

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>	
(3) REVISED	
<u>2021.02.19</u>	<u><i>M Abuse</i></u>
DATE	SIGNATURE

CASE NUMBER: 70477/09

DATE: 19 February 2021

**THE MEC PROVINCIAL TREASURY, THE PROVINCIAL
GOVERNMENT OF LIMPOPO**

Plaintiff

V

MAGNUM SIMPLEX INTERNATIONAL (PTY) LTD

Defendant

JUDGMENT

MABUSE J

[1] By combined summons issued by the registrar of this Court on 17 November 2009, the Plaintiff, the MEC Provincial Treasury of the Provincial Government of Limpopo, seeks against the Defendant, Magnum Simplex International:

1.1 *"an order declaring that the purported approval/exceptions in respect of NTP 8419 and 8937 are invalid, void, ab initio and falls to be set aside;*

- 1.2 *an order declaring that Annexure 'B' (to the particulars of claim) is invalid, void ab initio and falls to be set aside;*
- 1.3 *repayment of the amount of R98,486,141.00 less any amount lawfully paid to the Defendant in terms of NTP 6891;*
- 1.4 *interest on the amount of R98,486,141.00 at the prescribed legal rate of interest per annum, a tempore morae, alternatively from the date of summons;*
- 1.5 *cost of suit, such costs to include the costs occasioned by three counsel."*

[2] At the same time the Defendant has lodged a counterclaim against the Plaintiff in which it seeks:

- 2.1 payment for annual license and support fees.
- 2.2 payment of annual license fees (its usage fees based on the ownership of copyright).
- 2.3 payment for the reinstatement of annual license and support fees for the module in Schedule 3.
- 2.4 payment for modification to the asset module.

[3] The Defendant's claims against the Plaintiff amount to approximately R202 million, the bulk of which comprises of interest in an amount of R95 million. The claims in respect of annual fees and maintenance and support amount to approximately R95 million.

THE BACKGROUND

[4] On 11 August 1999, and not on 17 February 2000, the Plaintiff requested the Northern Province Tender Board ("the Board") to invite tenders for the provision or development of an Automated Procurement System under Tender No. NTP 6891. This tender was valid for the period 1 October 1999 to 31 April 2000. Seven companies submitted their tenders to the Tender Board. The Department recommended Lechabile Information Technology Services (Pty) Ltd ("Lechabile") at the amount of R8,949,912.00 by reason of the fact that it complied with the requirements for the Northern Provincial Administration which was mainframe based. The recommendation was also supported by SITA. On 17 February 2000, the authority

dated 8 February 2002, was granted in terms of the Northern Transvaal Tender Board Act 2 of 1994 ("the Tender Board Act") for acceptance of the tender by Messrs Lechabile to the sum of R8,949,912.00. The Board awarded the tender to a consortium of Lechabile for the total value of R8,949,912.00. The automated procurement system provided under the said tender is hereinafter referred to as Module 1.

- [5] It was a condition of the tender that no amendment or variation of the contract or its provisions would be valid and of force and effect unless the agreement to amend or vary was entered into in writing, signed by the parties and approved by the Board. On 20 April 2011, the said tender was lawfully extended for an additional amount of R932,138.00. Tender NTP 6891 was completed and signed off by Lechabile on or about 29 May 2001.
- [6] The Plaintiff paid the total amount of R15,699,871.00 made up as follows to:
- 6.1 Lechabile, R14,462,716.00.
 - 6.2 Mma-O-Tile Communications (Pty) Ltd, R1,237,155.00, a company associated with the Defendant.
 - 6.3 the Defendant in an amount unknown to the Plaintiff which is not included in the amounts set out above.
- [7] At a precise time and place unknown to the Plaintiff the Defendant persuaded Mr JNT Mohlala ("Mr Mohlala"), at the time the Chief Financial Officer of the Plaintiff, to write a letter to the Tender Board. A copy of that letter that Mr Mohlala wrote to the Tender Board is attached to the particulars of claim as Annexure 'A'. It states, *inter alia*, that:
- "The Provincial Administration has been implementing the FINEST Financial Management System since November 2000. Since that time, all departments including the Regional Offices have fully implemented the procurement module of Finest. The Assets Management function has been implemented at head office and central regions. The implementation of the Assets Management in the other regions is in progress."*

The cost of implementing the Procurement module was implemented at a cost of R9.8 million and the Asset Management tender approval was R11 million. Therefore, the total cost for the implementation of the Public Finance Management Act (PFMA) requirement is R20,9 million.

The Limpopo Provincial Administration implemented the two modules of Finest to enhance the performance of the Basic Accounting System to comply with the requirements of the PFMA. The solution improved the financial management in the province, but it also created a problem of managing three financial systems namely, BAS, PERSAL and FINEST that eventually slows down the speed of the service delivery and increases the labour resources. The usage of the three systems and the problems of interfacing, necessitated the introduction of the fully integrated system in the province.

The meeting of Heads of Department of March 2002 tasked the Office of the Director General and Treasury to investigate the possibility of implementing the remaining modules of the FINEST in order to have one integrated financial system in the province. The investigation included the preparation of cost benefit analysis of the proposal to support the decision to implement or not to implement the full system

The total cost of the remaining modules excluding Supply Chain Management is R35,787,363. However, the system provider is offering the remaining modules at the previously discounted promised price of R17,110,569.00.

However, a number of interfaces to fully automate the subsidiary systems and to facilitate the progressive implementation of FINEST were provided at a cost of R4,800,000.00 details of which are provided below as Additional Interfacing Cost.

The discounted price was agreed in 2002 and subsequently the Treasury and the Tender Board Secretariat approached the vendor to include the Supply Chain Management functionality.

The cost of the Supply Chain Management module is R3,500,000.00. The computer hardware, operating system and other system software required to host the Supply Chain Management facility is R850,000.00.

In order to better manage the tender responses from suppliers and the subsequent archiving, the solution will require scanners and document management software at a cost of R1,250,000.00. This facility is optional, and the Tender Board can make a decision based on the volume of documents handled, the need for their retrieval and the loss rate of documents.

