REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO 2010/34662

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

8/8/12
DATE

SIGNATURE

In the matter between

COUNTRY CLOUD TRADING CC **PLAINTIFF**

and

MEC, DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT **DEFENDANT**

Neutral citation: *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2012 SA (GSJ)

Coram: SATCHWELL J

Heard: 02–13 March 2012

Delivered: 08 August 2012

Summary: Provincial Department concluding contract without public tender; invalidity discussed; distinguished from *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

JUDGMENT

SATCHWELL J:

INTRODUCTION

[1] Plaintiff ('Country Cloud') claims the sum of twenty million rand (R 20 000 000) from the defendant, formerly known as the Gauteng Department of Transport, Roads and Public Works, (the 'Department'). It is claimed that the Department wrongfully cancelled an agreement with a third party, Ilima Projects (Pty) Ltd ('Ilima') in circumstances where the Department owed a duty of care to Country Cloud not to cancel such agreement, alternately the Department negligently interfered in the contractual right of Country Cloud to receive payment from the third party.

[2] The background to the dispute is the fate of three agreements. The first is the 'completion contract' between the Department and Ilima for the completion of the construction of a hospital in Jabulani, Soweto. The second is the 'loan agreement' between Country Cloud and Ilima providing funds to enable Ilima to furnish the requisite performance bond to the Department as a guarantee against default in the construction of the hospital. The third is the 'repayment agreement' between the Department, represented by its managing agent, Tau Pride/Motheko Joint Venture ('Tau Pride'), and Country Cloud providing for repayment of the loan to Country Cloud.

[3] The completion contract was cancelled by the Department on the grounds that Ilima fraudulently misrepresented that the tax certificate presented by Ilima was valid. It is this cancellation which gives rise to Country Cloud's claims against the Department.

[4] In terms of a reconstituted pre-trial minute of 9th February 2012, a number of issues were agreed upon by the parties for determination by this court. At trial and in argument the parties focussed on the validity of the Ilima tax certificate. I appreciate that this was probably done

because that was the reason officially given by the Department for termination of the completion contract and that was the nub of the defence as originally pleaded by the Department.

[5] However, I prefer to set these issues out in the order in which I believe they ought to be determined: Firstly, whether the contract was awarded to Ilima in compliance with the procurement regulations and policies of the defendant's department; was advertised and whether other companies were invited to bid for the contract; was evaluated and adjudicated by the appropriate internal structures of the Department; and whether, if any of the above factors relating to the contract were not satisfied, whether this had any effect on the plaintiff's entitlement to payment from the defendant as claimed in the particulars of claim. Secondly, whether the tax certificate presented by Ilima was valid. Third, whether the defendant had a legal duty towards the plaintiff as alleged in the particulars of claim. Fourth, whether the sum of R12 million was paid by the plaintiff.

[6] I had expected that in this judgment I would have to consider the circumstances of the award by the Department of the completion contract to Ilima, the terms of the completion contract between the Department and Ilima, the reasons given for cancellation by the Department, whether the loan was paid over by Country Cloud and the terms of the repayment agreement. However, by virtue of the view I take of the first issue to be determined – the compliance issue – I do not deal with all the other issues.

[7] The evidence of Dr Lupepe (CEO of Ilima), Attorney Brian Webber (Country Cloud's attorney), Mr Thulare (Chief Director: Legal and Contract Management during 2008 and during the relevant time a member of the Departmental Acquisition Council) and Mr Broughton (senior Specialist with SARS) was heard in the course of the trial.

THE COMPLETION CONTRACT

Background

[8] During 2006 the Department called for tenders for the building of a hospital in Jabulani and required the inclusion of a number of small and not-so-small black empowerment

construction companies to participate in a joint venture and then awarded the contract to this joint venture.

[9] Numerous difficulties arose as regards the joint venture and its constituent companies as well as cash flow difficulties on the part of the Department. By May 2008, at which time the hospital project should have been completed, the works were only very partially commenced, the joint venture had collapsed and Ilima was the only contractor remaining on site.

