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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 3966/2020P

In the matter between:

SIZANANI MAZULU TRANSPORT (PTY) LTD	FIRST APPLICANT
DUZI BUS SERVICES (PTY) LTD	SECOND APPLICANT
IMPENDHLE SERVICES (PTY) LTD	THIRD APPLICANT
TANSNAT COACH LINES (PTY) LTD	FOURTH APPLICANT
ISMAIL BHAYLA N.O.	FIFTH APPLICANT
AYESHA GORI BHAYLA N.O.	SIX APPLICANT
IRSHAAD PEER N.O.	SEVENTH APPLICANT
MTUNZINI BUS SERVICES (PTY) LTD	EIGHTH APPLICANT
RIPPLE EFFECT 40 CC	NINTH APPLICANT
METRO BUS SERVICES (PTY) LTD	TENTH APPLICANT
COMBINED TRANSPORT SERVICES (PTY) LTD	ELEVENTH APPLICANT
KZT COUNTRY CRUISER (PTY) LTD	TWELFTH APPLICANT
KZT BUS SERVICES (PTY) LTD	THIRTEENTH APPLICANT
MAPHUMULO MAIL (PTY) LTD	FOURTEENTH APPLICANT
SOUTH COAST BUS SERVICE (PTY) LTD	FIFTEENTH APPLICANT

And

THE MEMBER FOR THE EXECUTIVE COUNSIL FOR TRANSPORT OF KWAZULU-NATAL — **FIRST RESPONDENT**

THE NATIONAL MINISTER FOR THE DEPARTMENT OF TRANSPORT FOR THE REPUBLIC OF SOUTH AFRICA — **SECOND RESPONDENT**

THE AUDITOR-GENERAL OF SOUTH AFRICA — **THIRD RESPONDENT**

THE MEMBER FOR THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF FINANCE OF KWAZULU-NATAL — **FOURTH RESPONDENT**

THE ETHEKWINI METROPOLITAN MUNICIPALITY — **FIFTH RESPODNENT**

THE NATIONAL MINISTER OF FINANCE AND EXECUTIVE HEAD OF THE DEPARTMENT: NATIONAL TREASURY FOR THE REPUBLIC OF SOUTH AFRICA — **SIXTH RESPONDENT**

JUDGMENT

P C BEZUIDENHOUT J:

[1] This matter has a very long history which appears from the chronology in the practice note of Applicants. During the period 1997 to 2001 the KwaZulu-Natal Department of Transport initiated a tender process for public transport services concluding contracts with Applicants which are referred to as the old order contracts.

During the period of 2005 to 2007 the older contracts expired due to effluxion of time and were extended on a month to month basis. During the period of 2016 to 2017 nine contracts were concluded with certain of Applicants. During June 2017 Respondents and Applicants concluded addendums to the agreements which are annexures "D1 to D15A" extending the contracts for a interim period of one year. If a tendered contract was extended into prior to the expiry of the interim period it shall terminate.

[2] As these contracts were not renegotiated they were extended on a number of occasions during the period 2017 to 2020 but then the Department of Transport KwaZulu-Natal refused to extend it any further. In 2019 the Auditor General found the extensions of the old order contracts to be irregular and contrary to the provisions of the Public Management Finance Act 1 of 1999 (PFMA) and the Treasury instruction note 3 of 2016/2/17. The Auditor General also found that the already negotiated contracts to be irregular and contrary to the provisions of section 38(1)(a)(iii) of the PFMA.

[3] On 26 June 2020 this application commenced when an urgent application was brought against the MEC for Transport KwaZulu Natal (Second Respondent) wherein an order was sought that Respondents forthwith issue Applicants with written extensions of each of Applicants 2017 contracts annexures "D1 to D15A" already referred to. Thereafter the matter came before this court on various occasions and various orders were granted extending the contracts for periods of time. An application was also granted to join certain Respondents. Various meetings were held between the parties but no solution could be found despite the addition of the other Respondents. Only First and Fourth Respondent oppose this application.

