive payment for services it was not entitled to perform because the City had rejected its tender;

12.3 accordingly, the tacit agreement was intentionally concluded in violation of Section 217 of the Constitution which made it contra bonos mores and illegal;

12.4 The proposed amendment ought not to be allowed because, if allowed, it would advance a claim in terms of which the plaintiff sought specific performance of an illegal agreement which the rule ex turpi causa did not permit. Hence the claim

⁵ Plaintiff's Heads of Argument – (054-12 to 054-13)

*is excipiable.*⁶

16. In argument in the previous hearing for the application for leave amend the Plaintiff had stated that the Court should not refuse the proposed amendment because *inter alia* at trial they may reveal that the City's SCMP allowed a tacit agreement concluded in the circumstances pleaded and thereby making it lawful and enforceable.
17. The City countered the aforesaid argument on the basis that a proposed amendment could not be granted "*...on speculation about an SCMP that was not relied on, referred to or attached to the proposed amendment.*"

"17. This Court heard the application for leave to amend and upheld this City's objection. A copy of the Judgment is attached hereto as annexure "D"."

...

21. In each application for leave to appeal, the Plaintiff purported to rely on the SCMP despite never including it in its papers or disclosing its contents and asserted that the tacit agreement could not be found to be illegal until a Court satisfied itself that it was illegal when considered against the provisions of the SCMP.

22. It is in the context of the above facts and circumstances that the proposed Declaration (dated 24 May 2021) that is the subject of

⁶ 1st Defendant's objection to the proposed amendment Paras 12.1-12.4 - (034-31 to 034-32)

the City's objection must be considered."⁷

18. Metropol alleges that it was under no obligation to have attached the SCMP to the proposed declaration and it argues that the city is in possession of same and is aware of its contents. Metropol alleges that this is akin to expecting a plaintiff to make discovery at this early stage of the proceedings.
19. In the proposed Amendment before Opperman J at *paragraph 13 to 18 of the Judgment*, the Judge sets out the essential allegations that Metropol relied on to support its claim for specific performance of the tacit agreement and that it sought to introduce by amendment. Opperman J concluded that the true meaning of the allegations was that *'...the parties conspired to circumvent the City's procurement processes using an intermediary in the form of a successful tenderer, Mathipane.'*⁸
20. According to Opperman J, that was the only interpretation that the allegations could reasonably bare.⁹
21. The city submitted that given the substantive similarity between the two claims, Opperman J's conclusions applied equally to the current proposed claim. By applying the principle that agreements concluded in contravention of the "constitutional standard", i.e. in purported circumvention of a fair and transparent public procurement process,¹⁰ are

⁷ The First Defendant's Objection to the Proposed Amendment – (034-33 and 034-34)

⁸ Judgment, page 001 – 127 para 20.

⁹ Ibid

¹⁰ Section 217 of the Constitution provides that Organs of State must procure goods and services 'in accordance with a system that is fair, equitable, transparent, competitive and cost effective'

illegal and that a Court will never permit enforcement of an illegal contract.¹¹

22. In the present case, the First Defendant's grounds of objection are as follows:

"30. In the proposed Declaration, the plaintiff attempts to overcome the difficulties of the first proposed declaration by:

30.1 omitting the allegations in the first proposed declaration that it submitted a bid in the City's tender for debt collection services and that its bid was rejected;

30.2 omitting the allegations in the first proposed declaration that Mathipane was awarded the tender that resulted in the SLA between Mathipane and the City in terms of which Mathipane would render debt collection services to the City;

30.3 omitting the SLA as an attachment;

30.4 omitting the allegations in the first proposed declaration that it concluded a written contract with Mathipane ('the contract') in terms of which it would render the section 118 debt collection with the result that Mathipane 'would effectively be precluded from

¹¹ Judgment page 001 – 127 paras 23 – 29.

recovering the section 118 debts' which function was to be 'solely and exclusively reserved for the plaintiff';

30.5 omitting the contract as an attachment;

30.6 introducing new allegations that the tacit agreement was concluded **pursuant to a deviation in terms of the Regulations of the SCMP**; (emphasis added)

30.7 omitting the SCMP as an attachment; and

30.8 introducing new allegations that Mathipane was a party to the tacit agreement.

31. The omitted allegations constituted facts that were essential to a claim that the plaintiff was so committed to that it appealed this court's refusal of its application to amend all the way up to the Constitutional Court hoping that that Court would overturn the refusal and allow it to proceed with its claim.

