IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

5/8/2016 DATE SIGNATURE

Case Number: 16829/15

5/8/2016

In the matter between:

BIG FIVE DUTY FREE (PTY) LIMITED	APPLICANT
and	
AIRPORTS COMPANY SOUTH AFRICA LIMITED	1ST RESPONDENT
DFS FLEMINGO SA (PTY) LIMITED	2ND RESPONDENT
TOURVEST HOLDINGS (PTY) LIMITED	3RD RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J:

INTRODUCTION

[1] The applicant, Big Five Duty Free (Pty) Limited (Big Five), seeks a declaratory order in the following respects:

(a) Firstly, declaring that the first respondent, Airports Company South Africa Limited (ACSA) is bound to its decision of 26 August 2009 to award the right to Big Five to operate Core Duty and VAT free stores in the international departures and arrivals airside terminals at O.R Tambo International Airport, Cape Town International Airport and King Shaka International Airport;

(b) Secondly, ACSA be directed in terms of the Bid reference No.:CDF08.05/2009, to conclude the requisite written lease agreement with Big Five within 30 days from the grant of this order;

(c) Thirdly, in terms of Clause 13 of the Bid, ACSA be bound by the lease agreement that came into effect on 13 or 20 June 2014;

(d) Fourthly, Big Five requires this court to review and set aside ACSA's decision to initiate a new tender process in respect of this Bid; and

(e) Lastly, directing the first respondent together with those opposing this application to pay the applicant's costs.

[2] On 26 August 2009 Big Five was named the successful bidder to provide duty-free retail services at all international airports within South Africa. This has, to date, not been implemented primarily because one of the bidders, the second respondent, namely DFS Flemingo SA (Pty) Limited (Flemingo), obtained an interim interdict from this Court (Tolmay AJ (as she then was), to stay the implementation of the award whilst it took the decision to award the bid on review.

[3] In the review proceedings this Court (Phatudi J) concluded that the decision was *"...not in accordance with the system that is fair and transparent..."* This, he

found, amounted to a contravention of section 6(2)(c) and 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and section 217 of the Constitution of the Republic of South Africa. Phatudi J accordingly set the decision of ACSA to award the bid to Big Five aside. The order of Phatudi J reads as follows:

" ***ORDER***

The decision of the first and/or third respondent to award the tender for the operation of the Core Duty and Vat-free Stores in the International Departures and arrival airside terminals at OR Tambo International Airport at La Mercy (north of Durban KZN) bid reference number CDF08.05/2009 to the second respondent is set aside with costs, such costs to include the costs of two counsel."

[4] In these proceedings ACSA and Big Five opposed the relief sought by Flemingo. Big Five was the only party that proceeded with an application for leave to appeal the decision of Phatudi J which application was refused. On petition to the Supreme Court of Appeal (SCA) leave was accordingly granted to the full court of this division. Even though ACSA was part of the review proceedings before Phatudi J they opted not to take part in the appeal before the full court and merely abided by the decision of the full court. The appeal was argued and judgment was reserved however before the full court handed down its decision a settlement agreement was concluded between Flemingo and Big Five. On 20 June 2014 this settlement agreement was made an order of court.

[5] For easy reference the order of the full court is set out below:

"HAVING HEARD counsel for the parties and having read the record of appeal against the judgment of the Honourable Mr Justice ***PHATUDI*** *delivered on* ***17 MAY 2012.***

IT IS ORDERED

THAT the Settlement Agreement between the parties filed of record and marked 'X", be and is hereby made an order of Court."

[6] The crux of the settlement agreement is that Flemingo agreed to abandon the review judgment in its favour and acknowledged that ACSA was free to implement the award of the bid to Big Five without limitations, restrictions and any challenge

thereto by Flemingo. ACSA took the stance that it could not implement the award to Big Five as it would create the impression that it was taking the law into their own hands by ignoring the review decision. This culminated on 14 January 2014 with ACSA taking a decision to initiate fresh tender proceedings.

THE SETTLEMENT AGREEMENT

[7] Big Five submitted that ACSA was apprised of the developments at all times regarding the settlement agreement. On 30 May 2014 Flemingo sought that ACSA be cited as a party to the settlement agreement. On the very same day having been advised that the parties in the appeal intended to conclude a settlement agreement ACSA, by way of correspondence from its director, congratulated the parties and thanked them for the updates.

