



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/03/2017

CASE NO: 13874/2017

In the matter between:

**MOIPONE GROUP OF COMPANIES (PTY) LTD**

Applicant

and

|                                          |                                         |
|------------------------------------------|-----------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE       |                                         |
| (1) REPORTABLE: YES/NO                   | <input checked="" type="checkbox"/> YES |
| (2) OF INTEREST TO OTHERS JUDGES: YES/NO | <input checked="" type="checkbox"/> YES |
| (3) REVISED                              | <input checked="" type="checkbox"/>     |
| 29/3/2017                                |                                         |
| DATE                                     | SIGNATURE                               |

**CITY OF TSHWANE METROPOLITAN MUNICIPALITY**

Respondent

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**JUDGMENT**

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**DAVIS, AJ:**

**[1] NATURE OF THE APPLICATION:**

This was an urgent application by a group of companies, incorporated as such as Moipone Group of Companies (Pty) Ltd ("Moipone") for an order compelling the City of Tshwane Metropolitan Municipality ("CTMM") to

adhere to a Public Private Partnership Agreement (*"the agreement"*) concluded between the parties.

[2] **RELIEF CLAIMED:**

The Applicant, apart from claiming that the application should be heard as one of urgency in terms of Rule 6(12) of the Rules of the High Court, claimed the following relief:

- "2. An order directing the Respondent to comply with its obligations under the Public Private Partnership Agreement ('the agreement') concluded between the Applicant and the Respondent on 24 March 2016 pending the finalisation of the urgent arbitration proceedings to be initiated by the Applicant.*
- 3. That the Applicant initiate urgent arbitration proceedings wherein it seeks, inter alia, a declarator that the agreement is valid and enforceable and compelling the Respondent to comply with its obligations thereunder within 10 days of this order.*
- 4. That the Respondent is interdicted and restrained from appointing and/or concluding any agreement with a service provider for the services that the Applicant provides in terms of the agreement pending the finalisation of the arbitration proceedings.*
- 5. That the Respondent pay the costs of the application on the attorney and client scale alternatively that the costs be costs in the arbitration proceedings."*

[3] **THE TERMS OF THE AGREEMENT AND THE IMPLEMENTATION THEREOF:**

- 3.1 It is common cause that the agreement referred to in Moipone's notice of motion was indeed entered into between the parties. The agreement and the terms thereof were expressly admitted by CTMM.
- 3.2 In terms of the agreement Moipone agreed to provide CTMM with full maintenance lease services, fitments and accessories, short-term rentals, driver hire services, licensing of vehicles, vehicle cleaning services, services concerning vehicle accidents, training of city-based employees, the management of the abuse of vehicles, call centre services, administration of vehicle licences and traffic fines, information and management reports and managed maintenance services. These services were to be rendered in respect of so-called Category A and Category C vehicles as defined in the agreement.
- 3.3 In terms of the agreement Moipone was required to provide CTMM with small vehicles (Category A) and large vehicles for industrial use (Category C). The terms of the agreement are analogous to an instalment sale agreement in terms whereof a monthly instalment is payable by CTMM in respect of all vehicles supplied whilst the Moipone would provide full maintenance of the vehicles, the installation and monitoring of tracking devices as well as the cleaning and washing of the vehicles.

3.4 The documentation comprising the agreement is extensive and virtually each and every aspect pertaining to the furnishing of the vehicles are catered for. This much is clear from the agreement itself as well as Schedule 1 thereto, being a schedule prescribing the “*payment mechanisms*”, Schedule 2, being the “*output specification*”, Schedule 3, being the “*variation procedure*”, Schedule 4, being the “*master lease schedule*”, Schedule 5, being the “*breach and termination provisions*”, Schedule 6, being the “*function schedule*”, Schedule 7, being the “*ad hoc rental provisions*”, Schedule 8, being the “*settlement value calculation*”, Schedule 9, being the “*managed maintenance schedule*”, Schedule 10, being the “*BBEEE obligation schedule*”, Schedule 11, being the “*performance bond*” and Schedule 12, being the “*training requirements*”. Various annexures to these schedules were also agreed upon which deals with ancillary and auxiliary matters.

3.5 In terms of the agreement CTMM undertook to make payment to Moipone in accordance with the provisions of Schedule 1 which provided for capped annual amounts. In respect of 2015/2016 these were some R66 million for Category A vehicles and some R64 million for Category C vehicles. These capped amounts escalated for the year 2016/2017 to some R68 million and some R65 million respectively.

