REPUBLIC OF SOUTH AFRICA

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

CASE NO: 31580/2014

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

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DATE SIGNATURE

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA LIMITED Applicant

and

AIRPORT BOOKSHOPS (PTY) LTD
t/a EXCLUSIVE BOOKS Respondent

JUDGMENT

DODSON AJ:

Introduction

[1] The applicant ("ACSA") applies for the eviction of the respondent ("Exclusive Books") from the shop that it occupies in the international

departures area of the OR Tambo International Airport ("the Airport"). ACSA has selected a new tenant pursuant to a competitive tender process.

[2] Exclusive Books says that it is entitled to remain in the shop until its judicial review of the tender process has been decided.

Factual background

[3] On 27 March 2009, ACSA and Exclusive Books entered into a written agreement in terms of which the former let to the latter "Shop DFE02-International Departures – A side OR Tambo International Airport" ("the shop"). The lease was for a period of five years backdated to 1 September 2008 and terminating on 31 August 2013.

[4] On 15 August 2013, the parties concluded a written agreement ("the extension agreement") which reads as follows:

> *"We refer to previous negotiations regarding the extension of the abovementioned lease agreement that expires on 31 August 2013.*
>
> *The said lease agreement is, notwithstanding anything to the contrary contained in the relevant agreement, herby renewed on month on month at the minimum monthly rental of R585,761.70 excluding VAT.*
>
> *This letter will form an integral part of the above lease agreement but it does not waive, extend or change any of the terms and conditions of the lease agreement, except as herein stated."*

[5] On 4 December 2013, ACSA issued what it describes as a "*request for bids*" ("RFB"). In terms of the RFB, ACSA invited suitably qualified companies to submit bids to take up the rental of 13 shops. It described these as "*foreign exchange, jewellery and speciality retail stores in the international arrivals and departures A side terminal."*

[6] Exclusive Books responded by submitting a bid in the hope of retaining its tenancy of the shop. It did so before the deadline for submission of bids expired at noon on 31 January 2014.

[7] On 18 June 2014, ACSA informed Exclusive Books that its bid had been unsuccessful and that, if it so wished, a "*debriefing session*" could be arranged upon request made within the next 21 days. Exclusive Books requested a debriefing by email the following day "*to understand the reasoning behind its exclusion from the bid*".

[8] On 23 June 2014, and before any debriefing, ACSA addressed a further email to Exclusive Books giving it notice to vacate the premises by 31 July 2014. On 25 June 2014, Exclusive Books' attorneys addressed a letter to ACSA asserting that the decision to award the tender was irrational, procedurally flawed and therefore invalid. It also asserted that ACSA was obliged to give reasonable notice of the termination of the renewal agreement. Such "*reasonableness would be influenced by all circumstances, including a new tenant for the premises, concluding an agreement consequent upon a valid tender process."* The letter called on ACSA to withdraw the "*purported cancellation*" and to undertake that *"any subsequent cancellation notice will be based on a reasonable period"*.

[9] The "*debriefing session*" was held on 27 June 2014. At the debriefing meeting, ACSA told Exclusive Books that its bid had failed because it did not comply with two of the mandatory criteria. It failed to submit a valid tax clearance certificate and it failed to meet the specified percentage of

turnover rental.

[10] On 11 July 2014, Exclusive Books launched its judicial review application in terms of section 6(2) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). Included as respondents were ACSA, the chairperson of the bid evaluating committee, the chairperson of the ACSA tender board and Amger Retailing (Pty) Ltd, the party whose bid for the shop had been successful.

[11] On 14 July 2014, ACSA sent a letter to Exclusive Books reminding it that it was obliged to vacate the shop. On 15 July 2014, Exclusive Books' attorneys replied, reiterating their stance in the 25 June 2014 letter, referring to the review application and asserting that the notice to vacate could not be implemented until such time as the review application had been decided. In the circumstances, they informed ACSA that Exclusive Books would retain possession of, and continue to trade from the shop until the review had been decided.

[12] On 17 July 2014, ACSA responded, saying that it would defend the review application and insisting that Exclusive Books was obliged to vacate in accordance with the notice given. Another reminder to vacate was sent on 29 July 2014. Consistent with the stance in its letter, Exclusive Books did not vacate on 31 July 2014 and continues to occupy and trade from the premises until this day.

[13] On 6 August 2014, ACSA disabled the access cards of all of Exclusive Books' employees who worked in the shop. This was met with a successful

spoliation application by Exclusive Books.

[14] On 27 August 2014, ACSA launched this application for eviction on an urgent basis, setting the matter down for hearing on 2 September 2014. On that occasion, the matter was struck from the roll on the grounds of want of urgency. The matter now falls for decision in the ordinary course. The review application is still pending.

Validity of the extension agreement

[15] ACSA founded its case for the eviction of Exclusive Books on its interpretation of the extension agreement. In particular it contended that the reference to its being renewed *"on month on month"* entitled it to terminate Exclusive Books right of occupation on one month's written notice, as it had done. This was regardless of any pending tender process or judicial review.

[16] ACSA changed its stance in the replying affidavit. It contended that the extension agreement was invalid for want of compliance with section 217 of the Constitution. Exclusive Books therefore had no legal basis whatsoever for its occupation. Eviction should be granted on the basis of *Graham v Ridley*.[1] Its case based on the founding affidavit was now presented in the alternative. It is appropriate to deal with this issue at the beginning of this judgment.

[17] In my view, ACSA was not permitted to change its stance in this manner.

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[1] *Graham v Ridley* 1931 TPD 476.

Firstly a party may not approbate and reprobate.[2] Secondly, it is trite that a party may not seek to make out a new cause of action in reply. It must make out its cause of action in the founding affidavit.[3] The effect is that Exclusive Books has never had an opportunity to meet this cause of action. This is in conflict with what the Constitutional Court has described as the *"fair hearing component"* of the fundamental right of access to court in s 34 of the Constitution.[4]

[18] Thirdly, our courts have held that generally an organ of State cannot ignore a decision or action that it has taken[5] on the grounds that it is constitutionally or legally invalid, without first approaching a court by way of judicial review to have the decision or action set aside.[6] It is a rule that has both a constitutional and a common law pedigree in the presumption of legal validity of administrative acts - *omnia praesumuntur rite esse acta.*

[19] The decision by an organ of State to enter into a lease agreement is administrative action.[7] The effect of ACSA's challenge to the validity of the extension agreement is to ask this court to treat its decision to conclude that agreement as void on the grounds of non-compliance with s 217 of the

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[2] *Sager Motors (Pvt) Ltd v Patel* 1968 (4) SA 98 (RA) at 101F.

[3] See, for example, *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-J.

[4] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) at paras 10-11; *S v Malindi and Others* 1990 (1) SA 962 (A) at 976D.

[5] This would contemplate a decision taken and communicated to and relied on by those affected by it.

[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 39-40; *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC) at paras 64-65.

[7] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at paras 19-28.

