

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

Case No: 1227/2018

Heard on: 08/03/2019

Delivered on: 30/08/2019

In the matter between

LUKE BERNARD SAFFY N.O.

1st Applicant

DONOVAN THEODORE MAJIEDT N.O.

2nd Applicant

SHAVONNE BADENHORST ST CLAIR COOPER N.O.

3rd Applicant

(In her capacity as appointed liquidators of

VISTA PARK DEVELOPMENT (PTY) LTD

And

THE MINISTER OF PUBLIC WORKS

1st Respondent

THE MEC: NORTHERN CAPE PROVINCIAL

2nd Respondent

GOVERNMENT: DEPARTMENT OF PUBLIC WORKS

THE HOD: NORTHERN CAPE PROVINCIAL

3rd Respondent

GOVERNMENT: DEPARTMENT OF PUBLIC WORKS

JOH-ARCH INVESTMENTS (PTY) LTD

4th Respondent

JUDGMENT

PAKATI J

[1] The applicants, Luke Bernard Saffy N.O., Donovan Theodore Majiedt N.O. and Chavonne Badenhorst St Clair Cooper N.O., the first to third applicants respectively (the applicants), in their capacity as appointed liquidators of Vista Park Development (Pty) Ltd (Vista Park), seek an order in the following terms:

'1. The settlement agreement concluded between the Applicants and the First to Third Respondents is enforced.

2. The Second Respondent is ordered to pay to the Applicants the amount of R25 million.

3. The Second Respondent is ordered to pay interest on this amount calculated at 10, 25% per year *a tempora morae* as follows:

3.1 On the first tranche payment that was due on 31 October 2017 in the amount of R15 million – from 1 November 2017 until 31 November 2017;

3.2 On the balance outstanding of the first tranche payment totalling R5 million, from 1 December 2017 until date of final payment;

3.3 On the second tranche payment that was due on 31 January 2018, from 1 February 2018 until date of final payment;

3.4 On the third tranche payment that was due on 30 April 2018, from 1 May 2018 until date of final payment.

4. The Second Respondent is ordered to pay the costs of the application. Alternatively and should any of the other Respondents oppose, then and in that case such Respondents be ordered to pay the costs of the application together with the Second Respondent, payment by one the other to be absolved.

5. Further and/or alternative relief.'

[2] The Minister of Public Works cited herein as nominal respondent (the Minister), the Member of the Executive Council: Northern Cape Provincial Government: Department of Public Works (the MEC) and the Head of the same Department: Northern Cape Provincial Government (the HoD), are first to third respondents respectively. The Minister, MEC and the HoD (the Department) filed a notice of opposition on 16 July 2018.

[3] Joh-Arch Investments (Joh-Arch Investments), a company duly registered and incorporated in terms of the relevant statute of the Republic of South Africa, with its main place of business situated at

3326 Bhekuzulu Street, PO Mankuruane, Vergenoeg, Kimberley, is cited in this matter as the fourth respondent.

- [4] On 25 October 2018 the Department filed a third party notice joining Joh-Arch in the proceedings in terms of Rule 13 of the Uniform Rules of Court¹. The HoD alleges that the relief sought against the applicants is also equally applicable to the third party jointly and severally, the one paying the other to be absolved.

APPLICATION FOR CONDONATION

- [5] The Department applies for condonation of the late filing of the answering affidavit. The HoD explained that service of the application was not effected on him in his official capacity. It was served on the State Attorney on 28 June 2018, who in turn forwarded it under cover of a letter dated 08 July 2018 to the Department's attorneys on 09 July 2018. The notice of motion gave ten days' notice to file the notice of opposition instead of fifteen days as provided for by the Rules of Court. Due to the defective manner of service the Department was only aware of the application on 08 July 2018 and the notice of opposition was expected to be served on 29 July 2018 but was filed on 16 July 2018. The answering affidavit had to be filed by 06 August 2018, fifteen court days thereafter. On 16 July 2018 junior counsel from Bloemfontein was instructed. Consultation with him was scheduled to take place on 01 August 2018 in Kimberley. That week there was unrest in Kimberley which made it impossible for consultation to take place. I take judicial notice of the said unrest during that period.

¹ Rule 13 of the Uniform Rules of Court provides: "Where a party in any action claims- (a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or (b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should be properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them, such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff."

- [6] On 31 July 2018 when counsel tried to make arrangements for consultation to be held on 02 August 2018 he was informed that it would be safer for him to drive to Kimberley on 07 August 2018, hence the consultation was rescheduled for 07 August 2018. During this meeting it was considered that senior counsel from the Johannesburg Bar should be engaged due to the complexity of the matter. Mr Maru Maphalla, the Director General for Legal Services, made available all documentation to counsel.
- [7] In the meantime Mr Katlego Baloyi, the respondents' attorney of record, searched for the court files relating to the litigation between the parties including the action. He found some documents from the action file. He was advised that the members of the Hawks had attached some of the files and enquiries to them did not yield any results. Another consultation with counsel was arranged for 21 August 2018 but the HoD could not attend due to an urgent government business. Counsel was able to consult with the Department in the presence of Mr Baloyi but it transpired that further consultation was essential. The said consultation took place on 27 August 2018 and was attended by senior officials from the Department. Written legal advice prepared by counsel was delivered on 01 September 2018 to the Department.
- [8] The said document reached the Department on 14 September 2018 because the MEC and HoD were abroad for the period between 02 and 12 September 2018. Summons was served on the Department on 03 September 2018 in order to attend an enquiry in terms of sections 417 and 418 of the Companies Act, 61 of 1973, in Bloemfontein on 18 to 21 September 2018. The Department thought it prudent to finalise the said proceedings before completing the answering affidavit. The enquiry was finalised on 19 September 2019. On 20 September 2018 a detailed consultation was conducted

with Mr FJ Borman, the Legal Administration Officer, Roads and Public Works, with the purpose of preparing the answering affidavit.

- [9] Prior to preparing the said answering affidavit counsel had to first prepare advice concerning the liquidation and distribution account which he provided on 11 October 2018 with the draft answering affidavit and the accompanying pleadings. After Mr Baloyi received the draft and pleadings he forwarded same to Mr Maphalla to peruse and advise the Department accordingly.
- [10] A week later Mr Baloyi went on passionate leave. Upon his return he continued with the preparation of the answering affidavit and confirmatory affidavits. From 15 to 19 October 2018 the HoD and the MEC had to prepare for the Budget Lekgotla meeting in Upington.
- [11] On 22 October 2018 the HoD perused the draft answering affidavit and other documents and effected amendments. Other deponents also considered same satisfying themselves with its correctness. On 23 October 2018 Mr Maphalla also attended to the draft answering affidavit and forwarded same to counsel for finalisation.
- [12] In my view, the Department gave a full explanation for the delay as required by **VAN WYK v UNITAS HOSPITAL**². It is also in the interests of justice that I grant condonation in this matter as the applicants and the third party would suffer no prejudice if the application is granted. The failure by the respondents to timeously file their answering affidavit is hereby condoned.

