



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. : **A46/2018**

In the matter between:-

MEC: POLICE, ROADS AND TRANSPORT
(FREE STATE PROVINCIAL GOVERNMENT)

Appellant

and

SMEC SOUTH AFRICA (PTY) LTD

Respondent

CORAM: DAFFUE, J *et* MOENG, AJ *et* MEINTJES, AJ

HEARD: 15 APRIL 2019

JUDGMENT BY J P DAFFUE

DELIVERED: 30 MAY 2019

I INTRODUCTION

- [1] There is now clear authority that an organ of State, like any other party, is obliged to challenge an administrative decision in order to escape its effects. This may be done reactively provided its reasons for doing so are sound and there has been no unwarranted delay.¹ This judgment deals with the manner in which a reactive challenge by an organ of State was presented as well as the delay in challenging the decision.
- [2] On 21 September 2017 Lekale, J (“the trial court”) handed down judgment in favour of a company of consulting engineers, ordering the Department of Police, Roads and Transport, Free State Province to pay R2 397 173.36 plus interest and costs of suit.
- [3] The trial court dismissed an application for leave to appeal, but an application for leave to appeal to the Supreme Court of Appeal (“the SCA”) was successful. The SCA directed that the appeal be heard by the full bench of this Division.

II THE PARTIES

- [4] Appellant is the MEC for the Department of Police, Roads and Transport, Free State Province. It was represented in this court by Adv C Georgiades SC, instructed by Lebea and Associates. I shall interchangeably refer to appellant as such or as “the Department.”
- [5] Respondent is SMEC South Africa (Pty) Ltd, a company of consulting engineers represented by Adv S Grobler, instructed by Peyper Attorneys.

¹ Department of Transport v Tasima (Pty) Ltd 2017 (1) SA BCLR 1 (CC) at paras [151] & [152]

III THE ISSUES ON THE PLEADINGS

- [6] Respondent claimed payment of the balance of the contract price in the amount of R2 397 173.36 in respect of its last two invoices for services rendered and expenditure incurred in its capacity as appellant's appointed consulting engineers. Amongst other duties it had to oversee the road works on the Petrus Steyn/Heilbron road. The total contract price was just below R20m. In the alternative, and in the event of a finding that the contract was invalid, respondent relied on the just and equitable principle and in a further alternative, on enrichment.
- [7] Appellant pleaded that the contract relied upon by respondent was unlawful, invalid and unenforceable as it was in breach of its Supply Chain Management Policy, its Delegation of Powers, the Public Finance Management Act of 1999, Treasury Regulations and the National Treasury's SCM Practice Notes. It also averred that the official who signed respondent's appointment letter, Mr Menye, fraudulently held himself out as the Head of Department ("HOD") and that the Chief Director: Roads, Mr Troskie, who eventually signed the contract on behalf of the Department was not delegated to do so. In its replication respondent averred that even if Messrs Menye and Troskie were not authorised to bind the Department, appellant could not escape liability based on estoppel.

IV JUDGMENT OF THE TRIAL COURT

- [8] The trial court held that an organ of State cannot simply ignore an apparently binding decision on the basis of alleged invalidity, but "has to test the validity of such a decision in appropriate

proceedings.”² It continued³ by stating that an organ of State is obliged as of law to resist the enforcement of a “void or unlawful contract” and “have such a contract set aside by filing a counter-application or claim as opposed to proceeding by way of an application for formal review.”

[9] The trial court made the point that appellant did not utilise any of the procedures mentioned in the previous paragraph, but merely relied on its plea and the evidence in that regard. It was of the view that it was entitled to consider the principles of administrative law as the decision to award the contract was administrative in nature and continued⁴ to deal with such issues with reference to several judgments which will be considered again later in this judgment. The trial court emphasised that the Auditor-General’s report did not have the effect of setting aside the relevant decision which remained valid and enforceable until set aside by a competent court.

[10] The trial court held that there was no substantive reactive challenge to the award of the contract, requiring determination by it. Appellant resorted to self-help, so the court found, in purporting to cancel the contract instead of seeking a pronouncement on the validity thereof. Consequently, the question of validity of the contract was not raised “fairly and squarely” as would have been the case in a formal review.

² Par [12] of the judgment.

³ Par [14] of the judgment.

⁴ Paras [16] – [22].

[11] In conclusion the trial court held that respondent had rendered the relevant services and that it was entitled to ignore the purported cancellation of the contract. The *quantum* of the claim was never in dispute. In one final sentence the trial court held that even if the contract was unlawful, it was “only just and equitable for the plaintiff to be compensated for such services.”

V GROUND OF APPEAL

[12] Five grounds of appeal were raised⁵, *i.e.* that the trial court erred:

1. in not finding that appellant clearly and unambiguously challenged the validity of awarding the contract to respondent;
2. in law in not declaring the appointment of respondent unconstitutional, unlawful and invalid and should have set it aside;
3. in not finding that the report of the Auditor-General obliged appellant to cancel the contract with respondent;
4. in finding that it was just and equitable for respondent to be compensated for the work performed without conducting any inquiry in this regard;
5. in not finding that the actions of respondent were dishonourable and that no enrichment action was available to it.

[13] Mr Georgiades incorrectly averred in paragraph 22.6 of his heads of argument that a further ground of appeal was relied

⁵ Supplementary bundle, p 67.

upon, to wit that the trial court “erred in finding that the principles of administrative justice govern the appointment of the plaintiff and therefore its appointment stands until set aside by a court.” He was allowed to argue the issue before us and therefore, consideration will be given thereto.