Constitution. But it asks the court to do so without in any way impugning the extension agreement in its notice of motion or in separate review proceedings.

[20] ACSA acknowledges the absence of any such challenge, but contends that there are exceptions to the rule requiring it to make such a challenge. It relies on the qualifying word "generally" in the judgment of Cameron J in the *Kirland* case, when he said –

> *"Even where the decision is defective … government should generally not be exempt from the forms and processes of review."*

[21] ACSA argues that this qualification entitles a court in a particular matter such as the present one to follow the minority judgment of Jafta J in *Kirland* and to hold the extension agreement invalid notwithstanding the absence of any judicial review proceedings.

[22] What was meant by the qualifying word "generally" in the judgment of Cameron J is in my view apparent from the paragraph following the one relied on by ACSA, in which the reasons for the rule are explained:

> *"[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in*

> *which all factors for and against are properly weighed."* (emphasis added)

[23] The exception to the rule contemplated in *Kirland* is that where a statute expressly or impliedly authorises the organ of state to vary or revoke its decision of its own accord. It is a well-recognised exception.[8] ACSA did not point to any statutory basis for bringing the matter within the exception to the rule.

[24] In the circumstances, the matter must be decided on the basis that the extension agreement was valid.

Tacit term

The law

[25] As pointed out earlier, ACSA contends that it is entitled on the basis of the extension agreement to terminate it on a month's notice at its discretion. Exclusive Books contends that the extension agreement was subjected to a tacit term, whereby neither party was entitled to terminate the extension agreement until completion of a valid and lawful tender process to identify a new tenant.

[26] Nienaber JA gave the following description of a tacit term in *Wilkins NO v Voges:*[9]

> *"A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their*

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[8] See Hoexter *Administrative Law in South Africa* Juta 2nd Ed at p 278.

[9] 1994 (3) SA 130 (A) at 136H–137D.

> *assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional."*

[27] Christie in *The Law of Contract in South Africa*[10] describes a tacit term as a "*term implied from the facts"* and refers to the judgment of Corbett AJA, as he then was, in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*[11] as-

> *"... An unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties."*

[28] Based on an analysis of the case law, Christie identifies three areas of focus in deciding whether or not a tacit term is to be imported into a contract.[12]

[29] The first is to consider the express terms of the contract. These may

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[10] 6th Ed LexisNexis at p 164.

[11] 1974 (3) SA 506 (A) at 531H- 532A.

[12] Above at pp 174-181.

expressly or impliedly preclude the importation of a tacit term.[13] A tacit term would be impliedly excluded where its effect was to contradict an express term or terms of the contract.[14]

[30] The second area of focus is that the tacit term must be a necessary one.[15] This means that *"[a] proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time."*[16]

[31] What is meant by *"necessity"* is apparent from the *"bystander test"*. It derives from the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd*[17] where he said the following:

> *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'oh of course!'".*

[32] In considering this aspect, Christie identifies the following considerations:

[32.1] the term should be necessary in a business sense to give efficacy to the contract;[18]

[32.2] however, that does not mean that the contract as it stands must of

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[13] Christie above at pp 174-175.

[14] *De Lange v Absa Makelaars (Edms) Bpk* [2010] 3 All SA 403 (SCA) at para 22; *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) at para 12.

[15] Christie above at pp 176-179.

[16] Per Brandt JA in *City of Cape Town (CMC Administration) v Bourbon-Leftley* 2006 (3) SA 488 (SCA) at para 19.

[17] [1939] 2 KB 206 at 227.

[18] *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605.

necessity be ineffective without the proposed tacit term;[19]

[32.3] necessity does not equate with a standard of proof beyond reasonable doubt – a balance of probabilities still applies;[20]

[32.4] as pointed out above in the extract from the judgment of Nienaber JA in *Wilkins v Voges*, it is not necessary to prove that the parties applied their minds at the time of concluding the contract to the issue to which the tacit term pertains. In this sense, the test is an objective and not a subjective one.

[33] The third area of focus identified by Christie is that the tacit term sought to be imported must be capable of clear and precise formulation.[21]

Does the extension agreement preclude the tacit term?

[34] The extension agreement was an extension of the written lease agreement previously entered into between ACSA and Exclusive Books. It is that agreement which was "*renewed on month on month"*. However, neither party put up or relied on the terms of the original lease agreement. More particularly, ACSA did not rely on any of its terms to suggest that they either expressly or impliedly precluded the incorporation of a tacit term.

[35] What ACSA did contend was that the extension agreement itself in referring to a renewal *"on month on month"* precluded the tacit term contended for. This was so because renewal on that monthly basis implied that a month's

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[19] *Boeschoten & Lorentz v Minister of Mines* 1933 TPD 169 at 177-178.

[20] *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 108 (A) at 196H-197A.

[21] Christie above at pp 179-180.

notice could given at any time, regardless of any pending tender process or review. Reliance was placed on two decisions. The first is *Tiopaizi v Bulawayo Municipality*[22] where the court held as follows:

> *"From the various cases decided in our courts it may now be taken as settled that in the absence of agreement or custom to the contrary, a monthly contract of letting and hiring for an indefinite period requires a month's notice to expire ... at the end of a month."*[23]

[36] The second is *Lyle v Kemp*[24] where the court held that:

> *"Under the common law, it is clear that as this is a monthly tenancy a month's notice would in the ordinary way be sufficient to terminate it."*[25]

[37] In my view, the decisions do not preclude the tacit term contended for. The tacit term contended for, properly considered, does not suggest that a month's notice is not reasonable or applicable. Rather, it pertains to the point at which a month's notice may be given. If the tacit term can be proven, it suggests that notice of termination may not be given until completion of a lawful tender process. Upon completion, a month's notice would apply. The qualification that I have emphasised in the above extract from the *Tiopaizi* decision, recognises that the parties to the contract may *"[agree] … to the contrary"*. The tacit term, if proven, would fall within that exception.

[38] Cooper confirms that a monthly tenancy is not invariably terminable at any

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[22] 1923 AD 317.

[23] At 326.

[24] 1948 (1) SA 165 (D).

[25] At 166.

time on a month's notice.[26] He explains the position as follows:

> *"A periodic lease continues until it is terminated by notice given by either party. In the absence of agreement to the contrary, notice must be given a reasonable time before the date on which a party decides to terminate the lease. The period of such notice must be such that the lessor has a reasonable opportunity of letting his premises or the lessee of finding other premises. A day's notice is considered reasonable in the case of a daily lease; a week's notice in the case of a weekly lease; and a month's notice in the case of a monthly lease; but there is no fixed ratio between the period of the lease and the notice period."* (emphasis added)

[39] The enquiry is thus in each instance determined by the terms of the particular contract and the circumstances in which it was concluded.

[40] In those circumstances, the parties express recordal in the extension agreement that the lease agreement is *"renewed on month on month"* does not in itself preclude the tacit term. Because the duration of the tender process was unknown, it was logical to extend the lease agreement on a month-to-month basis in order that it would endure for no longer than the time it took to complete the tender process. Upon completion, a month's notice would be appropriate.