FACTUAL BACKGROUND

- [13] It is common cause that Vista Park and Joh-Arch, a Joint Venture, represented by Mr Andrew George Scholtz, successfully tendered and entered into a procurement agreement covered by section 217

² 2008 (2) SA 472 (CC) at p477 paras [20] and [22]

of the Constitution³ for the construction of the psychiatric hospital in Kimberley with the Department. The tender documents constituted the agreement between the parties when the tender was awarded.

[14] The Joint Venture started with the construction and proceeded considerably until the contract was cancelled by the then acting HoD in writing on 07 December 2009. The applicants allege that the Department was not entitled to cancel the tender unilaterally. The validity of the cancellation was a major dispute between the Department and the Joint Venture. The erstwhile MEC brought an application under Case Number 1522/2010 to have the procurement agreement declared validly cancelled. An order dated 23 September 2011 confirmed the cancellation of the procurement agreement with effect from 07 December 2009. The Department alleges that taxed costs to the amount of R443 113-03 were payable to the Department by the Joint Venture in that case as it can also be gleaned from the purported settlement agreement. On 10 June 2010 Vista Park was placed in liquidation with Master's Reference Number B219/2010. On 03 March 2011 the applicants were appointed by the Master of the High Court as liquidators of Vista Park. This was confirmed by Mr Frederick Senekal, the attorney of Matsepes Incorporated on behalf of the applicants.

[15] On 07 December 2012 the Joint Venture instituted action against the HoD claiming damages based on the alleged unilateral cancellation of the construction agreement. They relied on the interpretation of Clauses 24 and 28 of the procurement agreement which does not form part of these papers.

[16] The Department filed a plea dated 02 July 2013 and raised special pleas *inter alia*, (a) that the Head of Department had no *locus*

³ The Constitution of the Republic of South Africa Act, 108 of 1996. This section provides: "Where an organ of state in the national, provincial or 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."

standi as defendant or respondent either nominal or otherwise and no order could be made against him as he was not the executive authority of the Department and for that assertion relied on sections 1 and 2 of the State Liability Act⁴; (b) That prior notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act⁵ had not been given to the Department within six months.

[17] On 30 April 2014, ten months later, the Joint Venture applied for condonation for failure to give prior notice in terms of the Institution of Legal Proceedings against Certain Organs of State Act. The Minister and the MEC were then cited as the first and second respondents although both had not been parties to the action and no application for joinder had been made at any time. The HoD was also cited as the third respondent. The Department argues that any claim against the MEC or the HoD as his substitute would have prescribed on 03 March 2014. The Joint Venture did not file their replying affidavit on time and no application for condonation was filed. The respondents set the matter down for hearing on 26 August 2016. The Joint Venture filed an application for postponement and they ultimately filed their replying affidavit but did not set the matter down for hearing of the condonation application.

[18] The applicants contend that the citation of the Minister and his joinder has no impact in the outcome of this matter.

[19] Sections 1 and 2 of the State Liability Act provide:

"1 Claims against the State cognizable in any competent court

Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

⁴ State Liability Act, 20 of 1957

⁵ Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002.

2 Proceedings to be taken against executive authority of department concerned

[\(1\)](#) In any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as nominal defendant or respondent.” My emphasis

[20] The word ‘must’ is imperative in that in a case against the State the executive authority of that particular department must be cited as the respondent and not the HoD. The Department contends that the plaintiff could be able to cite the right defendant if the claim had not prescribed. *In casu* the summons was issued after the Act had been amended after 30 August 2011. The executive authority had to be cited as nominal defendant. That means that the HoD of Roads and Public Works was not the executive authority. It confirms that in citing the HoD there was non-compliance with section 2 of the State Liability Act, the argument goes.

[21] The Supreme Court of Appeal remarked thus in **DISTCOR EXPORT PARTNERS AND ANOTHER v THE DIRECTOR GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY:**

“5. There is no statutory provision on how the State may initiate proceedings. There is one, however, providing how the State may be brought before the courts. It appears in s[ection] 2 of the State Liability Act 20 of 1957 which provides in s[ubsection] (1) that ‘...the Minister of the department concerned may be cited as nominal defendant or respondent.’ The subsection does not oblige a litigant to sue a minister. It was intended to facilitate actions against the State by making it possible to sue the political head of a department instead of the State in its own name. It did not introduce an inviolable rule. A plaintiff may still choose to sue the government of the Republic of South Africa and this has since 1957 often occurred.”⁶

[22] The Department alleges that on 30 April 2014 Vista and Joh-Arch filed an application citing not only the HoD but also the Minister and the MEC seeking condonation for the late filing of their notice in terms of Act 40 of 2002. Mr Frederick Senekal deposed to the founding affidavit dated 30 April 2014 and stated the following in paragraphs 30.9 and 30.10:

⁶ 2005 JDR 0293 (SCA) at para 5 and LAWSA Vol 25 (1) para 270

"30.9 I have been advised that prescription will only start running against the liquidators from the date of the first meeting of creditors and the final appointment of the liquidators, which occurred on the 3rd of March 2011.

30.10 I have therefore been advised that the first applicant's claim against the third respondent [HoD] will only become prescribed on the 3rd of March 2014"

This shows that the MEC was never joined in the main action, the argument goes.

[23] The Department alleges that Mr Scholtz persistently sought payment from the Department on behalf of the Joint Venture since 2017 before the meeting in Port Nolloth was held. He repeatedly made calls to Mr Nogwili, the HoD and deponent to the answering affidavit, to implore him to make payment. He also called the Premier of the Northern Cape and allegedly sought to influence other officials at senior level in the Provincial Government to exert payment. He further called Mr Borman, the Department's in-house legal adviser, on numerous occasions. He further made contact with the MEC until the MEC prohibited contact with him. He contacted Mr Mjila, the respondents' attorney of record, but Mr Mjila did not entertain him. He also contacted Volksblad and Diamond Field Advertiser Newspapers for assistance in his crusade. The pressure he exerted was relentless, the argument goes. Mr Nogwili refers to him as *"a thorn in the Northern Cape Provincial government's flesh."*

[24] The Department alleges further that on various occasions Mr Nogwili requested Mr Scholtz to prove that he had a right to compensation which he failed to do. All he said was that whether or not the construction agreement was validly cancelled once it had been unilaterally cancelled the Joint Venture was entitled to 10% of the total building costs which in this case amounted to R36 million. Mr Scholtz continued to pressurise the Provincial Government although other contractors who replaced it proceeded with the construction slowly but at enormous costs. My emphasis

[25] During September 2017 Mr Nogwili arranged for a meeting of the Department's executives and senior officials to consider collectively the approach to adopt in dealing with Mr Scholtz's persistence to get payment despite pending legal proceedings. On 12 September 2017 Mr Borman and other senior official of the Department held a meeting and the topic for discussion was the Joint Venture litigation claim regarding the first contract dealing with construction of the Kimberley Mental Health Facility for the Department of health. He prepared the minutes, Annexure "KSN1", which record:

"The meeting was convened to discuss the summons and litigation of the Vista Park matter. [The] HOD, Nogwili, explained the reason for calling the meeting and informed those present that he requires approval and guidance in regard to the litigation matter which has been dragging on for four years now and is costing the Department in legal costs and fees to the attorneys. The plaintiff in the matter had approached the department to push for a settlement of the litigation as he too was struggling to cope with the high costs of legal fees.