[4] There was also various amendments to the notice of motion of Applicants the last which appear at page 1491 of the indexed papers. The relief sought therein is a declarator that:

"3.

3.1 Sections 41 and 46 of the National Land Transport Act 5 of 2009 permits provincial departments of transport to conclude negotiated contracts with bus operators without going to tender.

3.2 The agreements marked annexures "D1 to D14 and D15A" to the Applicants founding affidavit and supplementary affidavits and the extensions thereof are not rendered unlawful by the provisions of the Public Finance Management Act 1 of 1999 (PFMA) and in particular section 38(1)(a)(iii) thereof.

3.3 That payments made under such contracts to Applicants by First Respondent do not amount to irregular expenditure as defined in section 1 of the PMFA.

4. An order directing the First Respondent to extend the interim contract periods, in respect of clause 3.1 of each of the agreements concluded between Applicants and First Respondent marked annexure "D1 to D14 and D15A" annexed to the Applicants founding and supplementary affidavit prior to the expiration thereof until

4.1 A negotiated contract has been concluded with each of First to Ninth Applicants and Fourteenth Applicant.

4.2 The implementation of the IPTN by the contracting authority is finalised in respect of each of Tenth to Thirteenth and Fifteenth and Sixteenth Applicants.

5. Directing First Respondent to extend the interim contract period in respect of each of the agreements marked annexure "D1 to D14 and D15A" to Applicants founding and supplementary affidavits for a period of not less than a year on each occasion which extension will terminate upon:

5.1 The conclusion of a new negotiated contract with the operator in respect of each of First to Ninth Applicants and Fourteenth Applicant and;

5.2 The implementation of the IPTN by the contracting authority in respect of each of the Tenth to Thirteenth and Fifteenth and Sixteenth Respondents.

6. An order directing First Respondent and any other Respondent opposing, to pay the costs of this application with such costs to include the costs of two counsel where so employed jointly and severally, the one paying the others to be absolved."

[5] This is the notice of motion of Applicants which falls to be determined herein.

[6] As set out above the application is opposed by First Respondent and Fourth Respondent. First Respondent brought a counter application as appears from page 116-3.

"3. Declaring that the addendum for the provision of public transport services concluded between the Department of Transport for the Province of KwaZulu-Natal and the following applicants:

Sizanani Mazulu Transport (Pty) Ltd, Duzi bus Services (Pty) Ltd, Impendle bus Services (Pty) Ltd Transnet Coach Lines (Pty) Ltd, Dumbe Bus Services and Nondweni Bus Service trust, Mtunzini Bus Service (Pty Ltd, Ripple Effect 40 CC, Metrow Bus Service (Pty) Ltd, Combined Transport Services (Pty) Ltd, KZN Country Cruiser (Pty) Ltd, KZT Bus (Pty) Ltd, KZN Country Cruser (Pty) Ltd, KZT Bus Services (Pty) Ltd, Maphumulo Mail (Pty) Ltd, South Cost Bus Services (Pty) Ltd and Marrin pine Transport (Pty) Ltd annexure "D1 to D14 and D15A" to the founding papers are declared to be inconsistent with the Constitution and are invalid.

4. Declaring that the declaration of invalidity in paragraph 3 is suspended for a period of one year. Alternatively pending the decision of the Department of Transport for the Province of KwaZulu-Natal to award a

new tender (bid) after completion of the tender (bid) process ordered in paragraph 5 under.

5. Directing the Department of Transport for the Province of KwaZulu-Natal to put arrangements in place for the bus services to be put out to tender and initiate a new tender (bid) process for the provisions of public transport services within the province of KwaZulu-Natal within a period of thirty days from the granting of this order.

6. Pending the decision of the Department of Transport for the province of KwaZulu-Natal to award a new tender (bid) as is envisaged in paragraph 5 above and to ensure that the services can continue without interruption as envisaged in section 42(1) of the National Land Transport Act 2009 the Applicants are authorised to provide public transport services on the routes which they are currently operating within the province of KwaZulu-Natal for a period of one year from the date of granting of this order.