The issue of supply Chain Management was discussed with the CFO's at the Technical Committee on finance, and the HODs forum and the Tender Board Secretariat. All the members agreed to this approach."

- [8] The purpose of the letter was to persuade the Tender Board to acquire Modules 2 and 3 without following the procurement procedures then in place. For unknown reasons, the said letter was not dated. But nothing turns on this. It was received by the office of the Provincial Tender Board on 24 June 2003. To the said letter the said Mr Mohlala assigned Code or Tender No. NTP 8419. Assigning the said Tender No. NTP 8419 by Mr Mohlala was wrong in as much as the said code was only assigned to tenders sought by the Province. No tender had been advertised. The Plaintiff had also not called for quotations from the preferred bidders. This shows that already there were negotiations behind closed doors for the procurement of goods and services between the Plaintiff and the Defendant.
- [9] On 6 February 2002 the Acting Secretary of the Tender Board, a certain Adv BB Mohlala, purported to authorize, alternatively exempt, in terms of the Tender Board Act the acquisition of the Finest Asset Management Module, Module 2, for R9,465,000.00 and thereafter purported to grant approval or exemption to amend the sum to R11,455,666.00. The decision of the Secretary of the Tender Board which purported to authorise or exempt in terms of the Tender Board Act the acquisition of the Asset Module 2 for R9,465,000.00 and thereafter purported to grant approval or exemption to amend the sum to R11,455,666.00 was unlawful and invalid for failure to follow the procurement processes. The decision must be impugned on the ground that it was not in compliance with s 217(1) of the Constitution, s

33(1) of the Constitution, s 38(1) of the Public Finance Management Act No. 1 of 1999 (“PFMA”), and the Treasury Regulations.

- [10] The decision was unlawful and irregular. In terms of s 217(1) the Secretary of the Tender Board exceeded his powers. *“This is in conflict with the value of law and specifically the principle of legality. These principles require administrative functionaries to exercise public power conferred on them and nothing more.”* See paragraph [81] of **The Department of Transport v Tasima 2017(2) SA 622 (CC)** at page 644 (“Tasima”).

ACQUISITION OF MODULE 2

- [11] The said letter referred to in paragraph [9] *supra*, written by Adv BB Mohlala, the Acting Secretary of the Provincial Tender Board and directed to the Superintendent General of Department of Finance and Economic Affairs, Tourism and Environment, and referring to Tender No. NTP 8419: acquisition of Finest Asset Management Module, stated as follows:

“Your NTP 8419 dated 29 January 2002 refers.

Authority/Exemption dated 31 January 2002 is hereby granted in terms of the Tender Board Act, No 2 of 1994 for:

Acquisition of Finest Asset Management Module at an amount of R9,465,000.00.”

THE AUTHORITY

- [12] The authority to grant or give exemption in compliance with the Tender Board Act was found in the following section:

12.1 Section 4 of the Northern Transvaal Tender Board 2 of 1994.

12.2 Regulation 2 of the Regulations in terms of Act 2 of 1994, Northern Transvaal Tender Board Regulations, Provincial Notice No. 4 of 1997, as amended by General Notice 99 of 2004.

12.3 Regulation 3 of the Regulations in terms of Act 2 of 1994, Northern Transvaal Tender Board Regulations, Provincial Notice No. 4 of 1997, as amended by General Notice 99 of 2004.

12.4 Directive NTP2, directives to Departments in respect of procurement – clause 4.6 and clause 12.

[13] According to the Plaintiff the Tender Board had not satisfied the jurisdictional requirements because:

13.1 the request for a single or selected supplier or service provider was required to be advertised in, at least, the Provincial Tender Bulletin, setting out the specific requirements of the Department and the fact that only tenders complying with the requirements would be considered for acceptance. During his evidence, Mr Molako John Petje (“Mr Petje”) testified that the User Regulations System Notifications are of paramount importance when it comes to issuing a tender. These were what the user would like the computer to do. A system should be functional if it satisfies the User Regulation System.

13.2 the request for the invitation of a single or a selected supplier for a specific brand or trademark had to be submitted to the Tender Board for consideration.

13.3 the request to dispense with the invitation of tender must justify:

13.3.1 why the invitation of tenders should be dispensed with (urgency without explanation or motivation would not be acceptable).

13.3.2 what the implications would be should the Board insist upon the invitation of tenders.

13.3.3 who the previous suppliers or service providers were, when the previous transaction took place, at what price the product or service was obtained because of the previous tender number.

13.3.4 the value of the present equipment if the extension of an existing system is involved.

13.3.5 full particulars (including value and quantities) of previous purchasers, if the Department wishes to standardize on a specific contract; and accordingly,

13.3.6 it is the Plaintiff's case that therefore any ground for the acquisition of the Asset Amendment Module, Module 2, was accordingly void, invalid, ultra vires, and of no force and effect. In addition, the assignment of the No. NTP 8419 was in the premises invalid.

[14] The authority or exemption referred to in paragraph [11] *supra* was somehow communicated to the Defendant. Notwithstanding the foregoing:

14.1 the Plaintiff paid amounts to the Defendant for it.

14.2 the Defendant in fact did not supply additional or in any other manner implement the Asset Management Module, Module 2, in a workable manner. The said Module 2 did not satisfy the Plaintiff's requirements.

AQUISITION OF MODULE 3

[15] During the period July 2003 to December 2003 the Tender Board considered the implementation of the remaining Module of Finest, Module 3, under:

15.1 Tender No. NTP 8937 which did not exist.

15.2 when the Provincial Tender Board had no authority in law to consider implementation of Module 3, without calling for tenders.

[16] The Defendant concedes that the consideration of the implementation of Module 3 by the Tender Board was done during July 2003 to 6 November 2003 when the Tender Board approved the implementation of Module 3. According to the Defendant the consideration by the Tender Board of the implementation of Module 3 was done pursuant to the submission of Annexure 'A' to the Plaintiff's claim. It will be recalled that Annexure 'A' to the Plaintiff's particulars of claim is a letter by Mr Mohlala to the Secretary of the Tender Board to consider the approval of the implementation of the Finest Management System. The Defendant denies that the Tender Board had no authority in law to consider the implementation of Module 3 as pleaded.