32. More fundamentally, the omitted allegations were supported by documentary evidence. The Plaintiff's bid, the SLA and the Contract were all attached to the first proposed declaration. The Plaintiff attached those documents as proof that the City had initiated an ordinary tender process, that the Plaintiff and Mathipane participated, and that the City rejected the Plaintiff's bid before awarding the tender to

Mathipane and Others.

33. *The facts pleaded in the first proposed declaration remain allegations that this Court can and should take account of.*

34. *In the absence of a compelling explanation why the facts have been omitted, the proposed amendment would not raise a triable issue because the omitted facts which are facts this Court must take account of, materially contradict the plaintiff's claim that the parties concluded a tacit agreement pursuant to a lawful deviation from the SCMP necessitated by an emergency.*

35.1 *In the context of the application that preceded this action, It is an act of bad faith **to pursue the same claim (i.e. a tacit agreement, that the Court has found to be unenforceable** by omitting material that is fatally inconvenient and without explanation, introducing averments that purport to sidestep the difficulties with the claim but are undermined by the omitted facts.*

35.3 *Having insisted on the centrality of the SCMP to the question whether the alleged tacit agreement is lawful, it is a manifest act of bad faith for the Plaintiff, without explanation, **to refer selectively to its terms without disclosing its contents in full.** The*

inference to draw from such conduct is that the Plaintiff has shielded from scrutiny the terms of the SCMP that would demonstrate that its claim is unsustainable.¹² (emphasis added)

23. The First Defendant's objection states further that:

"36. *The Plaintiff's claim is based on the SCMP. It is therefore obliged to place the SCMP before the court as it would be obliged to do were its claim based on a written contract. The City contends that the provisions of Rule 18(6) apply in the circumstances of this case. The City accordingly objects to the proposed amendment on the ground that, if it were allowed, it would constitute an irregular step that would fall to be set aside in terms of Rule 30(1).*

37. *If it is found that the proposed declaration cannot be disallowed on the basis set out above, the City nevertheless contends that the claim advanced in the proposed declaration is excipiable because it is illegal:*

37.1 *The SCMP and the regulations set out the requirements and conditions that must be fulfilled to ensure lawful emergency deviation procurement process. A deviation undertaken in contravention of the requirements of the SCMP and the regulations*

¹² First Defendant's Objection to Proposed Amendment – 034-42 to 034-44.

cannot be sanctioned by the manager. It follows that an agreement is illegal if it arises out of any process that purports to be a deviation, but which is undertaken in contravention of the requirements of the SCMP and the regulations.

37.2 *The allegations in the proposed declaration are that the parties engaged in conduct that gave rise to a tacit agreement that the manager allegedly sought to make lawful by complying with the requirements of the SCMP and the regulations. The SCMP and the regulations do not permit that.*

37.3 *Moreover, the proposed declaration lacks particularity such that this Court cannot determine whether the requirements of the SCMP and the regulations were satisfied in a manner that makes the alleged emergency deviation lawful. The plaintiff does not state:when and how the manager allegedly complied with the requirements of the SCMP. The plaintiff also does not state when each element of the conduct that is the subject of the tacit agreement occurred, the absence of that particularly means this court cannot assess compliance with the regulations and the SCMP.*

37.4 *Accordingly it does not follow from the allegations in the proposed declaration that the deviation was lawful.*

38. *In the circumstances the proposed amendment should be refused. Were it allowed, it would introduce a claim that is excipiable either because it contains insufficient allegations to sustain the claim or because it is vague and embarrassing.”¹³*

24. According to the City in its Heads of Argument, it is stated that the tacit agreement according to the Plaintiff arose due to the fact that the City *inter alia* trained Metropol's staff on the use of the City's SAPS/VENUS software, installed the software on Metropol's computers, gave Metropol access to the sensitive and classified information and issued all instructions in respect of the recovery of section 118 debts directly to Metropol.

25. Metropol had accordingly **invoiced Mathipane (and not the City)** for services it had rendered and the City paid Mathipane (not Metropol) for the services Metropol rendered, and upon receiving payment from the City, Mathipane, as the “conduit” paid Metropol what was due, minus 10%. (emphasis added)

26. Metropol had allegedly complied with its obligations to the City by allegedly rendering its services during March 2015 to November 2016 to the City. Due to the aforesaid, according to Metropol, the City became indebted to

¹³ Paragraph 36 to 38 of the First Defendant's Objection to the Proposed Amendment, pages 034/44 034/45

