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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 18085/2020

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: 13 August 2024 Signature: _____

In the matter between:

WILLIAM DARIER t/a URBAN SOCCER

Applicant

And

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The applicant seeks an order from this court in the following terms:

- 1.1 An interdict restraining the respondent from pursuing a so-called C9 application and public tender of the property more fully described as Erf 6[...], Hatfield, Pretoria.

- 1.2 Directing the respondent to comply with its obligations set out and contained in the said addendum to the original lease agreement.
- 1.3 Directing the respondent to state and debate the applicant's electricity account within sixty (60) days of this order.
- 1.4 Payment by way of a refund from the respondent, of any monies found to be owing to the applicant, in respect of his electricity bill with the respondent.

[2] In the alternative — and in the event that the court finds that the addendum to the lease agreement is invalid and/or not binding on the respondent, the applicant seeks:

- 2.1 The expense incurred by the applicant in preparing the strategic plan in the amount of R250 000.00.
- 2.2 Damages sustained by the applicant in the amount of R 7 900 000.00 (Seven Million Nine Hundred Thousand Rand) having made the initial capital investment; rental and electricity costs and having incurred the upkeep costs for the last seven years.

[3] In opposition to the above, the respondent:

- 3.1 Seeks condonation for the late filing of its answering papers in terms of Rule 27(3) of the Uniform Rules of Court.
- 3.2 Opposes the relief sought by the applicant.

- 3.3 Brings a counter application to self-review unlawful administrative decisions by its officials.
- 3.4 Seeks related declaratory relief concerning the status of the addendum to the original lease agreement arising out of the unlawful administrative decision.
- 3.5 Seeks the ejectment of the applicant from the premises.

- [4] In its riposte to the above, the applicant seeks to introduce supplementary evidentiary material.
- [5] The respondent opposes the introduction of such supplementary evidentiary material on the grounds that the evidence is not relevant to the lawfulness of the addendum to the lease agreement.

B. BACKGROUND

- [6] On 9 September 1968, the respondent concluded a written lease agreement (hereinafter "the lease") with the Pretoria East Bowling Club (hereinafter "the Club"), in terms of which the Club leased the subject property from the respondent.
- [7] The lease agreement did not include a termination date and would endure for an indefinite period - for as long as the parties complied with the conditions of the lease agreement. The agreement could however be terminated by either party on 3 months' notice.
- [8] On 29 September 2011 the Club directed official correspondence to the respondent in terms of which it gave the respondent notification of the termination of the lease, on three (3) months' notice, as provided for in clause 3 of the Deed of Lease.

- [9] The respondent, per the Manager in the Sports, Recreation, Arts, Culture and Library Service Department, accepted the termination of the lease on 06 October 2011, with such termination to take effect on 21 December 2011 — three months from date of termination of the lease, as provided for in terms of clause 3 of the Deed of Lease.
- [10] During 2012 the applicant engaged with the respondent's authorised representative, Zelda Breytenbach ("Breytenbach"), who proposed three possible locations owned by the respondent.
- [11] On 28 February 2013 and at Pretoria, the applicant and the respondent concluded **a written addendum to the lease agreement** in terms of which the existing lease agreement between the Club and the respondent, was **ceded** to the applicant thereafter referred to as the "Lease Agreement"). (Emphasis supplied.)
- [12] The applicant took possession of the property and caused permanent alterations and improvements to be effected to the property. The cost of such alterations and improvements exceeded R7 900 000.00.
- [13] After being in undisturbed possession of the property for approximately 4 years, during October 2017, the applicant approached the respondent with a proposal to develop student housing on the subject property which would complement the existing uses being exercised on the subject property.
- [14] The respondent indicated its support for the proposed development on various occasions between 17 October 2017 and December 2017.
- [15] Around this time disputes started arising between the parties and escalated in 2019 when on 15 November 2019 the respondent informed the applicant that there was no right or legal basis for the applicant to be in occupation of Erf 6[...], 4[...] G[...] Street, Hatfield (Pretoria East Bowling Club) — and

requested applicant to vacate the premises by no later than 31 December 2019.

[16] The above is a concise summary of events that culminated in the application and counter application, which are more extensively set out in the parties' respective heads of argument and affidavits.

C. APPLICANT'S SUBMISSIONS

[17] The applicant submits that having invested in alterations and improvements on the leased property, the respondent then informed it that the addendum through which the cession of the lease agreement was effected was illegal because Breytenbach was not authorised to sign it on behalf of the respondent.