[17] On 17 July 2003 the Tender Board purported to approve the implementation of Module 3, under the description authority or exemption in writing for the total sum of R45,747,683.00. The conduct of the Tender Board in attempting to approve the implementation of Module 3 under the description *“authority/exemption in writing for the total sum of R45,747,683.00 without complying with the principles set out in section 217(1) of the Constitution was unlawful, invalid and without any force and effect. The Tender Board exceeded its authority. It obviously relied on the antiquated provisions of the Tender Board Act.”* A letter written by BB Mohlala, the Secretary of the Provincial Tender Board to the Head of Department, Department of Finance and Economic Development in that regard states as follows:

“Tender No. NTP 8937 Authority to appoint consultants for implementation of the remaining module of the Finest Financial Management System.

We refer to your letter dated 7 July 2003 and wish to inform as follows:

1. *Authority dated 17/7/2003, to appoint consultants is hereby granted in terms of the Tender Board Act, No. 2 of 1944.*
2. *The implementation of the remaining module of the Finest Financial Management System by Simplex International to the amount of R45,747,673.00 (Forty-Five Million Seven Hundred and Forty-Seven Thousand Six Hundred and Seventy-Three Rands Only) is hereby approved subject to the following additions:*
 - (i) *That the letter by SITA dated 11 July 2003, the concerns raised in paragraph 4.1 to 4.3 are adhered to;*
 - (ii) *The Department should inform the Board in writing whether these conditions or concerns have been complied with. For ease of reference the letter from SITA is hereby attached.”*

[18] Authority to grant or give exemption in compliance with the Tender Board Act is found in the following sections:

18.1 Section 4(1) of the Northern Transvaal Tender Board Act, 2 of 1994, provides as follows:

“Powers of the Board:

(1) The board shall have the sole power to procure supplies and services for the province, and, subject to the provisions of any other Act of the provincial legislature, to arrange the hiring or letting of anything, or the acquisition or granting of any right for or on behalf of the Province, and to dispose of movable Provincial property, and may for that purpose -

(a) On behalf of the Province conclude an agreement with a person within or outside the Republic for the furnishing of supplies and services to the Province, or for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Province or for the disposal of movable Provincial property;

(b) With a view to concluding an agreement referred to in paragraph (a), in any manner it may deem fit, invite offers and determine the manner in which and the condition subject to which such offers shall be made”;

18.2 Section 4(2) of the Northern Transvaal Tender Board Act provides as follows:

“No exemption, condonation, settlement or amendment which may be to the prejudice of the Province shall be granted, negotiated or made under paragraph (g) and (h) of sub-section (1) without the prior approval of the Treasury.”

18.3 Regulation 2 of the Regulations issued in terms of Act 2 of 1994, Northern Transvaal Tender Board Regulations, Provincial Notice No. 4 of 1997, as amended by General Notice 99 of 2004 provides as follows:

“Subject to the provisions of any Act of the Provincial Legislature, supplies and services for and on behalf of the acquisition or granting of any right for and on behalf of the Province and the disposal of movable Provincial property shall be procured, arranged or disposed of through the Board or in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (as amended by Act No. 29 of 1999).”

4.6.3 requests for the invitation of single or selected supplier tenders for a specific brand or trademark product only must be submitted to the Provincial Tender Board for consideration - see paragraph 3.6.3 of NPT2.

4.6.4 requests that the invitation of tenders be dispensed with must be submitted to the Board. The following information must be furnished in addition to information considered necessary by the Department:

- (a) why the invitation of tenders should be dispensed with (the argument of urgency without explanation for such motivation is not acceptable);
- (b) what the implications would be should the Board insist upon the invitation of tenders;
- (c) who the previous supplier / service providers were, if any, when the previous transaction took place, at what price the product / service was obtained as well as the previous tender number(s);
- (d) ...
- (e) full particulars (including value and quantities) of previous purchases, if a Department wishes to standardise on a specific product."

Clause 12 provides as follows:

- "12.3.1 ... applications for the exemption / deviation from normal tender procedures must be accompanied by a recommendation to the effect that the request is supported.
- 12.3.2 when it is clear that alternative action is proposed with the sole purpose of circumventing Tender Board directives, or that urgency is the result of negligence or bad planning of a Department, the application will not be supported without very sound reasons."

This is not denied by the Defendant. The Defendant's approach is that the Tender Board complied with the provisions of the Tender Board Act and the Regulations promulgated thereunder.

[19] According to the Plaintiff none of the jurisdictional requirements were satisfied in that:

19.1 the request for a single or selected supplier or service provider was required to be advertised in, at least, the Provincial Tender Bulletin setting out the specific requirements of the Department and the fact that only tenderers complied with the requirements would be considered for acceptance;

19.2 the request for the invitation of a single or selected supplier for a specific brand or trademark had to be submitted to the board for consideration;

19.3 the request to dispense with the implication of tenders must justify:

19.3.1 why the invitation of tenders should be dispensed with (urgency without explanation or motivation would not be acceptable);

19.3.2 what the implications would be should the Board insist upon the invitation of tenders;

19.3.3 who the previous suppliers or service providers were, when the previous transaction took place, at what price the product or service was obtained as well as the previous tender number;

19.3.4 the value of the present equipment if the extension of an existing contract is involved;

19.3.5 full particulars (including value and quantities) of previous purchases if a Department wished to standardize on a specific product.

It is the Plaintiff's case that accordingly any ground for the acquisition of Asset Management Module 3 is void, invalid, ultra vires and of no force and effect for failure to comply with the principles of s 217 of the Constitution.