Ms Gill gave a brief overview of the matter and the details of who Mr Andrew Scholtz was and his role in the constitution of the Kimberley Mental Health Facility from the period 2005 to 2009. The project had been extended numerous times and the result was that the contract sum increased from approximately R250 million to approximately R360 million. He had been terminated due to non-performance as per the evaluations done by the professional staff.

Mr Borman gave an overview of the litigation. He explained briefly that the cause of action was based on damages that Mr Scholtz is claiming on behalf of his company. It was further indicated that the company and indirectly Mr Scholtz had gone into liquidation soon after the termination of the contract. The plaintiff claimed that this was as a result of the termination which the Department has denied. The plaintiff was seeking damages claim in the amount of approximately R57 million. Of that claim approximately R36 million was for damages as calculated at 10% of the contract sum. Approximately R4.7 million was for work done but not paid for and the rest of the claim was made up of the R10 million retention money.

The plaintiff was relying on clause 28 of the contract signed with the Government at the time. The Head of Department indicated here that none of the current participants around the table had been the decision makers at the time of the inception of the contract. The contract had been awarded by the then Provincial Tender Board. The contract had been drafted by consultants not the Department itself.

Mr Borman indicated that [C]lause 28 stipulated that where the Director-General terminated the contract unilaterally the contractor would be entitled to either 10% of the contract sum, this being the approximate R36 million or 10% of the work done or an amount of the damages proven to the Director-General. This clause, it was explained to the members after Director-General Bekebeke asked if the Department was not correct in terminating; contradicts with clause 25 which allows the DG to terminate due to breach. Said breach would be non-performance on the part of the contractor. Even if we rely on this [C]lause in court the possibility exists that [C]lause 28 will be deemed to have superseded [C]lause 25 and the Department would be liable to pay the 10%. This would be much better than the total R57 million but could possibly be that [that] amount, if one must take into account that a judgment draws interest and the interest on R36 million would be substantial. We are saved by the fact that [C]lause 28 only gives the 10% and no other amounts can be claimed. If one were to interpret as [neither] such that would mean that the plaintiff does not get the R4.7 million nor the R10 million as claimed and would not be entitled to interest should the decision be to accept the settlement proposal on [C]lause 28.

Mr Scholtz also owes the Department R437, 000-00 in legal costs for litigation in 2011 that the Department was successful in and has not satisfied. If in agreement this amount would be deducted from the settlement amount in order to settle this costs order. Members agreed this should be done.

The Premier asked if we consider the settlement would it only be the R36 million. The answer was yes each party would pay their own costs and the litigation would be settled and the matter would be ended in court.

[The] Premier said we must look at the costs of legal fees and the lengthy delays in finalising the court process. We should also consider that the plaintiff did not lose his company and funding and that this has caused possible undue hardship on him hence the desperation in hounding the Departments. [The] Premier asked [the] MEC for Finance, Mr Jack, [if] Treasury (provincial) would be able to assist to pay the money if we settle on the R36 million proposal? MEC Jack stipulated that as per the first meeting held between the plaintiff and Mr Scholtz in previous months that yes Treasury would be able to pay the R36 million but in staggered amounts as we do not have the full amount readily available. He indicated that [if] the plaintiff agrees that the amounts be paid in increments starting possibly with R10 million. [The] members agreed that this could be proposed to the plaintiff to consider.

Resolutions:

1. The proposal of R36 million be made to the plaintiff as full and final settlement of the litigation with no interest and each party to pay its own legal costs;
2. The amount of the settlement to be paid in increments and not a lump sum amount; [and]
3. Mr Borman to handle the negotiations with the assistance of the Chief State Law Adviser Adv G Botha from the office of the Premier to be present at the negotiations as well.

Within the members in agreement the meeting was ended.

Compiled by Fabian Borman (LLB 2005) (Attorney 2008)

Legal Administration Officer

Approved by

Mr Kholekile Nogwili

Head of Department". (My emphasis)

[26] On 27 September 2017 the applicants and the Department signed the purported settlement agreement (Annexure "AS5") in an attempt to settle the dispute that existed between them. It reads:

"1. The Plaintiffs agree to accept payment in settlement of the 10% of the Contract sum said amount being R36,811,539.34 in full and final settlement of the claim under [C]ase [N]umber 2072/2012.

2. The Plaintiffs agree to that the payments will be made in tranches with the first payment being made on the:

2.1 31 October 2017; and subsequent payments to be made on:

2.2 31 January 2018;

2.3 30 April 2018;

2.4 31 July 2018.

3. The Plaintiffs and Defendants agree that the first tranche payment will be in the amount of R15,000,000.00 thereafter the second payment will be in the amount of R10,000,000.00 and third payment will be an amount of R10,000,000.00 and the final payment will be an amount of R1,368,426.31.

4. The Plaintiffs agree to pay the Defendants the amount of R443, 113.03 in payment of legal costs under the Case Number 2106/09, which amount will be set off against the final tranche payment due on 31 July 2018.

5. The Plaintiffs and Defendants agree that the terms of this settlement agreement will be subject to non-disclosure to any third parties and that the terms thereof remain strictly confidential between the parties.

6. If the Defendants fail to adhere to the terms of the settlement agreement and fail to make any payment within thirty days of the stipulated payment dates under paragraph 2, the Plaintiffs may make this settlement agreement an order of Court.

7. This settlement agreement is subject to approval by the liquidators of the Plaintiffs.

Dated and signed at Kimberley on this 27th day of September 2017." My emphasis

[27] Mr Scholtz, the deponent to the founding affidavit, represented the applicants and Mr Kholekile Nogwili, the HoD and accounting officer in terms of section 36 of the Public Finance Management Act, 1 of 1999, as amended ("PFMA") since 01 October 2014, the Department.

[28] The Department made one payment in the amount of R10 million in terms of the settlement agreement on 01 December 2017. Thereafter no further payments were made. On 08 March 2018 Mr Vertue advised the first applicant (Saffy) of the settlement agreement and forwarded a letter dated 08 March 2018 to the Department (Annexure "AS6"). Importantly paragraphs 4 to 7 of the said letter record:

"4. The settlement is subject to the approval of the Liquidators of Vista and directors of Joh-Arch.