[8] By 2 June 2014 ACSA's legal representative advised the parties as regards the settlement agreement that: *"We all on (the) same page!"* On the same day ACSA ultimately responded to the request to be a party to the settlement agreement. It advised that it needed the board to convene and veto its participation to waive claims against Flemingo; that a response will only be announced after the appeal was heard. The parties were advised by ACSA that they could conclude the settlement agreement without its involvement or wait upon the decision of the board. The parties chose the former and concluded the settlement agreement on 13 June 2014.

[9] On 17 June 2014 a copy of the signed settlement was sent to ACSA. A meeting with the acting CEO of ACSA and their legal representative was held on 19 June 2014 with Big Five as regards the signed settlement.

[10] On 20 June 2014 ACSA sent correspondence to Big Five thanking them for the opportunity to discuss the settlement and advising that they still needed to consider their legal and financial positions before giving their response to the settlement agreement. ACSA on the other hand, persists that the settlement agreement had not been canvassed with them.

[11] A compromise by disputing parties reached out of court amounts to a settlement. Big Five and Flemingo are the parties to the settlement. The compromise

settled all the disputes between them, inclusive of the interim interdict, the review application, the petition and the appeal. By virtue of this settlement agreement it follows that new rights and obligations arose between the two parties. See *Lieberman v Santam Ltd 2000(4) SA 321 (SCA) at paras [11] and [12].*

[12] ACSA persists that its decision to abide by the decision of the court did not make it party to the agreement even though the parties made provision upon signature that ACSA may *"...implement the award of its tender to the Appellant (Big Five) without limitation or restriction and without any challenge thereto ..."* The parties also made provision for the settlement agreement that was envisaged to be made an order of court by the appeal court (the full court) and agreed to be bound by the express terms ordered therein.

ABIDING BY THE SETTLEMENT AGREEMENT MADE AN ORDER OF COURT

[13] After the judgment of Phatudi J Big Five applied for leave to appeal this was refused by Phatudi J. It petitioned the SCA for leave which was granted to the full court. Big Five correctly submits that the judgment of Phatudi J is consequently suspended in terms of Rule 49(11) of the Uniform Rules of Court. Section 18 of the Superior Courts Act 10 of 2013 is not applicable at this stage.

[14] Before concluding the settlement agreement Flemingo formally abandoned the interim interdict of Tolmay AJ and the judgment of Phatudi J which were both in its favour. Flemingo also formally withdrew its opposition to Big Five's appeal. Both steps enabled Flemingo to enter the settlement agreement with Big Five without reservation.

[15] Adv. Trengrove SC representing Big Five argued that ACSA, having opted to abide by the decision of the appeal court was bound by the settlement agreement which was made an order of that court. To the contrary the crux of ACSA's argument by Adv. Marcus SC on this point is that since the judgment of Phatudi J had not been overturned on appeal on the merits ACSA was still bound by that judgment. The settlement agreement, to which ACSA was by all accounts not a party, was not binding on ACSA. Mr Marcus emphasised that this court should not lose sight of the

concession made by Big Five in its heads of argument that: 'The order of the full bench did not expressly set aside the review judgment.'

[16] Adv. Swart SC for the third respondent, Tourvest Holdings (PTY) Limited one of the unsuccessful bidders and a party in all the proceedings, aligned Tourvest Holdings' case with ACSA's submission and went on to argue that the making of the settlement agreement an order of court did not nullify the judgment of Phatudi J. This being the case, the argument went, the order by Phatudi J's judgment stood and ACSA was bound by it.

[17] The dictum that is apposite to this aspect is located in the headnote of *Gollach & Comperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A):*

"**Headnote:**

A *transactio* is an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them. It is most closely equivalent to a consent judgment.

Whether extra-judicial or embodied in an order of Court, it has the effect of *res judicata* and, like any other contract and any order of Court, made by consent, it may be set aside on the ground that it was fraudulently obtained or on the grounds of *justus error*, provided the *error* vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.

Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement."

[My emphasis]

[18] As regards what constitutes a settlement agreement *Gollach at 921A-D* stated:

' In *Cachalia v Herberer & Co., 1905 T.S. 457 at p. 462*, SOLOMON, J., accepted the definition of transactio given by Grotius, Introduction, 3.4.2., as
"an agreement between litigants for the settlement of a matter in dispute".

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, 2.15.10., he includes within the scope of transactio, agreements on doubtful matters arising from the uncertainty of pending conditions "even though no suit is then in being or apprehended". (Gane's trans., vol. 1, p. 452.) The purpose of a transactio is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, *Civil Law*, vol. 1, para. 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 T.P.D. 20 at p. 24, but which bears repetition:

"A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.'"