[20] The Defendant denies the foregoing allegations by the Plaintiff. The Defendant's case is that the process followed by the Professional Tender Board in awarding the authorisation or

exemption for the implementation of Module 3 was done in accordance with the provisions of the Tender Board Act. It is furthermore the Defendant's case that the members of the Tender Board were duly authorised to take the resolution to authorise or exempt the implementation of Module 3 and the resolution was taken at a properly constituted meeting of the Board. The Defendant does not seem to juxtapose these admissions against the provisions of s 217 of the Constitution, s 33(1) of the Constitution and s 38(1) of the PFMA which were applicable at the time when the authorisation or exemption was given.

- [21] In addition, the assignment of the No. NTP 8937 was, in the premises, invalid.
- [22] The authority or exemption was communicated to the Defendant by the Head of the Department in a letter dated 2 December 2003, who misrepresented the amount of the purported authority or exemption by adding an amount of R6,838,104.00 in respect of an annual maintenance cost or an annual maintenance fee when he and the Defendant knew this was incorrect. The Defendant denies these allegations.
- [23] Notwithstanding the foregoing the Plaintiff paid amounts to the Defendant for it. The Defendant did not supply and install or in any manner implement the remaining Modules, Module 3, in a workable manner. Module 3 did not satisfy the Plaintiff's requirements. This allegation is denied by the Defendant. As far as the Defendant is concerned the Plaintiff's payments to the Defendant in respect of Module 3 were made lawfully and were valid. Furthermore, the Defendant's case is that it supplied, installed, and implemented Module 3 in a workable manner which satisfied the requirements of the Plaintiff. As an example, project reports were submitted by the Defendant to the Plaintiff and further reports were presented at the Project Committee Meetings, evidence in the supply, installation, implementation of the Module.
- [24] In order to obtain payment from the Plaintiff the Defendant was required to invoice and produce to the officials of the Plaintiff approval for payment. Thereafter a clerk would cause

payment to be made by electronic fund transfer ("EFT"). The Plaintiff's losses hereinafter particularised were the consequence of a fraudulent scheme or conspiracy entered by officials of the Plaintiff, including the Northern Province Tender Board and the Director and/or agents and/or servants of the Defendant, who wrongfully committed the acts as set out in the preceding paragraphs. The Defendant submitted invoices and produced to officials of the Plaintiff for payment for the purported implementation, installation, licence fees, maintenance, and support of the Finest Modules 1, 2 and 3. The Plaintiff set out those invoices in the particulars of claim. The total of those invoices is R300,309,131.50.

[25] In respect of the foregoing claims the Plaintiff paid the Defendant an amount of R98,486,141.00 made up of the invoices set out in the Plaintiff's particulars of claim. The Plaintiff is unable to identify what amount was paid to the Defendant in respect of Module 1 which was provided and implemented with the consequence that they are seeking judgment in respect of the cause of action pleaded in paragraph [29] above ought to be reduced by whatever amount the Defendant shows it lawfully received in respect of Module 1.

[26] In the alternative to the foregoing, the Plaintiff pleads that the purported approval of the Tender Board for authority and/or exemption to appoint the Defendant in terms of NTP 8419 and NTP 8937 was formalised into a written agreement on or about 21 October 2004 at Polokwane, Limpopo, the Plaintiff represented by BM Mphahlele and the Defendant represented by TP Prabakaran. A copy of the written agreement is attached to the Plaintiff's particulars of claim as Annexure 'B'.

[27] In terms of the preamble or recital of Annexure 'B' prepared and submitted by the Defendant for signature by the Plaintiff:

27.1 MSI, the Defendant, prepared and submitted the proposal to the licensee, the Plaintiff, and the licensee has awarded tenders NTP 6891, NTP 8419 and NTP 8937 to the Defendant;

27.2 the parties have agreed to enter into an agreement whereby, *inter alia*, the Defendant undertook to conduct the project and deliverables on the terms and conditions contained in the Agreement.

In the first place it was not correct that the Agreement was concluded following an award of tenders. No tenderers were issued for NTP 8419 and NTP 8937.

[28] The subsequent formalisation into a written agreement, Annexure 'B', purporting to validate, alternatively legalise and further alternatively authorise, or otherwise sanction the prior void, invalid, ultra vires approval of the Tender Board for authority or exemption to appoint the Defendant in terms of NTP 8419 and NTP 8937 was ultra vires, void, unenforceable and invalid for the following reasons:

28.1 MP Mphahlele did not have the authority to bind the Limpopo Provincial Government in terms of s 4(1) of the Tender Board Act;

28.2 alternatively, acted ultra vires in terms of the Tender Board Act, alternatively, the PFMA.

28.3 Further Provincial Procurement Policy from Act 5 of 2000, further alternatively, NTP 6891 was not awarded to the Defendant but to an entity known as Lechabile Technology Services (Pty) Ltd.

28.4 NTP 8419 and NTP 8937 were not tenders and were not awarded to the Defendant in terms of a legitimate tender procedure.

28.5 The agreement is in breach of the provisions of the Board's Directives contained in NTP1 and NTP2 respectively, regulatory standards and conditions which may not be varied for any contract issued by the Board and the Plaintiff in that:

- 28.5.1 the agreement purported to absolve the Defendant of all liability for any failure to perform its obligations, any consequential, direct, special, punitive, or incidental damages whether in contract or delict or otherwise, whether based on the purported agreement, any commitment performed or undertaken in terms thereof or otherwise;
- 28.5.2 if it is found that Mr Mphahlele, the Head of Limpopo Treasury, had the requisite authority, then he acted outside of authority in concluding a one-sided agreement which in certain of its terms was contrary to the best interests of the public and the public interests.