VI MATERIAL FACTS

[14] Several material facts appear from the evidence led by the parties which have not been fully dealt with by the trial court as most of these were common cause. However, it is deemed necessary to provide a cryptic background as I intend to deal with some aspects in the evaluation of the trial court’s judgment and the submissions of the parties.

[15] During 2006 appellant embarked on a process to rehabilitate several roads in the Free State Province that required urgent rehabilitation. The appellant made use of a roster system in terms whereof several firms of consulting engineers – between ten and twenty according to the evidence of Mr Jacobs - had been placed on a list of service providers without first having followed a competitive bidding process. These firms, road specialists according to Mr Jacobs, were selected for different projects from time to time on a rotational basis. It is placed on record that Mr Jacobs testified for respondent, he being a former employee of appellant until 1996, where after he took up employment with respondent.

[16] It is common cause that several high ranking officials of appellant considered the poor conditions of several Free State

roads, referring to “severe infrastructure deficiencies in the road network” and made recommendations which were apparently approved by senior officials including the HOD. In terms hereof respondent was appointed as consulting engineers and it was confirmed that a contract had to be concluded in respect of the rehabilitation of the Petrus Steyn/Heilbron road. These officials were, *ex facie* the document, the Director Land, Transport and Planning, the Chairperson of the Bid Committee, the Chief Financial Officer of the Department of Public Works, Roads and Transport, the Chief Director: Roads and Transport, the Chief Director: EPWP, the Director: Supply Chain Management, the Deputy Director-General: Roads and Transport and the HOD: Public Works, Roads and Transport.⁶ The motivation was recorded as follows:

“Furthermore, the roster system is a fair and auditable system that allows for the fair and equal distribution of wealth throughout the engineering fraternity – thus, the professional service providers proposed by the roster system are a true response to the current work – and revenue distribution in the industry.”⁷

- [17] On 27 March 2007 Mr Menye, an employee of appellant, signed a letter of appointment in terms whereof respondent was appointed as consulting engineers for the rehabilitation of the Petrus Steyn/Heilbron road. Mr Menye pretended to be the HOD *ex facie* the letter, but that was not correct. Clearly, this letter is a consequence of the aforesaid approval and the resolution taken that respondent be appointed in terms of the Department’s roster system. Several other consulting

⁶ Bundle B, p 1440 of the record.

⁷ At p 1441.

engineering firms were approved for appointment in respect of different roads at this stage. This was not the first time that respondent received a letter of appointment from appellant.⁸

[18] On 19 January 2009 a standard written contract was entered into between the parties. The Chief Director: Roads, Mr Troskie, signed the contract on behalf of appellant. It is now appellant's case that Mr Troskie was not authorised to sign the contract. Mr Jacobs testified that Mr Troskie regularly acted as HOD and as senior official in the Department he believed that Mr Troskie had authority to bind it. It is recorded that not a single firm of consulting engineers or anybody else, including appellant, objected to respondent's appointment and its involvement in the tender process and thereafter during rehabilitation of the road until the events referred to later herein. As mentioned, several other firms of consulting engineers were appointed in similar vein in respect of the other roads identified for urgent rehabilitation. The Department had budget constraints in 2007 and 2008 which caused the contract with respondent to be entered into in 2009 only.

[19] Respondent was responsible for assessment of the condition of the road, the drafting of an assessment report and after approval, preliminary and eventually detailed designs of the work to be done. After each stage the Department had to approve and consent to the next phase. Hereafter respondent drafted the tender documents and invited tenders for the construction works on behalf of the Department. Initially Tau

⁸ Record, pp 1579 – 1580.

Pele was the successful tenderer, but after litigation, Haw and Inglis were awarded the tender as the contractors to rehabilitate the road. The site was handed over to them by the Department and road works started in 2010/2011. As far back as 2012 respondent and the contractor experienced problems with the payment of their invoices.

- [20] The Auditor-General issued a report on 26 July 2010 in respect of appellant's 2010 financial year, indicating that respondent's appointment was irregular in that the Department "did not follow proper procurement procedures in the appointment of such consultants..." The report also applied to other well-known consulting firms such as Dihlase, Kwezi 3 and Ninham Shand. The Auditor-General recommended merely that the management of the Department "must ensure that all appointments of consultant is (sic) made in compliance with Treasury regulations and PFMA."⁹

Apparently nothing was done about this until the appointment of Mr Msibi as HOD on 1 November 2011. It should be mentioned at this stage that Mr Msibi should not be confused with Adv Msibi who was the HOD when the respondent was appointed as stated. In obvious defiance of the Auditor-General's report, or at best for him, instead of adhering to the report, Mr Msibi failed to act accordingly and approach the court to have the contract declared null and void. Respondent was also not alerted. He opted to order an internal investigation and obtained a report on 5 December 2012.

⁹ Record. From p 1185 and 1191 & 1192 in particular.

Hereafter he decided to appoint Mr Lebea, the appellant's attorney, to investigate.

[21] On receipt of the attorney's report a meeting was arranged with respondent for 26 March 2013, attended by several people including Mr Msibi and Mrs Botes on behalf of appellant and Mr Jacobs on behalf of respondent. Mr Msibi testified that he informed respondent of the illegality of the contract and that it should vacate the site. According to him there was total agreement between appellant and respondent at the meeting on this issue. His version is contradicted by his colleague, Mrs Botes as well as respondent's Mr Jacobs. The letters by appellant that followed after this meeting clearly do not serve as proof of an agreement. In fact, respondent continued to deliver services until completion of the project. I shall deal with this again when I evaluate the submissions of counsel.