[18] The respondent was aware of the lease agreement for approximately six years. The respondent did not raise the alleged illegality of the lease agreement at any point in time before the applicant revealed the potential of the Property, by the redevelopment thereof for purposes of student accommodation, and the possible income that can be derived therefrom.

[19] The respondent's legal department was at all times involved prior to the concluding the addendum agreement and should have been aware of the fact that Breytenbach was not authorised to sign the lease agreement or that the original lease agreement between the Club and the respondent had been cancelled which affected the respondent's ability to cede and transfer the rights afforded thereunder to the applicant.

[20] The respondent further illustrated its *mala fides* by willy-nilly debiting an amount of R260,000.00 on the applicant's municipal rates account, allegedly for the consumption of municipal services at the subject property.

[21] In an attempt to resolve the municipal account, the applicant submitted a dispute in terms of the provisions of Section 95(f) read with section 102(2) of

the Municipal Systems Act (hereinafter referred to as the “MSA”) on 4 June 2019.

[22] The Applicant, acting *ex abundanti cautela*, and without admitting the alleged illegal status of the existing lease agreement, during October 2019, applied to the respondent to lease the subject property for a period of a further 3 years.

[23] The respondent however failed and/or refused to formally respond to the above lease application and informed the applicant that it had 30 days to vacate the subject property. This was also the first time the applicant was made aware of the fact that the Club had terminated its lease agreement with the respondent during 2011.

[24] The respondent also debited an amount of R880 000.00 on the applicant’s municipal account without any legal basis.

[25] After the filing of the main application, the respondent exacerbated the issues in the applicant’s municipal account by debiting a further R415 995.20 on the account for alleged “arrear rental”.

D. ISSUES TO BE DECIDED

[26] The issues to be decided are:

26.1 Whether the addendum to the original lease agreement dated 28 February 2013 is valid and binding as between the parties.

26.2 Whether the respondent is obligated to perform its obligations in terms of the lease agreement.

26.3 Whether the respondent is obligated to repay the applicant an amount of R7 900 000.00.

Is the addendum to the lease agreement lawful?

[27] The applicant argues that the lease agreement as it currently stand constitutes a valid and binding contract between the applicant and the respondent which persists to date.

[28] The applicant relies on *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹ where the Supreme Court of Appeal stated:

“[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon 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.”

¹ 2004 (6) SA 222 (SCA) at para 26.

[29] Therefore, concluded the applicant, premised on the aforementioned, even if the respondent's allegations are correct i.e. that Breytenbach was not authorised to conclude a lease agreement with the applicant, that the Club terminated the historic lease agreement prior to same being ceded to the applicant, and that the prescribed procurement procedures were not complied with, the lease agreement as it currently stands is valid and binding between the applicant and the respondent.

[30] According to the applicant, the respondent has to firstly satisfy the court that the declaration of invalidity of the lease agreement is a just and equitable order as envisaged in section 172 of the Constitution, and secondly, that its delay to institute the review application was not unreasonable, alternatively, if it is found that the delay of the respondent to institute the review application was indeed unreasonable, that the court can condone such unreasonable delay.

Alternative claim: the *condictio ob turpem vel iniustam causam*

[31] In the alternative, the applicant advances an unjustified enrichment claim on the basis that it had performed to its detriment in terms of an illegal contract, and thus seeks to reclaim such performance.

[32] The applicant places reliance on the decision in *Afrisure CC v Watson N.O. and Another*² where the SCA held that:

"The central requirement of the condictio ob turpem vel iniustam causam is that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal..."

² 2009 (2) SA 127 (SCA).

[33] It is pursuant to the conclusion of the lease agreement that applicant invested approximately R7 900 000.00 to refurbish the clubhouse and to build 4 asphalt urban soccer fields on the Property, to enable the applicant to use the Property for the purpose for which it was leased from the respondent.

[34] It is only after the applicant initiated the main application that the respondent for the first time provided evidence — under oath — which provided tangible evidence that the lease agreement may have been concluded in an illegal manner — in the sense that the original lease agreement between the Club and the respondent had been cancelled before same was ceded to the applicant, that Breytenbach was not authorised by the respondent to enter into the lease agreement with the applicant, and that the prescribed procurement legislation and policies had not been complied with prior to the lease agreement being entered into.

E. DISCUSSION

On the cession:

[35] A party relying on cession must allege and prove the contract of cession.