THE DEFENDANT'S CASE

- [29] According to the Defendant Tender NTP 6891 was for development, implementation and supply delivery and maintenance of an automated procurement system. The Defendant admits that the said tender was awarded to the consortium led by Lechabile. The members of the consortium were Lechabile, IBM, Management Solution and Motcom.
- [30] It is the Defendant's case that the authorisation or exemption granted by the Tender Board in relation to Module 2 was done in accordance with the provisions of the Tender Board Act.
- [31] According to the Defendant the fact that the process followed in obtaining the authorisation or exemption was lawful, was further substantiated by the Plaintiff in a letter to the Auditor General dated 11 May 2000, responding to a query on the approval of the implementation of Modules 1 and 2. According to Annexure 'MS14' to the Plea, the Procurement Module, Module 1, was implemented prior to the implementation of the PFMA and all provinces had their own Provincial Acts. At the time the Module was implemented there was no requirement to get prior National Treasury approval to implement a financial system. About Asset Module 2 the Plaintiff was alerted to the provision of Treasury Regulation 7.3.1 and an application was therefore made to the National Treasury to obtain approval. The

understanding was that approval is for all other Modules, Asset Management being included in the application for approval.

[32] The Defendant states that at all relevant times relating thereto it relied and acted upon the representations made by the Plaintiff and the Provincial Tender Board in relation to the approvals, authorisations or exemptions relating to Modules 2 and 3. According to it, the representations made on behalf of the Plaintiff and the Tender Board were made by duly authorised representatives of the Plaintiff and the Tender Board with the necessary authority to bind the Plaintiff in terms of the relationship therein. Acting upon such representations, the Defendant concluded Annexure 'B' to the Plaintiff's particulars of claim and installed the Finest Software for Modules 2 and 3 respectively at all the Departments in the Limpopo Province and further maintaining them on behalf of the Province.

[33] The only Modules that are at the centre of the dispute between the parties are Modules 2 and 3. It is the Plaintiff's case that Modules 2 and 3 should have been procured through a tender process. The Plaintiff contends that because these Modules 2 and 3 were not procured through a lawful tender process, their procurements was void, invalid and ultra vires and of no force and effect. For this reason, the procurement of Modules 2 and 3 should be set aside, so contends the Plaintiff.

[34] On the other hand, it is the Defendant's case that, relying on Annexure 'B' to the Plaintiff's particulars of claim and on the conduct of the Tender Board and some officials of the Plaintiff, the Plaintiff and the Defendant had concluded a valid agreement between them. Annexure 'B' to the Plaintiff's particulars of claim is a Project Agreement between Magnum Simplex International Ltd, the Defendant, on one side and the Limpopo Provincial Government on the other side. It was signed by both parties to it on 21 October 2004. Mr DB Prahakaran signed in his capacity as the Director on behalf of Magnum Simplex International (Pty) Ltd, the Defendant, while Mr MB Mphahlele, in his capacity as the Head of the Department of

Finance and Economic Development, signed for the Department of Finance and Economic Development.

[35] Quite clearly the Plaintiff relies on the law in support of its position, on:

- 35.1 section 217 of the Constitution;
- 35.2 State Tender Board Act 86 of 1968;
- 35.3 Public Finance Management Act 1 of 1999;
- 35.4 Preferential Procurement Policy Framework Act 5 of 2000;
- 35.5 the Northern Transvaal Tender Board Act, No 2 of 1994.

[36] Section 2 of the Constitution provides as follows:

“This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it (the Constitution) must be fulfilled.”

This section makes it clear that the Constitution is the supreme law of the land. It reigns supreme above all laws whether national or provincial or municipal. Everything had to be done in accordance with the dictates of the Constitution. Any law, whether national or provincial or municipal that was inconsistent with any section of the Constitution became, to that extent, invalid and of no force and effect. Section 2 indirectly declared as invalid and of no force and effect any law that was inconsistent with its provisions. Therefore, any reliance on the law that was inconsistent with the Constitution is invalid and of no consequences.

[37] All the laws, such as the Tender Board Act, that were inconsistent with the Constitution on 4 February 1997, when the Constitution started to operate, had to be redrafted to bring them in line with the provisions of the Constitution, unless they or parts of them became inoperative by virtue of their inconsistency with the Constitution. This implied that a system with these attributes had to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the Constitutional demands of s 217(1), the question whether any procurement is valid must be answered with reference to the national legislation or regulation. In this regard see **Chief Executive Officer, South African Social**

Secret Agency v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 SCA at para [15] page 221 where Tshiqi JA, as she then was, states that:

“[15] Section 217(1) of the Constitution prescribes the manner in which organs of State should procure goods and services. In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. This implies that a ‘system’ with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of s 217(1), the question whether any procurement is ‘valid’ must be answered with reference to the mentioned legislation or regulation.”

[38] Section 217(1) of the Constitution provides that:

“When an organ of state in the national, provincial and local sphere of Government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.”

S 217(1) applies to the organ of state in the national, provincial, and local sphere of Government. The Provincial Government of Limpopo would be included in these organs of state. In terms of s 239 of the Constitution, an organ of state means:

- “(a) Any department of state or administration in the national, provincial or local sphere of government; or*
- (b) any other functionary or institution –*
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
 - (ii) exercising a public power or performing a public function in terms of any legislation but does not include a court or a judicial officer.”*

[39] Section 217 of the Constitution makes in plain that public procurement must be effected according to a system which is *“fair, equitable, transparent, competitive and cost effective”*.

Actions relating to procurement and licensing ordinarily qualify as administrative actions. In **Umfolozi Transport Edms (Bpk) v Minister van Vervoer [1997] 2 ALL SA 548 (A)**, the Supreme Court of Appeal decided that the award of a state tender amounted to administrative action. These requirements set out in s 217(1) are repeated in s 38(1) of the PFMA which came into operation on 1 April 2000 and s 33(1) of the Constitution. Similar requirements are included in various Provincial Tender Boards' legislation. S 38(1)(iii) of the PFMA provides that:

"The accounting officer for a department, trading entity or constitutional institution –

- (a) must ensure that the department, trading entity or constitutional institution has and maintains –*
- (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective."*

An accounting officer is defined as any person mentioned in s 36.

