REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 17534/11

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

11 Oktober 2012
DATE

SIGNATURE

In the matter between:

BUENA VISTA TRADING 15 (PTY) LIMITED	First Applicant
8 MILE INVESTMENTS 523 (PTY) LIMITED	Second Applicant
and	
GAUTENG DEPARTMENT OF ROADS AND TRANSPORT	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR ROADS AND TRANSPORT	Second Respondent
GAUTENG DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR INFRASTRUCTURE DEVELOPMENT IN GAUTENG	Fourth Respondent
GOVERNMENT OF THE PROVINCE OF GAUTENG	Fifth Respondent

J U D G M E N T

MBHA J:

INTRODUCTION

[1] The applicants seek an order against the respondents jointly and severally for payment of the sum of R85 132 673,82 plus interest thereon at a rate of 15,5% per annum *a tempore morae* until date of payment, plus costs of suit. This matter arises out of six (6) agreements concluded between the applicants and the respondents regarding the leasing of, *inter alia*, trucks, vehicles and construction material.

[2] On 7 July 2010 the respondents purported to cancel the agreements and refused to be bound thereby. In cancelling the agreements, the respondents alleged that the agreements were unlawful and unenforceable because the processes provided for in the Constitution of the Republic of South Africa Act No. 108 of 1996 (the Constitution), the legislation and regulations with regard to the procurement by the organ of State were not followed and adhered to. The applicants on the other hand, contend that they are entitled to be paid for the balance of the agreements and seek an order to this effect, requiring the respondents to pay them the amounts that were due for the balance of the agreements.

[3] The applicants' claim is based on clause 9 of each of four (4) specific agreements which provides that:

'In the event of the lessee cancelling the lease prior to the full term thereof, the lessee will be liable for the lease amounts due for the remaining period. This amount will become due and payable upon cancellation.'

[4] The respondents' defence rests largely on a single proposition namely, that the contracts concluded between the applicants and the respondents were entered into unlawfully and consequently they are neither binding nor enforceable. In the circumstances the applicants are not entitled to the payment of the amount claimed and referred to as *"due for the balance of the agreements".*

FACTUAL MATRIX AND BACKGROUND FACTS

[5] The common cause facts in relation to how the contracts concerned were concluded between the parties are as follows:

5.1 In mid-2007, a representative of the applicants approached the Impophoma Infrastructure Support Entity (Impophoma), a trading entity of the respondents (the Department) to enquire about how the applicants could become suppliers to the respondents. He was informed that Impophoma kept a supplier database and that the applicants had to be placed on the database in order to contract with Impophoma. He was given an advertisement from the Pretoria News and Government Gazette calling for applications for the supplier database in question.

5.2 The applicants duly applied and were placed on the supplier database.

5.3 Thereafter, representatives from Impophoma would request quotes from the applicants and other suppliers on its database. The applicants would provide such quotes.

5.4 Impophoma would then determine which supplier's quote to accept and place an order with the relevant party.

THE AGREEMENTS BETWEEN IMPOPHOMA AND FIRST APPLICANT (BUENA VISTA)

[6]

6.1 On 18 January 2008, 28 October 2008 and 15 December 2008 respectively, the first applicant represented by its Chief Executive Officer Mr L I Ratshefola (CEO), concluded three separate written agreements with Impophoma, which was represented by Mr F Mochothli in his capacity as the Chief Executive Officer. These agreements were known as a Service Level Agreement (SLA), a Vehicle Lease Agreement (VLA) and a Truck Lease Agreement (TLA).

6.2 In terms of the SLA, the primary function of the first applicant was to lease to the respondents at an agreed price, construction machinery such as motor graders, bulldozers, excavators and tipper trucks. The Department appointed the first applicant to lease construction machinery to the Department on the terms and conditions as set out in the SLA.

6.3 The agreement came into effect on 17 January 2008, which is the commencement date, and subsists until 17 January 2013 subject to an extension thereof at the Department's discretion.