JBCC and annexures

[10] Discussions took place between Ilima and the Department. It was agreed that Ilima would continue with the project – hence 'completion contract' – with fees to cover the monies agreed still owed by the Department to Ilima in respect of the earlier contract.

[11] On 10th July 2008 the Department informed Ilima in writing that the 'Completion Contract' for the hospital had been awarded to Ilima subject to the signing of a contract.

[12] A letter was prepared from the Department to Tau Pride Moteko dated 14th July 2008 in which the Department appointed Tau Pride 'as management agent for the management of the above-mentioned project and the management of the services rendered by the sole contractor for the project, Ilima Projects (Pty) Ltd, for and on behalf of the department on the terms and conditions set out herein'. This letter was signed by neither the Department nor Tau Pride.

[13] A series of documents were prepared for signature in August 2008.

[14] The JBCC contract was the actual 'completion contract' concluded on 4th August 2008 between the Department as employer and Ilima as contractor which provided for Tsiya Developments (Pty) Ltd as 'principal agent' and Tau Pride Moteko as 'supervisor'. Annexure F to the JBCC contract was an 'Engineering and Construction Contract' between the Gauteng Provincial Government and Ilima Projects (Pty) Ltd which recorded that 'in May 2008 the

DPTRW terminated the JV contract', that Ilima was now the only contractor on site and the new contract with Ilima projects 'will be co-administered by Tau Pride/Moteko'.

[15] Annexed thereto is a document entitled 'Roles and Responsibilities on the Revised Appointment between Ilima Pty Ltd and Tau Pride Moteko JV' which records the difficulties with regards the principal JBCC contract for the construction of the hospital and the decision of the Department 'not to terminate the contract with Ilima Projects, but rather to assist the contractor to complete the project'. Accordingly, the Department had 'decided to appoint Ilima Projects with the assistance of Tau Pride/Moteko JV to assist with the execution of the project'.

NON-COMPLIANCE WITH DEPARTMENTAL PROCUREMENT REGULATIONS AND POLICIES

[16] The Department has pleaded that the contract awarded to Ilima was 'contrary to the procurement regulations and policies of the department, in that it was not advertised and other companies were not invited to bid for the tender and it was not evaluated and adjudicated by the appropriate internal structures of the department'.[1]

Non Compliance

[17] Section 217(1) of the Constitution requires an organ of state to contract for goods or services '...in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.[2] These provisions are underpinned by various legislation, regulations and policies including the Public Service Management Act, National Treasury Practice Notes, the Preferential Procurement Policy Framework Act and the Preferential Procurement Regulations. These procurement regulations and policies have been viewed by our courts as peremptory.[3] Failure to

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[1] Paragraph 8.14 of defendant's plea.

[2] The rationale for this sub-section has been extensively dealt with in a number of judgments including *Minister of Social Development & Others v Phoenix Cash & Carry / Pmb CC* 2007 (9) BCRL 982 (SCA) at 983G–984A–C and *TEB Properties CC v MEC, Department of Health* 2012 (1) ALL SA 479.

[3] See *Phoenix Cash & Carry supra*; *Chief Executive Officer, SA Social Security Agency NO & Others v Cash Paymaster Services (Pty) Ltd* 2011 (3) ALL SA 23 (SCA); *Eastern Cape Provincial Government & Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA); *TEB Properties supra.*

comply with such provisions has been found to render the administrative decision unlawful and invalid.[4]

[18] Initially the Department founded its defence to this action by reference only to the claimed invalidity of the tax certificate presented by Ilima.[5] Shortly before trial, the Department amended its plea to aver that the completion contract was contrary to the Department's regulations and policies.[6] Once all the evidence had been heard, Country Cloud's argument completed and partway through the Department's argument, application was then made for an amendment of the plea to include an averment to the effect that the award of the completion contract was 'contrary to procurement legal prescripts prescribed for an organ of state'. This application was refused for reasons given at the time.