Section 36 deal with accounting officers. It states that:

- "(i) Every department and every constitutional institution must have an accounting officer,*
- (ii) subject to subsection (3) –*
- (a) The head of a department must be the accounting officer for that department."*

In the Paymaster Services case, the Court had the following to say at paragraphs [17] and [18] at page 222:

"[17] The main object of the PFM Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies (s 2). SASSA and SAPO, as mentioned, are such entities more particularly because they are both funded, fully or substantially, from the National Revenue Fund or by way of tax, levy or other money imposed in terms of national legislation, and they are accountable to Parliament (s 1). The PFM Act, read with the Treasury Regulations, is such legislation. It should be noted that it was not the respondent's case that the PFM Act or the Treasury Regulations were unconstitutional, only that SASSA did not comply with their provisions.

[18] Section 51(1)(a) of the PFM Act states that an accounting authority for a public entity must (inter alia) ensure that the particular public entity has and maintains an appropriate procurement and provisioning system which, echoing the words of the Constitution, is fair, equitable, transparent, competitive, and cost-effective. The National Treasury may in terms of the PFM Act make regulations or issue instructions applicable to all institutions to which the Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (s 76(4)).”

[40] The most emphatic way an organ of state can show that it complied with the requirements of s 217(1) of the Constitution is through a public, transparent tender process in which all tenderers are treated fairly and equitably. Accordingly, a public tender constitutes the most preferable method of engaging public procurement. This is what Pickard JP had to say about the benefits of tender procedures:

“Tender procedures, as we have come to know them over many years, have been the result of a vast experience gained in the procuring of services and goods by Government. They have evolved over a long period of time through trial and error and have crystallised into a procedure that has become vital to the very essence of effective government procurement. Strict rules have developed over the years in order to ensure that the system works effectively. The very essence of tender procedures may well be described as a procedure intended to ensure that government, before it procures goods or services or enters into contracts for procurement thereof, is ensured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended.” See **Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 1999(1) SA 324 CKHC at 350 F-H.**

[41] It is as clear as crystal that s 217(1) does not demand a tender process. It simply provides that the system that an organ of state uses when contracting for goods or services must be fair, equitable, transparent, competitive, and cost effective. *In casu*, what is of paramount

importance though is that generally a tender process will invariably constitute the most effective way of complying with the principles of fairness, equitability, and competitiveness. Accordingly, an open tender, or in the least some comparable procedure should generally be followed in relation to contracts of a substantial value as in the current matter. In this instant case no tender for procurement of Modules 2 and 3 was advertised. This is not in dispute. The negotiations with the procurement of the Modules were only between the Plaintiff and the Defendant. There was no compliance with the provisions of s 217(1). As a result of the failure to observe the provisions of s 217, no other person or company took part in negotiations for the procurement of those Modules. The negotiations were not transparent, they were unfair to other people who would have been interested parties should they have been notified. There is no proof that the Defendant's prices were competitive and cost effective. Accordingly, the conclusion of the Project Agreement between the Plaintiff and the Defendant, Annexure 'B' to the particulars of claim, which lead to the unlawful procurement of Modules 2 and 3 of Finest System, and which followed upon the said negotiations, was effected in violation of s 217 of the Constitution. May I at this stage hasten to refer to the judgment of Municipal Manager: **Qaukeni Local Municipality and Another v General Trading CC 2010 (1) SA 356 (SCA)** in which Leich AJA, held, at paragraph [15] thereof, that: *"Consequently, in a number of decisions this Court has held that the contracts concluded in similar circumstances without complying with the prescribed process are invalid. In Premier, Free State and Others v Firechem, Free State (Pty) Ltd 2000 (4) SA 413 (SCA), this Court set aside a contract concluded in breach of Provincial Procurement Procedures, holding that such a contract was entirely submissive of a credible tender process" and that it would "deprive the public of the benefit of an open competitive process."*

- [42] There was another acceptable manner in terms of which the Limpopo Tender Board could have lawfully procured the goods or services with the Defendant. This method included choosing from a list of quotations submitted from preferred bidders. This list should have been previously compiled after an open and competitive process. In this case it is of crucial importance that both the compilation of the list of preferred bidders and ultimate choice of a

particular service provider satisfies the requirements of s 217(1). The Plaintiff did not even try to use this method. No compilation of quotations of the list of preferred bidders was made. This is due mainly to the fact that the negotiations for the procurement of the Models were exclusively between the Limpopo Government and the Defendant. Only the Defendant negotiated with the Plaintiff.

- [43] The procurement of goods by an organ of state must be procedurally fair in keeping with the principle of fairness and with equitability. Interested parties should be given a reasonable opportunity to make their own representations in connection with the award of the relevant contract. This requirement of fairness and equitability is also echoed by s 33(1) of the Constitution which provides that:

“Everyone has the right to an administrative action that is lawful, reasonable and procedurally fair.”

All the tenderers must, over and above, be treated fairly and equally and be furnished with the same information and give equal opportunities.

- [44] Counsel for the Plaintiff referred the Court in his heads of argument to the judgment of **Premier, President and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 SCA** at page 429 para 30H-I. This judgment is a classical illustration of a process that could be labelled as one that undermined the principle of fairness, equitability, and competitiveness. In this case the SCA struck down a contract for the provisions of the cleaning material to the Free State Province by reason of the fact that the contract finally concluded with the provincial department differed from the terms of the invitation to the tender and the letter of acceptance produced by the Tender Board. The effect thereof was to undermine the fairness of the process. Judge Schutz JA, in dealing with the situation of the award of a tender outside the applicable framework stated that:

“One of the requirements ... is that the body judging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms”

[45] Counsel for the Plaintiff contended that it should always be borne in mind that s 217 of the Constitution prescribes the way organs of state should procure goods and services. He stated furthermore that organs of state must do so in accordance with a system that is fair, equitable, competitive, and cost effective. He found support in the judgment of Froneman J in **Allpay Consolidated Chief Executive Officer v Sassa 2014 (1) 604 (CC), 620 para [40]** where, after referring to Bolton in *The Law of Government Procurement in South Africa* at 57, stated that:

"One of the primary reasons for the express inclusion of the five principles of s 217(1) of the Constitution is to safeguard the integrity of the government procurement Process. The inclusion of the principles, in addition to ensuring the prudent use of producers, is also aimed at preventing corruption."