6.4 The SLA provided that the Department was obliged to provide the first applicant with an order clearly specifying the construction machinery to be leased and the location of the construction site wherever the construction machines were to be delivered. The first applicant was obliged to lease construction machinery to the Department upon receipt of the aforesaid order. Furthermore, the first applicant was obliged to deliver the construction machinery at the required construction site within 14 (fourteen) days of receipt of such order.

[7] The leasing of the vehicles at issue in this application was regulated by two specific agreements namely, the vehicle lease agreement (VLA) and the truck lease agreement (TLA).

THE (BEUNA VISTA) VLA

7.1 In terms of this agreement, the first applicant agreed to lease to the Department ten (10) 2008 model Toyota 2.5 D vehicles at a cost of R15 955,00 per month per vehicle, excluding VAT.

7.2 The further material terms of this agreement were as follows:

7.2.1 F Mochothli was duly authorised by the lessee to sign this agreement on the lessee's behalf.

7.2.2 The lease of such vehicles would expire 60 months from the date of the agreement, 28 October 2008.

7.2.3 In the event of the lessee cancelling the lease prior to the full term thereof, the lessee would be liable for the lease amounts due for the remaining period, which amounts would become due and payable upon cancellation.

[8] On 20 and 21 November 2008 the first applicant supplied and delivered the ten vehicles contemplated in the agreement to the Department.

THE (BEUNA VISTA) TLA

[9] In terms of this agreement, the first applicant agreed to lease to the Department ten (10) 2009 6-cubic metre tipper trucks at a monthly rental of R55 850,00 per truck, excluding VAT.

[10] The further material terms of this agreement were:

10.1 F Mochothli was duly authorised by the lessee to sign this agreement on the lessee's behalf.

10.2 The lease would expire 60 months from the date of signature on 15 December 2008.

10.3 In the event of the lessee cancelling the lease prior to the full term thereof, the lessee would be liable for the lease amounts due for the remaining period, which amounts would become due and payable upon cancellation.

[11] During or about February 2009, the first applicant delivered the ten tipper trucks through its subcontractor JVDS to the Department, together with an operator who remained on site for the duration of the hire of each vehicle.

THE AGREEMENTS BETWEEN IMPOPHOMA AND THE SECOND APPLICANT (8 MILE)

[12] On 28 October 2008 the second applicant represented by G N Salejee, concluded three separate written agreements with the Department, represented by Mr F Mochothli. These agreements were also known as a Service Level Agreement (SLA), a Vehicle Lease Agreement (VLA) and a Truck Lease Agreement (TLA). The agreements expressly recorded that Mr Mochothli was duly authorised to conclude the agreements on the respondents' behalf.

[13] In terms of the SLA, the second applicant agreed and undertook to lease to the Department at an agreed price, construction machinery such as motor graders, bulldozers, excavators and tipper trucks on the terms and conditions set out in the SLA.

[14] The agreement came into effect on the commencement date namely 28 October 2008 and subsists until 30 October 2013, subject to an extension thereof at the Department's discretion.

[15] The Department was obliged to provide the second applicant with an order clearly specifying the construction machinery to be leased and the location of the construction site wherever the construction machines were to be delivered, and the second applicant was obliged to lease the said construction machinery to the Department upon receipt of the aforesaid order, and deliver the construction machinery at the required construction site within 14 days of receipt of such order.

[16] The leasing of the construction machinery at issue in this application was regulated by two specific agreements namely, the Vehicle Lease Agreement (VLA) and the Truck Lease Agreement (TLA).

[17] Pursuant to the VLA, the second applicant leased to the Department ten (10) 2008 model Toyota 2.5 D vehicles at the cost of R15 850,00 per month per vehicle, excluding VAT.

[18] The material terms of this agreement were:

18.1 The lease of such vehicles would expire 60 months from the date of the agreement, 28 October 2008.

18.2 In the event of the lessee cancelling the lease prior to the full term thereof, the lessee would be liable for the lease amounts due for the remaining period, which amounts would become due and payable upon cancellation.