Metropol in the amount of R266 095 033.60.¹⁴

27. The City summarises this matter as follows:

“19. Metropol relied on substantively the same allegations in the proposed amendment before Opperman J. At paragraphs 13 to 18 of the judgment, the Judge set out the essential allegations that Metropol relied on to support its claim for specific performance of the tacit agreement that it sought to introduce by amendment. Opperman J concluded that the true meaning of the allegations was that the parties conspired to circumvent the City’s procurement process using an intermediary in the form of a successful tenderer, Mathipane.”¹⁵

According to Opperman J that was the only interpretation that the allegations could reasonably bear.¹⁶

28. The City submitted that by applying the principle that agreements which are concluded in contravention of “the constitutional standard”, i.e. in purported circumvention of a fair and transparent public procurement process,¹⁷ are illegal and that a Court will never permit enforcement of an illegal contract.¹⁸

¹⁴ Respondent’s Heads of Argument, paragraphs 18.6 to 18.9 – **054 – 22 CaseLines**.

¹⁵ 1st Respondent’s Heads of Argument, paragraphs 19, **(054-26)**

Judgment page 001 – 127 paragraph 20.

¹⁶ *Idid*.

¹⁷ Section 21(7) of the Constitution provides that Organs of the State must procure goods and services in accordance “with a system which is fair, equitable, transparent, competitive and cost-effective”

Paragraphs 20 of the Respondent’s Heads of Argument – **054-27**.

¹⁸ Judgment – page 009-127, paras 23 to 29.

29. Based on the aforesaid the City seeks an order that this Court also refuse the application for the proposed amendment.
30. The City points out that Metropol for the "first time" in the history of this litigation now states that the tacit agreement was concluded in accordance with a deviation permitted by the SCMP. According to Metropol, this policy allows the deviation in the case of an emergency and where there is a sole provider.
31. Metropol's Counsel stated that the Court should look at the pleading as it stands. Metropol's Counsel argued that the payment being made to Mathipane, less 10%, does not amount to anything untoward with this tacit agreement and nevertheless these issues would be argued at trial as these are allegedly factual issues as to when, where and how this tacit agreement was concluded.
32. Metropol argued that there is no prejudice to allowing the proposed amendment and persisted with the argument that the deviation was allegedly permitted by the SCMP and this in fact has created a triable issue.
33. According to Metropol, the Court should not adopt a technical approach to this application to allow the proposed amendment and the Court was requested to exercise its discretion. Metropol argued that the Court would be adopting an over technical approach by preventing Metropol from ventilating its issues at trial.

34. The City also states in the Heads of Argument:

“23. The immediate, insurmountable difficulty with Metropol’s contention is that the ‘tacit deviation’ from a policy is no more than noncompliance with the policy.For a procurement deviation to be lawful, it must be express, overt and in terms of the policy.

....¹⁹

35. In paragraph 3.4 of the proposed declaration Metropol states that section 36(1)(a)(i) and (ii) of the regulations provides that a SCMP may allow the accounting officer to dispense with official procurement processes required by SCMP and procure required goods and services which may include direct negotiations, but only *inter alia* in an emergency or if such goods and services are produced or are available from a single provider.
36. Metropol furthermore in its proposed amendment states the following in paragraphs 3.7 to 3.9:

“3.7 In terms of Section 21(1)(a) and (b) of [the City’s] policy, deviations from the procurement mechanisms entailed in the [the City’s] policy may be allowed in emergency or exceptional cases or if such goods and services are produced or are available from a single/sole provider only, a sole supplier being defined in Section 1 as read with Section 19.5 of [the City’s] policy;

3.8 Section 21(1) [of the City’s] policy provides, inter alia, that the

¹⁹ Paragraph 23 of the 1st Respondent’s Heads of Argument – **054 – 28 of CaseLines**.

deviations from the procurement mechanisms must be recommended by the head of the department for consideration by Executive Acquisition Committee and the city manager must record the reasons for the said deviations from the procurement mechanisms;

3.9 *The city manager of [the city] in his capacity as the accounting officer deviated from the procurement mechanisms entailed in [the City's] policy by dispensing of the procurement processes so as to allow [the City] to procure the required services from the plaintiff, which included direct negotiations taking place between duly authorised representatives of [the City], [Mathipane] and the Plaintiff.*²⁰

37. In paragraph 3.10 Metropol stated that the City's procurement process was dispensed with due to the fact that "*at all material times*" the City was experiencing a debt recovery crisis and therefore "*an emergency had arisen which justified the procurement by 'the City' of Metropol's services without procurement processes taking place*" i.e. a deviation; and therefore the relevant debt collection services "*were only available from the Plaintiff, the Plaintiff being a single/sole provider as envisaged by the SCMP as read with the Regulations.*

38. In paragraph 3.11, Metropol alleged that the city manager had "*duly complied with*" the requirements of the SCMP read with the Regulations "so

²⁰ Paragraphs 25.3 of the 1st Respondent's Heads of Argument – 054 – 29 to 054 – 30 of the CaseLines.

as to enable the deviations from the procurement mechanisms” and “the procurement processes to be dispensed with” as envisaged in terms of the SCMP read with the Regulations.