[19] ACSA and Tourvest Holdings were party to the main application of Flemingo from where the judgment of Phatudi J emanated. Tourvest Holdings' failure to partake in the appeal was at its own peril having been granted ample opportunity to present its case. In my view Tourvest Holdings are in the same position as ACSA who had opted to abide by the outcome of the process embarked upon.

[20] In the result, taking the dictum of *Gollach* into account, the settlement agreement concluded by the parties became the equivalent to a consent judgment and as such has the effect of *res judicata.*

[21] Big Five contended that the parties who opted to abide by the decision of the appeal court are bound by its order. It referred to two decisions: *Eden Village (Meadowbrook) (Pty) Ltd v Edwards 1995 (4) SA 31 (A); and MEC for Health,*

Eastern Cape v Premier, KwaZulu-Natal: In Re Minister of Health v Treatment Action Campaign 2002 (5) SA 717 (CC) at para [11] ('TAC'). In the latter case the Concourt stated:

"As for the Premier, he did not note an appeal against the High Court's order. He supported the relief that was granted and the application for leave to execute and abided this Court's decision on appeal. The judgment and orders in the main appeal thus bind the Premier, the MEC and the government of KZN. Should leave to appeal be granted and the Premier be successful in his proposed appeal, he would still not be a party to the appeal in the TAC case. It also follows that no useful purpose would be served by allowing the Premier to lodge any additional evidence. "

I agree with Big Five that the TAC decision is on point. The Constitutional Court held that, the judgment and orders were binding as the Premier opted to abide by the decision on appeal. Likewise in this instance, ACSA and Tourvest Holdings who support the relief granted by the High Court elected to abide by the decision of the full court on appeal and stand to be bound by it.

THE ABANDONMENT BY FLAMINGO

[22] Mr Swart posed the rhetorical question whether the abandonment by Flemingo resulted in the judgment of Phatudi J 'disappearing', that is, whether the abandonment resulted in there no longer being a court order in place, as Big Five contends. Counsel submitted that in these circumstances Flemingo could not abandon the judgment of Phatudi J as it was a judgment *in rem* and not a judgment *in personam,* which affects the status of ACSA's award. This abandonment, so the contention went, could not lead to *res judicata* and as such would require an order for the judgment of Phatudi J to 'disappear'.

[23] Mr Marcus supports Mr Swart on this score. He goes further to submit that the abandonment by Flemingo has no effect on the judgment of Phatudi J, as it is one of those judgments which does not lose its effect, unless successfully appealed against. Counsel invoked *Du Plessis v Du Preez 1916 TPD 125 at page 129* whereat it was held:

"But the defendant abandoning the judgment in his favour dismissing the plaintiff's summons, the plaintiff is not benefitted in the way desired. Mere consent of the

defendant cannot reinstate the summons, nor does it appear that the magistrate can reinstate the proceedings where they were before the order upholding the plea of prescription and dismissing the summons. An order of court is necessary, and the magistrate cannot give such an order even with consent of parties. It appears that in this particular case the plaintiff-appellant was bound to continue his appeal to get the order of the magistrate set aside, and therefore the appellant is entitled to the order he asks for setting the magistrate's decision aside with costs of appeal and wasted costs in the lower court."

[24] In conclusion, on this aspect, Mr Marcus submitted that Big Five should have pursued the judgment of Phatudi J to its logical conclusion instead of placing reliance on Flemingo's abandonment. Not so, according to Mr Trengrove who submitted that Flemingo's abandonment of the judgment which was in its favour led to there being 'no court order in place reviewing and setting aside ACSA decision'.

[25] It is trite that judgments *in rem* are such that they determine the status of a person or thing and are binding on all and not just the parties to the dispute. See *Tshabalala v Johannesburg City Council 1962 (4) SA 367 (T) 368H-370A.* In the premises if the judgment has an effect on the status of a person or thing it cannot be abandoned as it is binding on all. It would necessitate a court order instead as pronounced in *Du Plessis supra.* In this instance, in my view, the judgment of Phatudi J declaring the process of awarding the tender to Big Five as unfair and not transparent has an effect on the status of the award to Big Five and as such would constitute a judgment *in rem.*

[26] If I am correct, then Flemingo cannot lawfully abandon the judgment of Phatudi J. the meaning of this is that the *status quo ante* is maintained. The judgment of Phatudi J would thus require an order overturning it as per the dictum in *Du Plessis.*

THE ORDER OF THE FULL COURT

[27] I find it apposite to commence my analysis of the full courts' order with a pronouncement by the Concourt in *Eke v Parsons 2016 (3) SA 37 (CC) at 48 to 50:*

"[28] This in no way means anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, 'relate directly or indirectly to an issue or *lis* between the parties'...