[19] On 20, 24 and 28 November 2008, the second applicant supplied and delivered the ten (10) vehicles contemplated in the agreement to the Department.

[20] In terms of the TLA, the second applicant was obliged to lease to the Department ten (10) 2008 Toyota Hino 500 F15 trucks at a monthly rental of R55 250,00 per vehicle, excluding VAT.

[21] The material terms of this agreement were:

21.1 The lease would expire 60 months from the date of signature on 28 October 2008.

21.2 In the event of the lessee cancelling the lease prior to the full term thereof, the lessee would be liable for the lease amounts due for the

remaining period, which amount would become due and payable upon cancellation.

21.3 On 4 May 2009, 15 May 2009, 18 June 2009 and 27 July 2009, the second applicant delivered the ten (10) trucks contemplated in the agreement to the Department.

[22] It is common cause that both parties performed their obligations in terms of the agreements. However, by February 2010, each of the applicants had a series of invoices under the relevant agreements that had not been paid by the Department. As a result, the applicants launched application proceedings in this court compelling the Department to make payment on outstanding invoices. However, the matters were subsequently settled with the Department paying, on a '*without prejudice basis*', amounts of R10 028 747,36 and R10 230 216,34 to the first and second applicants respectively.

[23] On 7 July 2010, the Department addressed letters to each of the applicants regarding their ongoing litigation in which it alleged that because due procurement processes were not followed, the agreements were unlawful and unforceable. The Department tendered the return of the vehicles leased to the Department in terms of the agreements.

[24] On 13 July 2010, the applicants' attorneys replied stating that they were of the view that the agreements were binding and enforceable and that

they considered the respondents' conduct to amount to a repudiation of the agreements, which repudiation the applicants accepted.

[25] The applicants contend that in terms of the provisions of the agreements, the termination of the agreement by the Department entitles the applicants to claim all amounts due for the balance of the agreements. Alternatively, the Department's repudiation of the agreement entitles the applicants to claim all amounts due for the balance of the agreements.

SUMMARY OF RESPONDENTS' CASE

[26] The respondents' contend:

26.1 That the process by which the goods or services were procured was not in accordance with a system which is fair, equitable, transparent, competitive and cost-effective as required by section 217(1) of the Constitution.

26.2 That the use of quotes to procure the services from the applicants was in contravention of the Supply Chain Management: A Guide for Accounting Officers/Authorities (SCM Guide), in particular paragraph 4.6.4 of the SCM Guide which provides that the request for quotations exceeding R30 000,00 must comply with the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA).

26.3 That the quotes were also in violation of the requirements of the SCM Guide, which provides that if the product to be procured is above the

value of R100 000,00, the competitive bidding process should be followed.

26.4 Failure to comply with the SCM Guide is in violation of Regulation 16A6.1 of the Treasury Regulations issued on 15 March 2005 in terms of section 76(4)(c) of the Public Finance Management Act No. 1 of 1999 (PFMA) as amended, which provides that the procurement of goods and services either by way of quotation or through bidding must be within the threshold value determined by the National Treasury. With effect from 1 December 2007 the National Treasury prescribed in terms of Practice Note No. 8 of 2007/2008 that the accounting officers should invite competitive bids for all procurement above R500 000,00.

26.5 The process employed in procuring of goods and services from the applicants was in violation of Regulation 16A6.4 which provides that where deviation is necessary, the reasons for such deviation must be recorded and approved by the accounting officer/authority.

26.6 The purported contracts were entered into without the approval of the Trading Entity Acquisition Committee (TEAC), a committee established in terms of Regulation 16A.

26.7 The request to establish a database of providers to provide for construction material, plant and other goods as suppliers to Impophoma, was never approved by TEAC.