- 3.6 The following terms and conditions of the agreement itself are also relevant:

**"2. SUSPENSIVE CONDITIONS**

**2.1 Conditions**

*This agreement is subject to the fulfilment of the following suspensive conditions, that:*

*2.1.1 The Private Party provides to the City a duly executed Performance Bond in the form attached hereto as Schedule 11 (Performance Bond) and as referred to in clause 37; and*

*2.1.2 The City provides the Private Party with documentation evidencing that the City has the required power and authority to conclude the agreement."*

[The "Private Party" refers to Moipone and "the City" refers to CTMM.]

- 3.7 The Performance Bond referred to in the suspensive condition contained in clause 2.1.1 is dealt with in clause 37 as follows:

**"37. PERFORMANCE BOND**

**37.1 The Private Party to provide Performance Bond**

*The Private Party shall provide the City a Performance Bond in the amount of 10% (ten per*

*cent) of total contract value as provided for in clause 7 above in accordance with the terms set out in the agreement, which bond shall be provided by a registered South African financial institution or other entity reasonably acceptable to the City, for the due performance of the Private Party's obligations in terms of this agreement and the implementation thereof.*

### **37.2 Exercise of the Performance Bond**

*The Performance Bond will be exercised in the event of a breach as a result of non-performance with respect to the SLA which remains unremedied following notice of breach in accordance to Schedule 5 (Breach in Termination Procedure) being furnished to the Private Party, without further notice to the Private Party ..."*

- 3.8 In respect of waiver clause 43 of the agreement contains the following stipulation:

#### **"43.2 WAIVER**

*No waiver of any of the terms and conditions of this agreement will be binding or effectual for any purpose unless expressed in writing and signed by the party thereto giving the same and any such waiver will be effective only in the specific instance and for the purpose given."*

- 3.9 In respect of the suspensive conditions, the agreement further provides as follows:

**“2.2 PARTIES TO USE BEST ENDEAVOURS**

*The parties will use their best endeavours and shall negotiate in good faith to procure the fulfilment of the suspensive condition as soon as reasonably possible after the signature date and shall at all times act in good faith to procure same.*

**2.3 CONSEQUENCES OF FAILURE**

*Should the suspensive condition fail to be fulfilled as contemplated in this clause 2.2 within 90 (ninety) days of the Signature Date or within such longer period as the parties may agree in writing, the provisions of this agreement, save for those which by their nature and content seek to protect the ongoing interest of the parties, shall automatically lapse and be of no force or effect and no party shall have any claim against the other in terms hereof or arising therefrom.*

**2.4 FULFILMENT**

*Upon fulfilment of the suspensive condition, the parties shall sign a certificate confirming that the suspensive conditions have been fulfilled and that the agreement is unconditional, provided that any failure so to sign shall only constitute prima facie evidence of the continued conditional nature of this agreement.”*

3.10 As recorded in the recitals of the agreement, the agreement was concluded pursuant to a competitive tender process being followed by CTMM and based on Moipone's responsiveness to the

requirements of the bid. This much was also admitted in the answering affidavit deposed to on behalf of CTMM.

3.11 After having been awarded the tender, Moipone was provided with a copy of the agreement which was signed by its Group Executive Chairman on 13 November 2015. The agreement was thereafter returned to CTMM for its signature.

3.12 On 28 January 2016 the CTMM City Council authorised its City Manager to conclude the agreement with Moipone. The resolution reads as follows:

*“RESOLVED:*

- 1. That cognisance be taken of the alignment process undertaken since Mayoral Committee Resolution of item 1.1.1 of 17 June 2015 and Council Resolution item 23 of 25 June 2015.*
- 2. That cognisance be taken of the process followed in terms of Section 120 of the Municipal Finance Management Act (MFMA), Section 78 of the Municipal Systems Act (MSA) as well as Section 33 of the Municipal Finance Management Act (MFMA).*
- 3. That the accounting officer be authorised to sign all the necessary agreements with the preferred service providers to give effect to the Public Private Partnership (PPP) agreements.”*

- 3.13 On 20 April 2016 the City Manager addressed a letter to the Applicant, the contents of which read as follows:

*"CONFIRMATION OF APPOINTMENT: TENDER FOR THE PROVISION OF FLEET VEHICLES AND FLEET-RELATED SERVICES THROUGH A CO-SOURCED MECHANISM FOR THE CITY OF TSHWANE (COT): 5 YEAR PERIOD UNDER CATEGORY A AND C*

*I confirm that the MFMA Section 33 process has been completed and that the Public Private Partnership (PPP) agreement was approved by Council on 28 January 2016.*

*I also confirm that as delegated by Council, I signed the PPP Agreement between the City and yourselves on 24 March 2016, for the provision of fleet vehicles and fleet-related services through a co-sourced mechanism for the City of Tshwane under Category A and C.*

*This letter serves to confirm the completion of the process envisaged in your preferred bidders' letter and confirms your outright appointment for the provision of fleet vehicles and fleet-related services through a co-sourced mechanism for the City of Tshwane under Category A and C ..."*

- 3.14 On 9 February 2016 the CTMM's Strategic Executive Director: Group Legal Services forwarded an Executive Memorandum to the City Manager which read as follows:

*"CATEGORY C PPP AGREEMENT*

*Find enclosed herewith abovementioned agreement with annexures which has been renegotiated, drafted, vetted and reviewed. We confirm that the City Manager may proceed to*

*sign the agreement of the approved PPP Agreement as approved by Council on 28 January 2016.”*

- 3.15 The letter was also forwarded to CTMM's Corporate and Shared Services: Corporate Fleet Management, its Chief Financial Officer and its Supply Chain Management Department.

[4] **THE SUSPENSIVE CONDITIONS:**

- 4.1 In terms of clauses 2.1 to 2.3 of the agreement the suspensive conditions were required to be fulfilled, **alternatively** waived within 90 days from 24 March 2016, i.e. on or before 22 June 2016.
- 4.2 On 22 May 2016 (i.e. within the aforementioned 90 day period) the parties agreed in writing to extend the period of 90 days to 180 days from the signature date of the agreement. The City Manager furnished Moipone with a letter in this regard dated 22 May 2016 which reads as follows:

*“EXTENSION AS ENVISAGED IN CLAUSE 2.3 OF THE PUBLIC PRIVATE PARTNERSHIP AGREEMENT (PPP AGREEMENT): SUPPLY OF FLEET VEHICLES AND FLEET-RELATED SERVICES THROUGH A CO-SOURCED MECHANISM BETWEEN THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND MOIPONE GROUP OF COMPANIES (PTY) LTD*

*As envisaged in clause 2.3 of the PPP Agreement signed between the parties on 24 March 2016 we confirm, by signature hereto, that the parties agree to an extended period of 180 (one hundred and eighty) days from signature date of the PPP Agreement to fulfil the suspensive condition therein.”*

4.3 For various reasons the parties on 10 August 2016 entered into a further written agreement in terms whereof the CTMM waived the fulfilment of the suspensive condition contained in clause 2.1.1 of the agreement.

4.4 The waiver was done by way of a letter sent by the City Manager and subsequently co-signed by both parties which reads as follows:

*"WAIVER AS ENVISAGED IN CLAUSE 43.2 OF THE PUBLIC PRIVATE PARTNERSHIP AGREEMENT (PPP) AGREEMENT: SUPPLY OF FLEET VEHICLES AND FLEET-RELATED SERVICES THROUGH A CO-SOURCED MECHANISM BETWEEN THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND MOIPONE GROUP OF COMPANIES (PTY) LTD*

*WHEREAS the Council of the City of Tshwane in its meeting on 28 January 2016 authorised, inter alia, the conclusion of a PPP Agreement with Moipone Group of Companies (Pty) Ltd and further in Resolution no. 3 resolved as follows:*

*'3. That the Accounting Officer be authorised to sign all necessary agreements with the preferred service providers to give effect to the Public Private Partnership (PPP) agreements.'*

*AND WHEREAS the City of Tshwane on 10 August 2016 accepted and acknowledged the cession and step-in rights of funders in relation to Moipone Group of Companies (Pty) Ltd*

*AND WHEREAS the City of Tshwane, having accepted and acknowledged the cession and step-in rights of the funders of Moipone Group of Companies (Pty) Ltd runs no risk of*

*performance in relation to the obligations of the PPP Agreement concluded between the parties*