[46] Transparency promotes openness and accountability. These principles serve an especially important function. They encourage good decision making in relation to the procurement and prevent the ever-present possibility of corruption in the assessment and award of contracts. By so doing they inculcate in the public confidence in the procurement process. It is difficult for an organ of state to award a contract in the absence of some form of public process in the light of the Constitution and principles of open procurement. In the very least it is imperative that the public should be notified that a public body contemplates negotiating the contract with a particular entity.

[47] Finally, the principle of competitiveness and cost effectiveness are the imperatives that an organ of state should consider, together with other factors. The organ of state must in procuring goods or services try to procure such goods or services at the lowest possible cost. The organ of state must always try to achieve value for money. This principle of competitiveness and cost effectiveness was applied in the judgment of **Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) [2002] 3 All SA 336 at 356 T, para [70]**. One of the bases upon which the award of a tender for rehabilitation and construction of a

road was struck down was the considerable difference between the higher price of the successful tenderer and the lower price of the unsuccessful tenderer. This prompted De Villiers J, as he then was, to state that:

“The award by the first respondent of the tender to a tenderer who has not tendered the lowest price is contrary to the provisions of the guiding document and more particularly section 217(1) of the Constitution in that it results in the contract for services which is not competitive and cost effective.”

See also Cash Paymaster Services at p 351 F-H where the Court stated that:

“The task of the tender board has always been and will always be primarily to ensure that the government gets the best service and value for that for which it pays. If that were not the prime purpose of the tender board and policy considerations were to override those considerations, the very purpose of the tender board is defeated, and no tender board needs to exist. It would then be quite simple for government simply, on a basis of policy determination, to enter into contracts for whatever it required without intervention of a tender board.”

[48] It is imperative and of supreme importance that in deciding whether a particular procedure is consistent with the fundamental principles set out in s 217 of the Constitution, that such principles should be taken as a whole.

[49] Before analysing the Project Agreement or Annexure “B” between the parties, it is my view, of paramount importance that I emphasize the following. These are the words of Jafta J in the judgment of Tasima.

“37. Where, as here, the validity of the source of the right of the Applicant sought to preserve was also impugned on the basis that it was an illegal source, a Court can hardly close its eyes to these and proceed to grant an order preserving an illegally obtained right.”

Therefore, the constitutionality or legality of the Project Agreement was an issue pre-eminently within the competence of this Court. Once the Court has established that the

conclusion of the Project Agreement conflicted with s 217(1) of the Constitution, the Court is obliged by s 172(1)(a) of the Constitution to declare the agreement to be invalid. As guardians of the Constitution, Courts are under an obligation to uphold it. A decision is invalid because of its inconsistency with the Constitution, it can never have legal force and effect. This is fundamental to the principles of Constitutional democracy. See paragraph [79] of the Judgment of the minority in the Tasima matter. *“The declaration of invalidity is a mandatory consequence of inconsistency with the Constitution. Section 2 of the Constitution proclaims that the Constitution is the supreme law and that law or conduct that is inconsistent with it is invalid.”* Secondly, on 21 October 2014, the date on which the Project Agreement was signed, the provisions of s 217 of the Constitution were in force and had to be applied in all procurement of goods and services. Thirdly, and lastly, the provisions of sections 2 and 217 of the Constitution were in force on the dates on which BB Mohlala purported to authorise or alternatively exempt in terms of the Tender Board Act the acquisition of Modules 2 and 3 of the Finest System. The Project Agreement is therefore invalid, unlawful and of no force and effect.

THE COUNTER-CLAIM

[50] The following paragraphs of the Defendant’s counsel’s heads of argument encapsulate the Defendant’s case:

- “1. As the evidence demonstrated, the Plaintiff initiated these current proceedings in an effort to frustrate and undermine the Defendant’s genuine claims arising from the lawfully concluded agreements between the parties.
2. In essence, when it became apparent to the Plaintiff that the Defendant sought to enforce his rights in terms of the concluded agreements, more so, in the light of the Thohoyandou interdict proceedings and the letters of demand despatched on behalf of the Defendant against the Plaintiff long before the Plaintiff could even initiate these proceedings.
3. It is indeed revealing that only after the Defendant has demonstrated an intention to initiate legal proceedings against the Plaintiff, the Plaintiff in an attempt to frustrate the

Defendant's genuine claims flowing from the Plaintiff's breach, decided to initiate these frivolous proceedings against the Defendant and advanced the case which was not supported by any evidence, such as fraud, corruption, illegality and challenging the Defendant's ownership of Finest, with the hope of escaping its obligations under the lawfully concluded agreements."

- [51] The underlined parts of the paragraphs quoted above prove that the Defendant's case is undoubtedly that on 21 October 2014, the Plaintiff and the Defendant concluded a valid agreement.
- [52] In my view, this argument by counsel that the parties had concluded a valid agreement does not advance the case for the Defendant because it loses complete sight of the circumstances under which the agreement was concluded. It ignores completely the provisions of s 217(1) of the Constitution; the provisions of s 33(1) of the Constitution and the provisions of s 38(1) (iii) of the PFMA.
- [53] The agreement concluded by and between the Plaintiff and the Defendant on 21 October 2014 is constitutionally invalid and unenforceable against the Plaintiff. The process that was followed by the Plaintiff to procure goods and services on 21 October 2014 was constitutionally invalid and unlawful. This agreement provided for the procurement of goods and services by the Defendant to the Plaintiff and ought to have been concluded pursuant to the procurement processes contemplated in s 217(1) of the Constitution. The said section requires, among others, that a service provider from whom goods and services are provided should be selected through a system that is "fair, equitable, transparent, competitive and cost effective".
- [54] The said agreement was, for the following fundamental reasons, not concluded in accordance with the prescripts of s 217(1) of the Constitution; s 33(1) of the Constitution; s 38(1) of the PFMA.