[19] This background indicates that the alleged failure to comply with 'regulations and policies of the Department' was something of a last minute and moving feast – no reference was made in the pleadings to Statutes, Regulations and Policies applicable to the completion contract and in the evidence there was reference only to the Preferential Procurement Regulations dealing with tax certificates as also the Treasury Practice Note 6 of 2007 dealing with competitive bidding.[7]

[20] The difficulty which therefore arises is that this court has not been fully (or at all) informed of the 'statutory matrix'[8] applicable to the Department in connection with procurement in general and particularly in connection with construction contracts. I have no knowledge of the 'regulations and policies of the Department' as pleaded. Although from the evidence of the Compliance Manager, Mr Thulare, I do know that the Departmental Acquisition Council ('the DAC') required the completion contract to be placed out for competitive public tender.

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[4] See *Phoenix Cash & Carry supra, Cash Paymaster Services supra, Contractprops supra, TEB Properties supra* and *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA),
[5] See the defendant's plea dated 23rd February 2011.
[6] 9th February 2012.
[7] Exhibit C 411.
[8] See *TEB Properties supra* at paragraph 9.

[21] Although the Department may have failed in its pleadings and evidence to furnish citations for and the wording and details of its 'regulations and policies', both the Public Finance Management Act No 1 of 1999 ('PFMA') and the Treasury Regulations are applicable to the Department.[9]

[22] The PFMA, applicable to Provincial Departments, requires that the accounting officer must ensure that the department has and maintains 'an appropriate procurement and provisioning system which is fair, equitable , transparent, competitive and cost-effective'[10] (my underlining) and envisages that the National Treasury may make regulations concerning 'the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective'[11] (my underlining). Clearly competition is at the heart of the statutorily envisaged procurement systems of Provincial Departments.

[23] Treasury Regulations, published in terms of the PFMA,[12] envisage that the procurement of goods and services shall either be by way of quotation or through a bidding process. There may only be deviation from the bidding process where 'it is impractical to invite competitive bids'. In all other instances, there must be a supply chain management system as envisaged in the PFMA which establishes bid specification, evaluation and adjudication committees, the bidding and advertising procedures, documentation to be obtained and so on.[13]

[24] To my mind, the crux of the defence raised is that the completion contract 'was not advertised and other companies were not invited to bid for the tender and it was not evaluated and adjudicated by the appropriate internal structures of the department'. The defence is that

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[9] In *Cash Paymaster Services supra* the Supreme Court of Appeal, in considering the import of s 217(1) of the Constitution, said the following at paras 15 and 17: 'Section 217 (1) of the Constitution prescribes the manner in which organs of State should procure goods and services. In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation. The main object of the PFM Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies...The PMF Act, read with the Treasury Regulations, is such legislation.'

[10] Section 38(1)(iii).

[11] Section 76(4)(d).

[12] On 15th March 2005.

[13] Regulation 16A6.

procurement of a significant construction contract was not the subject of competition as required of municipal, provincial and national authorities engaged in procurement processes.

[25] I cannot ignore the many judgments, admittedly where the parties had properly pleaded and proven the applicable 'statutory matrix', where our courts have commented on the reasons for competitive tendering in the procurement process. For instance, in *Contractprops supra* it was said that competitive tendering seeks to 'eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts.'[14]

[26] Failure by the Department to identify and cite the prescribed 'regulations and policies' cannot be of moment when the Constitution, the PFMA and the Treasury Regulations are applicable. To my mind the issue has been sufficiently defined for this court.[15]

No Competitive Tender

[27] Mr Thulare, the Chief Director: Legal and Contract Management in 2008, and now the Director of Governance and in 2008 a member of a body within the Department's structures called the 'Departmental Acquisition Council' ('the DAC'), testified that there were a number of mandatory requirements for procurement including competitive bidding which involved a number of committees (competitive bid committee, bid specification committee, bid evaluation committee). All construction matters are required to be placed on open tender and thereafter sent to the DAC which would make a recommendation to the Departmental Accounting Officer. Thulare referred to Treasury Regulation 16A and stated that the Head of Department was required to ensure that a Bid Committee dealt with tenders or bids.

