REPUBLIC OF SOUTH AFRICA

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

**Case No: 21725/2018**

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

24/04/2020

SIGNATURE DATE

In the matter between:

**METROPOL CONSULTING (PTY) LTD** Plaintiff/Applicant

and

**CITY OF JHB METROPOLITAN MUNICIPALITY** First Defendant/Respondent

**MATHIPANE TSEBANE INC ATTORNEYS** Second Defendant/Respondent

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**JUDGMENT**

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**INGRID OPPERMAN J**

**Introduction**

[1] This is an opposed application to amend its declaration by the plaintiff.

[2] During June of 2018, the plaintiff ('*Metropol*') launched an application for, amongst other relief, an order directing the first defendant ('*the City*'), to make payment of the sum of R266 094 033. 60 (two hundred and sixty six million, ninety four thousand and thirty three rand and sixty cents). The application was set down for hearing on 13 May 2019 at which time, the parties agreed that the application be referred to trial.

[3] The notice of motion stood as a simple summons and Metropol filed a declaration to which the City delivered a notice in terms of rule 23(1) calling upon it to remove certain alleged causes of complaint. Metropol unsuccessfully applied for the matter to be certified a Commercial Court matter and during November 2019 I was appointed to case manage this matter in terms of the Practice Manual of this Division.

[4] On 5 December 2019 a case management meeting was held to plot a way forward. Metropol thereafter and on 24 January 2020, filed a notice of intention to amend its declaration substituting it in its entirety. The approach of seeking to amend its declaration rather than arguing the exception was the quicker approach apparently necessitated due to the ill-health of Metropol's director and the need to expedite the hearing of this matter.

[5] On 7 February 2020, the City delivered an objection to the proposed amendment. Metropol thereafter launched the application for leave to amend its declaration and in doing so elected not to support its application for leave to amend by filing any affidavit. It thereby opted not to put up evidence to support its application.

[6] In the proposed declaration, Metropol relies on a tacit agreement ('*the tacit agreement*') in terms of which it is allegedly entitled to payment for certain debt

collection services it allegedly performed on behalf of the City. Metropol seeks payment in the aforesaid amount as specific performance of the alleged tacit agreement. The City objects to the proposed amendment.

**Proper approach to an application for leave to amend**

[7] The proper approach to an application for leave to amend is set out in *Trans-Drakensberg Bank Ltd v Combined Engineering*, where the Court, after considering the relevant authorities, said:

> "These observations, in all four Provinces, make it clear, I consider, that the aim should be to do justice between the parties by deciding the issues between them. The mistake or the neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs, and where appropriate, a postponement...He does not come to court as a supplicant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleadings, if he wishes to change or add to this, he must explain the reason and show, prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation." [1]

[8] What emerges from the authorities is this: The decision whether to grant leave to amend is a matter that is within the discretion of the Court.[2] But it is a discretion which must be exercised with due regard to certain basic principles.[3] The primary principle is that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties. This is so because the ultimate aim in litigation is

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1 *Trans-Drakensberg Bank Ltd v Combined Engineering*, 1967 (3) SA (D) 632, at 640G – 641A, cited with approval in *Caxton LTD and Other v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565G-566A

2 *Trans-Drakensberg Bank Ltd v Combined Engineering*, supra, 637A; *Caxton LTD and Other v Reeva Forman (Pty) Ltd and Another*, supra, at 565G

3 *Caxton LTD and Other v Reeva Forman (Pty) Ltd and Another*, supra, at 565G

to determine the real issues between the parties so that justice may be done.[4] The overall consideration is that an amendment will not be granted if it will result in prejudice to the other party which cannot be cured by an appropriate order for costs, or where appropriate, a postponement. Mere delay in bringing an amendment is, in itself, no ground for refusing an amendment in the absence of prejudice that is not remediable[5].

[9] The question therefore is whether Metropol has shown, *prima facie*, a triable issue.