7. In the event that the tender (bid) is not awarded during the period of suspension of the declaration of invalidity as envisaged in paragraph 3 read with paragraph 4 above the Respondents are authorised to approach this honourable court for authorisation of a further extension of the addendums envisaged in paragraph 3 above on the same papers supplemented if necessary regarding the provision of public transport services on the affected routes.

8. Directing that the order granted herein must be served on the Minister of Transport, the Auditor General, KwaZulu-Natal Provincial Treasury and eThekwini Municipality withing 5 days of the granting thereof.

9. The Respondent is ordered to pay the costs of this application only in the event that none of the Applicants oppose the counter application."

[7] It is submitted by Applicants that the matter principally turns on whether the agreements are lawful and binding and whether they fall to be struck down for want of compliance with the procurement legislation in the form of section 217 of the Constitution section 38(1)(a)(iii) of the PFMA and various treasury legislations and

notes. The fundamental legal question must be seen in the context of legislation which has been enacted over time specifically to regulate the transport sector in South Africa.

[8] It is submitted by First Respondent that the extensions of the older contracts is a contravention of section 217 of the Constitution. The negotiated contracts concluded in terms of section 41 of the National Land Transport Act (NLTA) are also in contravention of the prescribed procurement legislative framework. The provisions of the PFMA must take precedence over the provisions of the NLTA. It was submitted that only Fifth Respondent in the implementation of the IPTN may negotiate in terms of section 41. That the illegality cannot be condoned by granted the declaratory orders sought by Applicants.

[9] It is submitted by Fourth Respondent that the agreements in respect of which the application was brought have lapsed and terminated. The court cannot grant a declarator and directions which are incorrect in law and illegal. Further that the issue is that section 217 of the Constitution requires a procurement process to be undertaken for Government contracts for goods and services. That the auditor General has concluded that the expenditure is irregular and that there is no reference to a procurement process. The agreements concluded with First Respondent and any extensions contemplated would be without any tender process. It is therefore submitted on behalf of Fourth Respondent that the applications must be dismissed as such orders cannot be granted.

[10] The issues that therefore have to be determined is whether the agreements annexure "D1 to D14 and D15A" are valid and do not contravene section 41 and 46 of the NLTA or the Constitution or whether the agreements ought to be struck down as invalid for want of compliance with the procurement legislation and particular section 217(1) of the Constitution and section 38(1)(iii) of the PMFA and various transport regulations.

[11] Applicants contend that the provisions of section 41 and 46 of the NLTA provides for a deviation from the usual procurement of services through a tender process and that the negotiated contract model in terms of the NLTA does not offend the provisions of section 217(1) of the Constitution, section 38(1)(iii) of the PMFA and the various treasury regulations and notes.

[12] Fourth Respondent submits that section 217 of the Constitution does not allow the procurement process that was undertaken prior to contracting with Applicants and that the relief can therefore not be granted. Also that there has been non joinder of National Treasury and that no order can be granted in the absence of the National Treasury.

[13] Various contracts for transportation were granted to various of Applicants in respect of various routes on 11 January 2011.

[14] Annexure "D1" is in respect of Impendle Bus Services (Pty) Ltd, Third Applicant. In the addendum it was recorded that the contract which was entered into on 1 October 2000 had terminated by effluxion of time. Services were thereafter rendered, and that there were negotiations. It then sets out that from the date of signature of the addendum the contract for services were extended for a period of one year save that if the operator and KZNBOT enter into a new negotiated contract with the transport services falling under the tender contract prior to the operation of the interim period then the interim period shall terminate on such earlier date. This was signed on 19 June 2017 and accordingly in terms of clause 2.1 it would have been extended to June 2018. The other addendums annexure "D2 to D15" are all similar

[15] From a perusal of the agreements annexures "D1 to D14 and D15A" it appears that they were all extended for a year during June 2017 after all the original agreements had come to an end. On 29 June 2020 when this application was brought an order was granted by this court, that the matter be adjourned to 16 September 2020

and that the interim extensions granted by Respondents for a period of three months was accepted by Applicants without prejudice to any of their rights and without concession that at least a year extension is required and without constituting a novation of any of Applicants rights as contained in the agreements between Applicants and Respondents.