5. Joh-Arch indicated that they are willing to accept the settlement in terms of the above mentioned proposal.

6. If the above mentioned proposal is accepted by the Liquidators of Vista the first pro rata payment can be effected within 24 hours.

7. We look forward to receive your favourable consideration in order for us to finalize the matter." My emphasis

From this letter it is important to note that this was the first time that the applicants were made aware of the settlement agreement.

[29] Honey Attorneys, on behalf of Saffy N.O. addressed a letter dated 26 March 2018 to Mr Vertue ("AS7"). Basically, it was about the details of the account into which the money was going to be deposited and thereafter divided amongst the applicants after the Department had made payments in terms of the settlement agreement. Of importance is paragraph 1.3.7 of the said letter which reads:

"In the event that Joh-Arch Investments (Pty) Ltd is in agreement with the above we will proceed to inform the State accordingly that we accept the settlement."

Notably at this stage, the Department had not been informed of the approval of the applicants and the applicants had not been informed of the R10 million that was deposited in Mr Scholtz' trust account.

[30] On 29 March 2018 Mr Vertue responded to the above letter as follows:

- '1. The abovementioned matter and your letter dated 26th instant refers:
2. We confirm the contents of your letter to be in order.
3. Joh-Arch also confirmed their consent to the settlement *via* Engelsman Magabane Attorneys on the 28th instant.
4. Proof of payment of the R10 000 000-00 held by us in trust is attached hereto.
5. We confirm that the settlement amount reached with SARS on behalf of the joint venture will be paid out of the abovementioned funds and the pro rata amount of R2 750 000-00 due to Joh-Arch in terms of the settlement will be paid into our trust account, details as follows:

Gous Vertue & Ass Inc Trust, Nedbank, 166234, 1662 038 917, Ref: CV1365
6. We confirm that an amount of R 1 000 000-00 reserved for costs will be paid by us in trust.' My emphasis

[31] On 12 April 2018 Mr Vertue sent a letter to the Department reminding them of their failure to make payments in terms of the settlement agreement and threatened them with a court application if they did not comply. A response was received by the applicants from Mr F Borman, advising that he no longer worked for the Department and had directed the letter to Adv Maru Maphalla for his attention. Nothing was forthcoming from the Department until 16 April 2018.

[32] In response to the applicants' application the Department filed a counter-application dated 23 October 2018 seeking review and setting aside of the decision taken at Port Nolloth on 12 September 2017 in the following terms:

"3.5.1 Reviewing and setting aside the decision arrived at on 12 September 2017 to settle the claims of the applicants and the fourth respondent as joint venture

partners in the litigation instituted in this court against the Head of Department under Case Number 2072/2012 ("the action");

3.5.2 Setting aside as unlawful and invalid the ensuing settlement agreement, Annexure 'AS5' to the founding affidavit;

3.5.3 Claiming from the applicants and the fourth respondent jointly and severally payment of the amount of R10 million paid to them on 1st December 2017;

3.5.4 Claiming payment of the taxed costs due to the MEC Case No. 1522/2010 (Northern Cape High Court) in the amount of R443 113.03, an acknowledgement of the indebtedness which is recorded in the settlement agreement;

3.5.5 Costs of suit to be paid jointly and severally by the applicants and the fourth respondent, the one to pay the other to be absolved.

3.5.6 Further and/or alternative relief."

[33] The Department alleges that Mr Borman's submissions during the meeting excluded and were not expected to include an analysis of the pleadings and the merits of the special pleas raised by the respondents in the main action. The following aspects were also not considered when arriving at the abovementioned resolutions:

"40.1 The action against the Head of Department was ill-conceived, a nullity, or at least litigation which could never have resulted in any judgment in favour of the plaintiffs in the action with no resultant liability accruing for the [S]tate;

40.2 The MEC, and only the MEC, ought to have been the defendant, which he was not at any stage of the proceedings;

40.3 By 12th September 2017:

40.3.1 any possible claim against the MEC had as a fact become prescribed;

40.3.2 it was a matter of factual impossibility for the plaintiffs in the action to have cured the fatal defect of having cited the wrong defendant;

40.4 Had the matter gone to trial (assuming for a moment the condonation application was successful) the plaintiffs would have been unable, as a fact, to obtain judgment and no liability whatsoever for the State would have arisen.

40.5 Fact was that liability of the State was zero, and not R36 million or any other amount."

[34] The Department argues further that these factors came to light after the meeting was held. Mr Nogwili contends that if same were raised at the meeting the settlement agreement would not have been concluded. The MEC would never have been the debtor obliged

to make payment to the Joint Venture. The payment of R10 million was *bona fide* made in error, and at the latest from 03 March 2014, the MEC ought to have been the defendant as the debtor but was not. He was exonerated from making any payment due to the fact that he was not cited timeously as the functionary of the State from whom payment could lawfully be claimed, the argument continues. The Department finds it strange that the R10 million was paid to Mr Vertue's account before acceptance of the settlement agreement by the applicants was conveyed to it.

[35] The Department submits further that it has no doubt that the original award complied with the principles as provided for in the Constitution. It contends that the decision was arrived at without taking into account all the facts as some were not available at the time. According to it the Department a settlement figure in the amount of R36 million could not be referred to as cost-effective in the spirit of the Constitution pertaining to procurement. **It denies that the Joint Venture concluded an agreement with it but did so regarding the procurement agreement.**

[36] The Department contends that the decision arrived at on 12 September 2017 to settle the applicants' claims stands to be reviewed and set aside on the application of the doctrine of legality. It argues that as the decision maker, it is entitled to the relief sought in the counter-application. That is so because the doctrine of legality requires the State to act in accordance with the legal principles and rules that apply to it and its functionaries. The powers conferred on a State functionary to make decisions in the public interests should be exercised properly and rationally, based on the true facts, the argument goes. The Department submits that it is within the power of the MEC, as the decision-maker, to apply for review and setting aside of a decision based on non-compliance with the principle of legality.

- [37] The Department denies that the settlement agreement is the agreement entered into on 27 September 2017 because it only contained two pages at the time. The third page was added on 13 February 2018. Prior to this date Mr Borman was unaware of the existence of Mr Sibisi, the member and director of Joh-Arch. On 13 February 2018 Mr Sibisi approached Mr Borman in his office without prior arrangement, accompanied by Ms Van Wyk of Engelsman Magabane Attorneys in Kimberley and informed him that he had just become aware of the settlement agreement entered into by Mr Scholtz on his behalf. Mr Sibisi demanded to have sight of the settlement agreement in order to assert Joh-Arch's right to benefit from it. Mr Borman allowed him to sign the third page appended to the settlement agreement.
- [38] It further denies that Mr Scholtz represented the applicants or Joh-Arch but that the settlement agreement preserved rights for the applicants subject to the applicants adopting same, which never happened. It is disputed further that the applicants conveyed their acceptance to the Department. Taking into account that the offer might still be available the Department contends that it is withdrawn. As at the date of launching these proceedings the applicants had not yet conveyed their acceptance of the agreement to the Department with the result that the application was prematurely brought to court. The Department contends further that the R10 million was not due and payable at the time due to lack of *consensus* between the parties, hence no further payments were made.
- [39] The Department submits that although Mr Scholtz signed the settlement agreement on behalf of the applicants, Joh-Arch was unaware of the representation on its behalf when the agreement was signed on 27 September 2017.

