REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 52530/2011

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

Date: 19 December 2022 E van der Schyff

In the matter between:

NATIONAL DEPARTMENT OF PUBLIC WORKS	APPLICANT
and	
ROUX PROPERTY FUND (PTY) LIMITED	FIRST RESPONDENT
NEDBANK LIMITED	SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant approached the court seeking an order declaring the Standard Lease Agreement (the lease), concluded between the applicant (the DPW) and the

respondent (Roux Property Fund/ Roux Property) for office accommodation at the Sanlam Middestad [MidCity] Building Pretoria (the property), entered into on 13 July 2010, invalid *ab initio.*

[2] The application is essentially a self-review application under the doctrine of legality. However, the applicant does not explicitly seek an order reviewing and setting aside its administrative decision but only seeks declaratory relief.

[3] In the Constitutional Court in *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd*,[1] Cameron J, writing for the majority, held as follows:[2]

> 'Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions?' That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.
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> 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,

[1] (CCT 77/13) [2014] ZACC 6 at para [38].

[2] *Supra*, para [64], [65].

> 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.'

[4] *In casu*, the DPW approached the court for a declaration that the contract concluded between itself and the Roux Property Fund in July 2010 is *ab initio* void. Since the application was instituted, a body of caselaw developed that indicates that such a declarator can only be granted once the applicant made out a case that the decision to conclude the contract was invalid. In this matter, the DPW's approach can be criticised, but it did not merely disregard the existence of the agreement or regard it as a non-approval. The applicant informed the respondents of the Public Protector's investigation and ultimately approached the court to determine the agreement's validity. The matter thus stands to be distinguished from the facts in *Kirkland.* The first respondent was given proper notice of the relief sought and afforded the opportunity to put its case before the court. The applicant provided the court and the first respondent with all the relevant documentation that sets out the history of the decision and its shifting attitude towards it. All material parts of the 'review record' were placed before the court despite the applicant not utilising rule 53 but rule 6 of the Uniform Rules of Court.

[5] If the papers filed of record are considered, it would be overtly technical to hold that because the applicant did not include as prayer 1 to its notice of motion 'that the decision taken to conclude the impugned agreement be reviewed and set aside,' this application cannot be considered for what it essentially is, namely a self-review under the doctrine of legality. It must be stated, though, that the effluxion of time since the application was issued, and the course of events that subsequently followed arguably rendered the issue of the lease agreement's validity moot. However, having considered the majority decision in *Buffalo City Metropolitan*

Municipality v Asla Construction (Pty) Ltd,[3] I am persuaded that the unlawfulness of a contract, even when the contract period has lapsed due to the effluxion of time at this point, cannot be ignored. The application is thus considered.

[6] The applicant stated in its founding affidavit:

> 'Whether the lease is invalid is evidently placed in issue by the respondent, and in the circumstances it is necessary to establish the correct position by declaratory order. The terms of the impugned lease are such that considerable sums of public monies are involved, and the matter is one which in the public interest clearly needs to be determined as expeditiously as possible.'

[7] The applicant included prayer 3 in its notice of motion seeking further and alternative relief. There is no reason to hold that the 'further relief' excludes the review and setting aside of the decision that preceded the conclusion of the impugned agreement if a case is made out for such relief on the papers.

Salient facts

[8] The lease agreement concluded between the applicant and first respondent in July 2010 and amended thereafter, has been the subject of an investigation by the Public Protector and the Special Investigating Unit. The investigations led to findings that the lease was concluded under highly irregular circumstances, which vitiated the lease. The applicant brought this application pursuant to those findings.

[9] The applicant contends that because the validity of the lease was (and still is) contested, a declaration of invalidity is necessary to regularise the situation. For this reason, the applicant seeks a pure declarator, simply declaring the lease void *ab initio*. The applicant seeks no ancillary relief. The first respondent, in turn, did not launch any counter-application in which ancillary relief is requested, although

[3] 2019 (4) SA 331 (CC).

counsel for the respondent submitted during argument that' justice and equity require remedial amelioration to preserve Roux Property's accrued rights under the lease.' Counsel for the first respondent submitted that under s 172 of the Constitution, a court deciding a constitutional matter has a wide remedial power and that Roux Property Fund finds itself in the same position as the innocent tenderer in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd.*[4]

[10] It is common cause that a competitive open tender process did not precede the conclusion of the lease agreement between the applicant and Roux Property Fund. The agreement was concluded through a negotiated bilateral process in July 2010. This process was initiated after a letter was sent about two months earlier by the South African Police Service's Divisional Commissioner responsible for Supply Chain Management to the Director-General of the Department of Public Works (DPW). The letter identified the Sanlam Midcity Centre as the ideal premises to house the SAPS' headquarters but without providing any needs assessment. Nor did it provide any confirmation for funding. The DPW requested confirmation of funding. A memorandum dated 10 May 2010 was sent to the SAPS's National Commissioner. It was, amongst other things, stated in the memorandum that:

i. Funds for the relocation to the premises were not budgeted for. Additional funding would have to be sourced;
ii. The Department administered all lease contracts. The Department would have to invite tenders due to the extent of office accommodation required. A shortened tender process could be followed once confirmation of funding for this purpose was received.

[11] In a letter dated 11 May 2010, the Deputy National Commissioner of SAPS informed the DPW that funding for the lease agreement had been approved and that the DPW should continue with the "immediate procurement of two floors at Sanlam MidCity Centre for SAPS communication services during the FIFA World Cup as a matter of urgency."