[16] On 16 September 2020 a rule *nisi* was granted returnable on 12 February 2021 that Respondents extend the contract periods in respect of annexures "D1 to D14 and D15A" until a negotiated contract be concluded with each of First to Ninth Applicants and Fourteenth Applicant and until the implementation of the IPTF by the contracting authority is finalised in respect of each of Tenth to Thirteenth and Fifteenth Applicants. Further that Respondents extend the interim period in respect of the agreements for a period of at least one year on each occasion which extensions would terminate when there is a conclusion of a new negotiated contract with the operator in respect of each of First to Ninth Applicants and Fourteenth Applicant and the implementation of the IPTN by the contracting authority in respect of each of Tenth to Thirteenth and Fifteenth and Sixteenth Applicants. The matter was at a later stage adjourned and the rule extended to 27 August 2021. Relief was granted to file supplementary affidavits and Respondents were directed to provide further interim extensions until judgment is delivered in the application.

[17] On 27 August 2021 all the applications and interdicts were adjourned to 11 March 2022. Provision was made for the filing of further affidavits and Respondents were directed to provide further interim extension until the final determination of the main and counter applications of all the agreements that have been referred to. In terms of this order the Acting Head of Transport KwaZulu-Natal issued a letter extending the contracts in terms of the order from 1 October 2025 to 31 March 2026. On 18 February 2025 an order was granted that the matter be adjourned sine die and all previous orders and *rule nisi* issued be extended until finally disposed of and costs reserved.

[18] It is advisable at this stage to set out the specific sections which are referred to:

[19] Section 217 of the Constitution refers to procurement and reads as follows:

> "1. When 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.
>
> 2. Subsection (1) does not prevent the organ of state or institutions referred to in that subsection from implementing a procurement policy providing for:
>
> (a) categories of preference in the allocations of contracts and
>
> (b) the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.
>
> 3. National legislation must prescribe a framework within which the policy referred to in subsection 2 must be implemented."

[20] The Preferential Procurement Policy Framework Act 5 of 2000 (PFMA) which commenced on 3 February 2000 in its heading states the following:

> "To give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution and to provide for matters connected therewith."

[21] The National Land Transportation Act 5 of 2009 (NLTA) in its heading states:

> "To provide further the process of transformation and restructuring the National Land Transport System initiated by the National Land Transportation Transition Act 2000 (Act 22 of 2000) and to provide for matters connected therewith.

[22] Section 41 of the NLTA is as follows:

"Negotiated Contracts

1. Contracting authorities may enter into negotiated contracts with operators in the areas once only, with the view to:
   (a) Integrating services forming part of integrated public transport networks in terms of the integrated transport plans;
   (b) Promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination or;
   (c) Facilitating the restructuring of a parastatal of municipal transport operator to discourage monopolies.
2. The negotiations envisaged by subsections (1) and (2) must where appropriate include operators with the arear subject to interim contracts, subsidised service contracts, commercial service contract, existing negotiated contracts and operators of unscheduled services and non contracted services.
3. A negotiated contract contemplated in subsection (1) or (2) shall be for a period of not longer than twelve years.
4. The contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.
5. Contracting authorities must take appropriate steps on a timeous basis before expiry of such negotiated contracts to ensure that the services are put out to tender in terms of section 42 in such a way as to ensure unbroken service delivery passengers."

[23] Section 46 of the NLTA reads as follows:

"Existing Contracting Arrangements

1. Where there is an existing interim contract, current tendered contract or negotiated contract as defined in the Transition Act in the area of the relevant contracting authority that authority may:
   (a) Allow the contract to run its course or;

(b) Negotiate with the operator to amend the contract to provide the inclusion of the operator in an integrated public transport network or;

(c) Make a reasonable offer to the operator for alternative services or of a monitory settlement which offer must bear relation to the value of the unexpired portion of the contract if any.