[36] The maxim *nemo plus iuris ad alium transferre postest quam ipse habet* means that one cannot transfer legal rights greater than those that one lawfully possesses. A consequence of this principle is that a principal cannot empower his agent to exercise more rights than the principal himself possesses. It follows that no one can transfer more rights in property than he possesses in the property. The Supreme Court of Appeal has affirmed this legal principle in *Brayton Carlswald (Pty) Ltd and Another v Brews*.³

[37] The 'Deed of Lease' attached to the Founding Affidavit as annexure 'WD1' entered into between the City Council of Pretoria and the Pretoria East

³ 2017 (5) SA 498 (SCA) para 12 and 13.

Bowling Club — was as a matter of law and fact not capable of being ceded to the applicant on 28 February 2013 on account of the fact that the Deed of Lease was terminated by mutual consent between the respondent (the successor in title to the City Council of Pretoria) and the Pretoria-East Bowling Club with effect from 31 December 2011. The termination was by way of three months' notice in writing, as provided for in terms of clause 3 of the Deed of Lease.

[38] What took place on 28 February 2013 between the applicant and Ms Breytenbach was the purported conclusion of a new lease agreement. This flouted procurement laws that have since come into being as a result of the Constitution of the Republic of South Africa.

[39] The respondent is an organ of State and as such is obliged to procure all goods and/or services in a manner that complies with:

39.1 **Section 217 of the Constitution.**

39.2 The Local Government: Municipal Finance Management Act 56 of 2003 ("**MFMA**").

39.3 The Municipal Systems Act 32 of 2000 ("**the Systems Act**").

39.4 The Asset Transfer Regulations, 2008.

39.5 The Municipal Public-Private Partnership Regulations ("**Municipal PPP Regulations**").

39.6 The Municipal Supply Chain Management Regulations. ("**Municipal SCM Regulations**").

39.7 The Respondent's Supply Chain Management Policy
("SCM Policy").

[40] The respondent is constitutionally and legally obliged to procure goods and services in accordance with a system that is fair, transparent and equitable - open to all interested and qualifying persons - and in which favouritism, corrupt and irregular practices are conspicuous by their complete absence.

[41] Any contract entered into outside of or contrary to the principles and provisions of procurement law is both unlawful and void *ab initio* and consequently of no force and effect. The reason for this is that the organ of State is bereft of powers to enter into any contract that does not comply with its constitutional and legal obligations.

[42] In *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others*⁴ it was put as follows:

"Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution."

[43] While affirming the duty upon State owned entities to resist any attempts at enforcement of procurement contracts/agreements concluded in violation of the procurement system contemplated in section 217 of the Constitution,⁵ the SCA in *Municipal Manager: Qaukeni and Others v F.V. General Trading CC*⁶ observed as follows:

⁴ 2014 (1) SA 604 (CC) at 619G – 620B para 40.

⁵ See also *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at [36].

⁶ 2010 (1) SA 356 (SCA) para 16.

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

[44] All the regulatory prescripts listed in paragraph 39 above were not complied with when the "Addendum to Lease Agreement" was entered into between the respondent and applicant. This is primarily because the Addendum was not concluded pursuant to any competitive bidding process. The detailed specifics are tabulated in the respondent's papers, more particularly in paragraph 15 to 23 of its heads of argument and need no repetition herein.

[45] The primary relief sought by the applicant is an interdict against the respondent. It is settled law that interdicting an organ of state from fulfilling its obligations should only be resorted to in the clearest of cases. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,⁷ the Constitutional Court stated that:

"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers.

The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

⁷ 2012 (4) SA 618 (CC) at para 39.

[46] With respect to the applicant's endeavours to enforce a patently unlawful contract, the SCA in *Premier, Free State and Others v Firechem Free State (Pty) Ltd*,⁸ considered the duties of an organ of state when faced with attempts to have an unlawful contract enforced. Schutz JA explicitly held that:

"The province was under a duty not to submit itself to an unlawful contract and (was) entitled, indeed obliged, to ignore the delivery contract and to resist attempts at enforcement".

[47] Then Cameron J writing for the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*,⁹ encapsulated the position of how a court should deal in interdict proceedings with a hopeless case, wherein he stated that:

"When the facts are unclear, the interdicting court must weigh prospects, probabilities and harm. But when the respondent who is sought to be interdicted has a killer law point it is just and sensible for the court to decide that point there and then. The court is in effect ruling that, whatever the apprehension of harm and the factual rights and wrongs of the parties' dispute, an interdict can never be granted because the applicant can never found an entitlement to it."