- [40] On 31 October 2018 the applicants filed a notice of intention to oppose the counter-application and on 09 August 2018, the original replying affidavit in response to both the answering affidavit and the counter-application. The applicants and the third party deny that Mr Vertue was not authorised to receive payment in his trust account on their behalf. They deny further that the applicants had not accepted the benefits of the settlement agreement.
- [41] The third party filed an opposing affidavit to the third party notice and counter-application. It raises a defence of estoppel should the Court find for the respondents in the counter-application. In addition, it aligns itself with the factual and legal averments made by the applicants.
- [42] The essence of the doctrine of estoppel by representation is that a person (A, the representor) is precluded or estopped from denying the truth of a representation previously made to another person (B, the representee) if B, believing in the truth of the representation, acted on the misrepresentation to B's detriment.⁷
- [43] The third party alleges that the Department created an impression with it that the matter had been settled. I will deal with the case of the third party together with the case of the applicants considering that it aligns itself with the submissions made by the applicants.
- [44] The applicants contend that if the Department wishes to have its decision reviewed and set aside it should have launched a proper review application in terms of Rule 53 of the Uniform Rules of Court. This Rule provides:

"53 Reviews

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by

⁷ Amler's Precedents of Pleadings 9th Edition by Harms at p 187; see also *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* [1981] 4 All SA 238 (A)

way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.”

[45] The Department alleges that the MEC cannot in the performance of its responsibilities escape its duties by entering into a patently irrational settlement agreement. The applicants on the other hand argue that the MEC is not in a position to review its own decision. They argue that an organ of State seeking to undo what it had done before on the basis that it was done invalidly or unlawfully should follow a particular process in order to obtain relief as its review application is not in terms of Rule 53. They deny that the Department could do so in a counter-application. They relied on **DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**⁸.

[46] In **MEC HEALTH, EC v KIRLAND INVESTMENTS** Cameron J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J concurring) had this to say about the procedure to be followed by government when it seeks to disregard one of its own officials’ decisions:

“[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials’ decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective — as the evidence here suggests — government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court

⁸ 2012 (1) SA 417 (SCA) at para 37

to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. 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 should not be allowed to take shortcuts. 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 it has 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.”⁹

[47] Goosen J in **NELSON MANDELA BAY METROPOLITAN MUNICIPALITY v ERASTYLE (PTY) LTD AND OTHERS**¹⁰ cited with approval **STATE INFORMATION TECHNOLOGY AGENCY SOC LIMITED V GIJIMA HOLDINGS (PTY) LIMITED**¹¹ and held:

“[25] In State Information Technology Agency Soc Limited V Gijima Holdings (Pty) Limited (Gijima) the Court held that in seeking to review its own decisions an organ of state is entitled to rely upon the principle of legality. The court added:

“[39] Pharmaceutical Manufacturers tells us that the principle of legality is 'an incident of the rule of law', a founding value of our Constitution. In Affordable Medicines Trust the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus: 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'

[40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what s 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.”

⁹ 2014 (3) SA 481 (CC) at para 64 and 65

¹⁰ Case No. 398/2016 ECLD delivered on 06 November 2018 at para 25 and 26

¹¹ [2017] JOL 39257 (CC) at para [37] and [40]; See also Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC)

[26] The use of the phrase 'legality review', in my view, implies no specified procedure. It refers to the substantive legal basis upon which a court exercises its adjudicative function and formulates relief appropriate to its findings as it is required to do in terms of s 172 of the **Constitution**. The exercise of this power must of course be formerly initiated by due process so that the court adjudicating the matter may decide, in accordance with relevant legal principles, whether or not to exercise its powers."

[48] Theron J (Basson AJ, Dlodlo AJ, Goliath AJ, Mhlantla J and Petse AJ concurring) in **BUFFALO CITY METROPOLITAN MUNICIPALITY v ASLA CONSTRUCTION (PTY) LIMITED**¹² held:

"1. The applicant, Buffalo City Metropolitan Municipality (Municipality), seeks the review and setting aside of its own decision. It seeks leave to appeal against a decision of the Supreme Court of Appeal that held that the Municipality had not made out a case for condonation in terms of section 9 of the Promotion of Administrative Justice Act (PAJA) and, as a result, the review application could not be entertained. In this Court, the Municipality originally relied on a review in terms of PAJA, but following this Court's decision in *Gijima*, the review must be dealt with in terms of the principle of legality."

It is clear that Rule 53 is not applicable but the legality review.

[49] The applicants contend that the R10 million that the Department seeks repayment of has already been paid to the applicants. This, according to the applicants, translates into a situation where the liquidation and distribution account and its confirmation by the Master are in law equated to a court order. Only a competent court with jurisdiction should set it aside. The applicants submit further that a counter-application for repayment of what had already been paid should be dismissed on that basis.

[50] The Department contends that when the R10 million was paid there was no concluded contract between the parties. Scholtz secured a benefit for the applicants which they would be entitled to if they had accepted it by conveying their approval to the Department, which they did not do. They instead distributed the R10 million in the

¹² 2019 (6) BCLR 661 (cc) at para [1]

fourth liquidation and distribution account approved by the Master in May 2018.

[51] In **KILROE-DALEY v BARCLAYS NATIONAL BANK LTD**¹³ the Appellate Court held:

" ...'[H]is (ie the Master's) confirmation shall have the effect of a final judgment' in s[ection] 408 of the Company's Act [Act 61 of 1973] did not give each item in the liquidation and distribution account the quality of a judgment' of a court, after objections (if any) have been dealt with, his confirmation of that account was final and it could not be re-opened save where a court authorises the re-opening."

[52] *In casu* the confirmation of the fourth liquidation and distribution account received from the Master on 04 May 2018 in terms of section 112 of the Insolvency Act¹⁴ stands and can only be set aside by the court on certain circumstances. The Master's confirmation has the effect of a final judgment except as against a person whom the Court permits to re-open the account, which can only be done before the liquidator commences with distribution.¹⁵ That is not the application before me. In the instant case the Department seeks repayment of the R10 million paid to the applicants. In my view, this does not mean that the amount they used during the liquidation and distribution account is the one they seek but an amount equivalent to it.

