

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-031081

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: YES
8/12/2025	
DATE	SIGNATURE

In the matter between:

TSHIRELETSO TRAFFIC AND ROAD MANAGEMENT CC	First Applicant
MOTHEO WA MODIMOLLE WOODWORK CC	Second Applicant
MBALI TRADING ENTERPRISE CC	Third Applicant
WILDBREAK 201 (PTY) LTD	Fourth Applicant
THABA KGOMO	Fifth Applicant

and

THE PREMIER: GAUTENG PROVINCE PANYAZA LESUFI	First Respondent
THE DEPARTMENT FOR TRANSPORT AND LOGISTICS, GAUTENG PROVINCE	Second Respondent
THE MEC FOR THE DEPARTMENT OF TRANSPORT AND LOGISTICS, GAUTENG PROVINCE: KEDIBONE DIALE TLABELA	Third Respondent
THE DEPARTMENT OF FINANCE: GAUTENG PROVINCE	Fourth Respondent

**THE MEC FOR THE DEPARTMENT OF FINANCE:
JACOB MAMABOLO**

Fifth Respondent

**ANY OTHER COMPANY INTERESTED IN AND/OR
AFFECTED BY THE OUTCOME OF THESE
PROCEEDINGS**

Sixth Respondent

JUDGMENT

DREYER, AJ

- [1] The applicants were part of a cohort of 69 contractors appointed by the second respondent, the Department of Roads and Transport, Gauteng (the Department) in September 2008 to conduct routine road maintenance for Gauteng provincial roads. The contractors each concluded written NEC 3 contracts (the main contract) with the Department. The main contract was amended by an addendum in March 2010 and a further addendum in March 2012. The first addendum changed the terms of payment in the main contract from a fixed amount to a system requiring that all work was to be done in accordance with a signed works order with quantities and rates. The contractors' appointment terminated on 31 March 2013. Disputes between these contractors and the Department has been the subject of much litigation before this division. In that litigation, the dissatisfied contractors instituted proceedings against the Department, based on their contractual rights and obligations arising from the main contract.
- [2] The applicants have not exercised their contractual rights. The applicants base their claim in administrative law, contending that the Department is bound by a decision it took on 26 September 2017, to settle all disputes with the contractors. The "decision" relied on by the applicants, is an internal memorandum addressed by the Chief Director of Advisory Services to the Head

of the Department, advising that the Department is obligated to comply with a court order (the 2017 memorandum).¹ I will return to this.

- [3] The main contracts were standard construction NEC 3 contracts. The only difference between the contracts that each contractor concluded with the Department was the contract data specific to each contractor.

- [4] The main contract specified the manner in which any payment dispute a contractor had with the Department was to be resolved. The first step in the dispute resolution process was that the Department was only liable to pay a contractor for work that was done according to the signed works order with quantities and rates. All work completed by a contractor had to be certified by the consulting engineers. Such certification required that the contractor's invoice was certified by the consulting engineer. In the event that the Department did not pay a contractor's certified invoice, the contractor could then refer the disputed invoice to the adjudicator. The adjudicator would determine the amount payable by the Department and issue an award. The main contract appointed Mr Lloyd Mogotsi as adjudicator.

- [5] On termination of the contracts, in April 2013, twenty-one of the contractors referred their individual payment disputes with the Department relating to the short or non-payment of their invoices for adjudication. In April 2014, Mr Mogotsi issued his adjudication awards.

- [6] Thirteen of these contractors instituted proceedings to make their adjudication awards orders of court. Two contractors, Impota Trading (Pty) Ltd and Midco Business Enterprises CC launched the first application in August 2014. The application was successful.² The Department appealed against the decision. On 28 June 2017, the Full Court upheld the appeal, holding that Mr Mogotsi's

¹ The department had reached a settlement on the quantum to be paid to the applicants, which settlement agreement had been made an order of court in *Misthing Construction and Projects Cc and 8 others v The MEC Department of Roads and Transport, Gauteng & another*.

² *Impota Trading (Pty) Ltd and Another v The MEC for the Department of Roads and Transport, Gauteng Province and Another*, unreported judgment of the Gauteng High Court, case number 30979/2014.

adjudication awards were final and binding on the Department (the Impota Appeal).³