Necessity

[41] As pointed out above, Exclusive Books bears the onus to prove that the tacit term is a necessary one in the sense that it is *"so self evident as to go without saying"*. A tacit term being one that is implied by the facts, it is the facts that I must turn to.

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[26] *Landlord & Tenant* Juta 2nd Ed at pp 65-66

[42] It was common cause between the parties that the conclusion of a fresh lease agreement to replace the fixed term lease agreement with Exclusive Books had to be via a legally-compliant, public tender process. In those circumstances, the ideal would have been for the tender process to have been completed before 31 August 2013 when Exclusive Books' previous lease agreement terminated.

[43] However, that was not to be. The extension agreement was signed by Exclusive Books on 30 July 2013 and by ACSA on 15 August 2013, 16 days before the lease was due to end. It was manifestly entered into to avoid the looming problem that Exclusive Books' lease would end and there was no tenant to replace it.

[44] From ACSA's perspective, an outcome where Exclusive Books vacated the premises on 31 August 2013 without a tenant to replace it was manifestly undesirable and irrational because it would have forfeited the rental otherwise payable, it would have had to contend with a cavernous empty space in the international departure area and the facility previously provided by Exclusive Books to passengers would no longer be available.

[45] From Exclusive Books' perspective, its vacation of the premises on 31 August 2013 was also undesirable and irrational. It was a potential bidder for the new lease. Were it to succeed in its bid in the tender process, it would have gone to the trouble and expense of vacating the premises, only to have to go to the further trouble and expense of reinstating itself in the shop concerned. It too would have forfeited the revenue from its business.

[46] However, once the tender process had reached its conclusion, it was obviously necessary for there to be provision to require Exclusive Books to vacate as quickly as reasonably possible in the event that its bid was not successful.

[47] Exclusive Books pointed to these factual circumstances in its answering affidavit in contending for the tacit term. In essence, ACSA's response to these averments in its replying affidavit was simply that they were *"absurd and outrageous"* and that they conflicted with the wording of the extension agreement.

[48] Read in isolation, the extension agreement is far from clear. This is particularly so when one has regard to the circumstances in which it was concluded. The notional officious bystander is likely to have had a number of questions. ACSA's simple reliance on the terms of the extension agreement is thus not helpful. Given that these are motion proceedings in which final relief is sought, it is Exclusive Books' version on the factual circumstances relating to the tacit term that must prevail, unless they are *"far-fetched or clearly untenable"*.[27] Moreover, ACSA in its replying affidavit chose not to engage with Exclusive Books about the significance of the factual circumstances surrounding the conclusion of the extension agreement, other than to say that a tacit term was an *"absurd contingency"*.

[49] That is not to say that Exclusive Books' version must be taken at face value. Its factual version must still be sufficient to support the inferences that must

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[27] *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.

necessarily be drawn for incorporation of a tacit term.

[50] There is a further component of the circumstances in which the extension agreement was concluded, that needs to be taken into account. That is the constitutional and statutory regime that applied. Both parties in these proceedings proceeded on the assumption that section 217 of the Constitution governed the letting of the premises or at least the decision-making pertaining to it, although Exclusive Books disputed that it applied to the conclusion of the extension agreement.

[51] I examine first whether section 217 applies in general terms to the letting of the premises concerned and decision-making pertaining to it. Then I consider its application to the extension agreement.

[52] Section 217 provides in relevant part as follows:

> *"**217 Procurement***
>
> *(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."*

[53] As a state-owned company, ACSA would not be an organ of state in the national provincial or local sphere of government. However, it is an organ of state specifically listed as a "*major public entity*" in schedule 2 of the Public Finance Management Act, 1 of 1999 ("PFMA"). The PFMA is *"national legislation"* as envisaged in section 217(1). This is because s 51(1)(a)(iii) of the PFMA echoes s 217(1) of the Constitution in requiring that—

> *"An accounting authority for a public entity-*

> *(a) must ensure that the public entity has and maintains-*
>
> *(i) ...*
>
> *(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."*

[54] Further, the Preferential Procurement Policy Framework Act, 5 of 2000 defines an *"organ of state"* as, amongst other things—

> *"any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and recognised by the Minister by notice in the Government Gazette as an institution or category of institutions to which this Act applies."*

[55] In Government Notice R501 of 2011,[28] the Minister recognised as categories of institutions to which that Act applied, all public entities listed in schedules 2 and 3 of the PFMA. The Preferential Procurement Policy Framework Act is the legislation specifically envisaged in s 217(3) of the Constitution.

[56] Accordingly, ACSA is an organ of state as envisaged in s 217(1). However, the question that then arises is whether the phrase "*contracts for goods or services"* refers to the acquisition of goods or services only or whether it includes the disposal of goods, such as the sale or letting of state-owned immovable property. In this regard, academic commentary diverges. Bolton in *The Law of Government Procurement in South Africa*[29] is of the view that it does include the sale and letting of assets. She refers to and adopts a definition of procurement as—

> *"[t]he process which creates, manages, and fulfils contracts relating to the provision of supplies, services or engineering and*

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[28] Contained in *Government Gazette* 34350 of 8 June 2011.

[29] 2nd Ed 2007 LexisNexis at pp 67-68.

> *construction works, the hiring of anything, disposals and the acquisition or granting of any rights and concessions."*[30]

[57] In her view the exclusion of the sale and letting of assets would be illogical and contrary to the purpose of the provision.

[58] Penfold and Reyburn,[31] on the other hand, adopt a different approach:

> *"The phrase 'contracts for goods or services' should be interpreted generously. It should apply to contracts for the provision of goods or services to the relevant body as well as contracts for the provision of goods or services on behalf of the body (i.e. the contracting-out or outsourcing of public functions). For example, it would include a contract for the rollout of antiretroviral drugs on behalf of the Department of Health. Nevertheless, it would probably exclude contracts where the state is providing (rather than procuring) the goods or services or other forms of benefit."*

[59] They refer to the heading of s 217, "Procurement", and to the definition of procurement in the UNCITRAL Model Law, which defines "procurement" as *"the acquisition of goods, construction or services"*.

[60] What limited case law there is seems to favour the exclusion of the disposal of assets from s 217. In *Londoloza Forestry Consortium (Pty) Ltd and Another v South African Forestry Co Ltd and Others*[32] the court was concerned with an attempted privatisation of state forests through the sale of 75% of the shares in a subsidiary of the respondent. The court stated, without giving any reasons, that the contract envisaged was not a contract for goods or services as contemplated in either s 217 of the Constitution or

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[30] RB Watermeyer, A Generic and Systemic Approach to Procurement: the case for an international standard Public Procurement Law Review, number 1 Sweet & Maxwell 2005 at p 39.

[31] Chapter 25 Public Procurement in Constitutional Law of SA, Juta pp 25-7 to 25-8.