The debating and accounting of the electricity and rental claims as well as the claim for damages:

[48] Over and above the mandamus, the applicant seeks an order for the debating and accounting of the accounts central to a dispute between the parties as well as a claim for damages.

⁸ 2000 (4) SA 413.

⁹ 2018 (1) SA 94 (CC) at 128 C - D.

[49] The applicant is canvassing these claims in this application.

[50] It is settled law that a party should not approach a court on application proceedings in circumstances where there are fundamental, eminently and readily foreseeable disputes of fact which cannot be resolved on the papers.¹⁰

50.1 If the material facts are in dispute, and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent justify such an order.¹¹

50.2 The application for referral to oral evidence must be made *in limine* and not once it becomes apparent that the applicant is failing to convince the court on the papers.¹²

[51] The accounting and debating of the electricity and rental accounts would procedurally require:

51.1 A claim for the delivery of the account.

51.2 A debatement about the actual account itself.

51.3 The payment of the amount found to be due.

[52] The need for the accounting of the account inherently presupposes that:

¹⁰ *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (A) at 368, and *Adbro Investment Co. Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350.

¹¹ *Stellenbosch Farmers Wine Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235; *Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.

¹² *Law Society Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195.

52.1 There are not yet facts sufficient to support the relief that the Applicant seeks.

52.2 There will inevitably be disputes of fact during the debatement of the account.

[53] The damages, alternatively enrichment claims of the applicant — arising out of either the applicant's unsolicited property development proposal, or disputes arising out of capital investments, rental, electricity and upkeep costs incurred by the applicant from its beneficial use and possession of Erf 6[...], Hatfield, (Pretoria-East Bowling Club) — are all disputed on the grounds that:

53.1 The underlying lease agreement on which they are purportedly based is either void *ab initio*, alternatively illegal and of no force and effect.

53.2 Any damages claim arising out of the contract is thus in its entirety being resisted by the respondent (as it has already been submitted,) on the basis that illegal contracts are unenforceable under the *ex turpi causa non oritur actio* principle.

53.3 Similarly, the enrichment claim for restitution under the *condictio ob turpem vel iniustam causam* is being resisted on the basis of the *par delictum* rule – *in pari delicto potior est conditio possidentis*.

[54] On the facts of the instant application, it is clear that the unsolicited property development proposal of the applicant did not comply with the requirements

for an unsolicited bid. There is no right to an unsolicited bid received outside of its normal bidding processes at all.¹³

[55] If the respondent elects to consider an unsolicited bid it may only do so in accordance and within a prescribed framework, which requires the municipality to, only consider unsolicited bids if one or more of the following considerations are applicable:¹⁴

55.1 The product or service offered in terms of the bid is a demonstrably or proven unique concept.

55.2 The product or service will be exceptionally beneficial to or have exceptional cost advantages for the Municipality.

55.3 The person who made the bid is the sole provider of the product or service.

55.4 The reasons for not going through the normal bidding processes are found to be sound by the accounting officer.

[56] Taking into account the circumstances around the 'conclusion' of the Addendum to lease agreement between and by the respondent and the applicant on 28 February 2013, it is clear that it was not concluded pursuant to the above-stated peremptory requirements.

[57] The Addendum was also not entered into as per the requirements for a Public – Private - Partnership Agreement.

The self-review Application by the Respondent:

¹³ s113(1) of the MFMA, read together with s37(1) of the Municipal SCM Regulations and s18(1) of the Respondent's SCM Policy.

¹⁴ *Ibid.*

[58] In *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*¹⁵ the question arose as to by what means may an organ of state seek the review and setting aside of its own decision? May it invoke the Promotion of Administrative Justice Act¹⁶ (PAJA)? Or is the appropriate route legality review? The question begs the answer herein as well.

[59] In *SITA v Gijima*, the parties had entered into an agreement which was extended several times by way of addenda. A payment dispute arose between the parties. When the dispute could not be resolved, *Gijima* instituted arbitration proceedings. *SITA* resisted the claim on the basis that the agreement, as well as the three extending addenda that followed it, were invalid as there was non-compliance with the provisions of section 217 of the Constitution when the parties concluded the agreement.