2. In the parties cannot agree on amendment of the contract or on inclusion of the operator in such a network, or the operator fails or refuses to accept such an offer, the matter must be referred to mediation or arbitration in the prescribed manner to resolve the issue.
3. The Minister may make regulations providing for the transition of existing contracting arrangements and the transfer of the contracting function in terms of this section or section 41, including the transfer or amendment of existing permits or operating licences to give effect to the provisions of the case of an assignment under section 11(2).
4. In applying this section, the contracting authority must give due regard to the rights of the worker employed by the operators in terms of the contract contemplated in subsection (1)."

[24] Section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 (PFMA) stipulates:

"General Responsibilities of Accounting Officers

(1) The accounting officer for a department, trading entity or constitutional institution:

(a) Must ensure that that department, trading entity or constitutional institution has and maintains;

(i).....

(ii)....

(iii) an appropriate procurement and provisioning system which is fair equitable, transparent, competitive and cost effective."

[25] Treasury regulations in terms of the PFMA by the National Treasury and which was published in the Government Gazette provides as follows in paragraphs 16.A.6.4:

> "If in a specific case it is impractical to invite competitive bids, the account officer or accounting authority may procure the required goods or services by other means, provided that deviations from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."

[26] It was submitted on behalf of Applicants that section 41 and 46 of the NLTA is a deviation from the general government norm that procurement is put out to tender. This results from the wording of section 41 which deals with negotiated contracts in certain circumstances and for a specified period of time. Also section 46 deals with existing contracting arrangements and negotiations that can take place and the conditions under which this may be done. It is further contended that regulation 16A 6.4 of the PFMA also allows for the deviation by the accounting officer as it allows specific cases when it is impactable to invite competitive bids. The accounting authority can authorise that goods be aquired by means of a deviation from inviting competitive bids and that it must be recorded and approved by the accounting officer or authority.

[27] It was submitted that this does not offend section 217 of the Constitution and accordingly that sections 41 and 46 of the NLTA fall within the ambit of section 217(2) and 217(3) of the Constitution. It was further submitted that the PFMA regulates financial management and is of general application and that the NLTA is industry specific. There is therefore no inconsistency between the NLTA and the PFMA as they deal with different issues. It is impractical to call for tenders where previously disadvantaged persons cannot compete for lack of capabilities and experience.

[28] The Auditor General's argument is flawed as the expenditure by First Respondent's accounting authority relating to implementation of a negotiated contract is authorised. Treasury instruction 3 of 2016/2017 issued pursuant to the PFMA was never published in the Government Gazette as required and therefore it is of no force

and effect. It was further submitted that instruction 3 of 2021/2022 in terms of the PFMA, which came into effect on 1 April 2022, in paragraph 4.1 deals with deviations from the normal bidding process where it states "in a specific case it is impracticable to invite competitive bids, VAO/OO may precure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the AO/AA." It was submitted that note 3 is in conflict with regulation 16A6.4 and section 41 and 46 of the NLTA as it does not require that it is only in an emergency situation.

[29] It is common cause that the IPTN has not been finalised nor that negotiated contracts had been finalised. The situation was different in respect of the agreements reached with the eThekwini Municipality. Operating outside eThekwini is Applicants 1, 2, 3, 4, 5, 6, 7, 8, 9 and 14. It was submitted that the counter application did not take this distinction into account of the IPTN operators and the non IPTN operators as set out above. Applicants have taken part in the transformation of subsidised transport programs and persisted in transformation. Despite supporting transformation they have not received finalised negotiated contracts.

[30] It was further submitted that First Respondent should have joined the municipalities in their counter application.

[31] Applicants submit that section 217(2) of the Constitution allows for the implementation of preferential procurement policies. It is an instrument for transformation but within the ambit of section 217(3) which requires National Legislation to prescribe a framework. It is further submitted that prior to the conclusion of the impugned agreements the KZN Provincial Government and First Respondent had already implemented a provincial procurement policy based on the NLTA and specifically section 41 and 46 thereof which allows for negotiated contract models to protect and advance the interest of people disadvantaged by unfair discrimination within the transport industry.