[32] [2008] JOL 22041 (T).

s 51(1)(a)(iii) of the PFMA.[33]

[61] In *CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality*[34] the court was concerned with the sale of an immovable property belonging to a municipality. The court held there that s 217 did not apply because *"[t]here is no reference in s 217 of the Constitution ... of [sic] the disposal of capital assets and more particularly the disposal of immovable assets. In terms of the national sphere it is regulated by the Disposal of State [Land] Act. The disposal of property by a municipality is regulated solely by s 14 of the [Municipal Finance Management Act]."*

[62] On the other hand, Binns-Ward J in *SA Metal Machinery Co (Pty) Ltd v City of Cape Town*,[35] treated *"the procurement or disposal of goods and services by organs of State"* as being required to comply with s 217 of the Constitution. He did not, however, give reasons for his view.

[63] In my view, it is unnecessary to resolve this conundrum here. Whilst the letting of the shop involves the disposal by way of letting of a state asset, the effect of the contract is to provide a service for those members of the public making use of the departures area at the airport. Absent a private bookstore operator like Exclusive Books, ACSA would be expected to provide a similar service itself. In my view that falls within the concept of *"contracting for goods and services"*, particularly on the purposive approach

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[33] Above at 18.

[34] [2012] 3 All SA 527 (WCC) at paras 32-36.

[35] 2011 (1) SA 348 (WCC) at para 5.

that I am bound to adopt in the interpretation of the Constitution.[36] Although not identical, it is similar to that category identified by Penfold and Reyburn, as *"contracts for the provision of goods or services on behalf of the body [ie the contracting-out or outsourcing of public functions]."*

[64] For the same reasons, s 51(1)(a)(iii) of the PFMA would in my view also apply, along with the relevant Treasury Regulations made in terms of s 76 of the PFMA requiring a competitive process.[37]

[65] That is the position generally. What is the position in relation to the extension agreement? In my view, once s 217 and the PFMA's statutory framework apply generally to the letting of the premises and the decision-making pertaining to it, that remains the case, whatever the circumstances. Those include the conclusion of the extension agreement. Indeed, this contention underlay the impermissible challenge to the extension agreement by ACSA in reply. However, the regime created by s 217 and the relevant statutory provisions is not an inflexible or irrational one. For example, as is apparent from Bolton's work, it does not impose a competitive bidding process in every situation – there are several recognised exceptions, notwithstanding that s 217 and the statutory framework apply.[38]

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[36] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at paras 16-17; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 9.

[37] Published under GN R225 in *Government Gazette* 27388 of 15 March 2005 as amended by GN R146 in *Government Gazette* 29644 of 20 February 2007 and GN R874 in *Government Gazette* 37042 of 15 November 2013. See in particular regulation 16A.6 regulating *"Procurement of goods and services"*. Regulation 16A.7 regulating the letting of immovable state property at *"market-related tariffs"* would also require a competitive process or a process which reflected the competition inherent in market-determined rentals.

[38] Bolton above at pp162 – 172.

[66] One of the categories of exceptions mentioned by Bolton is amendments to existing contracts.[39] She recognises that *"single source procurement"* may be appropriate in the case of variation of an existing contract, provided that the effect is not to create an entirely new contract not envisaged by the original tender process.[40] A variation would also be appropriate to deal with an exceptional or unforeseeable event.[41]

[67] The extension agreement was a variation of the original lease agreement. Neither party suggested that the original lease agreement was invalid. The constitutional and statutory framework for contracting by an organ of state applied at the time of its conclusion.

[68] If one takes the extension agreement as consisting only of its express words and interprets it in the manner contended for by ACSA, it contemplates a lease that could run indefinitely. This is so notwithstanding that it was "*month on month*". So read, the extension agreement has the potential to bypass the requirements of s 217 and the statutory framework of the PFMA. As an indefinite lease it gives rise to a contract that could not have been envisaged at the time of the original tender process. That tender process envisaged a lease of limited duration. On that basis the extension agreement and the decision-making giving rise to it would, in my view, be unlawful and invalid.

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[39] Bolton above at pp172, 204 – 207.

[40] Bolton above at pp 172, 205. See also Bolton *Scope for Negotiating and/or Varying the Terms of Government Contracts Awarded by way of a Tender Process* (2006) 2 Stell LR 266, especially at 280-282.

[41] Ibid at 282.

[69] If, on the other hand, the tacit term contended for by Exclusive Books is incorporated into the extension agreement, the extension operates only temporarily and only for as long as it takes to complete a valid tender process for a new lease agreement. It provides for what was probably an unforeseen circumstance ie that the tender process for a new lease had not been completed by the end of the previous lease. The limitation in duration brought about by the tacit term thus renders the extension agreement compliant with s 217 of the Constitution and the PFMA's statutory framework, on the basis that it is a limited and legitimate exception to the competitive process that should ordinarily apply.

[70] It is a rule of interpretation of contracts that a meaning that confers validity on the contract is to be preferred over one that does not. This is in terms of the maxim *ut res magis valeat quam pereat*.[42] In the present circumstances, the tacit term contended for is necessary not just to give the extension agreement business efficacy, but also to give it legal validity. As recognised in the above extract from *Wilkins NO v Voges*, a tacit term will more readily be imported into a contract if it is necessary to ensure its business efficacy. All the more so where it is necessary to ensure its legal validity.

[71] Additional evidence in support of a tacit term is to be found in what in fact transpired subsequent to conclusion of the extension agreement. ACSA made no attempt to terminate it until completion of the tender process and

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[42] *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 209; *Jubelius v Griesel* 1988 (2) SA 610 (C) at 626F.

appointment of a new tenant. Exclusive Books made no attempt to leave. ACSA in making out its cause of action in its founding affidavit, did not simply aver that it had given a month's notice. Instead it set out how it had, after conclusion of the extension agreement, conducted and completed a tender process in which Exclusive Books had been unsuccessful, whereupon it had given Exclusive Books one month's notice to vacate.

[72] ACSA advanced two further arguments against the incorporation of a tacit term. It pointed out that Mr Trisk, the deponent to the answering affidavit on behalf of Exclusive Books, was not present at the time of conclusion of the extension agreement. There was therefore no evidence to support Exclusive Books' version as to its *animus contrahendi*.[43] However, as pointed out above, the test for establishing a tacit term is an objective one. It is deduced from the facts. It is not even necessary to prove that the parties considered the eventuality on which the tacit term turns. There is sufficient evidential material from which the tacit term can be inferred. Most of it is common cause. The absence of Trisk is not an impediment to the case for a tacit term.

[73] ACSA's other argument was that the tender process could not have been to mind when the extension agreement was concluded on 15 August 2013 because the bid was only issued on 4 December 2013, three and a half months later. But the request for bids is a comprehensive, detailed document consisting of some 230 pages. Its conception and preparation must have commenced well before its issue. It is also improbable that the

[43] Intention to enter into an agreement.

parties in concluding the extension agreement operated without regard to the legal context that I have outlined above in relation to s 217 and the statutory framework under the PFMA.