**The Arguments**

[10] The City argues, in effect, that Metropol's proposed amendment should not be allowed as it would permit the introduction of an excipiable declaration that fails to disclose a cause of action i.e. no triable issue and that this Court should refuse to allow leave to Metropol to effect the amendment because, contends the City, *ex facie* Metropol's proposed amendment the tacit agreement which Metropol intends to base its case upon is illegal and *contra bones mores*. It argues that the facts and circumstances alleged by Metropol establish conclusively that the parties deliberately concluded the tacit agreement to circumvent and undermine the City's prescribed procurement processes. The City contends that Metropol's case on the face of the proposed amended declaration amounts to a scheme between Metropol and certain City officials, to ensure that Metropol would receive the debt collection work, and the vast sum that is allegedly due pursuant to that work having been done pursuant to the subject of the tacit agreement despite the City having rejected Metropol's tender

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[4] *Trans-Drakensberg Bank Ltd v Combined Engineering*, supra, at 638A-B

[5] *Caxton LTD and Other v Reeva Forman (Pty) Ltd and Another*, supra, at 566A; *Trans-Drakensberg Bank Ltd v Combined Engineering*, supra, at 642H

for that exact work. In short, the City's objection is that Metropol's tacit agreement claim is invalid and unenforceable.

[11] Metropol's primary response to the City's objection is that its claim cannot be defeated at this stage even if the tacit agreement is invalid because the Court retains a discretion in terms of section 172(1)(b) of the Constitution to grant an order that is just and equitable once it has declared conduct to be inconsistent with the Constitution. Metropol contends that its claim is presently impervious to the City's objection because Metropol will be entitled in due course: "*to request the court to declare for reasons of justice and equity, [that] the declaration of invalidity must not have the effect of divesting the Plaintiff of rights which, but for the declaration of invalidity, it might have been entitled to.*"[6] In other words, the claim is immunised against early challenge because Metropol may be able to persuade a trial Court to order 'just and equitable relief' despite that Court finding in due course that the tacit agreement is indeed, as the City argues in this application, invalid. Metropol bases its application for leave to amend upon a tacit concession that its tacit agreement case is invalid but wants this Court to permit a claim of that nature to reach the trial stage so that it can make a case for equitable relief.

**The Tacit Agreement**

[12] According to Metropol, the tacit agreement was concluded to facilitate payment to it for its work in collecting municipal debts contemplated in terms of section 118 of the Municipal Systems Act 32 of 2000 on behalf of the City. Metropol pleads the facts and circumstances that it alleges gave rise to the tacit agreement.[7]

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[6] Metropol's HOA, p 18 para 6.23

[7] It is required to do so as a matter of pleading: *Standard Bank of SA Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292A-D; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at [18].

They are described in the proposed declaration and then synthesised in the City's notice of objection.

[13] Metropol alleges that after the second defendant ('*Mathipane*') had concluded a Service Level Agreement with the City upon successful participation in the City's tender process to procure panellists for its debt collection panel, it concluded a written contract with Mathipane ('*the contract*') in terms of which it would render collection services in relation to the City's section 118 debts. This is not the tacit agreement upon which Metropol bases its claim. Its tacit agreement is between itself and the City. This is thus not a case of a successful tenderer engaging an unsuccessful one as a sub-contractor and the sub-contractor then suing on such contract. This is a case about the unsuccessful tenderer (Metropol) entering into a tacit agreement contrary to procurement process with the City itself.

[14] Metropol alleges that the contract with the City was concluded on the basis that Metropol's skill in the collection of the section 118 debts was known to the City because of a successful "pilot project" where it demonstrated its ability by recovering R80 million for the City; it had submitted an unsuccessful tender to be appointed by the City to recover the section 118 debts; the City had proposed that Metropol conclude an agreement with a nominated attorney (i.e. Mathipane) in terms of which Metropol would render the section 118 debt collection services to the City ('*the proposal*').