[28] Thulare's evidence was that the first construction contract between the Joint Venture (of which Ilima was a member) and the Department had been placed out to tender and subjected to

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[14] Para 8.
[15] See *Robinson v Randfontein Estates* 1925 AD.

the evaluation and approval process. However, the completion contract between the Department and Ilima had not been placed out to tender nor had the contract been referred to the DAC. The DAC knew of the difficulties with the first contract, including that the Joint Venture had not been a successful combination, and had determined that this construction project must 'go back to open tender'.

[29] That the DAC had recommended that the completion of the hospital project should be once again put out to a competitive bid process on tender appears to be confirmed by the email from the Head of Department, Mr Buthelezi, to a City Press journalist dated 15 August 2008 stating 'The DAC had taken a decision to re-tender this project. But for reasons already stated above, I decided to vary the DAC decision'.[16]

[30] It is common cause that the completion contract was not re-tendered.

Justification for Deviation from the DAC's instruction

[31] In his 15th August 2008 email, the Head of Department, Buthelezi, set out in some detail his reasons for not placing the completion contract out to a competitive tender process. Firstly, the Department had taken 'an aggressive drive to achieve the high BBBEE targets that we have set for ourselves. ...Ilima was the only black contractor in the whole country that was at level 8. ...So having applied my mind as the HOD, I decided to continue with the project with the remaining level 8 contract in order to achieve that desire to have black level 9 contractors.' Secondly, the project was to have been completed in May 2008 and '...going out on a new tender would have led to further delays in the project. Any delay in a project of this nature does give rise to additional costs to the state as a result of escalations'.

[32] Buthelezi also stated in this email that the PFMA does 'allow me in my capacity as the Accounting Officer of the department to amend and vary any decision taken by any of the employees and structures of the department. This decision was communicated through DAC to reconsider their decision based on the above facts' and he concluded his email by stating that 'it

[16] Email Exhibit B 175 and 176.

is my intention to disclose this decision (upon receiving the above mentioned investigation report) to the DAC, Provincial Treasury and the Office of the Auditor General.'

[33] This confirms the unchallenged evidence of Thulare that the DAC had determined that a competitive tender process should be recommenced, that the DAC had not authorized any deviation from that process and that the DAC had not approved or confirmed the completion contract between the Department and Ilima.

[34] It does not appear that Buthelezi acted alone in the reappointment of Ilima as the contractor in the completion project. A memorandum of June 2008[17] was addressed to the Head of Department requesting 'approval to revise the appointment of the existing contractor in line with the JBCC conditions of contract to ensure both service delivery and social responsibilities are achieved'. The memorandum dealt with the difficulties in the progress of the project[18] and the current status of the project.[19] It was suggested that the Department would like to 'continue the project with a revised Ilima Projects (Contractor)/Tau Pride Moteko (PMRG) JV'. This memorandum was recommended by the Director: Project Management, the Chief Director: Capital Works and approved by the Acting Deputy Director General Public Works on the 30th June 2008. The Head of Department, Buthelezi signed the memorandum on the same date.

[35] Treasury Regulation 16A6.4, issued in terms of section 76 of the PFMA, provides that where 'impractical to make competitive bids', the accounting officer or accounting authority may procure 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 accounting officer or accounting authority'.

[36] The evidence of Mr Thulare is that the DAC, to which Buthelezi clearly accepted he was accountable, did not approve the deviation from inviting competitive bids. The memorandum from employees to Buthelezi indicates a number of reasons for such deviation but not that these

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[17] Exhibit A61–68.
[18] Including 'change of site, unforeseen cost escalation, cash flow concerns and the disolvement of the JV partners'.
[19] '20.4% completed, letters of withdrawal received from three JV partners leaving only Ilima standing to complete the project'.

reasons (or any other) were recorded for the benefit of the DAC and presented to the DAC and approved by the DAC.

[37] Treasury Practice Note 6 of 2007 informs all Accounting Authorities that the provision allowing for deviation from competitive bids on the grounds of impracticality is intended 'for cases of emergency where immediate action is necessary'. Mr Thulare testified that the circumstances of the hospital project did not constitute 'an emergency'. In any event, it seems to me that it was for the DAC to decide whether or not there was an emergency and whether or not the DAC committees and procedures could be bypassed.