[74] I am accordingly of the view that Exclusive Books has, on a balance of probabilities, shown that the incorporation of the tacit term contended for is necessary.

Is the tacit term capable of precise formulation?

[75] Given that these are motion and not trial proceedings, Exclusive Books has referred to the tacit term in descriptive terms, not on the basis of a precisely pleaded wording.

[76] In its answering affidavit, Exclusive Books described the tacit term as follows:

> *"At all material times ... the parties contemplated that the respondent's tenancy would not be terminated before the conclusion of a valid and lawful tender process and the valid and lawful award of a tender for occupation of the shop."*

[77] In my view, the descriptive formulation by Exclusive Books is in order, provided that it can be translated into a precise formulation.

[78] Before considering that question, there is another matter to be considered. Based on the analysis up to this point, Exclusive Books has made out a case for a tacit term that precluded termination of the extension agreement before the conclusion of the tender process. Exclusive Books, however, contends further that the tender process must be a lawful one and that that

qualification must form part of the tacit term.

[79] Whether this qualification is to be incorporated as part of the tacit term must be determined on the basis of the bystander test. If an officious bystander had asked the parties at the time of conclusion of the extension agreement whether they contemplated a strictly lawful tender process, it could justifiably be predicted that they would have said *"of course!"* This is borne out by the express term of the RFB that subjected the tender process to the law of the Republic of South Africa. It is also fair to suggest that contracting parties domiciled in South Africa, one of whom is an organ of state, would be concerned to respect the rule of law as a foundational constitutional value in any of their dealings.

[80] I am accordingly satisfied that the tacit term would have to provide for a lawful tender process. In the circumstances, the tacit term is appropriately formulated as follows:

> *"Neither party may terminate this agreement until completion of a lawful tender process."*

[81] I am thus satisfied that the tacit term is capable of clear and precise formulation.

Implications of the lawfulness requirement

[82] Exclusive Books contended that acceptance of the lawfulness requirement of the tacit term had the necessary consequence that, provided that they had launched judicial review proceedings challenging the lawfulness of the bid, ACSA could not exercise any right to terminate the extension

agreement until the review proceedings had finally been decided (along, presumably, with any appeals).

[83] Acceptance of this contention requires me to impute to the parties by way of a component of the proven tacit term, or by way of a further tacit term, consensus at the time of concluding the extension agreement, that this would be the effect of a judicial review of the decision to award the bid to another party.

[84] In my view, this contention is not sustainable. Had the notional officious bystander asked the parties on 15 August 2013 whether Exclusive Books could remain in occupation pending a judicial review of the award of the bid to another tenant, consensus was unlikely to have followed.

[85] Exclusive Books would no doubt have liked the idea. Such an arrangement would have allowed Exclusive Books to extend its stay simply by launching a review, even one that lacked any prospects of success. But ACSA would likely have insisted that their chosen tenant replace Exclusive Books pending the review. It would no longer, in these circumstances, be facing the prospect of an empty shop, as there would be a new tenant to occupy the space. Even consensus on the basis that Exclusive Books could stay on if it was a well-grounded review, would have been unlikely.

[86] What is the upshot of this? In order to secure an ejectment order, ACSA must show that the extension agreement entitles it to that relief. The extension agreement allows ACSA to terminate upon completion of a lawful tender process. ACSA can show that it completed a tender process and

gave Exclusive Books a month's notice to vacate. In my view, the only way that ejectment can be resisted by Exclusive Books is if it is (a) entitled and (b) able to prove in these proceedings, irrespective of the pending review, that ACSA has failed to comply with the lawfulness component of the tacit term. It is to these questions that I now turn.

Is a lawfulness challenge permissible in these proceedings?

[87] This answer to this question depends on whether or not Exclusive Books is entitled to bring what has come to be known as a collateral challenge to the validity of the tender process.

[88] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*,[44] the Supreme Court of Appeal held as follows:

> *[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'.*[45] *Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law."*

[89] In the present matter, ACSA is a public authority. It is established in terms of s 2 of the Airports Company Act No. 44 of 1993. It is an organ of state envisaged in paragraph (b)(ii) of the definition of that term in s 239 of the

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[44] 2004 (6) SA 222 (SCA).

[45] Per Conradie J in *Metal & Electrical Workers Union of SA v National Panasonic Co (Parrow Factory)* 1991 (2) SA 527 (C) at 530 C-D and Scott J in *National Industrial Council for the Iron, Steel Engineering and Metallurgical Industry v Photocircuit SA (Pty) Ltd & Others* 1993 (2) SA 245 (C) at 253 E-F, citing Wade *Administrative Law* 6th Ed at 331.

Constitution. The tender process amounts to administrative action.[46] ACSA seeks coercive action against Exclusive Books in the form of ejectment from the premises that it occupies. For the reasons given above, its entitlement to act coercively through a court order is dependent upon the legal validity of its administrative action in the conduct of the tender process. In those circumstances, on the basis of *Oudekraal*, it is the *"right remedy ... sought by the right person in the right proceedings".*

[90] In *Helicopter & Marine Services (Pty) Ltd and Another v V&A Waterfront Properties (Pty) Ltd and Others,*[47] the Constitutional Court dealt with an application for leave to appeal from the judgment of the Supreme Court of Appeal in *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others.*[48] There the tenant under a lease operated a helicopter service from the leased premises. The lease agreement required it to comply with the rules and regulations of the South African Civil Aviation Authority. Under those rules and regulations, the South African Civil Aviation Authority had grounded the helicopter service. The landlord sought an interdict enforcing the relevant term of the lease agreement by interdicting the tenant from operating the helicopter service. The tenant raised a collateral challenge to the validity of the grounding order of the South African Civil Aviation Authority. The South African Civil Aviation Authority had been joined as a respondent. The SCA allowed an appeal against a decision of the High Court refusing the interdict. The SCA

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[46] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at par 21.

[47] 2006 (3) BCLR 351 (CC).

[48] 2006 (1) SA 252 (SCA).

rejected the collateral challenge on the basis that it was not a case of the South African Civil Aviation Authority seeking to enforce its grounding order, but rather the landlord enforcing the terms of its lease.[49]

[91] In its application for leave to appeal to the Constitutional Court, the tenant contended that the circumstances for permitting a collateral attack as identified by the SCA in *Oudekraal* were too narrowly circumscribed and should be expanded by the Constitutional Court. The Constitutional Court refused the application for leave to appeal. It held that it was unnecessary in that matter to decide whether or not *Oudekraal* had been decided on too narrow a basis. It upheld the grounds upon which the SCA dismissed the collateral challenge.[50] It went on to point out that it had been open to the tenant to take the grounding decision of the South African Civil Aviation Authority on review, yet the tenant had failed to do so.[51]

[92] This matter differs from the *V&A Waterfront* matter. The applicant in these proceedings is an organ of state. Moreover, the tacit term has as one of its specific requirements that the tender process be lawful. Insofar as the Constitutional Court criticised the tenant in that case for failing to bring an application for judicial review, this matter is also distinguishable. Within a very short time of learning of the outcome of the tender process, Exclusive Books brought judicial review proceedings. There is no suggestion that it has done anything to delay the judicial review proceedings. By contrast, ACSA, on its own version, failed initially to file a complete record in terms of

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[49] Above at paras 10–15.