[15] Metropol alleges that the proposal was designed specifically to secure Metropol's services and thereby '*devise a method to make payment to the plaintiff*' for its services '*through the conduit*' of Mathipane with the result that Mathipane '*would effectively be precluded from recovering the section 118 debts which was a function 'solely and exclusively reserved for the plaintiff*'.

[16] Metropol alleges that the City implemented the tacit agreement by giving instructions exclusively to Metropol (to the exclusion of Mathipane) and by permitting Metropol to take all actions required to perform the section 118 debt collection services for the CIty.

[17] Based on these facts and circumstances, and during November 2014 to November 2016, Metropol alleges that the tacit agreement came into existence, the material terms of which were that the City accepted the appointment of Metropol to render the section 118 debt collection services and that the City agreed to pay for these services in accordance with an agreed procedure that contemplated the City paying Metropol through the conduit of Mathipane.

[18] Metropol alleges that it performed in terms of the tacit agreement and that the City paid R88 397 315.37 for the section 118 debt collection services it rendered. Metropol alleges however that the City breached the tacit agreement when it failed, without lawful cause, to pay an outstanding amount of R266 095 033.60.

[19] At the amendment stage the court is to take as true the allegations pleaded by Metropol in the proposed amendment and to assess whether they disclose a cause of action.[8] The test on exception is whether on all reasonable readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every reasonable interpretation that can be put to the facts.[9]

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[8] *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144 F to G; *Makgae v Sentraboer (Kooperatief) Bpk* 1981 (4) SA 239 (T) at 244H to 245A

[9] *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Limited and Others* 2013 (2) SA 213 (SCA) at para [36]; cited with approval in *H v Foetal Assessment Centre* 2015 (2) SA 193 (CC) at para [10]

[20] In my view, there is only one interpretation these allegations can reasonably bear.[10] It is that the parties conspired to circumvent the City's procurement processes using an intermediary in the form of a successful tenderer, Mathipane.

[21] These allegations, if accepted, establish that Metropol together with certain officials of the City devised a scheme in consequence of which Metropol would receive payment for services it was not entitled to perform because the City had rejected its tender. Thus the tacit agreement was concluded in violation of section 217 of the Constitution and the subordinate legislation thereunder. The scheme was neither a "system" contemplated by section 217 nor was it fair, equitable, transparent, competitive and cost-effective (*'the constitutional standard'*). The pleaded case bears all the hallmarks of what the constitutional standard turns its face against: secrecy, irregularity, unfairness and wastefulness.

[22] The City's objection to the proposed declaration rests on the submission that this court should refuse the amendment because it advances a claim in terms of which Metropol seeks specific performance of an illegal tacit agreement.

**Enforceability**

[23] The courts have repeatedly held that such agreements are illegal and will not be enforced. This principle was crystallised by the SCA in *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* where Leach JA stated the position as follows:[11]

> "[14] It was suggested by the respondent both in the court below and in the heads of argument filed in this court that a failure to comply with these statutory precepts

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[10] *Klokow v Sullivan* 2006 (1) SA 259 (SCA) at [15]; *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F-G; *Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters* [2013] 2 All SA 692 (SCA) at [7]

[11] 2010 (1) SA 356 (SCA) at [14]-[16]

did not automatically visit a contract with an external service supplier with nullity, and that the court had a discretion to enforce such a contract if the supplier would otherwise be prejudiced. However counsel who appeared for the respondent in the appeal (who I should hasten to add had been briefed for the first time in the matter at the eleventh hour and had not been responsible for the respondent's heads of argument) was unable to advance this argument with any enthusiasm. His diffidence is understandable. **It is not a question of a court being entitled to exercise a discretion having regard to issues of fairness and prejudice. Rather, the question is one of legality.**