[38] When the Head of Department, such as Buthelezi, deems it 'impractical' to comply with the requirements of the bidding system, he is nonetheless still required to provide 'rational reasons for that decision'. See *Cash Paymaster Services supr*a and *TEB Properties CC supra.*

[39] There may well be many convincing reasons why it was in the best interests of all concerned that the completion contract should have been awarded to Ilima. Firstly: the Department had caused problems with the original contract – by insisting on identifying entities to constitute a joint venture when such entities did not apparently qualify for the tender and by running out of funds which delayed payment to the joint venture. Secondly, Ilima was already on site, was fully appraised of the requirements of the contract and the Department knew that Ilima was competent. Third, the Department owed monies to Ilima and the balance of such monies could be incorporated within the final project costs. Finally, there had been numerous delays with this hospital project and there was a pressing need for completion.

[40] However, these are reasons as they appear from the evidence available to me. They are not reasons provided by the Departmental Head at the time he deviated from the required tender processes, they were not advanced to the DAC and other authorities and neither did the DAC authorize departure from the required processes upon this basis.

The award of the completion contract was known to the DAC

[41] Country Cloud argued that the award of the completion contract to Ilima without tender was known to the DAC.

[42] Thulare confirmed that Mr G Martins was, at the time, a member of the DAC. It was then argued that Mr Martins was one of the persons who had approved the 30 June 2008 memorandum recommending that the completion contract be awarded to Ilima. It was further submitted that the DAC was therefore aware of the award of the completion contract.

[43] It should be noted that neither Buthelezi, Xiva, Pretorius or any other person who signed this memorandum gave evidence.[20] Where there is provision on the memorandum for signature by 'Mr G Martins, Deputy Director General Public Works', the memorandum shows a signature prefaced with 'pp' indicating that the person who signed was doing so on behalf of someone else. Next to the name of Martins, the name of 'Rac Davids' has been inserted in brackets in manuscript. Below the signature the word 'Acting' has been inserted in manuscript to indicate the signature purports to be that of or signed on behalf of the 'Acting Deputy Director General Public Works'. I cannot conclude from this document that Mr G Martins signed the memorandum.

[44] Even if Mr Martins had signed the memorandum, this would mean no more than that one member of the DAC was aware of and approved or recommended the award of the completion contract to Ilima without placing it out to competitive tender. That constitutes neither reconsideration nor a new decision by the DAC of its earlier determination that there should be a retendering process.

[45] There is no indication that the DAC changed its mind and determined that the contract could be awarded to Ilima or anyone else without competitive tender.

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[20] Thulare's evidence was that none of them were 'procurement people', and 'were not part of procurement in the Department'.

Invalidity of Administrative Action

[46] In several decisions it has been held that contracts concluded without complying with prescribed competitive processes are invalid. In *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA), in *Contractprops supra*, and in *Municipal Manager: Qaukeni supra*, contracts concluded in breach of provincial procurement processes were set aside. Such contracts were 'entirely subversive of a credible tender procedure' and would 'deprive the public of the benefit of the benefit of an open competitive process'.[21]

[47] One must have regard to the legislation and regulations involved as also the nature and functions of the administrative entity involved to determine whether or not the administrative entity is entitled, or perhaps even duty bound, to have its own irregular act set aside by a court.[22] Certainly, where the action concerns procurement of construction works to the tune of many millions of Rands and the irregularity emerges from non-compliance with legislation and regulations promulgated pursuant to Constitutional principles, it would seem beyond doubt that the administrative body would be entitled, at the very least, to have its own act set aside.

[48] Country Cloud has argued that the administrative act remains valid and enforceable and gives rise to lawful obligations until such time as it is set aside by a court.

[49] Of course, the Department has not taken any such steps. It neither sought review in terms of the Promotion of Administrative Justice Act nor did it approach the court for a declarator that the decision giving rise to the conclusion of the completion contract with Ilima was invalid and unenforceable and there is no counterclaim in this action for such a declarator or order that Buthelezi's award of the completion contract be set aside.