[53] It is so that the rule of law and the principle of legality is the founding value of the Constitution. In **PHARMACEUTICAL MANUFACTURES ASSOCIATION OF SA AND ANOTHER: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** the Court held:

"[85] In *Fedsure* [Life Assurance Ltd v Greater Johannesburg Metropolitan Council [1998] ZACC 17; 1999 (1) SA 374 (CC)] this Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the interim Constitution. It stated:

¹³ 1984 (4) 609 AD at 611D

¹⁴ Insolvency Act 24 of 1936; see also *Nedcor Bank Ltd v Rundle* 92007] 4 All SA 1120 (SCA) at 1123 where the Court held that this (final) account should be referred to as "a section 408 account".

¹⁵ Henochsberg on the Companies Act: service issue 33 Vol 1 p865

'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.'

This was reaffirmed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (Sarfu 3)*, where this Court outlined different ways in which the exercise of public power is regulated by the Constitution. One of the constitutional controls referred to is that flowing from the doctrine of legality. Although *Fedsure* was decided under the interim Constitution, the decision is applicable to the exercise of public power under the 1996 Constitution, which in specific terms now declares that the rule of law is one of the foundational values of the Constitution."¹⁶

[54] The learned Judges in *Kirland supra* added:

"85 It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.

[89] The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner. This, the President manifestly, though through no fault of his own, failed to do.

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the Court urgently, with the support of the Minister of Health and the professional

¹⁶ 2000 (2) SA 674 (CC) para 85,

associations most directly affected by the Act, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational.”¹⁷

[55] The Constitutional Court in *Fedsure Life Assurance (supra)* stated thus:

“58. It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they **may exercise no power** and perform no function beyond that conferred upon them by law a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Succession of Quebec from Canada* the Supreme Court of Canada held that:

‘Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v The Queen*, [1985] 1 S. C. R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.’”¹⁸

[56] The principle of legality obliges functionaries to act within their powers. It also requires the exercise of public power to be rationally related to a legitimate government purpose.¹⁹ In **DEMOCRATIC ALLIANCE v PRESIDENT OF SOUTH AFRICA AND OTHERS** Yacoob ADCJ (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, Van Der Westhuizen J and Zondo AJ concurring) had this to say about a rational decision:

¹⁷ At paras [85], [86], [89] & [90]

¹⁸ *Fedsure* at para 58

¹⁹ *Pharmaceutical Manufacturers Association of South Africa supra* at para 85

"[33] The Democratic Alliance submitted that the irrationality ground covers irrationality in process as well as on the merits. The Minister and Mr Simelane did not appear fervently to embrace this proposition but did not advance any cogent alternative submission against it. *Chonco*, concerned with the power of the President, as Head of State, to grant pardons under the Constitution, elucidated the rationality requirement in the process of granting pardons:

'In *SARFU*, this court, affirming *Hugo*, held that the powers s 84(2) confers on the President as Head of State originate historically from the royal prerogative and were exercised by the Head of State rather than the head of the national executive. The powers granted by s 84(2) are now clearly original constitutional powers. Section 84(2) (j) is the source of the power, function and obligation to decide upon applications for pardon. Though there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay. That decision rests solely with the President.' [Footnotes omitted.]

[34] It follows that both the process by which the decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition. The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard.²⁰"

[57] The requirement of rationality will only be met where objectively considered, there is a cogent link between the means adopted and the end sought to be achieved.²¹ Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[58] The Department argues that the settlement agreement is not the agreement entered into on 27 September 2017 as only two pages existed at the time, the third page having been added on 13 February 2018. It argues further that by signing the settlement agreement Mr Sibisi and the applicants admitted liability for the costs due and payable to the MEC in the amount of R443 113-03 jointly and severally the one paying the other to be absolved. It claims payment of taxed costs due to Case Number 1522/2010 held

²⁰ 2013 (1) SA 248 (CC) at paras 33 and 34; see also *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at 70 to 74

²¹ *Albutt* at para 85

in this Court in the amount of R443 113.03. It argues further that it would suffer prejudice if the settlement agreement is confirmed.

[59] In Clause 4 of the settlement agreement the applicants acknowledge their indebtedness as recorded in the agreement thus:

"4. The plaintiffs agree to pay the defendants the amount of R443 113.03 in payment of legal costs under the Case Number 2106/09 which amount will be set off against the final tranche payment due on 31 July 2018."

This Case Number (2106/09) appears in Clause 3.4 of Annexure "AS6" dated 08 March 2018. It also appears in Clause 1.3.2 of the letter sent to Mr Vertue by Honey Attorneys on behalf of LB Saffy (Annexure "AS7" at page 32 of vol 1 of the record). In two of these letters the same amount of R443, 113.03 is referred to. On the other hand Mr Nogwili who deposed to the answering affidavit dated 23 October 2018 he refers to Case Number 1522/2010 in paragraph 3.5.4. Scholtz, the deponent to the replying affidavit filed on 09 November 2018 also refers to Case Number 1522/2010.

[60] Taking into account that both cases are not before me and there is also no paper trail in their regard namely, the copy of the order, I am unable to verify which case number is the correct one. Even at the time the matter was argued there was no *consensus* between the parties regarding payment of this amount. The applicant stated that they would not deal with the said payment as it was not relevant in these proceedings. In the circumstances I am unable to make a finding on this issue.

[61] The Department contends that Mr Nogwili, the HoD, who attended the meeting held at Port Nolloth, did not have any extended authority on behalf of the MEC, the executive authority, to bind the Department. There is also no such allegation in the papers.

[62] The applicants and the third party deny that the claim against the HoD had prescribed by 03 March 2014 with prescription having started running from 03 March 2011 which means there would be

no claim against the MEC. The applicants do not dispute that the MEC was not a party to the action and was not joined at any stage thereafter. It is therefore possible that the claim might have prescribed. I do not deal with prescription considering the fact that the offer by the Department was not accepted, in my view.

[63] The Department has a duty to protect the *fiscus* and act reasonably when realising that there is a possibility of fruitless and wasteful expenditure in the process. Treasury Regulation 9.1.1 promulgated in terms of the Public Finance Management Act enjoins the Department to exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and should implement effective, efficient and transparent processes of financial and risk management.

[64] In **DEPARTMENT OF TRANSPORT AND OTHERS v TASIMA (PTY) LTD** Jafta J (Mogoeng CJ, Bosielo AJ, as he then was, and Zondo J concurring) held:

“138 In his majority judgment in *Merafong*, Cameron J traces the history of pre-constitutional reactive challenges in the common law. From that analysis, with which I agreed and again endorse here, it emerges that-

‘in South African law, the permissibility of a reactive attack on administrative action has always been approached with a measure of flexibility. And its availability is not limited to those at risk of criminal conviction.’

139 The majority judgment then proceeds to demonstrate that a flexible approach to allowing reactive challenges is buttressed and enhanced by the Constitution. The state functionaries are entitled to challenge exercises of public power, including their own, was recognised by the Supreme Court of Appeal in *Pepcor*, and endorsed by this court in *Khumalo*. There it was noted that ‘state functionaries are enjoined to uphold and protect [the Constitution]’ and that ‘a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.’