[22] On 29 April 2013 respondent issued an application for payment of all outstanding invoices since June 2012. This case was settled on 5 September 2013 on the basis that respondent's claim in excess of R8m would be paid. At that stage the State Attorney acted for appellant. Mr Lebea came on board hereafter and applied for rescission of the settlement agreement, but a few months later the parties settled the matter on the same basis as earlier. Respondent's last two invoices dated 29 August 2013 and 5 November 2013 in the total amount of R2 397 173.36, which did not form part of the claim instituted earlier and settled eventually, are in dispute.

- [23] On 14 May 2013 Mr Msibi addressed a letter to respondent, directing it to vacate the site because of the alleged unlawful contract. There is no proof that this letter, if it left the appellant's offices, reached respondent. This letter does not mention the alleged agreement testified to by Mr Msibi which version is in dispute as mentioned. It is also strange that a letter would be sent to respondent at that stage as it was already represented by attorneys who had instituted proceedings against appellant for payment of outstanding invoices. On 12 September 2013 a further letter was sent to respondent to which the letter of 14 May 2013 was attached.
- [24] When respondent was instructed to vacate the site during March 2013, about 90% of the contract was completed. It is evident that appellant was prepared to pay a total amount of close to R18m to respondent for services rendered over a period of more than four years in circumstances where it was alerted by the Auditor-General as long ago as 2010 of the alleged unlawfulness of the contract.
- [25] Appellant was prepared to pay the sum in excess of R8m after institution of litigation, on the basis that respondent added value, although it averred that respondent relied on an unlawful contract.

**VII EVALUATION OF THE TRIAL COURT'S JUDGMENT WITH
REFERENCE TO APPLICABLE LEGAL PRINCIPLES AND
SUBMISSION BY THE PARTIES**

Evaluation of the evidence pertaining to the contract and the works executed

- [26] The trial court gave a brief background of the material facts and elected to rely on the applicable legal principles in order to come to its conclusions. It is accepted that, notwithstanding no detailed reference to the evidence, it took cognisance of the facts stated above. It is deemed apposite to evaluate the evidence in some detail. It is accepted that appellant clearly challenged the validity of awarding the contract to respondent in its plea. It is one thing to make averments, but a different kettle of fish to prove those averments.
- [27] Appellant bore the onus to prove that the contract entered into between the parties was unlawful and null and void *ab initio*. In order to achieve that, it had to present cogent and acceptable evidence. It was also incumbent on appellant to fully disclose all relevant facts and documents to show and prove the alleged invalidity. I shall deal with this in more detail hereunder.
- [28] It is particularly important to note from the onset that appellant elected to tender no evidence as to the events between 2007 and 2009 mentioned above. Adv Msibi and his management team at the time and the persons who signed the documents referred to earlier were not heard. It was not placed on record

that anyone of them, Adv Msibi in particular, was not available to testify. The court was not presented with a full picture as to what really transpired and why the Department elected to make use of a roster system. I shall deal with this again hereunder. It is instructive to take note that the Auditor-General noted in the last paragraph of its report that “(N)o management comments were received.”¹⁰

[29] Mr Jacobs’ testimony in respect of the receipt of the letter of appointment, signing of the contract, respondent’s compliance with its contractual obligations, including its assistance with the procurement process for the appointment of a contractor, is not in dispute.

[30] There is no reason not to accept that the parties did not agree during the March 2013 meeting that the contract was null and void. If that was the case, Mr Msibi’s letters would have been worded differently. Respondent continued with its contractual obligations after this meeting and appellant even settled the outstanding invoices. Appellant failed to apply to court to declare the contract null and void. Respondent cannot be blamed, as now suggested by appellant’s counsel, for ensuring that the project was finalised. The completion of the works and the *quantum* of the claim are not in dispute.

¹⁰ Record, p 1192.

The roster system

[31] I mentioned above that high ranking officials of appellant accepted that the roster system for professional entities such as consulting engineers was a fair system. Again, as stated above, none of the other consulting firms, or anybody else, objected to respondent's appointment. Even Mr Watkins, appellant's expert on procurement law who failed to investigate why and at whose instance a roster system had been implemented and whether or not it could be said to be unfair and not transparent, conceded during cross-examination that the Supply Chain Management Policy in place in 2007 when the appointment letter was written, read as follows:

"However, this policy provides as an alternative to request for proposals/bids process for the establishment of a roster system, updated and maintained regularly by the Supply Chain Management with the appointments and recommendations being made on a rotational basis through the Office of the Chief Financial Officer and then in consultaion with the Bid Adjudication Committeee and approved by the relevant authorities as defined in the Policy."¹¹

[32] Mr Watkins, for reasons entirely unclear, did not investigate what transpired at the relevant time in the edifice that was the Department before and could not say, for instance, whether a deviation from the normal bidding process was allowed or not. The HOD could *ex post facto* ratify an appointment made which did not strictly comply with the acceptable procedure.¹²

¹¹ Record, p 1702.

¹² Record, p 1718.

Mr Watkins did not speak to, *inter alia* Adv Msibi, to establish if there was not perhaps such a ratification.