[50] However, in *Firechem supra*, the court concluded that 'the province was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery

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[21] *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 30.
[22] See *Municipal Manager: Qaukeni supra.*

contract and to resist attempts at enforcement'.[23] I do not think the Department in this action can be faulted for opposing this action on the basis pleaded and resisting reliance by a third party such as Country Cloud on the irregularly concluded completion contract.

[51] More recently, in *Municipal Manager: Qaukeni supra*, the Supreme Court of Appeal queried whether it was actually necessary to proceed by review when an administrative body seeks to 'avoid a contract it has concluded in respect of which no other party has an interest.'[24] No final conclusion was reached on this issue. The SCA held that if 'procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form.'[25]

[52] In the present case, all the Department has done is oppose the action by Country Cloud. It has not counter-claimed as was done in *TEB Properties supra*, *Contractprops supra* and *Municipal Manager: Qaukeni supra*.

[53] But, in opposing the Department has opposed the attempt by Country Cloud to rely upon the completion contract. The Department has 'raised the question of the legality of the contract fairly and squarely' in its plea.

[54] A significant difference between the cases to which I have referred and the current matter is that the other party to the litigation was the other contracting party to the invalid contract. In *Firechem supra* there was an invalid procurement agreement for the supply of all the Free State province's cleaning materials between the Premier of the Free State Provincial Government and Firechem Free State (Pty) Ltd, which Firechem, sought to enforce; in *Contractprops supra* there were two invalid lease agreements of premises entered into by the Department of Education as

[23] Para 36.
[24] Para 24.
[25] Para 26.

potential lessee and Contractprops 25 (Pty) Ltd as potential lessor which Contractprops sought to enforce; in *TEB Properties CC supra* there was an invalid lease agreement between the MEC of the Department of Health & Social Development, North-West as potential lessee and TEB Properties CC as potential lessor, which TEB sought to enforce; and in *Municipal Manager: Qaukeni supra*, there was a contract for the supply of refuse collection services between the Municipal Manager of the Qaukeni Local Municipality and FV General Trading CC, which the potential service provider, FV General Trading, sought to enforce.

[55] In the present case, Country Cloud is not a party to the completion contract. It is not mentioned in that contract. It relies upon other agreements which it claims are linked to and dependent upon the integrity of the completion contract. Neither of the contracting parties – the Department and Ilima – have sought to enforce or implement the completion contract. There are no claims (certainly not in this matter) between them.

[56] Accordingly, I have some difficulty in finding that the Department should itself have approached the courts for relief and have the completion contract set aside in circumstances where Ilima was not seeking to enforce the contract (which the Department believed it had lawfully cancelled – and on which I do not here comment). Once Country Cloud instituted proceedings, the Department belatedly pleaded the invalidity of the completion contract. Perhaps the Department ought to have sought to have Ilima (in liquidation) joined in these proceedings and then counterclaimed to have the completion contract set aside. But this would have been an exercise in which the liquidated Ilima apparently has or had no interest.

[57] The decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) is distinguishable in many respects from the present matter. Firstly, the Administrator had established a township without taking into account the presence of graves on the land involved. The Supreme Court of Appeal found that the Administrator's permission was unlawful and invalid at the outset because 'he either failed to take account of material information because it was not all before him or ... that he wrongly left it out of the reckoning when he should have taken it into account'.[26] The present case concerns the award of a contract

[26] Para 25.

and proposed expenditure of public monies without compliance with procurement principles, policies and legislation as set out in the Constitution, the PFMA and Treasury Regulations. Secondly, the Cape Metropolitan Council had simply disregarded the permission of the Administrator because it was believed to be invalid. In the present case Ilima, the other contracting party with the Department, has not sought to enforce the completion contract. The Department purported to cancel the contract for one reason (the invalid tax certificate) and Ilima did not and has not challenged the cancellation. In other words, both contracting parties have ignored the contract and the administrative decision which gave rise thereto.