[50] Above at paras 5 – 6.

[51] Above at para 7.

Rule 53(4) in the review proceedings and only supplemented the record several months later. It has yet to file an answering affidavit.

[93] Nor can it fairly be suggested that Exclusive Books should be precluded from raising a collateral challenge because it has a pending review application. On that approach, Exclusive Books would be worse off for having taken the trouble to bring a review.

[94] In *Kouga Municipality v Bellingan and Others*,[52] the respondents had applied to the High Court for the review and setting aside of a municipal bylaw regulating liquor trading hours. The High Court granted an order declaring the bylaw invalid but, at the same time, suspended the order of invalidity for a period to allow for its amendment.

[95] The respondents had brought the review application because they had been charged with contraventions of the bylaw. However, the effect of that part of the order that suspended the order of invalidity was that their review did not avail them as a defence in the criminal proceedings. The SCA explained their predicament as follows:

> *"[17] So far as the appropriateness of the order of the court a quo is concerned, the suspension of the order declaring the by-law invalid not only had the effect that the applicants could be prosecuted during the period of suspension — which is precisely the result they sought to avoid — but also meant that they were precluded during that period from mounting a collateral challenge to the validity of the bylaw — which means that although they were successful, they were in a worse position than they would have been in had they brought no proceedings at all. That is a result which would ... be inexplicable to a layman."*

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[52] 2012 (2) SA 95 (SCA).

[96] The SCA decided the matter on the basis that the respondents should not be worse off for having brought the judicial review proceedings. It amended the declaratory relief so as to recognise the invalidity of the bylaw for the purposes of any prosecution of the respondents.

[97] Similarly, in this matter, Exclusive Books should not be worse off for having launched review proceedings. Their having done so does not, in my view, close the door to a collateral challenge in this application.

[98] A further potential impediment to the collateral challenge is the fact that the successful bidder in the tender process, Amger Retailing, whilst a respondent in the review application, is not a party to the present proceedings. A similar issue arose in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*.[53] In that case, the municipality sought to recover regional services council levies from the respondent. It relied on a notice published by the Minister of Finance in the *Government Gazette* in terms of s 12(1)(b) of the Regional Services Council Act, 109 of 1985. The notice purported *inter alia* to allow the municipality to estimate the liability for levies of a person who had failed to submit returns.[54] The respondent made a collateral challenge to the validity of the relevant clause in the Minister's notice. The municipality resisted the respondent's collateral challenge *inter alia* on the grounds that the Minister had not been joined as a party.[55]

[99] The SCA rejected this argument on the part of the municipality, pointing out

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[53] 2010 (3) SA 589 (SCA).

[54] Above at paras 1-6

[55] At para 10.

that the collateral challenge did not involve a declaration of constitutional invalidity of the notice, or its setting aside.[56] The SCA also pointed out that once a party was entitled to raise a collateral challenge in its defence, the court had no discretion to refuse to consider it.[57] It relied on the following passage in *Oudekraal*:

> *"[36] It is important to bear in mind (and in this regard we respectfully differ from the court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and* ex hypothesi *the subject may not then be precluded from challenging its validity."*

[100] Similarly, no relief is sought by Exclusive Books in this application by way of counter-application or otherwise, setting aside or declaring to be invalid the tender process. It seeks solely to resist ejectment. If Exclusive Books is entitled to raise a collateral challenge, as I believe it is, on the authority of *Oudekraal* I have no choice but to hear it. If I uphold the collateral challenge it will not, in my view, bind the reviewing court. There the review and setting aside is squarely sought. The evidential basis will be different. In this matter, no record has yet been filed, nor has ACSA in its answering affidavit sought to meet the collateral challenge on its merits. The successful bidder's answering affidavit will also have to be considered, should it file one. Even if unlawfulness is proven in the review, the reviewing court will still have to decide in terms of s 8 of PAJA and s 172 of the Constitution, whether or not the setting aside of the tender process is a

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[56] At para 12.

[57] At para 16.

just and equitable remedy. If it decides that it is not, that will clothe the tender process with the lawfulness required by the tacit term.

[101] I am accordingly satisfied that Exclusive Books is entitled to raise a collateral challenge. This is so notwithstanding that the successful bidder is not a party to these proceedings.

Is the collateral challenge founded?

Introduction

[102] The framework in which a tender process is to be scrutinised for legality was summarised by the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,[58] as follows:

> *"[45] Section 217 of the Constitution, the [Preferential Procurement Policy Framework] Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established."*

[103] Exclusive Books in explaining its defence in the answering affidavit made clear at the outset that it contended that the tender process *"was tainted by*

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[58] 2014 (1) SA 604 (CC) at para 45.

illegality". To this end, it annexed to its answering affidavit in this application, the notice of motion, founding affidavit and the annexures in the review application.

[104] ACSA objected to this. It sought the striking out of the review application on the grounds that a party may not attach such a document without identifying in its answering affidavit which particular parts it sought to rely on. There is no merit in this objection. Exclusive Books summarised the review grounds in the answering affidavit in this application. The founding affidavit in the review was attached to provide the necessary adumbration. The summary of the review grounds in the answering affidavit provided guidance as to what to look out for in the founding affidavit. Moreover, the preceding analysis of the case law pertaining to a collateral challenge illustrates the relevance of any related judicial review proceedings. The inclusion of the review application in its entirety was thus appropriate. It provided the legal and evidential basis for Exclusive Books' collateral challenge.

[105] ACSA also took up the attitude that the review application was irrelevant because it was entitled to terminate the extension agreement on a month's notice, regardless of the judicial review. My findings that the tacit term has been proven and that a collateral challenge is available to Exclusive Books, disposes of this argument.

[106] The consequence of ACSA's stance is that there is no attempt in its replying affidavit to meet the collateral challenge. The consequence is that I must perforce decide the collateral challenge on the basis of Exclusive Books'

version.

[107] I turn to the grounds of the collateral challenge.