- [7] On 8 September 2017, Pather AJ in *Misthin Construction and Projects CC and 8 Others v The MEC for the Department of Roads and Transport, Gauteng Province and Another*,⁴ similarly held that the Department was bound by the Mogotsi adjudication awards.
- [8] On 18 May 2018, Siwendu J in *Stephup Construction Projects (Pty) Ltd v Kenny Maloa Trading (Pty) Ltd*,⁵ followed the previous decision of this division.
- [9] Two of the contractors Blue Lounge Construction (Pty) Ltd and Deku Ka Mise Trading CC referred their disputes to arbitration, seeking confirmation of their Mogotsi adjudication awards. The Department settled the arbitration after the Impota Appeal decision.
- [10] The commonality in these decisions is that the contractors had all followed the main contract's prescribed dispute resolution process. All these contractors had referred their disputed invoices to the appointed adjudicator, Mr Mogotsi, for adjudication. All these contractors were in possession of an adjudication award given by Mr Mogotsi.
- [11] Subsequent to these decisions, the Department resolved to settle and has settled the disputes with contractors that had been referred to Mr Mogotsi for adjudication and where Mr Mogotsi had issued an adjudication award.
- [12] In 2017, the first and second applicants, Tshireletso Traffic and Road Management CC (Tshireletso) and Motheo Wa Modimolle Woodwork CC (Motheo) instituted proceedings against the Department in the Pretoria High Court, for payment of disputed invoices, arising from the NEC 3 contracts. The Department settled its dispute with Tshireletso and Motheo *in full and final*

³ *MEC for the Department of Transport and Another v Impota Trading (Pty) Ltd and another*, unreported judgment of the Gauteng High Court, case number A5026/2016.

⁴ Unreported judgment of the Gauteng High Court, case number 25628/2016.

⁵ Unreported judgment of the Gauteng High Court, case number 26235/2017.

*settlement of all the claims Tshireletso and Motheo had against the Department in January 2018. Tshireletso and Motheo have not addressed this settlement agreement in either the replying affidavit or in argument before the court. In the applicant's heads of argument, the applicant argues that Tshireletso and Motheo's claims are for amounts not covered by the 2018 settlement. This position is untenable at law. Tshireletso and Motheo have compromised their claim with the Department arising from the main contract, they are barred from instituting an action based on the cause so compromised.*⁶

- [13] As the Constitutional Court held in *Gbenga-Oluwa Toye v Rickett Benckiser South Africa (Pty) Ltd and Another*,⁷ *"the public and indeed our courts have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his conduct"*.
- [14] The defence raised by department that it paid all of Tshireletso's and Motheo's claims arising out of the main contract, in full and final settlement, is an absolute defence. On this basis, Tshireletso's and Motheo's claim against the Department is dismissed.
- [15] A further six contractors, namely, Kwagga Holdings (Pty) Ltd, Taledi Morosi Building Construction CC, Kapano Kofifi Projects CC, Mafube Engineering Solutions, Basic Blue Trading 689 CC and Catagriet Imprimere (Pty) Ltd (Kwagga Holdings and others) instituted proceedings before this Court seeking payment from the Department for the disputed payments from the Department for disputed invoices that had been referred for adjudication to Mr Mogotsi, but where Mr Mogotsi had not finalised the awards in the timeframe required under the written contractual agreements. In November 2019, Yacoob J referred the disputes of Kwagga Holdings and others to adjudication.⁸ The parties

⁶ *Van Zyl v Niemand* 1964 (4) SA 661 (A).

⁷ 2016 (12) BCLR 1515 (CC) at para 24.

⁸ Unreported judgment of the Gauteng High Court, case number 6577/2019.

appointed Advocate Badela as adjudicator. Advocate Badela dismissed all the contractors' claims as the contractors had *inter alia* failed to submit signed and certified invoices of work done for adjudication and had claimed for payment of work which was not actually done (the Badela adjudication award).

- [16] Kwagga Holdings and others sought to review the Badela adjudication award. In *Kwagga Holdings (Pty) Ltd v Member of Executive Council for Roads and Transport of Gauteng Provincial and Others*,⁹ the Johannesburg High Court dismissed the applications of Kwagga Holdings and others, upholding the Badela adjudication award.

- [17] In July 2018, nine contractors referred a complaint to the office of the Public Protector. Their complaint was a failure by the Department to pay outstanding monies for services rendered for road rehabilitation in terms of the main contract, including escalation fees and interest on the outstanding amounts. The complaint was investigated by the Public Protector, who issued a report on 19 February 2022 in terms of section 182(1)(b) of the Constitution.¹⁰

- [18] The Public Protector found that the Department had acted in accordance with its contractual obligations under the main contract. The claimants did not dispute the payments made by the Department in terms of the BAS reports. The Public Protector found that the complainants did not provide copies of invoices or works orders in order to substantiate their claims. The Public Protector concluded her report, stating that no adverse findings were made against the Department and no remedial action was required by the Department.

- [19] In about 2022, the Department through the office of the State Attorney, Johannesburg invited the contractors who had not yet resolved their disputes with the Department, to refer their disputes in relation to unpaid invoices to adjudication. Twenty-five contractors accepted the invitation. None of the applicants did so. There is no explanation for their failure to participate in the

⁹ 1953 (3) SA 256 (C).