[15] Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid. In *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) ([2000] 3 All SA 247) **this court set aside a contract concluded in secret in breach of provincial procurement procedures, holding that such a contract was 'entirely subversive of a credible tender procedure' and that it would 'deprive the public of the benefit of an open competitive process'**. Similarly in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) [at paragraphs 8 and 10], which concerned the validity of two leases of immovable property concluded between the respondent and a provincial department without the provincial tender board having arranged the hiring of the premises as was required by statute, this court concluded that the leases were invalid. In giving the unanimous judgment of this court, Marais JA, after outlining the applicable statutory tender requirements, said the following:

'As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. **If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.**

As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended

> invalidity to be the consequence. **What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.'**
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> [16] I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, **is invalid and will not be enforced**."
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> (Emphasis added)

[24] Recently, the Constitutional Court reiterated in relation specifically to tacit agreements that:[12]

> "Whichever test is adopted, tacit contracts are required to be lawful. If a tacit contract is unlawful, it will ordinarily be void at the outset. **A tacit contract that does not comply with the requirements of section 217 of the Constitution and the relevant public procurement legislation will be unlawful and therefore void from the outset.** No case was made out as to why the provisions that regulate written contracts with government entities are not sufficient to regulate tacit contracts with government entities."
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> (Emphasis added)

[25] On the face of its intended declaration, Metropol relies on an illegal agreement. What it seeks is the enforcement of that agreement by means of an order for specific performance. As pointed out above in the discussion on the applicable principles relating to amendments, if the ground of objection to the proposed amendment is excipiablity, (which is what the City's objection to the amendment is essentially about), the pleaded allegations are taken at face value on

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[12] *Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited* 2019 (5) BCLR 533 (CC) at para 29

the assumption that they would be established on trial.[13] Metropol's own allegations establish that the tacit agreement is illegal. It is illegal because it was concluded in violation of section 217 of the Constitution which provides that organs of state must procure goods and services in accordance "with a system which is fair, equitable, transparent, competitive and cost-effective." – the constitutional standard.

[26] The starting point is the elementary general rule that, if a contract is illegal, it is void.[14] Metropol seeks to enforce specific performance of an illegal tacit agreement. The question that arises is whether our law recognises specific performance of an illegal agreement as a cause of action.

**The unavoidable consequence of illegality**

[27] Mr Pincus SC, appearing on behalf of Metropol, did not take issue with the principle that a court will not enforce an illegal or immoral contract derived from the Roman Law maxim *ex turpi causa non oritur actio* (*'the ex turpi rule'*).[15]

[28] Whilst the *ex turpi* rule precludes the enforcement of an illegal or immoral contract, the maxim *in pari delicto potior est conditio defendentis* (*'the par delictum rule'*) curtails a wrongdoer's right to recover its performance or part-performance of such a contract. Both rules seek to discourage illegality and immorality and advance public policy.[16] If both parties were knowingly party to the conclusion of the contract, it is unenforceable. The *par delictum* rule does not override the *ex turpi* rule and render the contract enforceable. Rather, where one party has performed or part-

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[13] *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) [4]

[14] *Lawsa* vol 9 ed 3 at para 334

[15] *Jajbhay v Cassim,* 1939 AD 537. In the opening passage of the judgment, Stratford CJ observed that the maxim *ex turpi causa non oritur actio* "*prohibits the enforcement of immoral or illegal contracts.*" He added that the maxim serves a specific purpose, or put differently, is inspired by a specific "*moral principle*", which is to "*discourage illegality and immorality and advance public policy*". Stratford CJ described that maxim as "*self-explanatory*", one permitting of "*no elucidation*". He stated that "*it is complete and unquestioned in our Courts as in the Courts of England.*"

[16] *Jajbhay supra* at 540-545; *Essop v Abdullah* 1988 (1) SA 424 (A) at 435G-436I

performed the contract (e.g. paid an amount or delivered a thing), a claim to recover the amount or thing may be granted or refused so as best to serve public policy by '*doing … simple justice between man and man*'.[17] This principle too Mr Pincus accepted. The *par delictum* rule is not relied on by Metropol either in the proposed declaration or in this application. It seems inapplicable on the pleaded facts and circumstances.