39. The City points out that at paragraph 3.12 Metropol accepted that a tacit agreement was concluded *“in the absence of procurement processes taking place”* but contended that the aforesaid conduct was legal because *“the accounting officer [i.e. the city manager] was lawfully entitled to dispense with the procurement process by virtue of the fact and circumstances which was set out above.”*²¹
40. The City argues that Metropol has failed to demonstrate the legality of the aforesaid tacit agreement even on a *prima facie* basis as the requirements for a valid deviation have not been met when the parties concluded the alleged tacit agreement.
41. According to the City, if Metropol cannot demonstrate that certain facts exist to permit the deviation and the tacit agreement, then the aforesaid conduct is once again illegal.
42. It was pointed out to the Court that Metropol's claim that there was an emergency is in fact contradictory to Metropol's own allegations that the City had issued a tender for section 118 debt collection services and it is common cause that Metropol's bid was rejected and the tender was awarded to a panel of attorneys. Therefore the fact that Metropol's bid had been rejected is clearly destructive of the allegation that an emergency

²¹ See paragraphs 25.5 to 25.6 of the 1st Respondent's Heads of Argument **054 – 30 of CaseLines**.

situation arose which required the City to procure the same services in respect of which the bid was rejected without following the proper procurement processes.

43. Furthermore, Metropol's argument that it is a single or sole service provider once again fails as on Metropol's own version, the City awarded the tender to a panel of Attorneys, including Mathipane, the aforesaid firm that had been allegedly used as a "conduit" for payment of Metropol's account.
44. Therefore, Metropol cannot possibly be a "single and/or sole provider".
45. According to Metropol's Counsel, the material facts upon which it relies will be assessed and investigated and resolved at trial stage.
46. The City has quoted two cases in regard to whether the amendment raises a triable issue depends on the answer to the question whether the proposed claim is sustainable at trial.²²
47. In the case of **Knox v. D'Arcy and Another v. Land and Agricultural Development Bank of South Africa [2013] 3 ALL SA (404) SCA** at para 35 the SCA held:

²² **Ciba-Geigy (Pty) Ltd v. Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA)** at paragraph 34 where the SCA referred with approval to the statement in **Trans Drakensberg Bank Ltd (under Judicial Management v. Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D)** at 641 A – B:

"Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable ..." (Emphasis added) See: paragraph 30.1.1 054 – 34 and 054 – 35 of 1st Respondent's Heads of Argument.

"It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. The party may not plead one issue and then at the trial, and in this case on appeal, attempt to canvass another which was not put in issue and fully investigated." (emphasis added and footnotes omitted)²³

48. Therefore based on Metropol's own proposed pleadings, at this stage it is apparent that Metropol's allegation of a "lawful" deviation from the procurement provisions and the alleged tacit Agreement is unsustainable and to argue that the City "may deviate" and that it is a factual issue to be canvassed at the trial is not sufficient to convince this Court that there was a lawful "deviation".
49. According to the City's Counsel it was argued that only in a "truly urgent situation and where there was only a single supplier" this would allow the City to deviate from the SCMP policy in order to ensure that there was no need for a lengthy process ("emergency"). However, the aforesaid facts are not before this Court.
50. Furthermore issue was taken by the City that the correct SCMP policy was not placed before this Court to enable the Court to assess whether this present application for the proposed amendment is sound.
51. Metropol did not provide sufficient evidence to show that it was a "sole supplier" as Metropol would still need to satisfy the requirements for this

²³ 054 – 35 of 1st Respondent's Heads of Argument.

deviation. The procedure was not pleaded and details of substantive compliance was not pleaded.