[27] It is trite that the *onus* to prove that the contracts were unlawful and unenforceable, rests on the respondents. Courts have repeatedly made clear that unless the illegality appears *ex facie* the transaction, which in my view is

manifestly not the case here, it is the party resisting the enforcement of the agreement that bears the *onus* of pleading that the agreement was unlawful and adducing all necessary evidence in this regard. See *Pratt v First Rand Bank Ltd* 2009 (2) SA 119 (SCA) at 123F-H; *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H.

[28] Section 217(1) of the Constitution provides that:

'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.'

[29] On the other hand section 217 (3) provides that national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. Subsection (2) makes provision for a possible deviation from subsection (1) in particular creating categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, the so called Black Economic Empowerment (BEE) which has now mutated into Broad Based Black Economic Empowerment (BBBEE).

[30] It is common cause that the national legislation envisaged by subsection 3 refers amongst others, to the (PFMA) and the Treasury Regulations enacted in terms of the PFMA. Importantly, paragraph 4.4 of Practice Note No SCM2 of 2005, issued by the Minister of Finance in terms of

section 76 of the PFMA provides that: 'Should it be impractical to invite competitive bids for specific procurement, eg. In urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services, in accordance with Treasury Regulation 16A.6.4 by other means, such as price quotations or negotiations. The reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer/authority or his/her delegate'.

[31] It is therefore clear beyond doubt that the Department can deviate from the strict procedure laid down in section 217 (1) provided that reasons therefore are recorded and approved by the accounting officer/authority or his/her delegate. The Supreme Court of Appeal has held that such a deviation is permissible provided there are rational reasons therefore. In *Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA), Tshiqi JA emphasized the importance of the formal requirement that the reasons for the deviation must be recorded. At paragraph 21 she said the following: 'The regulation permits an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions. As mentioned, it is not contended that a 'system' may not provide for such deviations. First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that

Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of reg 33.'

[32] The language used, both in section 217 (1) of the Constitution and regulations, in particular paragraph 4.4 of Practice Note SCM2 of 2005, issued in terms of the PFMA, above is peremptory. Clearly, non compliance with this compulsory approach will lead inexorably to insidious and rampant corruption which is eroding the fabric of our society.

[33] It is common cause the amounts involved in this case are far in excess of the threshold of R500 000,00 in terms of Practice Note 8 of 2007/2008 and that no written reasons in terms of the Treasury Regulation 16A6.4 for any deviation have been furnished in this case. Invariably, this leads to the unavoidable conclusion that there was no compliance with the peremptory provisions of the applicable legislation and regulations and that the contracts concerned were unlawfully entered into. Ordinarily and in strict compliance with the requirements of the governing statutes I would have set the contracts aside. However because of the reasons which I will set out fully hereunder, I have found it neither practical, fair nor desirable to set these agreements aside.

[34] All evidence points, conclusively, to the fact that the applicants concluded the contracts in good faith and discharged their obligations in terms thereof. There is nothing to gainsay their averment that as far as they were aware, any and all relevant approvals by TEAC in particular, had been obtained. In particular clause 3.2 of the Service level Agreements, expressly record that: '**The appointment of Buena Vista/8 Mile in terms of this agreement has been approved by TEAC.**' (emphasis added)

[35] In terms of the Turquand rule, the effect of which is that persons contracting with a company, and by necessary extension a statutory body, and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular. See *The Mineworkers' Union v JJ Prinsloo* 1948 (3) SA 831 (A) at 845-849; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 480.

[36] Thus when the applicants entered into the agreement in good faith, they were entitled to assume that the respondents had complied with all their requirements of internal management for the conclusion of the contracts, including TEAC approval. Clearly they were not required to enquire into any compliance with those requirements.