[29] The legal consequence of applying the *ex turpi* rule is this: the sanction attached to illegality is total invalidity or voidness – the contract does not create any rights or obligations and cannot be enforced. A claim based on an illegal contract is therefore not a claim that the law recognises at all. Since our law does not recognise such a claim, the City's objection to the amendment should therefore, it would appear, be upheld. It remains to consider Mr Pincus' reliance on section 172 of the Constitution.

**Section 172(1)(b) of the Constitution**

[30] Section 172(1) of the Constitution provides in relevant part as follows:

> **"Powers of the courts in constitutional matters**
>
> (1) When deciding a constitutional matter within its power, a court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable …"

[31] Metropol submits that its claim is impervious to objection at this stage of the litigation because section 172(1)(b) may yet come to its assistance at trial. The structure of Metropol's argument is as follows. Metropol contends that the tacit

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[17] *Jajbhay supra* at 540-545, 544, 550; *Kelly v Wright; Kelly v Kok* 1948 (3) SA 522 (A) at 527; *Klokow* supra at [17]-[24]

agreement cannot simply be taken as illegal but must be declared as such upon request by one of the parties. Metropol contends that it is incumbent upon the City to plead illegality as a defence, present evidence in support of that defence and then request the court to declare that the tacit agreement is illegal and invalid. Even if the court finds that the tacit agreement is illegal, Metropol contends that it is entitled to an order granting just and equitable relief in terms of section 172(1)(b). Metropol therefore contends that its proposed claim cannot fail at this stage of the litigation as that would deprive it of the just and equitable relief it is entitled to in terms of section 172(1)(b).

[32] The proposed declaration does not mention or place any reliance on section 172(1)(b). This section is raised in argument. Metropol's claim is for payment of a sum said to be due and payable by the City in terms of the tacit agreement; not for just and equitable relief given the illegality and invalidity of any such agreement. Nor is any alternative cause of action, such as unjustified enrichment, pleaded by Metropol. In particular, the proposed amendment is silent on *what* remedy would be just and equitable in the vacuum created by non-agreement; or *why*.

[33] Metropol's reliance on *Free State Province v Terra Graphics (Pty) Ltd and Another*[18] is misplaced. The case is readily distinguishable. The plaintiff in that matter had pleaded an express sub-contracting arrangement and relied on its enforcement. No procurement concerns were in issue. Neither the main contract nor the sub-contract was challenged by the Province. Indeed, the main contract contemplated - and the Province approved - the appointment of the sub-contractor. After abandoning meritless points *in limine*, the Province's purported defence, which was found to be spurious, was a lack of budgetary provision.

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[18] 2016 (3) SA 130 (SCA)

[34] A "contract" with a local authority, such as the City, in contravention of the Constitution and the provisions of the legislation specifically enacted to govern the procurement processes of local authorities is illegal, invalid and unenforceable. A party to such a contract cannot ask a court to order performance of its terms. Since this is precisely what Metropol asks this court to permit, the proposed amendment is excipiable in failing to disclose a cause of action, hence not establishing a triable issue (if there is no cause of action there is nothing to try) and the application should be refused. A just and equitable remedy granted in the vacuum created by an illegal agreement is an altogether different matter; and, forms no part of the Metropol's pleaded case.

[35] Mr Pincus placed much reliance on para [41] of *State Information Technology Agency Sic Ltd v Gijima Holdings (Pty) Ltd*[19]. This is the leading case holding that organs of state cannot review their own decisions based on the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*) but should do so based on the principle of legality. The facts of the current matter are distinguishable as well as the issues at stake and the nature of the proceedings. Plainly, this is not a review.