[33] As mentioned, appellant presented no evidence of its management and relevant role players during the period 2007 to 2009. Appellant failed to show that the Supply Chain Management Policy in place at the time had been contravened. It is also apparent that the Auditor-General did not receive communication from appellant's management at the time pertaining to the process adopted to appoint respondent. The full factual matrix as it played out in the offices of appellant was not placed before the court. If the trial court was concerned with a counterclaim or review application to have the decision to appoint respondent reviewed and set aside, it would be presented with full facts. Appellant would be obliged, especially in the case of a review and bearing in mind the provisions of Rule 53, to despatch to the court the record of decision ("ROD") to be set aside and to make copies thereof available to respondent. An allegation in pleadings is not evidence and save in the case of a clear-cut situation such as when an exception would be appropriate, a litigant cannot merely rely on a legal argument in order to convince the court to find in his/her favour. The legal submission must be based on admitted or proven facts.

The reactive challenge, procurement law and the validity of the appointment of SMEC

- [34] Appellant raised non-compliance with procurement laws in its plea. It elected not to file a review application or a counter-claim. Fact of the matter, and even if it can be accepted that review procedure was not required, which does not have to be decided in light of the authorities referred to herein, it attracted an *onus* to show that the contract was illegal and null and void *ab initio* based on the principle of legality.
- [35] Notwithstanding the main defence raised in the plea, Mr Georgiades submitted that this court should not consider itself with public law and decisions taken on an administrative level. According to his argument, once the contract was entered into between the parties, public law fell out of the picture. He relied on *Government of the RSA v Thabiso Chemicals* and the earlier *Cape Metropolitan Council* judgment¹³. Brand, JA explained the aspect with much clarity in *Thabo Chemicals*.¹⁴ The learned judge of appeal explained why the principles of administrative law could not be applied. In that case the contract and the cancellation thereof by the Tender Board were admitted, but it was denied that the cancellation was wrongful. The Tender Board cancelled the contract, relying on a clause in the General Conditions of the tender and the furnishing of incorrect information by the bidder. The bidder averred that it

¹³ [2009] 1 All SA 349 (SCA). See also *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) at para [18] where the court held that the appellant did not perform a public duty when it purported to cancel the contract, but that it exercised a contractual right founded on the consensus between the parties in respect of a commercial contract.

¹⁴ *Ibid* at para [18].

was entitled to be heard, based on the *audi alteram partem* principle, before cancellation and therefore the cancellation process was attacked as unfair. Brand, JA made it clear that once the tender had been awarded, the relationship between the parties was governed by the principles of contract law. The applicable regulations and General Conditions became part of the contract through incorporation of reference. These two judgments do not support the appellant's argument at all. When I asked Mr Georgiades on which term of the contract appellant relied for cancellation, he could not provide an answer. In any event, the plea, the meeting between the parties and the letters forwarded to respondent do not refer to cancellation at all.¹⁵ This did not prevent Mr Georgiades to repeatedly refer to cancellation of the contract, whilst it was his client's case that no valid contract came into being.

[36] Mr Georgiades submitted with reference to *Kirland Investments*¹⁶ that it is not cast in stone that an organ of State must approach the court for review and setting aside of its decision. On his version it was sufficient in this instance to send the letter of cancellation as Mr Msibi had done. He referred to the letter of 14 May 2013 as a letter of cancellation. I fail to understand how this letter could be regarded as a letter of cancellation of the contract if it is appellant's case that no lawful contract was entered into or as put by it, the "contract" was "invalid and void *ab initio*." I do not agree with counsel's argument based on the supposition that "(W)e are in the field of

¹⁵ Plea: Record p 258 – 263; letter: p 264.

¹⁶ MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute 2014(3) SA 219 (SCA)

contract law” and that the contract was duly cancelled. Even if that was the case and if appellant as the innocent party’s act of cancellation was rejected, it could not resort to self-help, but had to approach a competent court to confirm the cancellation. Appellant elected to refrain from utilising accepted legal principles and procedure by issuing summons to confirm its alleged cancellation of the contract. It unsuccessfully directed respondent to vacate the site and refused to pay what was due to it. A purported act of cancellation is not a reactive challenge, but even so, respondent was within its rights not to accept it without court intervention. However, in my view the matter fell within the purview of administrative law and that being the case, counsel’s argument is not meritorious at all, bearing in mind *Economic Freedom Fighters*.¹⁷

- [37] Reactive challenge, or collateral challenge as referred to in *Oudekraal*¹⁸ is raised as a challenge to the validity of an administrative act or decision. As the SCA said, “where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to justify his conduct by raising what has come to be known as a ‘defensive’ or ‘collateral’ challenge to the validity of the administrative act.” *Oudekraal* has been followed in numerous judgments. In terms thereof an administrative decision stands until set aside by a competent court. It must be treated as legally effective until a court pronounces authoritatively on its invalidity and set it aside.¹⁹

¹⁷ *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others* 2016(3) SA 580 (CC) paras [63] – [75].

¹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at par [32].

¹⁹ *Kirland* supra at para [32] and *Merafong City v AngloGold Ashanti* 2017 (2) SA 211 (CC) at paras [41] – [44].