First ground: the tax clearance certificate

[108] One of the reasons given by ACSA at the "*debriefing session"* for the rejection of Exclusive Books bid was its failure to comply with the mandatory requirement that bidders provide a tax clearance certificate. Section III of the bid document contains the *"Evaluation Procedure & Criteria"*. Paragraph 3 of that section lists *"Mandatory Administrative Requirements."* These include the following:

> *"All bids duly lodged as specified in this RFB will be examined to determine compliance with the mandatory administrative requirements and conditions. Bids with deviations from the stipulated requirements/conditions as defined in this RFP will be eliminated from further consideration, and excluded from the Tender process.*
>
> *Save in exceptional circumstances, no Bid shall be considered unless it meets each and all of the following mandatory criteria:*
>
> *3.1 ...*
>
> *3.4 A valid Original Tax Clearance Certificate (In the absence of a valid original tax clearance certificate, Bidders must provide proof of application from SARS);*
>
> *3.5 ...*
>
> *3.6 The Bidder must meet the specified percentage of turnover rental set out in Section V (the Retail Opportunities)." (*emphasis added)

[109] Exclusive Books was unable to provide a tax clearance certificate. Instead, it attached to its bid an explanatory letter. The letter explained the difficulties arising from the fact that the assets and liabilities of Exclusive Books and 40% of its shares had been acquired from the Times Media Group with effect from 1 December 2013, ie three days before the bid was

issued. As a result of this, those newly in control of Exclusive Books were delayed by office closures over the Christmas period and proceedings that had taken place before the Competition Commission, in completing *"statutory processes"* and in reviewing the state of the business' record keeping.

[110] By the time of writing the letter on 31 January 2014, those newly in control of the business had found two aspects of its tax affairs that had yet to be resolved. Firstly, as far as PAYE was concerned, nothing was owing to SARS, but the previous owners of the business had failed to respond expeditiously to queries from SARS and SARS had yet to update its records. To address this, the new owners of the business had met with SARS to deal with its concerns and had requested a tax clearance certificate, but this was not yet forthcoming from SARS.

[111] Secondly, as far as VAT was concerned, there were moneys due by SARS to Exclusive Books, but an audit had to be undertaken before any refund could be made. This too prevented a tax clearance certificate from being issued. SARS had failed to address this issue for almost two years and the previous owners of the business had failed to ensure that the audit was done.

[112] The letter concluded by asking that Exclusive Books not be prejudiced by the failure by the previous owners of the business to ensure that its tax affairs were in order and undertook to work with SARS towards resolving the issues *"forthwith in order for the clearance certificate to be issued"*.

[113] Exclusive Books pointed to that part of the bid documentation that provided that in "*exceptional circumstances"*, noncompliance with the mandatory requirements of the bid could be excused. In this regard, Exclusive Books made the following complaint:

> *"90. On the basis of what was conveyed to [Exclusive Books'] attorney at the debriefing meeting, it would appear that [ACSA] indeed acted in an impermissible way by summarily closing its mind to considering whether there were exceptional circumstances present or considering the explanation offered by the applicant.*
>
> *91 ...*
>
> *94. For [ACSA] not to have properly weighed these factors and not to have made even the slightest enquiry regarding [Exclusive Books'] ... tax position indicates that it did not apply its mind properly to the question before it... Had it been considered there could have been no conceivable reason to regard the certificate to be an impediment at that time."*

[114] Because of ACSA's stance in these proceedings, these averments stand unanswered. On the evidence before me, that renders the tender process unlawful on the following grounds of review recognised in PAJA:

[114.1] Relevant considerations, being the submissions contained in Exclusive Books explanatory letter regarding the tax certificate, were not considered (s 6(2)(e)(iii) of PAJA);

[114.2] In failing to consider the explanation, ACSA's decision was characterised by arbitrariness (s 6(2)(e)(vi) of PAJA);

[114.3] ACSA's decision was not rationally connected to the purpose of the empowering provision (s 6(2)(f)(ii)(bb) of PAJA). The provision in the request for bids documentation is seemingly aimed at ensuring that bidders' tax affairs are in order, not as a mechanical tool for

exclusion of bidders. The explanation given suggested strongly that the purpose of tax compliance would not be subverted by an award of the bid to Exclusive Books;

[114.4] The decision was not rationally connected to the information before ACSA in the form of the explanation, because it suggested that the explanation had been ignored (s 6(2)(f)(ii)(cc) of PAJA).

Second ground: minimum turnover rental

[115] As appears from the extract from the RFP quoted above, bidders were also required to "*meet the specified percentage of turnover rental"*. The RFP specified a minimum monthly rental of R300 000 and a "*minimum percentage of turnover annual rental*" of 16%.

[116] The narrative portion of Exclusive Books bid dealing with this aspect is entitled "*Highest turnover possible in the best retail environment"*. The narrative goes on to explain its approach to the forecasting of sales growth over the next five years and what gross sales figures this would give rise to during that period. It emphasised that it would "*embark on appropriate marketing strategies to maximise sales and growth in the market place"* and that *"the primary objective of this store is to generate the highest turnover possible... supplying both ACSA and Exclusive Books with a significant return on resources invested."* It concluded by saying *"in addition the rental offered to ACSA demonstrates a strong commitment to a partnership we feel will be rewarding for both sides."*

[117] A table was then provided under the heading *"Proposed Rentals"*. The

table reads:

	Year 1	Year 2	Year 3	Year 4	Year 5
Projected Gross sales (R)	29,400,000	30,576,000	32,104,800	34,031,088	36,413,264
Specified Percentage of Turnover Rental %	16	16	16	16	16
Specified Minimum Monthly Rental	392,000	407,680	428,064	453,748	485,510
Proposed Minimum Monthly Rental	**300,000**	**324,000**	**349,920**	**377,914**	**408,147**
Proposed Percentage of Turnover Rental %	**12.24**	**12.72**	**13.08**	**13.33**	**13.45**
Projected Monthly Rental Revenues	300,000	324,000	349,920	377,914	408,147
Shop's sm	236.81	236.81	236.81	236.81	236.81
Projected Monthly Rental revenue per square meter	1,267	1,368	1,478	1,596	1,724

[118] ACSA interpreted the table to mean that Exclusive Books in its bid was offering to pay the amounts in the table identified in bold as the *"Proposed Minimum Monthly Rental"* and the *"Proposed Percentage of Turnover Rental %"*. On this basis, it was offering to pay only amounts ranging between 12,24% and 13,45% of turnover by way of rental when the specified minimum percentage in the bid documentation was 16%.

[119] Exclusive Books described its wording of the table as *"perhaps unfortunate"*. They explained that their inclusion of the *"Specified Percentage of Turnover Rental"* as 16% throughout manifested their recognition that that was the percentage they were required to and intended to pay and that the following row entitled *"Specified Minimum Monthly Rental"* represented the projected amounts that would be payable to ACSA by way of rental. These amounts represent 16% of the projected gross sales.

[120] It is an understatement to describe the table as "*unfortunate"*. In my view the table is so confusing that it must have been apparent on any reasonable reading that there had been a mistake. No rational bidder would identify a higher amount of monthly rental that could be payable based on its projected sales and the specified percentage turnover of 16% openly, and then offer to pay a noncompliant percentage of turnover rental at the minimum specified monthly rental, not linked to its turnover. This in a tender process where maximisation of rental offered in the bid would have been the goal. The table was also out of kilter with the narrative portion of the bid, emphasising that ACSA would benefit from its projected maximisation of sales revenue.