[37] In the circumstances, the respondents are now estopped from seeking to contend that TEAC approval was not properly obtained. In *City of Tshwane*

Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA) at paragraph 12, Ponnan JA explained the position saying:

'...persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, **but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with ...Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.'** (emphasis added)

[38] Mr Mtshaulana, appearing for the respondents, argued that estoppel could not be relied upon in a case concerning an act beyond or in excess of the legal powers of the public authority. He placed reliance on the decision in *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at pages 148-149, where the court held that the two leases concluded without the provincial tender board having arranged the hiring of the premises as was required by section 4(1) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994, were invalid and that the doctrine of estoppel was inapplicable. The court affirmed as settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel and that if this were to be allowed, the very mischief which that Act was enacted to prevent, would be perpetuated. The court took into consideration the fact that the leases concluded were *ultra vires* the powers of the Department and that they could not be allowed to stand as if they were *intra vires*.

[39] In my view Contractprops (*supra*) is distinguishable from the facts of this case. The contracts we are concerned with in this case are not *ultra vires* the powers of the respondents. The respondents are ordinarily perfectly empowered to conclude similar contracts. Neither are they unlawful *ex facie*. The only gripe raised by the respondents is simply that internal procedures were never complied with. I have already pointed out that the contracts expressly record that TEAC already granted the necessary approval for their conclusion. Not only that, there was due performance by the parties of their respective obligations for a period of almost two and a half years until the respondents unilaterally decided to terminate the contracts in July 2010. In the circumstances, I find that estoppel has been properly raised by the applicants.

[40] There is a further ground which leads me to refrain from setting the contracts aside, namely, the respondents have not to date brought any counter-application to review and set aside the decisions to enter into the contracts and procure the goods concerned. Nor have they sought a declaration that such contracts and procurement decisions were unlawful.

[41] It is trite that the procurement or disposal of goods and services by organs of State, by means of any process required to comply with section 217 of the Constitution or the relevant derivative legislation, qualifies as 'administrative action' within the meaning of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA). See *Municipal Manager: Qaukeni Local*

Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA) at 365F.

[42] Our courts have on various occasions upheld the principle of administrative law that until an administrative decision has been set aside by a court in judicial review proceedings, it exists in fact and it has legal consequences that cannot simply be overlooked. Thus in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paragraph 26, the court stated that:

'...the Administrator's permission was unlawful and invalid at the outset. ... But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[43] The effect of this ruling is that parties are prohibited from disregarding an administrative act purely on the basis of their belief that the act is invalid. The SCA continued thus in paragraph 37:

'...a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.'

[44] It is common cause that the respondents have neither sought to review and set aside the decisions taken and which resulted in the conclusion of the agreements, nor have they brought a counter-application to declare the decisions unlawful. In argument Mr Mtshaulana conceded that this was a vital step which ought to have been taken by the respondents the moment they took the view that the agreements were entered into in an unlawful manner.

[45] In *TEB Properties CC v MEC of Department of Health and Social Development, North-West* 2011 ZASCA 243 (1 December 2011), the court specifically emphasized that a counter-application to declare the contract invalid, had been brought. At paragraph 26, Petse AJA said:

'Counsel for the appellant also called in aid the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) paragraphs 27-31 in support of the proposition that the decision taken by Kgasi to hire office accommodation from the appellant amounts to administrative action, and as such ought to be given effect until it has been set aside, which the respondent did not do. I do not think that the appellant's reliance on *Oudekraal* avails it in the context of this case. In my view, that the

respondent filed a counter-application in the court below to have the lease declared unenforceable, is a clear indication that it sought to prevent the implementation of the administrative action concerned on the ground that it was unlawful. Thus, the practical effect of the declarator granted by the court below is that the administrative action preceding the conclusion of the lease was of no force and effect. Accordingly it is, under those circumstances, illogical to speak of administrative action that is extant as though the declarator issued in relation to the juridical act flowing from the administration action concerned counts for nothing. In the circumstances there is, to my mind, much to be said for the view that **where an organ of state seeks to have a contract, concluded pursuant to administrative action, declared invalid a declaration of invalidity must have the effect of nullifying the administrative action that is the *fons et origo* of the contract concerned.**' (emphasis added)

[46] As no counter-application or review has been launched by the respondents, on this basis alone their defence cannot succeed. This is because in the absence of such a counter-application or review, the decisions in question stand. On the authority of *Oudekraal*, the respondents are bound by them, even if the decisions were improperly taken.