¹⁰ 108 of 1996.

dispute resolution process. The twenty-five contractors agreed to the appointment of Advocate Nalane SC as the adjudicator. Advocate Nalane SC dismissed all the claims, on the basis *inter alia* that either the contractors had failed to submit their claims to adjudication timeously, or at all, and as the substitute adjudicator, Advocate Nalane SC had no jurisdiction to consider claims that had previously been determined by Mr Mogotsi.

- [20] The thread running through the above decisions – whether by adjudication, arbitration, various court proceedings and that of the Public Protector – was that the contractors were bound by the dispute resolution process of the main contract. Where the contractors failed to comply with the dispute resolution process, their claims were dismissed.
- [21] The applicants in this matter (other than Tshireletso and Motheo) did not exercise their contractual rights. The relief that the third, fourth and fifth respondents seek is that the Department took a decision on 27 September 2017 that the historic 69 contractor matters would be settled, that this decision is binding on all other respondents and that the respondents must implement the decision, by identifying and verifying the amounts due to the applicants. In effect the third, fourth and fifth applicants seek final mandatory relief.
- [22] The decision on which the applicants rely is the 2017 memorandum.. It is an internal memorandum written by the legal advisor of the Department on 26 September 2017 to the Head of Department following the Impota appeal decision, advising that the Department was obligated to comply with the court order in the Misting matter, and recording the prior Department's decision that all similar pending actions that had been instituted by the historic 69 contractors disputed against the Department be settled. The 2017 memorandum records:¹¹

“In the recent Impota and Midco judgments, wherein the Department lost the matter in front of the full bench, the Department subsequently paid Impota and Midco in excess

¹¹ CaseLines, 001: Notice of Motion at 001-77 – 001-81.

of R40 million per the amounts as determined by the adjudicator Mogotsi in his award including interest.

The Department took a decision that all further matters that are in the courts or tribunals regarding these historic 69 contractor matters will be settled before a judgment can be taken as the strong precedent of the Impota and Midco matters were working against the Department.

A memo of approval from the HOD was subsequently obtained which detailed the approach and options of settlement with the remaining contractors."

- [23] What is clear from a reading of the 2017 memorandum is that the purpose of the memorandum was to obtain approval from the Head of Department to make payment of the court order granted by agreement in the *Misthing* matter. The recordal of the Department's prior decision to settle the historic 69 contractor disputes related to matters that were in courts or tribunal. There is no decision recorded in the 2017 memorandum to settle all disputes with the 69 contractors. None of the applicants had a dispute pending before a court or tribunal in July 2017. The applicant's dispute is not covered by the 2017 memorandum.

- [24] The 2017 memorandum specifically seeks authority from the Head of Department to pay the compensation due to the *Misthing* applicants in terms of a court order. The memorandum records a prior decision of the Department to settle the claims of the historic 69 contractors, which were already pending *before the court or any tribunal*. The 2017 memorandum does not record, as the applicants contend, that the Department took a decision to settle all the claims of all 69 contractors. The 2017 memorandum does not apply to the applicants.

- [25] The applicants argue the 2017 memorandum recorded a decision of the Department, which decision was an "administrative action". The Department as an organ of state, the applicants argue, is obligated to implement its decision. As the Department has failed to implement its decision by settling the applicants claims, the Department must be compelled to comply with the prescripts of its decision.

[26] I turn now to consider whether the decision entitles the applicants to the final mandatory relief. The first leg of the enquiry is whether the applicants have established a clear right to the mandatory relief.

[27] “Administrative action” is defined in terms of the Promotion of Administrative Justice Act,¹² as:

“‘administrative action’ means any decision taken, or any failure to take a decision, by –

(a) an organ of state when –

. . .

(ii) exercising a public power or performing a public function in terms of any legislation; or

. . . which adversely affects the rights of any person and which has a direct, external legal effect.”

[28] The Constitutional Court, in the *SARFU* matter,¹³ held that the President’s decision to appoint a judicial commission of enquiry only becomes final and binding when it is transmitted in an overt act by public notification:

“In law, the appointment of the commission only takes place when the President’s decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in writing. Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry but the method usually employed, as in the present case, is by way of promulgation in the Government Gazette. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to

¹² Act 3 of 2000.

¹³ *President of the Republic of South Africa v the South African Rugby Football Union* 2000 (1) SA 1 (CC) (*SARFU*) at para 44.

be adjudicated as at the time when the act takes place, namely at the time of promulgation.”