[32] It was submitted that there was no inconsistency between the NLTA and the PMFA as the PMFA does not regulate subsidised transport services. In this regard I was referred to the decision of Unico Ltd v Minister of Trade and Industry and other 1996 (6) BCLR798 (CC). In this matter it was held that before a provision in legislation can rank as dominant over a subordinate or be subordinate to another there must be a conflict or inconsistency or an incompatibility between them.

[38] Section 41 Negotiated Contract Model introduced by the NLTA provides an alternative method for procurement and in this regard I was referred to the decision of Golden Arrow Bus Service v City of Cape Town 418/13 (2013) ZASCA 152 at paragraph 11. After stating that the contract negotiated may only be once and for a maximum period of twelve years it sets out that it allows the deviation from the government norm in respect of private services which is that procurement is put out to tender. In effect, it facilitates the quick implementation of the transport system in a municipality. It is further submitted that in terms of Regulation 16A 6.4 of the Treasury Legislations under the PFMA that where it is impracticable to invite competitive bids the accounting officer of an institution may procure the requirement goods by other means. There are certain conditions under which this may be done.

[34] The Auditor General found that the old order contracts which had expired and which had been extended by the accounting officer also fell fowl of the treasury instruction in note 3 of 2016/2017 and should have been extended by the Provincial Treasury from 2016 to 2017. The Provincial Treasury condoned the conclusion of the negotiated bus subsidy contracts. They were concluded in terms of section 41. I was also referred to the Minmec Resolutions of the meeting held on 20 April 2023 where it was resolved that the extension of subsidised bus contracts for a period not exceeding three years from 1 April 2023 to allow for transition into new tendered and negotiated contracts which ever is applicable.

[35] It was submitted on behalf of First Respondent that Applicants misconceive the effect of the addendums annexures "D1 to D15A" as they are not negotiated contracts.

It was submitted that as appears from annexure "D1" at page 56 in terms of clause 2.1 thereof that it was to continue rendering service for a period of one year unless a new negotiated contract was entered into before the expiry date. In clause 3.1 it sets out that the interim period shall terminate in accordance with clause 2.1 save that the interim period shall be extended in the event that the negotiated contract with the operator has not been finalised.

[36] It is submitted that this is an indeterminate period and that tendered contracts have a fixed live span and therefore it cannot be reconciled with paragraph 3.1 of a tendered contract. I was referred to a document entitled "Interim Contract No. IC35/97 Interim Contract for the Provision of Services by South Coast Bus Services (Pty) Ltd". It was submitted the others had a common date and period. In clause 6 it sets out that the operator shall commence the service at a specified date and that it will run for a specified period as in the special conditions. In the special conditions referred to at page 823 in paragraph 3 the commencement date is 1 April 1997 and the duration of the contract was 154 weeks subject to clause 6 of the general conditions. It was submitted that the agreement was accordingly until March 1999.

[37] At page 888 there are tender rules, the provisions of public passenger transport services between certain areas in Vryheid under tender number ZNT1125/98T. In paragraph 8 at page 908 it sets out that it shall commence at a date as set out in clause 3 of the Special Conditions and run for the period as set out in clause 4 of the Special Conditions. It sets out in 8.3 that the representative, may on instruction of the employee, instruct the operator. At page 932 there are special conditions of contract and what appears therefrom in paragraphs 3 and 4 is that there is a commencement date and a duration period. It is therefore submitted that a contract cannot be never ending as that would be a violation of section 217 of the Constitution. It was submitted that in terms of the Preferential Procurement Policy Framework Act all the contracts are invalid because they are open ended.

[38] It was submitted that the Auditor General was of the view that the provisions of the PFMA superseded those of the NLTA if one has regard to the provisions of section 3(1)(a)(iii) of the PFMA which expressly provides for the PFMA to prevail in the event of any inconsistency between the PFMA and other legislation.

[39] It was submitted on behalf of First Respondent that the Golden Arrow decision was not what was submitted and was not authority for the proposition. Also the application was not premised on the Minmec minutes and that the addendums were based on subsidised services. It was submitted that the contracts were concluded, in contravention of the relevant procurement legislative framework. The addendums annexure "D1 to D15A" were unlawful and the contracts had to go to tender. It was submitted that the industry was dominated by a few families, that it was a monopoly and that they whished this to continue. It was submitted that an order should be granted in terms of the counter application.