*NOW THEREFORE as envisaged in clause 43.2 of the PPP Agreement signed between the parties on 24 March 2016 we confirm, by signature hereto, that the parties agreed to waive the fulfilment of the suspensive condition in terms of clause 2.1.1 referred in clause 37 by virtue of the signature of the full Maintenance Lease Agreement and the Cession Agreement between the Private Party and Absa Vehicle Management Solutions and the Banker's Step-In Rights in terms of clause 6 of Schedule 5."*

[5] **SUBSEQUENT EVENTS:**

5.1 During the course of 2016 CTMM placed orders on Moipone from time to time and Moipone in turn provided CTMM with vehicles and services. During the latter part of 2017 however, tensions arose between the parties which came to a head on 5 December 2016 when CTMM delivered a termination notice in respect of Schedule 9 of the agreement alleging a failure on the part of Moipone to perform in accordance with the agreement. This prompted the launch of an urgent application in case no. 98028/2016 by Moipone. The urgent application was set down for hearing on 10 January 2017 on which date CTMM through its attorneys withdrew the letter of termination pursuant to which the urgent application was also withdrawn at the costs of CTMM.

- 5.2 Some 10 days later, on 20 January 2017, CTMM through its attorneys referred to the contents of Moipone's founding affidavit in the urgent application as follows:

*"As we understand it from Moipone's founding affidavit under case no. 2016/98022, Moipone contends that the agreement is valid and of full force and effect – which means that on Moipone's version, the suspensive conditions have been fulfilled and were fulfilled timeously... In relation to the suspensive conditions contained in clause 2 of their agreement, we have been instructed to request that you provide us with the following:*

- 3.1 A copy of the Performance Bond referred to in clause 2.1.1 of the agreement;*
- 3.2 The documentation which the City was required to provide to Moipone in terms of clause 2.1.2 of the agreement;*
- 3.3 The certificate signed by both parties in terms of clause 2.4 of the agreement."*

- 5.3 Having regard to the chronology already set out above pertaining to the implementation of the agreement and the fulfilment of the suspensive conditions, the letter is curious in that it does not deal with the waiver of the Performance Bond requirement and that it requires Moipone to furnish CTMM with copies of CTMM's own documents.

- 5.4 It is common cause that there was no certificate signed as provided for in clause 2.4 of the agreement but this fact must also have been to the knowledge of CTMM. This much was conveyed to CTMM by Moipone in a subsequent letter of 23 January 2017.
- 5.5 Moipone contends that, since the despatch of the letter of 23 January 2017 it appeared that CTMM has elected not to comply with the terms of the agreement. It *inter alia* failed to accept delivery of a number of vehicles which were provided pursuant to written orders received from CTMM and failed to make payments due in respect of the full Maintenance Lease Agreement as well as the Managed Maintenance Schedule. Reportedly its officials on the instructions of the mayor also refused to attend meetings or to engage with Moipone. CTMM also started placing orders directly with Moipone's suppliers and has appointed two other companies to provide managed maintenance services for Category A and Category C vehicles.
- 5.6 Various attempted settlement negotiations and meetings came to nought which prompted the present application.

[6] **CTMM's CONTENTIONS:**

- 6.1 In the answering affidavit deposed to on behalf of CTMM by the Acting Executive Director of its Shared Services Department, it is contended that the agreement has lapsed due to the fact that the

suspensive conditions contained in clause 2.1.1 of the agreement were not fulfilled and were not lawfully waived.

6.2 The contentions are further that Moipone, being a party relying on a contract, had the onus to prove that the suspensive conditions had been fulfilled. The contention is further that Moipone had the onus to prove that CTMM had provided it with documentation “... *evidencing that the City has the required power and authority to conclude the agreement*”.

6.3 CTMM also contends that whilst the City Manager might have been authorised to sign the agreement, he did not have the authority to agree to the extension of the period for the fulfilment of the suspensive conditions and neither did he have the authority to waive the provision requiring a Performance Bond.

[7] **WAS THE SUSPENSIVE CONDITION CONTAINED IN CLAUSE 2.1.2 FULFILLED?**

7.1 This suspensive condition places an obligation on CTMM to provide documentation to Moipone evidencing CTMM’s power and authority to conclude the agreement. It is not set out what this documentation would purport to be or what would constitute “*evidence*”.

7.2 The power of CTMM as local authority is derived from Chapter 7 of the Constitution of the Republic of South Africa, 1996 and in

particular Sections 156 and 217 thereof. It is further regulated by the Local Government: Municipal Finance Management Act, 56 of 2003 (*“the MFMA”*).