[29] Secondly, 'the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order'. That means its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must 'hold some practical and legitimate advantage.' ...

[30] Once a settlement agreement has been made an order of court, it is an order of the court like any other. It will be interpreted like all court orders...

[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes res judicata (literally, 'a matter judged'). It changes the terms of the agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings..."

[32] Mr Trengrove argued that it matters not whether the parties to a proposed settlement agreement in the end concluded it or not. On counsel's view the important factor is that Flemingo abandoned the judgment of Phatudi J thus there is no *lis* that remains for determination. In addition, Flemingo withdrew the review proceedings in their entirety. The matter is considered *pro non scripto*. The new terms were set out in the settlement agreement and were endorsed by the full court when they made the settlement agreement an order of court. In these circumstances, so the argument goes, the only conclusion is that there is nothing left of the judgment of Phatudi J and therefore ACSA is free to implement the award made in favour of Big Five.

[33] Finally, in this regard, it was argued by Mr Trengrove that ACSA would have to implement the award to Big Five as it was bound contractually and in terms of its

administrative duty to do so. Contractually, the bid document makes specific mention that on the award of the bid a contract comes into place with the successful bidder. The terms of such contract are also attached to the bid document. The administrative decision to award Big Five the bid further binds ACSA. This decision has legal consequences and stands, correctly or incorrectly, until it is set aside by a court of law. See *Ouderkraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at para [26] and [27].*

[34] Mr Marcus on the other hand submitted that because the process in awarding the tender to Big Five was held to be in contravention of the Constitution and PAJA and the fact that no appeal judgment exists overturning the judgment of Phatudi J therefore ACSA cannot lawfully implement the award. In addition, the judgment was a determination made in respect of ACSA's award to Big Five being unlawful, invalid and unenforceable. This is validated or borne out by Big Five's withdrawal of its appeal.

[35] Both Mr Swart and Mr Marcus took refuge under the principle that administrative processes involving an administrative organ done in breach of administrative justice dictates a public remedy and not a private remedy. See *Steenkamp NO V Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para [29]:*

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appreciate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function...Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice..."

[36] In this instance the settlement agreement is between two private parties, Big Five and Flemingo, and is thus a private remedy which excluded the administrative

organ, ACSA. It was submitted that in the final analysis a court has a duty to 'advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.' See *Steenkamp supra at para [29].*

ANALYSIS AND EVALUATION

[37] It is unquestionable that in this case ACSA made an administrative decision with its award of the bid to Big Five. This resulted in a breach of administrative justice according to the judgment of Phatudi J accordingly, as per *Steenkemp,* a public-law remedy would be required and not a private-law remedy such as the settlement agreement.

[38] In my view, the settlement agreement is a compromise between Big Five and Flemingo. It in no way constitutes a public-law remedy to the parties in light thereof that the administrative organ, ACSA, who is pertinent to the *lis* was not a party. ACSA had opted to abide by the decision of the appeal. The status and ramifications of the order are dealt with below.

[39] The abandonment of the interim interdict and the review judgment and the further withdrawal of the review application would ordinarily have no force or effect as Flemingo could not implement the abandonment as it involves a judgment *in rem* which has an effect on the status of the award that is binding on all. However, the enquiry does not end here, as this particular settlement agreement was made an order of court.

[35.1] In order for a settlement agreement to be a proper and competent order, it needs to be directly related to the *lis* between the parties, which it does (See *Eke v Parsons supra*).

[35.2] Secondly, the settlement agreement must not be objectionable. In short the terms must conform to both the Constitution and the law (ibid *Eke v Parsons*). This is where I find the settlement agreement as an order of court to fall short.

[35.3] In the third place, the Constitutional Court (*Eke v Parsons*) has made it clear that conduct or transaction agreed upon should not be made an order of court without ensuring that it is competent and proper. In this instance, it has been held by Phatudi J that the award was in contravention of section 217 of the Constitution and other law as well as sections 6(2)(c) and 6(2)(e)(iii) of PAJA and public policy. The award was held not to conform to the systems in place. The full court endorsed the settlement agreement knowing that Phatudi J made these findings pertaining to the award.