[58] In *Oudekraal supra*, there was a detailed discussion of the apparent anomaly that an unlawful administrative act can produce legally effective consequences. The court stated the proper enquiry was not the initial validity of the administrative act but whether its factual or substantive validity was a necessary precondition for the validity of consequent acts. It was the answers to those questions which determined whether or not the subject was entitled to ignore the unlawful administrative act. The court discussed the individual's response to administrative acts which required action on the part of the individual or which were coercive of the individual. It was in that context that the court found that the subject could not ignore administrative acts and that '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'.[27]

[59] It is this discussion in *Oudekraal supra* which leads me to reject the reliance by Country Cloud on the *Oudekraal* decision as authority for the proposition that the administrative action of the completion contract remains valid until set aside by the court and that it cannot be a defence to the Department's cancellation of the completion contract that should not have come into existence in the first place.

[60] *Oudekraal supra* did not concern non-compliance with procurement policies, regulations and legislation and was not concerned with the validity or otherwise of a construction contract. This matter is not concerned with the individuals or bodies faced with criminal or civil sanctions

[27] Para 26.

for failing to comply with an administrative act. Where the Supreme Court of Appeal in *Oudekraal supra* referred to 'the principle of legality'[28] it was in the context of the English authority of *Boddington v British Transport Police* [1999] 2 AC 143 [HL] where the court commented on the possible need to 'preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely' and further 'it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures...'[29]

[61] Accordingly, I do not find that the Department can be held to the completion contract concluded without authority and therefore invalid merely because the Department did not *mero motu* apply to court for a declarator in respect of that contract, especially in circumstances where the other contracting party, Ilima, has sought no relief in terms thereof. The Department has opposed the claim of the third party, Country Cloud. To complain of the absence of a counterclaim would, to my mind, be putting 'form above substance'.

CONCLUSION

[62] By reason of the view I have taken of the validity of the completion contract, it is not necessary for me to make any finding in respect of the reasons given by the Department for cancellation of the completion contract, ie the validity of the tax certificate, whether the defendant had a legal duty towards the plaintiff as alleged in the particulars of claim or whether the sum of R12 million was paid by the plaintiff.

[63] The impact on Country Cloud is harsh. But as discussed in *Municipal Manager: Qaukeni supra* such harshness cannot validate the unlawful administrative act. Further, provision of

[28] Para 37.
[29] Para 32.

funding for performance guarantees is an assumption of risk in which Country Cloud chose to involve itself.[30]

[64] On the first day of the trial, 2nd March 2012, an application was made by the Department for a postponement on the grounds, *inter alia*, that certain documentation was still required to be obtained from SARS in respect of which an application had been launched which was now opposed by SARS and the postponement would be until such time as the application was determined and the documentation provided by SARS. This application was refused with costs. On Monday 5th March, I was informed that SARS was not opposing the interlocutory application. It turned out that a notice to abide had been served on 28th February (but that defendant's counsel considered this to be defective) and a second notice to abide had been furnished to counsel prior to bringing the application for postponement the previous Friday. I was then asked to hear the application which was done at the end of the court day and the order granted against SARS.

[65] I was concerned that the application for postponement had been made on Friday 2nd March notwithstanding that the notice to abide had been served by SARS on 28th February which meant that the defendant had known there was no intention to oppose by SARS from that date onwards. I was further concerned that postponement was sought on the grounds that this interlocutory application had to be placed on the opposed roll which was clearly incorrect. Finally, I could not understand why the defendant's attorneys and counsel had not brought the requisite application timeously (ie in 2011 or in 2012) when they must have known that the legislation precludes SARS from furnishing documentation without a court order.

[66] I expressed my concern to the defendant's counsel in somewhat incredulous terms. Subsequently I obtained a transcript of the proceedings on both days and found that though counsel had informed me on the Friday that the matter was on the opposed roll and he had also said 'subsequently there was a notice to abide filed by the plaintiff's attorney and also a notice...'

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[30] See unreported judgment of Satchwell J of *East London Own Haven t/a own Haven Housing Association v Coface South Africa Insurance Company Limited* (09/12141) [2011] ZAGPJHC 18 (22 March 2011) para 16.

APPEARANCES

PLAINTIFF:	LJ Morison SC (with X Stylianou)
	Instructed by Ramsay Webber, Johannesburg
DEFENDANT:	N Dukada SC (with B Shabalala)
	Instructed by the State Attorney, Johannesburg