[36] Metropol's incorrect belief that its claim is safe from challenge on account of section 172(1)(b) of the Constitution appears to originate from its mistaken view that it is entitled, as of right, to just and equitable relief, regardless of its pleaded cause of action, if the court finds that the tacit agreement is illegal. This view conflates enquiries into illegality and remedy. Section 172(1)(b) grants a court a discretion. This is clear from the use of the word "may" which appears in contrast to the word "must" in section 172(1)(a). It is clear then that a court would not be obliged to grant just and equitable relief if it found that the tacit agreement is illegal, not least

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[19] 2018 (2) BCLR 240 (CC)

because the proposed declaration does not ask the court to exercise its remedial discretion let alone plead a just and equitable cause of action. As a matter of pleading, the *facta probanda* underpinning such relief are to be pleaded for the benefit of the court and the City. The following pertinent statement of principle by the SCA in *Knox D'Arcy AG and Another v Land and Agricultural Development Bank of South Africa*[20] bears repeating:

> "It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. And a party may not plead one issue and then at the trial, and in this case on appeal, attempt to canvass another which was not put in issue and fully investigated."
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> (Emphasis added and footnotes omitted)

[37] If a Court were required to come to the assistance of Metropol the invitation must be properly framed and the Court must be given, as must the City, the basis of the claim in equity. The court must know what factors it should consider when it determines (1) where the equities lie and (2) if the relief sought serves the interests of justice. If just and equitable relief is Metropol's cause of action then it is incumbent upon it to state *what* that relief is; and *why*. The City must be informed of the basis of Metropol's case in equity so it can challenge or accept the assertion that the relief proposed is just and equitable in all the circumstances of the case.

**New argument**

[38] After the conclusion of argument and after judgment had been reserved, and on 21 April 2020, Metropol requested this court to receive 4 further authorities.

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[20] [2013] 3 All SA 404 (SCA) at para 35

Although the City objected, the court allowed this and afforded the City an opportunity to submit further short heads of argument dealing with these authorities and the identified extracts. The authorities are: *Van Zyl v Joubert,*[21] *France NO and Another v Matjhabeng Local Municipality,*[22] *Bowman Gilfillan v Minister of Transport: In re Minister of Transport v Mahlalela and Others*[23] and *Trudon (Pty) Ltd (formerly TDS Directory Operations) v National Prosecuting Authority and Another.*[24]

[39] The new argument now advanced for the first time is that even if illegality appears *ex facie* the declaration, the amendment should be allowed since the tacit agreement exists and may have legal consequences unless and until set aside on review.

[40] All the cases save for the *Van Zyl* case, concern challenges to administrative actions/decisions, in the form of tender awards. The cases grapple with how and when to challenge such decisions and what to do with contracts that flow from them. On the pleaded facts of this matter, there is no decision, no administrative action – only an alleged tacit agreement – and thus there is no need for any application of the sort Metropol appears to have in mind. The trigger for any obligation to initiate a review application or counter-application is the uncovering of a ground of challenge to an administrative action. None of the authorities relied upon holds that an alleged tacit agreement, absent any underlying decision, requires the same course of action. If there is no administrative action or similar exercise of public power, there can be no review application or counter-application. Further, the plaintiffs in those cases sought to enforce agreements said to be lawful whereas in this case, Metropol seeks to enforce an agreement shown by its pleading to be unlawful.

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[21] [2017] ZAGPPHC 326 (30 June 2017)
[22] [2017] ZAFSHC 179 (12 October 2017)
[23] [2018] ZAGPPHC (7 February 2018)
[24] [2018] ZAGPPHC 872 (23 November 2018)

[41] The *Van Zyl* case raises no new principles or anything that has not already been dealt with in this judgment. It does not assist Metropol. It supports the general principle that a court should refuse an amendment which renders a pleading excipiable.

**Further evidence will not save the claim**

[42] Metropol contends that the City's objection should fail because there may be evidence adduced at trial that may cure the claim of its illegality, invalidity and unenforceability. What evidence Metropol considers may cure the illegality is a question answered only by Mr Pincus in his heads of argument, but not set out in the proposed declaration. He submits that evidence of the City's Supply Chain Management Policy (the '*SCMP*') will ultimately determine whether the tacit agreement is lawful or not. Counsel refers to the legislation that requires the City to implement a SCMP that gives effect to the Municipal Finance Management Act 56 of 2003 ('*the MFMA*').