[38] Lately reactive challenge has received much attention and it is now clear as stated in the introductory paragraph that organs of State may rely on such challenge as well. Mr Georgiades relied on two *dicta* in *Merafong*²⁰ for his submission that appellant was fully within its rights to rely on invalidity in its plea, one by Cameron, J who delivered the majority judgment and one by Jafta, J, to be found in paragraphs [23] and [92] respectively. In the first instance the reference is to a “defence” against enforcement of an invalid administrative act, whilst in the second instance it is said that a collateral challenge is “nothing else but an argument advanced ... to the effect that the legal decision... sought to be enforced is invalid...” I do not understand the two learned judges to lay down a rule that either a plea or a mere legal argument would suffice in relying on a reactive challenge. Merafong did in fact rely on a conditional counterclaim, and the court held that the matter had to be remitted to the High Court with leave to both parties to file additional affidavits to enable that court to adjudicate the alleged invalidity of the applicable legislation. Cameron, J emphasised in paragraph [61] that “(g)enerally, it is the duty of the state functionary to rectify unlawfulness.” This Merafong did, although belatedly, by filing its conditional counterclaim.

[39] Jafta, J, writing for the minority in *Merafong*, not only questioned the correctness of judgments that followed *Oudekraal* such as *Kirland*, but went further and stated that an organ of State cannot be time-barred to rely on an invalidity. His view is that action based on an invalidity can at any time be

²⁰ Ibid

opposed by the organ of State, no matter when the action is brought. He explained his viewpoint in a minority judgment in *Tasima*, relying on the judgment of Skweyia, J in *Khumalo*²¹ but eventually concluded in paragraph [131] that he “..would have preserved what had already been done in terms of the invalid extension....” In the majority judgment of Khampepe, J in *Tasima*,²² she emphasised in paragraph [151] that in light of the substantial delay in instituting the counter-application it had to be determined first whether the applicants were time-barred from launching their reactive challenge, but having found for the Department on that issue, eventually made an order as suggested by Jafta, J. Froneman, J did not agree with Jafta, J’s criticism of *Kirland* and emphasised at paragraphs [228] and [229] that a unanimous CC bench held in *Economic Freedom Fighters* that “no decision grounded on the Constitution or law may be disregarded without recourse to a court of law.”

- [40] A party averring that a contract is illegal in that it is prohibited by either the common law or statute, may do so in his/her plea and a court may even raise the question of illegality *mero motu*; however the court must be satisfied that all the evidence pertaining to the illegality was led.²³ Bearing in mind this remark as well as the case law in respect of setting aside of administrative decisions which generally take place behind closed doors and without the affected parties being allowed the opportunity to monitor the process, Mr Georgiades was challenged to mention any judgment where the court had

²¹ *Khumalo v MEC for Education* 2014 (5) SA 579 (CC) at para [45].

²² *Tasima* footnote 1 supra at paras [142] & [143] read with [151] & [152].

²³ Harms, Amler’s Precedents of Pleadings, 9th ed at p 118 and authorities quoted.

accepted a reactive challenge contained in the plea of an organ of State. He referred to *Premier, Free State and others v Firechem Free State (Pty) Ltd.*²⁴ The SCA did not have to consider the constitutionality of the Tender Board's actions in authorising a secret contract to the successful tenderer (Firechem) as this was not pleaded – see paragraph [32] – and it merely stated that if it was open to the court to apply the constitutional requirements, it would have strengthened the Province's case. In that case a letter of appointment was issued to Firechem, stipulating that acceptance would constitute a binding contract. In accepting, Firechem referred to a contract to be signed by the parties. It transpired that this secret contract which was eventually signed, contradicted the terms of the tender contract already concluded. It even bound the Province to accept delivery of certain fixed quantities of products over a period of ten years contrary to the five years set out in the tender and did not allow Province to determine the quantities required. The facts in *Firechem* differ completely from the present case and Mr Georgiades is not correct to submit that *Firechem* is authority that an organ of State can merely plead unlawfulness in situations like the matter before us without resorting to either a counter-claim or a review application.

- [41] The accepted and default position is that an application to review and set aside a decision of a functionary is by way of Uniform Rule of Court 53, although disgruntled persons from time to time elect to make use of Rule 6. However, it has

²⁴ 2000 (4) SA 413 (SCA).

become accepted practice over the years that an organ of State may, in resisting an unlawful claim and preventing its perpetuation, file a counter-claim, seeking the review and setting aside the impugned decision. I shall deal with this again later herein.

[42] In *Mothapo Consulting Engineers*²⁵ the following was stated by the full bench of this Division:

“[12] Section 217 of the Constitution prescribes that when an organ of state in the National, Provincial or Local Sphere of Government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This is echoed in section 83(3) of the Local Government: Municipal Systems Act 32 of 2000. Section 112(1) of the Local Government: Municipal Finance Management Act, 56 of 2003 stipulates that the SCMP of a municipality must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management. In this regard regulations were promulgated under GN R 868 in GG 27636 of 30 May 2005. Procurement law is prescriptive and not permissive. See *SANYATHI CIVIL ENGINEERING AND CONSTRUCTION (PTY) LTD v ETHEKWINI MUNICIPALITY AND OTHERS* 2012(1) BCLR 45 (KZP) paras 26 - 36 and *TEB PROPERTIES CC v MEC, DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, NORTH WEST* [2012] 1 ALL SA 479 (SCA) para 31.”

[43] More recently the Constitutional Court set out the proper legal

²⁵ *Mothapo Consulting Engineers (Pty) Ltd t/a Mothapo Projects v Nala Municipality* (1053/2012 [2012] ZAFSHC 118 (21 June 2012))

approach pertaining to procurement processes in *Allpay*.²⁶ It is not necessary for purposes hereof to quote the *dictum* fully, save to reiterate that “the constitutional and legislative procurement framework entails supply chain management that are legally binding” and “(t)he remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.”