[40] On behalf of Fourth Respondent it was submitted that as set out in the affidavit of one Coetzee, the National Public Treasury Regulations under GNR25 in the Government Gazette 273388 of 15 March 2005 applies. Regulation 16A.3 deals with the development and implementation of a supply chain management system by accounting officers for goods and services. It refers to National Treasury Instructions SCM note 3 of 2016/2017 which has been contended has not been promulgated as it was not published in the Government Gazette and this has not been disputed. It was further contended that irrespective of the practice note 3 of 2017/2017 the Provincial Treasury would have to enforce the provisions of the PFMA. It was submitted that the contracts are irregular as they are contrary to the provisions of section 217 of the Constitution and section 38(1) of the PFMA. They can therefore not be extended.

[41] In the event that the contracts are seen as emergency procurement the procurement is a deviation from the norm and the approval from the relevant treasury must be obtained. This has not been given but was declined. It was submitted that the contracts sought to be extended are irregular, that they did not follow the

procurement prescripts of the Constitution and the PFMA. The failure to do so renders them irregular and invalid. They have also terminated by effluxion of time. It was submitted that in terms of section 217 of the Constitution it must be competitive.

[42] Applicants seek an order in the form of a declarator that sections 41 and 46 of the National Land Transport Act of 209 permits provincial departments of transport to conclude negotiated contracts of bus operators without going to tender. A reading of sections 41 and 46 of the NLTA indicates that indeed this can be done but in certain limited circumstances. Therefore it appears to me on a reading of the two sections that one cannot grant a blanket interdict that this can be done. It is only in the specific instances as set out in sections 41 and 46 that it can be done. Also in terms of the National Treasury Regulations published in the Government Gazette paragraph 16A.6.4 allows the accounting authority to procure services provided the deviation from inviting competitive bids must be recorded and approved. Further in section 41(4) it specifically states that the contracts contemplated in section 41 shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.

[43] There was much debate in the papers and in argument whether the PFMA takes precedence over the NLTA as it is of general application and the NLTA is industry specific. In my view the NLTA takes precedence as it deals specifically with the industry as the PMFA deals in general with public finance. In my view a section in an Act cannot override the general rule of interpretation. In my view there is no inconsistency between the NLTA and PMFA as they deal with different issues. However due to the conclusion I reach this does not have to be dealt with any further.

[44] It was submitted on behalf o First Respondent that the relief in the notice of motion was irregular as it was open ended. It is indeed not for a specific period but it is not open ended as it is until the IPTN is instituted. There is therefore a cut off although perhaps not ideal. I therefore do not agree that it is open ended. This also is not necessary to consider further due to the conclusion I reach.

[45] In terms of section 41(3) of the NLTA the contract contemplated shall be for a period of not longer than twelve years. A perusal of annexures "A1 to A15" indicate that indeed the negotiated contracts ran for a period of twelve years. It is common cause, they have lapsed by effluxion of time. Thereafter there were the addendums to the contracts annexures "A1 to A15". The addendums do not appear to be negotiated contracts but extensions of the contracts which have lapsed by effluxion of time before the addendums were entered into. It was merely an extension of one year to maintain the bus services in all the area. It is apparent from a reading of all the papers that there has not been any new negotiated contracts between Applicants and First Respondent. It was only the addendums which extended the service for a year and at a later stage court orders extending them for a year until the court order, which I refer to above, which extended the services to March 2026.

[46] Section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 (PFMA) stipulates in section (1) that the accounting officer must maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective. Section 16A.6.4 of the Treasury Regulations in terms of the PFMA allows for a deviation when it is approved by the accounting officer or accounting authority. It is common cause here that this was not done.