[43] It cannot be ignored that this is an application to amend rather than an exception *per se*. It is for Metropol to persuade this court to exercise its discretion in favour of granting the amendment. Metropol has filed no affidavit in support of its proposed amendment.[25] It has not put up the City's Supply Chain Management Policy, either in the proposed declaration or in this application and it is inconceivable to me that it can somehow cure the defect in the proposed declaration when made available in due course en route to a trial. There is not even an assertion of compliance with the City's Supply Chain Management Policy. Metropol asks this

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[21] Whilst an affidavit is not required in support of all amendment applications – especially those that are merely formal or nominal in nature – substantial amendments, including withdrawals of admissions, *do* require factual explanation and justification: *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 57A-C and 57G-58A; *De Kock v Middelhaven* 2018 (3) SA 180 (GP) at [17]. Mr Pincus did not take issue with this proposition.

court to indulge it by engaging in speculation to breathe provisional life into a bad cause of action on the strength of its counsel's speculation that evidence may emerge that may change the picture.

[44] Mr Pincus submits that, because the court cannot take judicial notice of the City's SCMP, this court cannot determine with certainty that the tacit agreement is illegal. The implication of this argument is that there may be something in the City's SCMP that permits procurement in the manner pleaded in the proposed declaration. The suggestion is that this court should not find that the tacit agreement is illegal until it has considered the provisions of the City's SCMP.

[45] That argument lacks merit as it is not open to Metropol's counsel to speculate that there may be evidence that may save the tacit agreement. Metropol elected not to motivate its amendment with the affidavits customarily filed when a party seeks permission to affect a substantial amendment. Metropol could and should have filed affidavits if it wished to base an argument on evidence. It could have attached any SCMP on which it seeks to rely. It could have identified what sections it relies on. It could have indicated the nature and extent of the evidence around the SCMP it may wish to lead to show that the tacit agreement was legal despite every indication to the contrary. Metropol could have but has not satisfied this court that there is evidence capable of curing the illegality appearing *ex facie* the proposed declaration. Instead, it says that the court must grant its amendment because, although the tacit agreement appears to be illegal, there may turn out to be a policy that may render it legal.

[46] Harms JA held in *Telematrix*[26] that :-

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[22] *Telematrix (Pty) Limited trading as Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para [3]

> "[E]xceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability. '

The vulnerability contemplated is the vulnerability of the pleading to collapse as the weight of the case being built bears on the foundation of the case; the pleading. If there is a crack in the foundation the structure must be condemned at that stage in the best interests of all concerned. To permit further building on a cracked foundation would be pointless and expensive. When a material weakness is exposed in the foundation cast by the pleader it is time to go back to the drawing board, and it is not in the interests of justice for a Court to grant the plaintiff an opportunity to keep on building in the hope that the structure can be made to stand with running repairs for which as yet no foundation has been cast.

**Conclusion and Order**

[47] In my view, the proposed amendment should be refused because, if allowed, the pleaded claim would be excipiable for its failure to establish a cause of action (a triable issue) and the application for the amendment falls to be dismissed.

[48] I accordingly grant the following order:

The application is dismissed with costs including the costs consequent upon the employment of two counsel where so employed and the costs of preparing the supplementary heads of argument dated 23 April 2020.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv S Pincus SC

Instructed by: Howard S Woolf

Counsel for the first respondent: Adv R Pearse SC, Adv M Seape, Adv J Chanza

Instructed by: Moodie & Robertson

Counsel for the second respondent: No opposition

Date of hearing: 17 April 2020

Date of additionl heads of argument: 22 April 2020 (applicant) & 23 April 2020 (1st Repondent)

Date of Judgment: 24 April 2020