[44] In *Westinghouse*²⁷ the court reiterated in paragraph [38] that fairness in the procurement process is a value in itself and in paragraph [39] that proper compliance with the procurement process is necessary for a lawful process.

[45] In *Qaukeni*²⁸ the SCA found as follows:

“[16] I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced.”

The SCA proceeded as follows in paragraph [26] in respect of the procedure to be adopted by a public body confronted with its own irregular administrative act:

“But it is unnecessary to reach any final conclusion in that regard (the review of the administrative action under PAJA). If the second appellant's

²⁶ *Allpay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) at para [22].

²⁷ *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and another* 2016 (3) SA 1 (SCA).

²⁸ *Municipal Manager: Quakeni Local Municipality and another v FV General Trading CC* 2010 (1) SA 356 (SCA) at para [16].

procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty-bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form." (emphasis added).

[46] In *Kernsig 17*²⁹ the court found in an unrelated issue, but in my view relative to the investigation to be undertaken herein, that s 38 of the Companies Act, 61 of 1973,

"is fact-based and that, without the necessary facts, a court cannot make a finding on whether s 38 was contravened or not."

The SCA concluded as follows:

"[24] In this matter it is plain that all the facts are not before court to enable the court to determine whether or not s 38 has been contravened."

The SCA also relied on the following *dictum* of Trollip JA:³⁰

"And if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded.

It is true that 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

²⁹ Absa Bank Ltd v Kernsig 17 (Pty) Ltd 2011 (4) SA 492 (SCA) at paras [23] & [24].

³⁰ Yannakou v Appolo Club 1974 (1) SA 614 (A) at 623G – H.

only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it.” (emphasis added.)

I deliberately emphasised the last part of the *dictum*. A court cannot make a finding of illegality if all necessary and relevant facts have not been placed before it.³¹

[47] In *Mofomo*³² the full bench of this Division stated the following:

“In its counter-application the Department was called upon to disclose the entire process followed prior to the appointment of Mofomo, the reasons for its decision and all relevant documents. In the process the Department as an organ of state seeking to repudiate its own administrative action disobeyed the essential requirements for a review application. The Department had to prove invalidity to the court *a quo*, but failed to do so.”

[48] The court proceeded in *Mofomo*³³ to emphasise that a public body such as a municipality seeking to have its own decision reviewed and set aside must play open cards with the court. It should provide the court with its ROD, the reasons for the decision and all relevant documents as would have been the case if its decision was taken on review by a disgruntled member of public. It relied on the following *dictum* of Cameron, J:

“When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government

³¹ *Mofomo* and *Kirland*. See also Harms at footnote 23 *supra*.

³² MEC for Public Works and Infrastructure, *Free State v Mofomo Construction CC* (A138/2016) [2016] ZAFSHC 196 (24 November 2016) at para [34].

³³ *Ibid*, paras [45] – [50], with reference to *Kirland* at para [65].

should not be allowed to take short cuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what has been done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.”

[49] As mentioned, the principle that a public body or state functionary may challenge exercises of public power, including their own, in appropriate circumstances, has been confirmed recently by the Constitutional Court in *Tasima*.³⁴ A reactive challenge to validity of a decision is allowed.

[50] In *State Information Technology Agency (SOC) Ltd v Gijima Holdings (Pty) Ltd*³⁵ the Constitutional Court found that a PAJA review is not available to an organ of state, but a legality review applies to enable the organ of State to apply for the review of its own decision. In coming to this conclusion the CC did not in any other manner change the established principles enunciated in *Kirland* and *Oudekraal*.

[51] Appellant did not launch review proceedings. If it did that, the reasons for its decision to issue the appointment letter and entering into the subsequent contract would have to be provided. All relevant aspects pertaining to the history of the matter would have been placed before the court, such as e.g. advertisements for tenders (if it was done), the tenders

³⁴ See footnote 1; also *Merafong*, paras [25], [55] & [56].

³⁵ 2018 (2) SA 23 (CC) at paras [37] - [40].

received, the discussions by panel members (if it was the case), any possible deviation requests and discussions about that at management level, who, when and on whose authority a roster system was put in place and on what basis appellant was selected and by whom. All the facts have not been placed before the court *a quo* for it to adjudicate whether an illegality has taken place. See: *Apollo, Kirland and VIP Consulting Engineers (Pty) Ltd v Mafube Municipality*.³⁶ The evidence of Mr Msibi and Mrs Botes was irrelevant in this regard. The court did not have the opportunity to hear evidence of the role players in the employ of appellant at the critical times in 2007 and 2009. Furthermore, no minutes of meetings that could shed light on the matter were presented to the court. Appellant should have placed reliable and credible evidence of witnesses that were involved with procurement and the roster system before the court, but failed to do so. The court *a quo* was left in the dark in this regard. Appellant wanted the court to exercise its discretion “in the air.”