- 54.1 there was no public invitation to interested parties to submit tenders for the provision of goods and services provided for in the Project Agreement;
- 54.2 the Project Agreement was not concluded in a transparent manner;
- 54.3 the Defendant's goods and services were not assessed to determine if the agreed price was competitive and cost effective;
- 54.4 the process which led to the conclusion of the agreement was not fair in that other service providers were not publicly invited to submit tenders or quotations for the provisions of the goods and services in issue.

- [55] Under the circumstances, the appointment of the Defendant was constitutionally invalid in terms of s 2 of the Constitution, the conclusion of the Project Agreement was not authorised by the Plaintiff in the manner contemplated in s 217 (1) of the Constitution and is therefore invalid.
- [56] The fact that the Defendant was the sole supplier for the Finest System in the Republic was never advanced as the reason to avoid complying with the provisions of s 217(1); s 33(1) of the Constitution, s 38(1) of the PFMA. No evidence that the Plaintiff was privy to this knowledge. In the premises it does not advance the Defendant's case. The question that this Court must adjudicate is whether the procurement of Modules 2 and 3 complied with the provisions of the Constitution or the PFMA and the Treasury Regulations and not whether there were other suppliers of the Finest System in the Country.
- [57] It still does not advance the Defendant's case to plead that the acquisition of the Finest System was approved by the National Treasury. Such approval conflicted with the Constitution. Two wrongs, even three, do not make a right.
- [58] It is correct that Modules 2 and 3 did not contain any specifications by the Plaintiff. That is so because no tender was advertised in respect of those modules.

[59] In the circumstances it is also difficult to appreciate how the Defendant could counter-claim on an illegal agreement. In accordance with the doctrine of illegality, a contract entered without complying with the prescribed tender process or in contravention of s 217(1) of the Constitution is invalid and the Court has no discretion to enforce it. In the circumstances there is extraordinarily little chance of the counterclaim succeeding.

[60] In its POC, the Plaintiff claims repayment of the amount of R98,486,141.84 with interest. The bases of such claim are firstly, that the payments that were made to the Defendant were not made in terms of valid crusade and secondly, the Defendant was unjustly enriched in the sum of R98,486,141.84. For that reason, it is the Plaintiff's case that the Defendant is obliged to refund the said amount by reason of *condictio ob turpem vel iniustam causam* alternatively *condictio indebiti*, further alternatively *condictio causa data causa non secuta*. Importantly the only reasons based on which the Plaintiff seeks refund of the said amount are that the payment was made without a valid causa and furthermore that the Defendant was unduly enriched.

THE PAYMENTS WERE MADE WITHOUT A VALID CAUSA

[61] It is not in dispute that the Plaintiff made the payments to the Defendant totalling the amount claimed. It is also not in dispute that the Defendant received the said amount. As seen earlier, it is the Defendant's case that payment to it of the said amount was legal. The said payments were made by the Plaintiff in respect of Modules 1, 2, and 3 of the Finest System. The Plaintiff has, with reference to the invoices, been able to establish how that amount is made of.

[62] The only problem that the Plaintiff has is that it is unable to prove the amount that was paid in respect of Module 1, which was procured lawfully. In paragraph 31 of the POC the Plaintiff admits that of the said amount he is unable to prove the amount that was paid to the Defendant in respect of Module 1. Still the Plaintiff claims payment of the whole amount

which means that the Plaintiff claims also refund of the amount lawfully paid by him to the Defendant.

- [63] The Plaintiff does not know the amount that the Defendant should be ordered to refund. It is not R98,486,141.84. In the premises I have conclude that the Plaintiff has not proved the amount refundable.
- [64] Secondly, there is another hurdle for the Plaintiff. While the Court accepts that the Finest System gave the Plaintiff problems here and there, such problems have not been quantified.
- [65] Thirdly, even with these problems, some form of service was rendered by the Defendant to the Plaintiff based on the said invalid agreement. Even if the Project Agreement was unconstitutional, it does not mean that the Plaintiff did not derive any benefit from the System. In the premises, fairness and equity demands that the Court should recognise the benefit that the Plaintiff enjoyed under an invalid agreement or the service that the Defendant rendered to the Plaintiff under an invalid agreement. I conclude that this Court is disinclined to order the refund of the sum claimed by the Plaintiff.
- [66] It is not necessary to consider the issue of unjust enrichment claimed in the papers.
- [67] Section 172(1) of the Constitution provides as follows:
- “When deciding a Constitutional matter within its power, a Court –*
- (a) may declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
 - (b) may make any order that is just and equitable including –*
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and*
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”*

Agreement or Annexure 'B' to the POC, was unlawful as no tender process was followed. There are therefore sufficient reasons to necessitate a declaration of nullity in terms of s 172(1)(a). It is obvious that once the Court declares the contract unlawful the contract must be set aside. The analysis of the documents at hand show convincingly that both the Plaintiff and the Defendant were equally guilty of perpetuating an illegality.

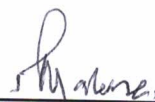
[69] The Constitutional Court had the following to say in pronouncing a remedy in **Steenkamp N.O. v The Provincial Tender Board Eastern Cape 2007(3) SA 121 (CC)**:

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated conditional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts the public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law." See paragraph 30 of **Allpay Security Agency and Others (Corruption Watch** and Another) 2014(4) SA 179 CC at para [30]**.

[70] The Court makes the following order:

1. It is hereby declared that the purported approvals or exemptions in respect of NTP 8419 and NTP 8937 are invalid, void ab initio, and are hereby set aside.
2. It is hereby declared that Annexure B is invalid, void ab initio, and is hereby set aside.

3. An absolution from the instance is hereby ordered with regard to the Plaintiff's claim for refund of the sum of R98,486,141.00.
4. The Defendant's counter-claim is hereby dismissed, with costs.
5. The Defendant is hereby ordered to pay the costs of this suit, such costs to include the costs consequent upon the employment of three counsel.



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

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Adv HC Janse van Rensburg

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Instructed by:

Werksmans Attorneys

c/o Mabuela Attorneys

Date on the opposed roll before Mabuse J:

27 January - 13 February 2020

Date of Judgment:

19 February 2021