[47] The extension of the contracts for a year at a time for the same service provider cannot be competitive or fair as there is no input from anyone else besides Applicants and First Respondent and Treasury. In term of section 217(1) of the Constitution when an organ of State in the National Provincial or Local Sphere of Government or any other institution contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

[48] It was contended on behalf of Applicants that subparagraphs 2 and 3 of section 217 of the Constitution allows for the relief which they seek in the notice of motion. In terms of subsection (2) an organ of State can implement a procurement policy

providing for categories of preference, the allocations of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. On an interpretation of this subsection it would appear to me that subsection (2)(b) specifically states the advancement of persons or categories of persons disadvantaged by unfair discrimination. If other operators are excluded it does not appear that this requirement is fulfilled. The contracts had run for a period of years and have also been extended on a yearly basis for a number of years thereafter.

[49] Subparagraph (3) of section 217 of the Constitution sets out that National Legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. In my view a reading of the PFMA and section 41 and 46 of the NLTA together with the Regulations indicate that this has been done in that it prescribes the circumstances under which this can be done.

[50] If the contracts are to be extended indefinitely then this would be prejudicial to other operators as they will not be given an opportunity to tender or to partake in the process. There has been mention in the papers that Applicants have given up certain routes and have also assisted by giving certain percentages of their routes to new operators. This however does not comply with section 217.

[51] In my view the fact that there may not be any other operators who have the necessary infrastructure to conduct the transport business is not an exclusion for not going to tender. In the counter application it provides for a period of one year to take account thereof. In the event that there are no bidders if it is put out to tender who qualify for the contracts which is set out to tender then indeed it may be appropriate to apply the provisions of section 41 and 46 in those circumstances as exceptional to allow for deviation.

[52] It would accordingly on a reading of section 217 of the Constitution appear to me that the addendums are contrary to the provisions of section 217 of the Constitution and section 38(1) of the PMFA. It is not an emergency procurement and a deviation from the norm and the approval of Treasury must be obtained. This was declined. As already stated they were terminated by effluxion of time and the addendums are not contracts but merely extensions and in my view on a reading of section 217 of the Constitution and applying the principles of interpretation section 217 of the Constitution clearly indicates that it must be competitive and fair. In this case if the contracts are merely extended it cannot be competitive nor fair. It excludes operators who are unknown at this stage who may qualify and want to take part in any tender and are in a position to do so.

[53] The orders sought in the counter application in paragraph 4 of the notice of motion of the counter application allows for a period of one year for the cancellation of the existing contracts pending the tender procedure. Also in paragraph 6 it allows for Applicants to continue granting the services for the period of one year from the granting of this order. It also provides for the position where the tender is not awarded during that period. It therefore provides that the services provided to the public does not immediately come to an end.

[54] It allows for a competitive bidding process. This is open to any operator who is in a position to qualify for the tender and in a position to provide the necessary services. This in my view is in line with the provisions of the Constitution and will prevent a mere continuation of the present situation which has just been an extension every year and excludes other operators from these contracts.

[55] The main application must therefore fail and an order be granted in terms of the notice of motion of the counter application. The matter has been dealt with on various occasions and various costs orders have been made. I was only addressed by Applicants in respect of a cost order for Mr. Moodley who appeared at the start of the matter. There was no opposition thereto nor was there any further argument about

the costs that may have been reserved in this matter. First Respondent only sought a cost order in the event that Applicants opposed the counter application which they have done. This to be the costs of 3 counsel. Fourth Respondent was joined as a party to these proceedings and is accordingly entitled to oppose the said application. Due to the order in this matter the costs of Moodley is not an issue.

Order:

1. The rule *nisi* granted on 16 September 2020 is discharged.
2. The application by Applicants is dismissed with costs.
   - 2.1 Such costs to include the costs of 3 counsel for First Respondent on Scale C.
   - 2.2 The costs of Fourth Respondent on Scale C.
3. An order is granted in terms of the notice of motion of the counter application by First Respondent as set out in paragraph 6 of this judgment (pages 1154 of the papers) together with the costs of 3 counsel on Scale C.

[redacted]

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON:	10 OCTOBER 2025
JUDGMENT HANDED DOWN ON:	19 MAY 2026

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