52. The City's Counsel argued that even if the Court is to omit the previous facts of the previous application for application of the proposed amendment, the existence of Mathipane is destructive to the present action. Mathipane is on the panel of Attorneys and therefore is a supplier of the Section 118 debts. Therefore, there are at least two collectors in this scenario.
53. The City's Counsel argued that the Plaintiff deliberately omitted the facts of the previous matter and this amounts to bad faith on the part of Metropol as the City must once again defend an application of a proposed amendment which is unsustainable at trial. Therefore the City argues there is no triable issue and the pleader ought to have disclosed the facts to this court..
54. The City has argued that it was not unreasonable in opposing this application as this is a clear case of the misuse of public funds, which verges on skulduggery and ought not to be countenanced by this Court.
55. According to Metropol, the history of this matter is "irrelevant to the present application, but relevant to the Trial Court".
56. "Opperman J in the conclusion to her judgment in Metropol's application

for leave to appeal²⁴ stated the following:

[13] *Whether illegality appeared ex facie the proposed declaration was the principal issue raised by the first defendant's objection to the plaintiff's amendment. The plaintiff during the hearing, did not contend for an alternative construction of the proposed declaration either in its written or oral argument. It did not offer an alternative interpretation that would explain how the tacit agreement complied with the constitutional standard and somehow saved it from being, on the face of it, illegal.*

[14] *The repeated criticism in the application for leave to appeal is that this court could not have made a factual finding of invalidity premised solely on the allegations in the proposed declaration. This court did not. The relevant principle is that, on exception (here taken in the context of an objection to an amendment), the pleaded allegations are taken at face value on the assumption that they would be established at trial.²⁵ The implication of that principle is that illegality may be determined from the proposed declaration alone.*

[15] *Because the illegality appears ex facie the proposed declaration, the court need not wait for the first defendant to raise the illegality before refusing to enforce the agreement. A court is duty bound to raise illegality mero motu and refuse enforcement even if a defendant*

²⁴ *Metropol Consulting (Pty) Ltd v City of Jhb Metropolitan Municipality and Another* (21725/2018) [2020] ZAGPJHC 207 (11 June 2020)

²⁵ *Stewart and Another v Botha and Another*, 2008 (6) SA 310 (SCA) at para 4

does not plead it. As Mthiyane JA said in *Madzivhandila and Others v Madzivhandila and Another*²⁶:

*"The approach to be followed where a question of illegality is raised was laid down in Yannakou v Apollo Club. Trollip JA writing for the majority said: '...it is the duty of the court to take the point of illegality mero motu, even if the defendant does not plead or raise it; but it can and **will only do so if the illegality appears ex facie the transaction**...' (Emphasis added)....."*

[20] *In my view there is only one interpretation these allegations can reasonably bear.²⁷ It is that the parties conspired to circumvent the City's procurement processes using an intermediary in the form of a successful tenderer, Mathipane.*

[21] *These allegations, if accepted, establish that Metropol together with certain officials of the city devised a scheme in consequence of which Metropol would receive payment for services it was not entitled to perform because the City had rejected its tender. Thus the tacit agreement was concluded in violation of Section 217 of the Constitution and the subordinate legislation thereunder. The Scheme was neither a 'system' contemplated by Section 217 nor was it fair, equitable, transparent, competitive and cost effective." "The Constitutional standard". The pleaded case bares all the*

²⁶ (584/2002) [2004] ZASCA 12

²⁷ *Children's Resource Centre Trust and Others v. Pioneer Food (Pty) Limited and Others* 2013 (2) SA 213 (SCA) at para [36]; cited with approval in *H v. Foetal Assessment Centre* 2015 (2) SA 193 (CC) at para [10].

hallmarks of what the Constitutional Standard Terms is faced against secrecy, irregularity, unfairness and wastefulness.”

57 The present application for leave to allow the amendment of the proposed declaration does not remedy or address the aforesaid finding of Opperman J. Metropol has failed to provide sufficient facts to satisfy the court that the alleged “deviation” has legalised the tacit agreement between the parties.

CONCLUSION

58 Based on the aforesaid, the Court is not prepared to exercise its discretion in favour of Metropol as this is once again an attempt to muddy the waters and to override the Judgment of Opperman J as Counsel for Metropol has repeatedly stated in argument that he believed that Opperman J was incorrect in her findings.

59 It is trite that costs normally follow the result and therefore I accordingly make the following order:

1. The Applicant’s application is dismissed with costs which costs include the costs of two Counsel.


H CONSTANTINIDES A J
Acting Judge of High Court
Gauteng Division
JOHANNESBURG

Counsel for the plaintiff: Adv S Pincus SC

Instructed by: Howard S Woolf

Counsel for the first defendant: Adv R Pearse SC, Adv M Seape, Adv J Chanza

Instructed by: Moodie & Robertson

Counsel for the second defendant: No opposition

Date of hearing : Tuesday 25 October 2022

Date of handing down of the
judgment: 3rd November 2022