[40] As was pointed out earlier the remedy which emerges from the settlement agreement is one which is a private remedy between two parties, it does not in my view, constitute a public remedy. That being my view the dictum in *Steenkamp* is binding on me. It is certainly not acceptable for parties' litigation to bypass a finding of unconstitutionality by a Court through a settlement agreement that on the face of it, nullifies that finding.

[41] The settlement agreement which has been made an order of court in respect of a private remedy is prejudicial to an affected party as it advocates that an award be implemented which does not conform to the Constitution and the law. In the circumstances, the order is at odds with public policy as the award seeks to advance that which is "*not in accordance with the system that is fair and transparent*".

[42] I must reiterate though that the settlement agreement was made an order under these circumstances, *"Having heard counsel for the parties and having read the record of appeal against the judgment of the Honourable Mr Justice Phatudi delivered on 17 May 2012."* The order would have, accordingly, been made with due reflection by the full court on the issues before it. I will return to this aspect in due course.

[43] Based on the view I take regarding the abandonment agreement by Flemingo and Big Five that did not have the effect of setting aside or nullify Phatudi J's judgement as advocated for by Big Five. This leaves us with an order of the full court from the appeal process, which ACSA and Tourvest Holdings opted to abide by. In

my view, if the order of the full court is competent and proper, ACSA and Tourvest Holdings would be by this order.

[44] It has been held that the award is at odds with the Constitution, the law and public policy. Surely an order of this nature which has been endorsed by the full court cannot be left in perpetuity. Cameron J stated in *MEC for Health, Eastern Cape and Another v Kirland Investments (PTY) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC) at [101] and [103]:*

"[101] The essential basis of *Ouderkraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, **until set aside by proper process...**

[103] The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom-*

'(the) rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.'

For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help..."

THE APPLICATION OF *STARE DECISIS*

[45] The meaning of the aforesaid legal principle *stare decisis et non quieta movere,* is 'to stand by precedents, and not to disturb settled points'. See Hahlo & Ellison Kahn, *The South African Legal System and its Background (1968) at 214.* In laymen's terms, this simply means that courts are bound to follow decisions handed down by their courts or a court with higher standing on similar legal issues. It is the legal propositions arising from the facts of the case, the *ratio decidendi* that is binding.

[46] Ordinarily I would be bound by the decision of the full court and if I sought to disturb the full court's decision I would have to demonstrate that it was clearly wrong.

See *Ex Parte Minister Of Safety And Security And Others: In Re S v Walters 2002 (2) SACR 105 (CC) at para [58]* where Kriegler J said:

"[58] The first reported instance in the constitutional era where the doctrine came pertinently under scrutiny was in *Shabalala v* E *Attorney-General, Transvaal, and Another; Gumede and Others v Attorney-General, Transvaal*,74 where counsel sought to persuade Cloete J that

'where a Court is called upon to interpret the Constitution, that Court can depart from other decisions on the same point in the same F Division if it disagrees with such other decisions. I cannot agree with this submission. **It is settled law that a Court can only depart from the previous decisions of a Court of equivalent status in the same area of jurisdiction where it is satisfied that the previous decision is "clearly wrong": *S v Tarajka Estates (Edms) Bpk en Andere* 1963 (4) SA 467 (T) at 470A; and cf *R v Jansen* 1937 CPD 294 at 297 and *Duminij v Prinsloo* 1916 OPD 83 at 84 and 85.** G

I see no reason to depart from this salutary principle simply because the point at issue involves an interpretation of the Constitution. I appreciate that s 4(1) of the Constitution provides that "This Constitution shall be the supreme law of the Republic . . ." and that s 4(2) provides that "This Constitution shall bind all . . . judicial organs of State at all levels of government"; but those provisions do not in my view mean that the established principles of H *stare decisis* no longer apply. Such an approach would justify a single Judge departing from a decision of a Full Bench in the same Division because he considered the interpretation given to the Constitution by the Full Bench to be in conflict with the Constitution, with resultant lack of uniformity and certainty until the Constitutional J Court, whose decisions in terms of s 98(4) bind, *inter alia*, "all judicial organs of State", had A pronounced upon the question.'

The Constitution that was under discussion there was the interim Constitution75 and the point at issue was the correctness of a previous interpretation of one of its provisions by another Judge in the same Division."