- 7.3 CTMM's argument is therefore that no *“documentation evidencing”* that CTMM has complied with the jurisdictional prerequisites for the conclusion of the Public Private Partnership Agreement in terms of the enabling legislation and in particular Sections 33 and 120 of the MFMA has been placed before court by Moipone.
- 7.4 What has however been produced by Moipone is the letter by the City Manager dated 20 April 2016 which confirmed the Applicant's appointment pursuant to a tender process as well as the confirmation that Section 33 of the MFMA has been complied with. This is strengthened by the executive memorandum from CTMM's Strategic Executive Director: Group Legal Services dated 9 February 2016. It is difficult to understand on what basis CTMM contends that no *“... documentation evidencing that a valid tender process preceded the conclusion of the agreement is contemplated in clause 2.1.2 of the agreement”* has been placed before court in view of the admissions of CTMM that such a process had indeed taken place. The contention by CTMM is technical to the point of being cynical. In view of its own admission, CTMM's criticism of Moipone for not having placed documentation before court which CTMM had the

obligation to produce, appears somewhat spurious. CTMM also had the obligation to utilise its “*best endeavours*” to procure fulfilment of the suspensive conditions as agreed to by it in clause 2.2 of the agreement.

7.5 It was not alleged by CTMM and neither was it its case that no valid tender process had been concluded or that the appointment of Moipone was invalid or deficient because of any non-compliance with any of the statutory provisions, constitutionally or otherwise.

7.6 Although it was referring to the issue of whether affidavits disclose a real, genuine or *bona fide* dispute of fact, the Supreme Court of Appeal in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008(3) SA 371 (SCA) stated the following (at [13]):

*“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact, said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. Where the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer to countervailing evidence if they be not*

true or accurate but, instead of doing so rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied..." . (my emphasis)

7.7 In the present instance the averment by Moipone is that the suspensive condition has been fulfilled. The ambiguous denial by CTMM is that insufficient documentation has been placed before the court. This denial pales into insignificance if regard is had to the documentation which was indeed supplied coupled with the failure to raise a *bona fide* dispute as to whether the statutory or jurisdictional preceding requirements have been fulfilled or not. I therefore find that Moipone has proven, on a balance of probabilities, that there has been substantive compliance with the abovementioned suspensive condition.

[8] **AD THE SUSPENSIVE CONDITION CONTAINED IN CLAUSE 2.1.1 OF THE AGREEMENT:**

8.1 Of the various points and contentions raised by CTMM, the one averment which is correct is that at the date of the waiver of this condition relied upon by Moipone, namely 10 August 2016, the cession agreements between Moipone and Absa Vehicle Management Solutions and the Banker's Step-In Rights (being contained in a set of four documents annexed to the replying affidavit as Annexures "RA8", "RA9", "RA10" and "RA11"), were not yet in existence. Although it is correct, as stated in the waiver that these

agreements removed the risk of non-performance in relation to the obligations of the PPP Agreement concluded between the parties, they only came into existence upon the signature thereof being on 19 and 23 August 2016.

- 8.2 In addition to this, CTMM was at pains to stress that while the City Manager had been authorised to sign the PPP Agreement, he was not expressly otherwise authorised to agree to any extension of the period of fulfilment of the suspensive conditions or to agree to the waiver thereof. Whether this is correct or not, it does not detract from the fact that the administrative actions constituting an extension of the agreement and the waiver of the fulfilment of the clause under consideration did in fact take place.
- 8.3 When confronted with the above factual situation during argument, counsel for CTMM averred from the bar that CTMM intends launching the requisite steps for the review and setting aside of these administrative acts. None of this had however yet taken place and apart from the technical legal arguments referred to above, no basis had been disclosed for such review and rescission. Significantly also, there was, apart from the answering affidavit referred to above, no affidavit from the City Manager himself nor from any other councillor or from the Strategic Executive Director: Group Legal Services dealing with this issue.

8.4 In this regard, the Supreme Court of Appeal has more than a decade ago pointed out in **Oudekraal Estates (Pty) Ltd v City of Cape Town** 2004(6) SA 222 (SCA) that even if an administrative act constitutes an illegality, until it is set aside by a court it exists in fact and is capable of having legally valid consequences meaning that even an obvious illegality cannot simply be ignored. The judgment *inter alia* states the following:

*“The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”*  
(at par. [26] in the joint judgment of Howie P and Nugent JA).