140 Drawing on this line of reasoning, the majority judgment in *Merafong* held that the municipality was not disqualified from raising a reactive challenge merely because it is an organ of state. The same must apply here. It is both a logical and pragmatic consequence of the aforementioned developments in our jurisprudence to allow state organs

to challenge the lawfulness of exercises of public power by way of reactive challenges in appropriate circumstances. I therefore agree with the first judgment's sentiment that the Supreme Court of Appeal was incorrect to find that the Department was barred from bringing a reactive challenge to the extension of the contract solely because it is a state functionary."²²

[65] In **PEPCOR RETIREMENT FUND AND ANOTHER v FINANCIAL SERVICES BOARD AND ANOTHER**²³ Cloete JA stated:

"[47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*, *Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorize the decision as *ultra vires*." My emphasis

[66] The question that arises is whether it is in the interests of taxpayers for a government department to make a payment of R37 million as a settlement amount where the department involved did not consider all material facts and/or that the decision was taken unreasonably and irrationally? This requirement will only be met where, objectively considered, there is a cogent link between the means adopted and the end sought to be achieved.²⁴ When the Department realises that the decision is irrational should it fold its arms and pay when that is inconsistent with the principle of legality, I do not think so. The state functionaries, no matter how well-intentioned, may only do what the law empowers them to do.²⁵ In my view even if the Department was negligent in its decision that

²² 2017 (2) SA 622 (CC) paras 138, 139 and 140

²³ 2003 (6) SA 38 (SCA) para 47. See also *Bullock NO and Others v Provincial Government, North West Province, and Another* 2004 (5) SA 262 (SCA) where the Court held that a provincial government's decision to dispose of a right in land on the basis of incorrect legal advice was set aside on review.

²⁴ See *Fedsure* at para [46] above

²⁵ *Head of Department, Department of Education, Free State Province v Welkom High School & Others* 2014 (2) SA 228 (CC), ('Welkom').

does not entitle the applicants to any payment from the State's funds.

[67] It is important to revisit the powers of the MEC as stipulated in the Constitution. Sections 125(1), 132(1), 133(1) (2) and (3):

"125(1) The executive authority of a province is vested in the Premier of that province.

132(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

133(1) Members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their power and the performance of their functions.

(3) Members of the Executive Council of a province must-

- (a) Act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and
- (b) Provide the legislature with full and regular reports concerning matter under their control."

[68] The Constitutional Court has mentioned the same dictum in several of its decisions. In **AAA INVESTMENTS (PTY) LTD V MICRO FINANCE REGULATORY COUNCIL AND ANOTHER**, the Court held:

"Legality

[68] This is a matter of the application of the rule of law and the principle of legality which flows from the value of the rule of law enshrined in s 1 of the Constitution. This Court has held that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law' The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised. Private power, although subject to the law and, in certain circumstances, the Bill of Rights, does not derive its authority or force from law and need not find a source in law. Public power, on the other hand, can be validly exercised only if it is clearly sourced in law."²⁶

²⁶ 2007 (1) SA 343 (CC) at 68; See also Minister of Health NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) 613; Fedsure supra; President

[69] The Department contends that in entering into the purported settlement agreement and paying the R10 million as the first instalment it was enjoined in terms of *inter alia*, section 195 of the constitution, its democratic values and principles ensuring and promoting efficient, economic and effective use of resources. Section 195(1), (b), (f) and (g) deals with the basic values and principles governing public administration as follows:

“195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (c) Efficient, economic and effective use of resources must be promoted;
- (f) Public Administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”

[70] In **P M OBO TM and ROAD ACCIDENT FUND**²⁷ Weiner AJA (Maya P and Wallis JA concurring) held:

“[31] Froneman J, on behalf of the majority in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC) para 13] confirmed the principles emanating from *Eke* [*Eke Parsons* [2015] ZACC 30 2016 (3) SA 37 (CC) paras 25 -28, 34], and in particular that ‘a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law’.

[32] Our courts have a duty to ensure that they do not grant orders that are *contra bonos mores*, or that amount to an abuse of process. Section 173 of the Constitution specifically empowers the Court to prevent any such abuses. In *Fagan v Business Partners Limited* the court held as follows:

Fagan v Business Partners Limited 2016 JDR 0317 (GJ) paras 19 and 26. (Emphasis added.) See also *Mzwakhe v Road Accident Fund* [2017] ZAGPJHC 342 paras 23-25.

‘A compromise, defined as a settlement of litigation or envisaged litigation, is a substantive contract that exists independently of the original cause. . . . Stipulations in a contract which are unconscionable, illegal or immoral will have the result that a court will refuse to give effect thereto. *A contract or term of a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to so-*

of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (10) BCLR 1059 (CC) 148

²⁷ Case No. (1175/2017) [2019] ZASCA 97 at 32 to

cial or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive. The criteria upon which a contract may be declared contrary to public policy is thus not sharply defined and changes with "the general sense of justice of the community, the *boni mores*, manifested in public opinion".' [emphasis added]

[33] As the full court in this matter held, a court cannot act as a mere rubber stamp of the parties. The full court referred, *inter alia*, to the usual requirement that moneys should be paid into the Guardian's Fund or that a *curator bonis* should be appointed. The draft order and settlement agreement did not contain such provisions, which the court as upper guardian of minors, must take into consideration. The court also has a duty to members of the public. Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds. The criteria are not as simple as the appellant would have this court believe, as is apparent from *Fagan*.¹⁸ the court's duty extends further than considering only whether the terms are illegal or immoral. For present purposes, however, it is not necessary for us to attempt to circumscribe the precise ambit of that discretion. It is better that it is done on a case by case basis.

[34] The RAF is an organ of state, established in terms of s 2 of the Road Accident Fund Act 56 of 1996 (the Act). It is thus bound to adhere to the basic values¹⁴ and principles governing the public administration under our Constitution. Section 195(1) requires, *inter alia*, that '[a] high standard of professional ethics must be promoted and maintained'; and that '[e]fficient, economic and effective use of resources must be promoted'.

[35] In cases involving the disbursement of public funds, judicial scrutiny may be essential. A judge is enjoined to act in terms of s 173 of the Constitution to ensure that there is no abuse of process. Judges in all divisions have expressed concern that in many RAF cases, there is an abuse of process. Settlements are concluded where, for example, the substantial damages agreed to bear no relation to the injuries sustained. In this case the judge had a legitimate concern that the only reason for the settlement was the lack of preparation of the RAF's case and that there may, in truth, as appeared to be the case from the evidence she heard from a passenger in the vehicle, have been no negligence on the part of the insured driver and thus no liability on the part of the RAF.