[47] In the present case I am of the view that the full court did not have the opportunity to consider the issues that arose regarding the terms of the settlement

agreement which were presented before me before they proceeded to make the settlement agreement an order of court. I say so because the argument regarding the terms of the settlement agreement and its consequences was not argued before the full court. I have in this Judgement dealt with these issues and the consequences thereof. I am further of the view that if the full court had the benefit of the argument advanced and having had an opportunity to examine same I believe they would not have granted the settlement agreement and made it an order. See *Harris and Others v Minister of Interior and Another 1952 (2) SA 428 (A) at 470F to 472D*.

[48] Be that as it may I don't regard my Judgement as violating the *stare decisis* principle. The Full Court did not hand down a Judgement with reasons but simply accepted a settlement agreement between two private entities and made it an order of Court without applying its mind to the consequences of so doing. In my view I cannot be bound by an order as simple as that which is devoid of any reasons. In my view that order did not displace the Judgement by Phatudi J.

[49] Mr Trengrove painstakingly pointed out that the issues of Flemingo's abandonment of the judgement of Phatudi J, Flemingo's withdrawal of the interim interdict and review in *toto*, like it never took place, and the *lis* between Flemingo and Big Five having come to an end, were issues before the full court as they were set out in the settlement agreement. He further argued that the full court having had the settlement agreement before it went ahead with the *impo mater* of the full court, in granting the order and thus the entire review process vanished.

[50] In this instance it is obvious that there is no *ratio decidendi* as the settlement agreement was merely made an order. Thus the fact that the issues set out in the settlement agreement were before the full court does not, in my view, mean that '*counsel was heard* ' on these issues for the full court to have made, with respect, an informed decision to grant such an the order. I must also mention that sight should not be lost of the fact that the Full Court heard full argument and was pre-empted from doing a full Judgement by the presentation of the settlement agreement which it accepted and acted upon without actually considering the consequences thereof.

[51] In *Thebus & another v S 2003 (6) SA 505 (CC) para [28] and [31]* it was said that where a court finds that a decision of its court does not conform with the Constitution or its objective normative values system it then has a duty to depart from that decision (ibid *Thebus para [28]*). In terms of section 173 of the Constitution the courts have an inherent power to develop the common law taking into account the interest of justice in order to reflect the changing social, moral and economic make-up of society (ibid *Thebus para [31]*).

[52] It is apposite to quote that acknowledged by Innes J in *Habib Motan v Transvaal Government 1904 TS 404 at 413*: "It is a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error." In light of the aforesaid and my analysis and evaluation I am fortified in my view that the Full Court should have been slow to accept the settlement agreement and make it an order. This is for the reason that a Judge of this Court had handed down a fully reasoned Judgement in which he found that ACSA had followed a Constitutionally flawed process in awarding the bid to Big Five and consequently set aside the resultant award. I stand resolute in my view that the making of the settlement agreement in this instance an order of court was, with respect, clearly wrong having been made without due consideration of the issues arising from the settlement agreement.

[53] The injunction in the *Eke* judgement was clearly not taken into account by the Full Court. The terms set out in the settlement agreement which was made an order of court clearly is at odds with the Constitution and public policy in that the award of the tender to Big Five had been found by Phatudi J as being at odds with the Constitution, the law and public policy. The decision taken to award Big Five the tender was an administrative process, as was the process in *Steenkemp*, and as such the administrative breach requires a public remedy and not the private remedy, that is the settlement agreement between two private entities.

[54] I find that the order of the full court, is at odds with the Constitution, the law and public policy, cannot stand, as the order is not competent and proper, and is objectionable in that it allows the implementation of an award which was held by this Court per Phatudi J, to be contrary to the Constitution, the law and public policy.

[55] In my judgment, the review judgment of Phatudi J having not been set aside by proper process stands and the parties remain bound by it.

[56] It stands to reason that the application by Big Five as set out in its Notice of Motion must fail and be dismissed with costs. Such costs to include the employment of two counsel.

[57] In the result the following order is made:

[57.1] The application of the applicant, Big Five Duty Free (PTY) Limited, is dismissed with costs. Such costs to include the employment of two counsel.

W. Hughes
Judge of the High Court,
Gauteng Division, Pretoria

Appearances:

For the Applicant:	Wim Trengove SC
	Steven Budlender
	Jason Mitchell
	Mmakgomo Maenetje
Instructed by:	Bouwer Kobeli Morabe Attorneys
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