[47] Finally, even though contracts can be regarded as unlawful, this Court still has a discretion to grant the relief sought. An important factor in this regard is the reliance which the innocent parties had placed on the allegedly unlawful decision. The circumstances under which the written agreements

were concluded show that the applicants acted honestly and in good faith throughout. They placed reliance on the recorded fact that the approval of TEAC had been duly obtained and that Mochothli was duly authorised to conclude the contracts on behalf of Impophoma. As I have stated above, these two important facts are expressly recorded in the written agreements. I am also fortified in this respect by Treasury Regulation 12.2.1 which states that:

'An institution must accept liability for any loss or damage suffered by another person, as for a claim against the State, which arose from an act or omission of an official, provided – (a) the act or omission was the cause of the loss, damage or reason for the claim ...'

[48] An important feature of this case is that both parties have already performed in terms of these agreements. It would therefore not be practical to undo what has been done and restore the status quo ante. In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at paragraphs 25-29, the court refused to set aside a decision to award a tender, despite the fact that the decision was invalid and that there was no suggestion that the applicant for review had unduly delayed or was at fault. **It did so simply on the basis that, due to the effluxion of time and intervening events, it was no longer practical to start the tender process over again for the work outstanding on the relevant contract.** (emphasis added). In *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA), the applicant for judicial review had been unlawfully

disqualified from consideration for a tender but despite this, the SCA refused to review and set aside the tender award. It criticised the court *a quo* for having done so, holding (at paragraph 21) that:

'The learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent Moseme. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect administrative process, is not entitled to any relief. **Not every slip in the administration of tenders is necessarily to be visited by judicial sanction.**' (emphasis added)

[49] The applicants have demonstrated that they placed substantial and due reliance on the written agreements and that they subsequently spent huge amounts of money procuring the vehicles, trucks and construction machinery which they duly supplied to the respondents in terms of the written agreements. They have also shown that they have suffered substantial financial prejudice as a result of the respondents' cancellation of the written agreements.

[50] In the light of what I have stated above, I, in the exercise of my discretion, find that although the contracts were entered into unlawfully and in breach of the applicable legislation and regulations the contracts shall not be set aside but shall stand and remain enforceable. I accordingly find that the

applicants are entitled to be paid for the lease amounts due for the remaining period in terms of clause 9 of the written agreements.

QUANTUM

[51] The parties are agreed that there is no dispute regarding the quantification of the amount claimable of R85 132 673,83, which represents the sum total of all amounts in respect of the balance of the contracts which cover the period August 2010 until December 2013.

[52] In conclusion, I feel impelled to make the following observation: It is not in dispute that in concluding these agreements which, admittedly exceed the threshold of R500 000,00, as required specifically by Regulation 16A.6.1, the Department did not comply with Regulation 16A.6.4 in that while deviating from an open tender process, it did not record its reasons therefore nor was approval obtained for such deviation from the accounting officer or accounting authority. Such conduct unless properly checked would open up a door for unscrupulous people to bypass, if not to defeat, the very purpose of section 217 of the Constitution which envisages procurement processes by government which are fair, equitable, transparent, competitive and cost effective.

I accordingly make the following order:

(a) The respondents are liable, jointly and severally, to pay the applicants the sum of R85 132 673,83 plus interest thereon at the rate of 15,5% per annum *a tempore morae*, until date of payment.

(b) The respondents are ordered to pay the costs of this application.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	:BOWES & TURNER
COUNSEL FOR RESPONDENTS	:PM MTSHAULANA SC N NTOMBELA
INSTRUCTED BY	:THE STATE ATTORNEY
DATE OF HEARING	:13 SEPTEMBER 2012
DATE OF JUDGMENT	:11 OCTOBER 2012