The Auditor-General’s report

[52] The effect of the Auditor-General’s report needs to be considered. Mr Georgiades submitted that, as is the case with reports of the Public Protector, the Auditor-General’s reports are binding on organs of State as well as citizens affected thereby. The irony of his submission, relying on the third ground of appeal, is that appellant did not regard it bound by the Auditor-General’s decision. It did not inform respondent

³⁶ Footnotes 30 & 33 and *VIP Consulting Engineers (Pty) Ltd v Mafube Municipality* [2018] 3 All SA 922 (FB) at para [57].

there and then – in 2010 and before the actual rehabilitation of the road started - that the purported contract was a nullity. Mr Georgiades did not provide any authority for this submission. I do not agree with him. I considered ss 181, 182 and 188 of the Constitution and the Public Protector Act.³⁷ Section 182(1) of the Constitution provides the Public Protector with the power, not only to report on specified conduct, but also to take appropriate remedial action and the Public Protector Act confirms this in greater detail. I also refer to recent judgments of the Constitutional Court pertaining to the powers and functions of the Public Protector and the *2016 State Capture Report* of the Public Protector.³⁸ In *SABC and others v DA and others*,³⁹ confirmed in *Economic Freedom Fighters*, the SCA held that “the Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations.” In *Economic Freedom Fighters*⁴⁰ Mogoeng CJ writing for a unanimous court, stated the following:

“Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.”

Appellant elected not one of the two available options as clearly demonstrated by the facts of this case.

[53] The Auditor-General is, as the Public Protector, one of the Chapter 9 institutions which are accountable to the National

³⁷ Act 23 of 1994, inter alia ss 6 – 8.

³⁸ *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others* 2016 (3) SA 580 (CC) paras [63] – [75] and *Absa Bank Ltd v Public Protector* 2018(2) All SA 1 (CC) paras [15] – [20]

³⁹ [2015] 4 All SA 719 (SCA).

⁴⁰ See footnote 38 at para [75].

Assembly. I accept that he/she is the watchdog over government. Contrary to the Public Protector's powers, the Auditor-General's functions as set out in s 188 of the Constitution, read with the Public Audit Act⁴¹ do not entail any binding nature, at least not on the citizenry. He/she must audit and report on the accounts, financial statements and financial arrangements of organs of State, those entities required by national and provincial legislation to be audited and institutions receiving funding from certain organs of State as well as institutions authorised by law to raise money for a public purpose. These reports must be submitted to the relevant entities and are made public. It is expected of these entities to adhere to the Auditor-General's reports in order to ensure future compliance with the relevant legislation. Although additional functions and powers may be prescribed to the Auditor-General by national legislation such as are found in the Public Audit Act, I have not been made aware of any further relevant powers. Whatever the appellant's argument before us, it is apparent that it failed to act upon the Auditor-General's report and communicated to respondent that no valid and binding contract had come into being. This it should have done in 2010, if it regarded it and respondent bound by the report, but it allowed the works to continue. Two years later it referred the matter, initially for an inhouse investigation and thereafter to a private Gauteng attorney to investigate. There would be no reason to waste money of the public purse on this expenditure if appellant acceded to the Auditor-General's report.

⁴¹ Act 25 of 2004 and ss 3 – 5 in particular.

Delay

- [54] If it accepted for the moment that appellant proved that an improper procurement process had been followed which resulted in an unlawful letter of appointment and the contract concluded to be null and void *ab initio*, the delay must be considered as well. Delay in applying for the review and setting aside of an administrative decision is a vital aspect and cannot merely be brushed aside. On appellant's version the letter of appointment of 2007 is a nullity. Yet, nothing was done to either retract the letter of appointment with consent of respondent or apply to court to set it aside. Two years later the contract between the parties was concluded to give effect to the earlier letter of appointment. Still, nothing was done to prevent respondent from executing its contractual obligations. It assisted in preparing tender documents and with the appointment of the contractor who had to rehabilitate the particular road. It ensured that the road was duly rehabilitated to the extent that about 90% of the work was done when appellant all of a sudden indicated that respondent had to vacate the site due to alleged unlawfulness of the contract.
- [55] The plea was filed in October 2014. The delay was, at worst for appellant seven years (from 2007) and at best for it about four years (from July 2010). This should not be tolerated,

especially bearing in mind the circumstances of the case. If appellant acted swiftly in accordance with the report of the Auditor-General and approached the court for relief then, and on the basis of it being successful, the contractor would not have started with road works and the matter would have been considered on a totally different basis. If respondent's appointment was set aside in March 2013 when it was for the first time alerted of appellant's attitude, appellant would have been compelled to undertake a procurement process to appoint new consulting engineers whilst in the meantime the rehabilitation of the road – which was considered urgent in 2007 - would have to be put on ice. The costs, wasting of time and money and the negative consequences for the travelling public are not only unimaginable, but would be enormous. Consulting engineers charge their fees based on the tariffs set out in the Engineering Profession of South Africa Act, 46/2000 and there is no reason to believe that a substitute consulting engineer would charge less than respondent for the remainder of the contract works. The opposite is more likely. Things became much worse for appellant by the time it pleaded as the project had been completed by then. Therefore, and even if it could be found that appellant was entitled to rely on a reactive challenge based on its plea, it could not have succeeded due to the considerable delay and the consequences thereof.

[56] In *Gijima*⁴² the CC also considered the rule against delay in bringing review applications with reference to *inter alia Tasima and Kirland supra* and found that even in the case of a reactive

⁴² See footnote 35.

challenge, due process must be followed by organs of State as there is no reason to exempt government. At paragraph [50] the court confirmed the following *dictum* by Cameron J in *Kirland* to be correct:

“...there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”

It must be emphasised that organs of State have constitutional obligations which must be performed diligently and without delay.⁴³

[57] In my view the appellant’s attitude towards the matter in allowing respondent to comply with its contractual obligations and then belatedly and all of a sudden raised unfairness and illegality when the project was about to be finalised, cannot be countenanced.