8.5 The abovementioned principle is still very much applicable to the facts of this case. See *inter alia* the discussion thereof by Cora Hoexter in **Administrative Law in South Africa** (2<sup>nd</sup> Edition) at p. 547 and **Nzimande v Nzimande** 2005(1) SA 83 (W) and, in particular, more recently **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd v Eye and Laser Institute** 2014(3) SA 481 (CC).

8.6 It appears that CTMM's attitude towards the administrative acts regarding the extension of time and the waiver of the fulfilment of the

suspensive conditions is similar to that of the Provincial Department of Health, Eastern Cape which was dealt with by Cameron J in the abovementioned constitutional judgment as follows:

*“[89] By corollary, the Department’s argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict to the detriment of the administration and the public and it would undermine the court’s supervision of the administration.”*

8.7 Accordingly, factually as matters currently stand, fulfilment of the suspensive condition contained in clause 2.1.1 of the agreement has been waived by CTMM.

8.8 It follows that the agreement is still *in esse*.

[9] **THE ARBITRATION ISSUE:**

9.1 As already indicated above, the Applicant claimed an order compelling CTMM to honour the agreement and to perform its obligations in terms thereof pending the finalisation of arbitration proceedings to be initiated. In addition thereto it claimed an order that itself be compelled to initiate urgent arbitration proceedings

wherein it *inter alia* seeks a declarator that the agreement is valid and enforceable.

- 9.2 The relief claimed in the fashion formulated is not competent. As already indicated above, I have found that the agreement is currently still valid and enforceable. It will only become unenforceable if the administrative acts referred to above regarding the extension of time periods for the fulfilment of suspensive conditions and the waiver thereof has been set aside (or if it is validity cancelled).
- 9.3 Regarding the issue of arbitration, CTMM in extensive parts of its answering affidavit point out that the initiation of arbitration proceedings as provided for in the agreement can only take place once a number of preceding steps had been taken. It is common cause that none of these preceding steps have to date yet been taken.
- 9.4 In addition, CTMM argues that the dispute which is envisaged in Moipone's notice of motion is not arbitrable.
- 9.5 Without finally deciding the issue of the arbitrability of the question of validity of the agreement, I am of the view that it would be inappropriate to make any order subject to an arbitration or to even force the parties into arbitration proceedings. It might be that the matter might be resolved otherwise or that the prescribed preceding

steps prior to an arbitration might lead to a favourable result or a resolution of the disputes.

[10] **COSTS:**

Having regard to the facts set out above and the consideration thereof I am, in the exercise of my discretion, of the view that there is no reason why costs should not follow the event. In view of the existing administrative acts on which Moipone had been entitled to rely, I am further of the view that there is no cogent reason why Moipone should be out of pocket in respect of the costs of necessity incurred in launching the application.

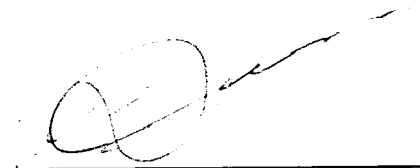
[11] **ORDER:**

Accordingly I make the following order:

1. The Respondent is directed to comply with its obligations under the Public Private Partnership Agreement (*"the agreement"*) concluded between the Applicant and the Respondent on 24 March 2016 pending the final conclusion of any process, application, action or arbitration whereby the validity of the agreement is finally determined or until such time as the agreement is validly cancelled.
2. The Respondent is interdicted and restrained from appointing and/or concluding any agreement with any other service provider for the rendering of the services that the Applicant is obliged to render in

terms of the agreement pending the final determination of the validity or valid cancellation thereof as aforesaid.

3. The Respondent is ordered to pay the costs of the application on the scale as between the attorney and client including the costs attendant upon the employment of two counsel.



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**N DAVIS**  
**ACTING JUDGE OF THE HIGH COURT**

|                           |                                  |
|---------------------------|----------------------------------|
| Date of hearing:          | 16 March 2017                    |
| Judgment delivered:       | 29 March 2017                    |
| Counsel for Applicant:    | Adv N P G Redman<br>Adv M Majozi |
| Attorneys for Applicant:  | Motalane Kgariya Inc.            |
| Counsel for Respondent:   | Adv K Tsatsawane<br>Adv C Marule |
| Attorneys for Respondent: | Gildenhuys Malatji Inc           |