- [29] Similarly, the Supreme Court of Appeal, in the *Kirland* matter,¹⁴ held that a functionary was not bound by the decision as it had never been conveyed to Kirland:

“The fact that the decisions were not communicated or otherwise made known has an important effect: because they were not final, they were subject to change without offending against the functus officio principle.”

- [30] In this matter, the 2017 memorandum is an internal memorandum. It was never published. The applicants state that unnamed departmental officials showed them the 2017 memorandum. The applicants do not contend that the unnamed officials were authorised to communicate the internal memorandum. . The 2017 memorandum does not have direct and immediate consequences for the applicants either as individuals or groups of individuals.¹⁵ Consequently, the 2017 memorandum has no direct external effect. It is not an administrative action. The applicants' claim founded in administrative law, fails.

- [31] In reply, the applicants rely on a further internal memorandum of the Department. This memorandum is dated 1 June 2021 and was addressed to the Acting Head of Department from the Director of Legal Services to obtain approval to settle all claims relating to the 69 contractors (the 2021 memorandum).

- [32] The recommendations that the legal adviser sought were that:

- 32.1 Kwagga Holdings be paid out based on the calculations made in the unsigned adjudication award by the adjudicator, Mr Mogotsi;
- 32.2 the State Attorney, Johannesburg (as the attorney of record for the Department), withdraw the review application in relation to the

¹⁴ *MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 219 (SCA) (*Kirland*) at para 15.

¹⁵ *Grey's Marine Hout Bay (Pty) Ltd v The Minister of Public Works* 2005 (6) SA 313 (SCA) at para 24.

adjudication awards granted to Tirisano Sonata and Taola and settle the claims;

32.3 all other pending disputes with contractors be approved for settlement.

- [33] The 2021 memorandum is recommended by the Acting Deputy Director General of Corporate Services, recommended with modifications by the Chief Financial officer and approved by the Acting Head of the Department. It is not clear from the papers what modifications were recommended by the Chief Financial officer and whether the approval by the Acting Head of the Department, included such modifications.
- [34] There is no evidence before me that the Head of Department implemented such a decision. To the contrary, there is evidence that the Department took a different route. The Department invited those contractors, who still had disputes pending which had not been referred to court or a tribunal, or who had failed to take any action in relation to their disputes, to submit their disputes to adjudication. The applicants' reliance on the 2021 memorandum, as a decision taken by the Head of Department, is misplaced.
- [35] First, it is trite that an applicant in motion proceedings must make out its cause of action in the founding affidavit.¹⁶ The replying affidavit cannot be used to augment the applicant's case.¹⁷ The case the applicants rely on, namely that the Department agreed to settle all the disputes with the historic 69 contractors is made in reply. This is impermissible.¹⁸
- [36] Second, the 2021 memorandum was never published. The applicants do not disclose how they came to be in possession of an internal departmental memorandum. The 2021 memorandum, for the reasons stated above, has no

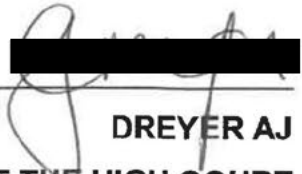
¹⁶ *Airports Company of South Africa (Soc) Ltd v Tswelokgotso Trading Enterprise CC* 2022 JDR 1754 (GJ) at para 9.

¹⁷ *SA Railways Recreation Club and another v Gordonias Liquor Licensing Board* 1953 (3) SA 256 (C).

¹⁸ *Id.*

external legal effect. Like the 2017 memorandum, the 2021 memorandum does not constitute administrative action.

- [37] The applicants did not take up the Department's invitation in 2021 to submit their claims to adjudication. The applicants provide no reason for their failure to do so.
- [38] The applicants, by limiting their cause of action to one sounding in administrative law, have not placed any evidence before the Court that there would be a claim for an adjudicator to consider. The applicants do not place any evidence that they had any invoices in dispute. There is no evidence that such invoices in dispute were certified by the consulting engineer, or that these were referred to adjudication as required under the main contract.
- [39] Neither the 2017 memorandum nor the 2021 memorandum constitute administrative action. The applicants have failed to show that they have a clear right to the mandatory action that they seek, namely, that the Department act in accordance with its decisions.
- [40] As the applicants have failed to meet the first leg of an enquiry to determine whether they are entitled to the final mandatory relief, the applicants' claim falls to be dismissed.
- [41] The Department does not seek costs in the event that it is successful with its claim.
- [42] In the result, I make the following order:
1. The application is dismissed.


DREYER AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Instructed by:

Adv Thabo Modisenyane

Mgiba Kgabi Attorneys

c/o Mkhabela Attorneys

For the Second and Third Respondents:

Instructed by:

MB Lecoge SC

Malatji & Co Attorneys

Heard on: 29 July 2025

Handed down on: 8 December 2025