The just and equitable principle

[58] Even if it could be found that the delay was not exorbitant, there is still sufficient reason to hold that respondent was entitled to succeed. It is not necessary to say anything in this regard, save to state that the trial court apparently had in mind the aspects mentioned in the previous paragraphs when it concluded as it did in the last sentence of the judgment which I quote again:

⁴³ Section 237 of the Constitution.

“Even if the contract is unlawful, it is, in my view, only just and equitable for the plaintiff to be compensated for such services.”⁴⁴

[59] The trial court’s conclusion in awarding the amount claimed is in line with the result achieved in *Gijima*⁴⁵ and it is fully endorsed. The CC held that Sita should not benefit from having given false assurances and from its own delay in instituting proceedings. The CC stated that *Gijima* “may well have performed in terms of the contract, while Sita sat idly by and only raised the question of the invalidity of the contract when *Gijima* instituted arbitration proceedings.”

In the present matter this is exactly what appellant did: it sat idly for a number of years with all the relevant information available to it, but allowed respondent to just about finish the contract worth in excess of R19m and then belatedly claimed that respondent had no contractual right to claim what was due to it. Such behaviour cannot be tolerated and/or approved.

VIII THE AUTHORITY OF MESSRS MENYE AND TROSKIE

[60] It is appellant’s case that Mr Menye fraudulently held himself out as HOD when he signed the letter of appointment. Therefore, so the appellant submitted, the purported appointment was fraudulent, alternatively irregular, unlawful and invalid. The allegation relating to Mr Troskie is that he as Chief Director: Roads, had no authority to contractually bind the appellant and the same allegations of fraud, etc are made against him. This is really a red herring. Mr Menye merely

⁴⁴ Para [22] of the judgment.

⁴⁵ *Gijima* loc cit at para [54] and para 3(b) of the order

conveyed in writing what was already approved by senior members of the Department including the HOD. The reference to him as HOD in the letter might be a mistake, but I am not prepared to find any fraud or illegality in light of the history of the matter and lack of evidence. In fact, two years lapsed since the letter before the standard contract was entered into. Neither the HOD, nor anybody else in the Department deemed it necessary – *ex facie* the record – to retract the appointment letter. In fact, a contract was entered into with respondent who thereafter drafted designs and tender documents to enable the Department to award a tender to a contractor for construction of the road. The project started and payments were made until 2012. When the appellant was sued for arrear invoices in 2013, it agreed to pay those. Mr Troskie was the “go to” person in the Department relating to road matters according to Mr Jacobs and I am prepared to accept that he was either properly authorised to sign the contract, or that his action was ratified thereafter by the HOD.

- [61] Respondent submitted, based on its pleadings, that if this court find in favour of appellant on the authority issue, the doctrine of estoppel prevents appellant from relying on lack of authority. It was accepted by Mr Grobler as trite that estoppel cannot be relied upon to defeat a case of illegality. He submitted that the doctrine of estoppel can and must find application if it is found that the Department’s internal arrangements had been contravened. At best for appellant, any non-compliance with the Department’s internal arrangements and formalities cannot be used to non-suit respondent who on all the available

evidence acted in good faith based on the history of co-operation as service provider for the Department over many years. Respondent may in such a case successfully rely on estoppel. The facts in *RPM Bricks*⁴⁶ are totally distinguishable although the exposition of the law by Ponnann, JA is with respect correct. Respondent falls in the second category mentioned by the learned judge of appeal.

IX CONCLUSIONS

[62] In sum, the appellant should have instituted proceedings for the review and setting aside of the decision to award the contract to respondent. It should have filed a review application or at best for it, a counterclaim. It failed to act accordingly. Consequently, the issue to be considered was not raised fairly and squarely.

[63] Even if it might be said that substance should trump form and that it was sufficient to rely on the plea only, appellant failed to present cogent, relevant and admissible evidence to the trial court for it to properly adjudicate its averments in the plea in respect of non-compliance with procurement principles and legislation.

[64] The reliance on the lack of authority of Messrs Menye and Troskie to sign the letter of appointment and contract respectively has not been proven, but even if that is accepted

⁴⁶ City of Tswane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA) paras 11, 12 & 13.

to be the case, the doctrine of estoppel has been raised successfully.

- [65] Even if it could be found that the contract was null and void *ab initio*, the delay in instituting timeous and appropriate steps is such that respondent should not be penalised. It is entitled, based on *Gijima*, to receive the final payment contractually due to it for work done.

X THE RECORD

- [66] A final remark should be made in respect of the voluminous record. If appellant would have been successful in the appeal, it would be penalised with an appropriate cost order. The record consists of 2 200 pages bound in 12 volumes. Several documents have been filed at two and even three different places. The heads of arguments filed with the trial court and the SCA and even the petition lodged with the SCA form part of the record. Numerous other documents such as reports and invoices which have not been referred to at all, either during testimony, or argument, are contained in these bundles. These are irrelevant bearing in mind the crisp issues to be adjudicated.

XI ORDER

- [67] The appeal is dismissed with costs.

J. P. DAFFUE, J

I concur

L MOENG, AJ

I concur

SG MEINTJES, AJ

On behalf of appellant:

Adv C Georgiades (SC)

Instructed by:

Phatshoane Henney attorneys

BLOEMFONTEIN

On behalf of the respondent:

Adv S Grobler

Instructed by:

Peyper Attorneys

BLOEMFONTEIN