[60] As in the instant case, *SITA* was adopting this stance for the first time as it had always assured *Gijima* that all relevant procurement processes had been complied with. *SITA* approached the High Court to set aside the agreement and the three *addenda*. The High Court held that the decision to award and renew the agreement qualified as administrative action in terms of the provisions of PAJA but that the review had been brought way out of the 180-day period stipulated in section 7(1) of PAJA.¹⁷

[61] The Constitutional Court disagreed with the above findings, asserting instead that the appropriate route was a legality review. The Constitutional Court in *SITA v Gijima* held, with reference to *Pharmaceutical Manufacturers Association of SA*¹⁸ that the principle of legality is “an incident of the rule of law” which is a founding value of our Constitution.¹⁹

¹⁵ [2017] ZACC 40.

¹⁶ Act 3 of 2000.

¹⁷ [2015] ZAGPPHC 1079 (High Court judgment) at Para [19].

¹⁸ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 17.

¹⁹ Paragraph 39 of *SITA v Gijima*.

[62] Ngcobo J (as he then was) put it thus in *Affordable Medicines Trust*:²⁰

“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.”

[63] The long and short of it 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.²¹

[64] In *SITA v Gijima* as in this case, it was not in dispute that the award of the disputed agreement by SITA was not pursuant to a competitive bidding process.

[65] SITA had delayed by just under 22 months before approaching the High Court for review. What impact, if any, should this delay have? It may indeed cross the court’s mind that the delay may be unreasonable, however, condonation may be granted in circumstances where it is in the interests of justice to do so.²² The relevant considerations are:²³

65.1 The nature of the application – with reference to the relief being sought. In the present case, the applicant seeks to resist an unlawful agreement.

65.2 The strength or weakness of the merits of the application. In the instant case the addendum was concluded without any adherence to basic procurement law.

²⁰ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49.

²¹ *Gijima* para 40.

²² *SA National Roads Agency Ltd v City of Cape Town* [2016] 4 All SA 332 (SCA).

²³ *Mandela v Executors: Estate Late Mandela* [2016] 2 All SA 833 (ECM).

65.3 The effect of the relief sought by the applicant is that the rule of law and constitutional principles would be vindicated.

[66] With all this having been said, just as in *SITA*, where the delay of nearly 22 months before the launch of the review application was not condoned, this instant case is even worse. The addendum at the heart of the “cession” at issue was concluded on 28 February 2013. The condonation and counter applications are dated 02 December 2020. It took 8 years before the respondent launched the self-review application.²⁴

[67] This does not mean that the cession agreement is in any way legal. It has been amply demonstrated that it was concluded contrary to constitutional prescripts and is thus illegal. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The award of the contract by way of the addendum thus falls to be declared invalid.

[68] Section 172(1)(b) grants a court deciding a constitutional matter a wide remedial power to make any order that is just and equitable.²⁵

[69] As was the case in *Gijima*, the respondent (“City of Tshwane”) must not benefit from its assurances to the applicant that Breytenbach was authorised to represent it in concluding the addendum and consequently investing monies on the property and belatedly raising the question of invalidity of the lease and addendum. In the circumstances, a just and equitable remedy is that the award of the lease contract by concluding the addendum, be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting the applicant of any rights to which –

²⁴ Filed at Caselines 011-2.

²⁵ Section 172(1) provides:

“When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect

but for the declaration of invalidity – it might have been entitled. Such rights as ventilated already, pertaining to an action for damages arising from the *condictio ob turpem vel iniustam causam*.

[70] The declaration of invalidity of the addendum represents nominal success for the respondent in its counter application for the declaration of invalidity of the addendum.

[71] The lease contract being illegal, it follows that the respondent's counter-application succeeds and the written addendum to the lease agreement is declared null and void.

[72] The applicant chose to proceed on an action for damages for the amounts of money it alleges that it expended on improvements and development on the property by way of application proceedings. Similarly, the relief for the debatement of electricity and rental account are misplaced in this application. The circumstances were clear from the onset that disputes of fact around this abound. Without belabouring the point, this application cannot succeed.

[73] It is established law that costs shall follow the event.

[74] In the result, the following order is made:

(a) The application is dismissed with costs. (The applicant is not divested of its rights as fully stated in paragraph [69] above.)

(b) The counter-application is granted with costs.²⁶

(c) The order of invalidity as fully stated in paragraph 69 above does not have the effect of divesting the respondent of any rights it would have

²⁶ Para 71 *supra*.

been entitled to under the written addendum to the lease agreement concluded on 28 February 2013, but for the declaration of invalidity.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 15 May 2024

Date of Judgment: 13 August 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 13 August 2024.