[36] Concern has been noted that to require a Judge to scrutinize every settlement in a RAF case would cause delays in the administration of justice. However, it is not every case that will require this form of judicial scrutiny. When a Judge expresses concern over the terms of a settlement, the court must ensure that those concerns are addressed by the parties to prevent an abuse of process and the unjustified disbursements of public funds." My emphasis

[71] This case not only raises legal questions of import, but also affords this Court the opportunity to provide guidance to organs of state who may wish to bring similar applications in the future and to lower courts dealing

with these cases.²⁸ The decision taken by the Department is not immune to amongst others, section 195 of the Constitution. The funds of the State cannot be used anyhow without judicial control. An obvious illegality as the one in the instant case could not be ignored.²⁹ In **MEC FOR HEALTH, EASTERN CAPE V KIRLAND INVESTMENTS (PTY) LTD T/A EYE AND LAZER INSTITUTE**³⁰ the avoidance of a contract between the State and a private entity was sought to be avoided. In this matter the decision to enter into an agreement was the exercise of a public function and importantly, I take into consideration that the settlement agreement was not approved by the applicants as alluded to earlier. There is also no evidence to that effect except for a bare denial by the applicants and the third party.

[72] It is interesting that the Joint Venture decided to lodge this application when it is alleged that pleadings were not closed and claim 10% of the total building costs amounting to R36 million without citing any authority supporting this proposition. Proceeding with the action for damages would have entitled them to request the Court to make the settlement agreement an order of Court. The applicants are at liberty to proceed with the action as they were at the time the purported settlement agreement was concluded.

[73] The question that arises is whether concluding the agreement conformed to the legal prescripts. The applicants allege that "*a party litigating cannot undo a settlement agreement on the basis the he /she got a bad bargain. It is in the nature of a compromise that the result of may not be advantageous to a party as litigation might have been*". I do not agree.

[74] Importantly, only on 08 March 2018 were the applicants made aware of the settlement agreement concluded on 27 September 2017 as per Annexure "AS6" after an amount of R10 million had

²⁸ Asla Construction supra at para 37

²⁹ Kirland para [21]

³⁰ 2014 (3) SA 481 (CC) the avoidance of a contract between the State and a private entity was sought to be avoided.

been deposited into Vertue's account on 01 December 2017. Paragraph 4 of this letter states: "*The settlement is subject to the approval of the Liquidators of Vista and directors of Joh-Arch.*" From this paragraph one can deduce that the Department had not been notified of the applicants' approval because no letter was addressed to it at that stage. In my view, until then the applicants were still not party to the agreement. In a letter dated 29 March 2018 ("AS8") Mr Vertue wrote to Honey Attorneys and confirmed that an amount of R10 million had been deposited into his trust account. I find it strange that the settlement agreement was signed on 27 September 2017 and Mr Vertue received into his trust account payment of R10 million on 01 December 2017 and the first report to the applicants about the money was only made on 29 March 2018. In the letter ("AS6") Joh-Arch indicated their willingness to accept the settlement agreement as proposed and that if accepted that would be conveyed to the Department yet nothing was forwarded to the Department. In the response to Mr Vertue's letter by the applicants dated 26 March 2018 ("AS7"), the acceptance was still not yet communicated to the Department (see paragraph 1.3.7 at para [29] above).

[75] In my view, payment of R37 million to Vista Park and Joh-Arch would definitely result in mismanagement of public funds. It would also be improper and unconscionable. In para 25 of Asla Construction the learned Judges said:

"[25] There are sound reasons why a court should carefully scrutinize a settlement agreement before making it an order of court. Once a settlement agreement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights in the same way.¹⁹ Madlanga J in *Eke* put the matter thus:

"The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order." (Id at para 31)

[76] In my view, the settlement agreement cannot stand for the reasons I have mentioned earlier. Section 237 of the Constitution requires that all constitutional obligations be performed with diligence and without delay. The decision was at odds with the principle of legality and should be reviewed and set aside.

COSTS

[77] The applicants seek an order in their favour and costs against the second respondent, the MEC, alternatively any other respondents who oppose the matter, jointly and severally the one paying the other to be absolved except the third party. On the other hand the Department urges me to dismiss the application due to the fact that the applicants and the third party brought this application while the pleadings were not closed with costs against the applicants and the third party jointly and severally the one paying the other to be absolved. It urges me further to grant the counter-application as prayed for with costs including the costs of two counsel. It also requests that the applicants and the third party be ordered to pay costs of 23 November 2018 on a scale as between attorney and own client jointly and severally the one paying the other to be absolved due to their insistence in the hearing of these proceedings contrary to the Rules of Court

[78] On 23 November 2018 Mr Engelbrecht, for the applicants and Mr Baloyi, on behalf of the respondents, approached Court and I granted the following order by agreement:

“1. The Respondents shall file their replying affidavit to the applicants’ supplementary affidavit and the third party’s answering affidavit on or before 14 December 2018.

2. The parties file their heads of argument and or supplementary heads of argument as prescribed by the Rules of Court.

3. The matter is postponed to 08 March 2019.

4. Costs will stand over for later determination.”

[79] The applicants and the third party indicated that costs of 23 November 2018 should follow the result. Mr Merabe, on behalf of the respondents was also of the view that those costs should follow the event. I must indicate that the issue of these costs were not seriously argued by the parties.

[80] It is a fundamental principle that a party who succeeds should be awarded costs and this rule should not be departed from except on good grounds.³¹ The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.³²

[81] As far as I am concerned there is no reason why costs of this application should not follow the result. I am of the view that a sufficient case for a punitive cost order has not been made out by the Department taking into consideration that I have no concrete proof that the pleadings were not closed when this matter was brought as no file was made available even during argument of this matter. However, I am of the view that this matter had complex issues that justify costs of two counsel.

In the circumstances I grant the following order:

- 1. The decision taken on 12 September 2017 at Port Nolloth to settle the dispute between the applicants and the Department in Case Number 2072 is hereby reviewed and set aside.**
- 2. The settlement agreement (Annexure "AS5") is declared null and void *ab initio*.**

³¹ South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at 912; see also Union Government v Gass 1959 (4) SA 401 (A) at 413C-F

³² Beinash v Wixley [1997] 2 All SA 241; 1997 (3) SA 721 (A) ; see also Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A) at 854C-E

3. The applicants and the third party /the fourth respondent are ordered to pay jointly and severally the one paying the other to be absolved:

3.1 The amount of R10 million paid on 01 December 2017 into the account of Mr Vertue with interest at the *mora* rate from 01 December 2018 to date of payment

3.2 The applicants and the third party/ fourth respondent are ordered to pay the costs of this application including the wasted costs of 23 November 2018 as well as costs of two counsel jointly and severally, the one paying the other to be absolved.

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant: Adv S Grobler
Instructed by: Engelsman Magabane

On Behalf of the Respondents 1-3: Adv J Du Toit (SC) & Adv NJ Merabe
Instructed by: Mjila Attorneys

On Behalf of the Respondent 4: Ms J Snyders
Instructed by: Engelsman Magabane