

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

LEGAL SUMMARY

MBHA J

In 2008 the applicants (*suppliers of vehicles and construction machinery*) and the respondents (*all of them government departments and or their representatives*) entered into lease agreements in terms of which the respondents leased trucks and construction material from the applicants. The respondents sought to cancel those agreements, alleging unlawfulness caused by the respondent's non adherence to their own constitutional imperatives, in particular s217 of the Constitution and various regulations governing procurement by an organ of State, when concluding those agreements.

The applicants sought an order against the respondents jointly and severally for payment of the remaining amount due to them for the duration of the agreements. The claim of the applicants was primarily based on clause 9 which appeared in all four specific written agreements, which reads;

‘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’

Initially both the applicants and respondents performed their obligations in terms of the agreements. During 2010 the respondents addressed letters to both applicants in which they alleged that because due procurement processes were not followed, the agreements were unlawful and unenforceable. The respondents also tendered the return of the vehicles and construction machinery leased in terms of the agreements.

The applicants contended that in terms of the provisions of the agreements, the termination of the agreement by the respondents entitled the applicants to claim all amounts due for the balance of the agreements. Alternatively, the respondents’ repudiation of the agreements entitled the applicants to claim all amounts due for the balance of the agreements.

The court confirmed the principle that unless it appeared *ex facie*, which was not the case in *casu*, that the agreement was unlawful and unenforceable, the onus was on the respondents to prove on a balance of probabilities that it was unlawful and unenforceable. On the evidence tabled before it, the Court held that ordinarily the agreements would have to be set aside as unlawful. However, due to other considerations it found it to be neither practical, fair nor desirable to set the agreements aside. The court held that all the evidence conclusively pointed to the fact that the applicants concluded the agreements in good faith and discharged their obligations in term thereof. The court applied the *Turquand* rule and held that the applicants were entitled to assume that the respondents had complied with all their requirements of internal management for the conclusion of the contracts. In the circumstances, the respondents were estopped from seeking to contend that proper procurement processes were not followed. Furthermore, the court said the respondents were at liberty to bring a counter claim to review and set aside their action, which constituted administrative action, but they did not do so and accordingly the agreements remained enforceable. The court also said that even if the agreements were unlawful, it still had discretion to grant the relief sought. In the circumstances the court took into account the reliance the innocent parties, being the

applicants, had placed on to the undertakings of the respondents and the latter's conduct, specifically in the fact that the respondents had for a considerable time also performed their obligations in terms of the agreements.

In the light of the above, the court exercised its discretion and held that although the agreements were entered into unlawfully and in breach of the applicable legislation and regulations, the agreements shall not be set aside but shall stand and remain enforceable.

The applicants were therefore declared to be entitled to be paid for the lease amounts due for the remaining period in terms of clause 9 of the written agreements. The court cautioned that the respondent had in the future to strictly abide by the legislative provisions and procurement requirements as non-observance could open the way for unscrupulous people to easily commit the very mischief the legislation was to prevent.