[121] Exclusive Books complained that ACSA failed to seek clarification in this regard or to afford it any form of hearing where it might clarify the table. It described this omission as *"all the more indefensible in light of the fact that the applicant has been the incumbent in the shop space for 11 years and has conducted it with huge success. The applicant was not some unknown entity. At the very least, the applicant was entitled to be asked to explain the meaning and import of the 'proposed rental' table."*

[122] In my view this complaint is justified. The error was so glaring, that it could not reasonably be taken at face value. There were two rational options open to ACSA.

[122.1] It could have treated the "*Specified Percentage of Turnover Rental"* and the *"Specified Minimum Monthly Rental"* in the table as those offered by Exclusive Books and, if it was successful in the bid,

made payment of the rental on that basis a condition of the lease.

[122.2] Alternatively, it could have sought clarification from Exclusive Books and that would no doubt readily have been forthcoming.

[123] Apart from this, if ACSA intended to rely on an obvious error on the part of Exclusive Books in rejecting the bid, it was bound by the duty to proceed fairly to warn it of its intended approach and to afford it a hearing in this regard. Our courts have held that where a public authority intends deciding a matter on a novel basis which an affected party could not have anticipated, the latter is entitled to a hearing.[59] On this basis too, ACSA should have afforded Exclusive Books an opportunity to clarify the table before rejecting its bid.

[124] Accordingly, on the evidence before me, the tender process was in this respect unlawful on the grounds that—

[124.1] a relevant consideration, in the form of the clarification that would inevitably have been forthcoming from Exclusive Books, if asked, was not considered (s 6(2)(e)(iii) of PAJA);

[124.2] its decision-making was not rationally connected to the information before it (s 6(2)(f)(ii)(cc) of PAJA); and

[124.3] it was procedurally unfair (s 6(2)(c) of PAJA).

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[59] *Theron v Ring van Wellington* 1976 (2) SA (1) (A) at 29 A-E and at 46A; *Maharaj v Chairman, Liquor Board* 1997 (1) SA 270 (N) at 277 G-I; *Logbro Properties cc v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para 23– 26.

Third ground: information not made available

[125] Mr Trisk says that, subsequent to being notified of the outcome of the tender process, he met with a Mr Hartzenberg. Hartzenberg represents the successful bidder, Amger Retailing, and was responsible for its bid. Hartzenberg informed Trisk that he had been aware when preparing Amger's bid that ACSA had taken a decision that there would no longer be two bookshops in the international departures area at the airport. Henceforth there would be place for only one. This had come to Hartzenberg's attention when ACSA informed him that his existing lease would not be renewed in the premises that he had until then been trading from as a CNA franchisee at the international departures area.

[126] Exclusive Books' complaint was that this was sensitive and important information that was not made available to them. It would have affected the way that bidders priced their bids. As an effective monopoly in that area, a lone bookshop could anticipate significantly higher revenue and on that basis could offer significantly higher rentals to ACSA.

[127] Although ACSA put up no evidence in answer to this, counsel for ACSA argued that the fact that there would only be one bookshop operating in the international departures area was apparent from the bid documentation.

[128] It is so that of the 13 shops listed in the bid documentation as being subject to the tender, only one is envisaged as a bookshop. A table in the bid documentation suggests that there are some 56 retail outlets in the international departures area. One of those listed, apart from Exclusive

Books, is *"CNA"*, with its *"lease status"* given as *"expired/N2"*. N2 means that *"these outlets form part of this tender bid"*.

[129] However, it is still not possible to infer from this that there would henceforth only be one bookshop in the entire departures area. If CNA gave up its shop in the current tender process, there was nothing to suggest that another bookshop opportunity would not be made available in one of the other shops falling outside the 13 subject to the tender. For example, a number of these shops have their "*lease status"* described as *"expired/N3"* which denotes that *"these outlets will be tendered in January 2014"*. There is nothing to suggest that one or more bookshops would not be accommodated in this later tender process.

[130] Accordingly, on the available evidence, Hartzenberg was the only bidder privy to this information.

[131] In *AllPay*,[60] the Constitutional Court approved of the following dictum in the SCA's decision in *Premier, Free State and Others v Firechem Free State (Pty) Ltd:*[61]

> *"One of the requirements ... is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competiveness is not served by only one or some of the tenderers knowing what is the true subject of tender... That would deprive the public of the benefit of an open competitive process."* (emphasis added)

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[60] Above at para [39]

[61] 2000 (4) SA 413 (SCA) at para 30.

[132] In my view, the failure to provide Exclusive Books with the information made available to Hartzenberg was neither fair, nor equitable, nor transparent. It distorted the competitive process. Section 217 of the Constitution and the statutory framework under the PFMA require a tender process that is *inter alia* fair, equitable, transparent and competitive.

[133] Moreover, s 3 of PAJA, which encapsulates the right to procedurally fair administrative action, provides in relevant part as follows:

> *"3.* ***Procedurally fair administrative action affecting any person***
>
> *(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
>
> *(2)(a) A fair administrative procedure depends on the circumstances of each case.*
>
> *(b) In order to give effect to the right to procedurally fair administrative action, an administrator ... must give a person referred to in subsection (1)-*
>
> *(i) adequate notice of the nature and purpose of the proposed administrative action;*
>
> *(ii) a reasonable opportunity to make representations;*
>
> *(iii) a clear statement of administrative action."*

[134] In my view, ACSA's failure to convey this information to Exclusive Books offended against sub-paragraphs (i), (ii) and (iii) of s 3(2)(b) of PAJA. Adequate notice of the nature and purpose of the proposed tender process required that the bidders be informed of this. The requirement of "*a clear statement of administrative action"* also required this information to be conveyed. The failure to do so deprived bidders other than Amger Retailing of a reasonable opportunity to make appropriate representations in their bids.

[135] Accordingly, on this basis too, on the evidence before me, the tender process was unlawful on the grounds of—

[135.1] failure to comply with the requirements of s 217 of the Constitution and the statutory framework under the PFMA; and

[135.2] procedural unfairness as envisaged in s 6(2)(c) read with s 3(2) of PAJA.

[136] There are further grounds on which Exclusive Books contends that the tender process was unlawful. It is not necessary for me to consider them all. They will be considered in the review proceedings. The above grounds are sufficient to show for purposes of the present proceedings and on the available evidence that the tender process was not lawful and that the collateral challenge must accordingly succeed.

Conclusion

[137] On the basis of the foregoing analysis, ACSA has failed to show that it has completed a lawful tender process. The tacit term required it to do so before it gave notice to Exclusive Books to vacate and before it sought its ejectment.

[138] I accordingly make the following order:

1) The application is dismissed.
2) The applicant is ordered to pay the respondent's costs, including the costs of two counsel.

_____
ALAN DODSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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Date of hearing : 11 May 2015
Date of judgment: 3 July 2015