[4] 2018 (2) SA 23 (CC) at paras [53]-[54].

[12] The deponent to the applicant's founding affidavit explained that, at the time, he was led to believe that the need for the property's procurement was sufficiently urgent to justify a negotiated procurement strategy as opposed to an open tender. The initial procurement instruction dated 13 May 2010 was only for two floors of the property, not the whole building. A second procurement instruction for the whole building was issued later. The procurement was eventually approved subject to "accommodation being procured according to the approved norm document."

[13] The needs assessment that SAPS subsequently provided was later reformulated. The identified building was not vacant at that time. In fact, only one of the floors was available for immediate occupation. The matter was, however, ostensibly pressed for time because of the pending World Cup series. The SAPS's alleged need to occupy the building without delay because of the pending World Cup series underpinned the DPW's decision to follow a negotiated process and depart from the mandatory procurement process. In a supplementary affidavit by the deponent to the applicant's founding affidavit attached to Roux Property Fund's answering affidavit, it is stated that the officials were aware that no other property was available that would meet the SAPS's needs and that it would be a waste of money to advertise the tender knowing this

[14] The building was, however, only ready for tenant installations to commence some three months later. The impugned contract was eventually signed only after the conclusion of the World Cup. By that time, SAPS have not yet occupied the building. The DPW informed Nedbank and Roux Property in August 2010 that the Department had reason to believe that not all the required procurement processes were followed in connection with the conclusion of the lease agreement and that the Public Protector would conduct a full investigation. The Public Protector requested that the implementation of the lease be suspended. During November 2010, before the outcome of the investigation of the Public Protector and the Special Investigating Unit was received, the DPW informed the respondents that the DPW was proceeding with the lease agreement and that the outcome of the reports would have no effect on the validity and enforceability of the lease agreement - this despite communicating an opposite view previously. An addendum to the agreement was

subsequently concluded in terms of which the SAPS would take occupation of the property on 1 April 2011, and that rental would be payable from 1 April 2011.

[15] Roux Property Fund obtained a loan from Nedbank and bought the property based on the negotiations with the DPW and the fact that the lease agreement was approved. A mortgage bond was registered over the property in favour of Nedbank. Due to the fact that the DPW ultimately opined that the lease agreement was void *ab* initio, *inter alia,* for non-adherence to the prescribed open tender procurement process, no payments were made to Roux Property Fund in terms of the agreement. SAPS never occupied the property.

[16] As a result of the dispute and the DPW's view herein, Roux Property Fund could not honour its commitment towards Nedbank. Nedbank obtained default judgment by consent against Roux Property Fund for amounts borrowed and advanced to Roux Property Fund. The property was eventually sold in execution to Nedbank. It is common cause that Nedbank acquired ownership of the property, subject to the lease agreement, on 11 October 2013. Nedbank applied for, and was granted the right to intervene in these proceedings.

[17] In a supplementary affidavit filed by Nedbank, Nedbank states that it "has taken the place of Roux Property as the lessor under the lease agreement and acquired all rights which Roux Property had in terms of the lease agreement." In my view, counsel for the applicant correctly contends that through the operation of *huur gaat voor koop*, Nedbank became the successor of all the rights in and to the lease agreement that was or might have been held by Roux Property. The matter subsequently became settled between the applicant and Nedbank, and Nedbank withdrew its opposition to the relief sought by the applicant in this application.

[18] I agree with the applicant's submission that Roux Property Fund did not retain any interest in the subject matter of this application, nor retained any residual role in the proceedings relating to the validity of the lease agreement, since Nedbank took its place as lessor under the lease agreement and acquired all the rights which Roux Property Fund had in terms of the lease agreement.

[19] I am of the view that the DPW's failure to follow the prescribed open tender process in the circumstances of this matter sufficiently tainted the whole procurement process to the extent that the decision to conclude the contract needs to be set aside. It is well-known and widely accepted that public organisations often rely on a competitive bidding process to achieve better value for money. It is as widely known that when it comes to fighting corruption, a non-competitive procurement process is considered a potential source of concern. *In* casu, no rational reason was tendered, either in the founding affidavit, the answering affidavit, or the supplementary affidavit by the deponent to the founding affidavit annexed to the first respondent's answering affidavit, for bypassing the competitive open bidding procurement process in favour of a negotiated bilateral process. The initial urgency, if it existed, evaporated as time passed and, in any event, related only to the lease of two floors in the property, not the whole building. If the impact of this lease agreement on the public purse is considered, it was imperative to follow the prescribed competitive tender process. The failure to do so renders the agreement to be declared constitutionally invalid. This renders the conclusion of the contract in July 2010 *ab initio* void.

[20] Although the applicant contends that, apart from the procurement challenge, the lease is also impugned based on s 66 of the Public Finance Management Act 1 of 1999 (the PFMA), it is not, in light of the finding above, necessary to additionally consider this aspect. Neither is it necessary to consider the issue regarding the availability of funding and the fact that the SAPS's budget did not reflect that provision was made for the lease.

[21] The question then arises whether this court should consider granting just and equitable relief to Roux Property Fund. The Supreme Court of Appeal recently held in *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality:*[5]

> 'It is incumbent on a court making an order of invalidity under s 172(1)(a) to then invoke the provisions of s 172(1)(b) in considering whether or not to make an order which is just and equitable. This the high court did

[5] (Case No. 60/2021) [2022] ZASCA 28 (18 March 2022) at para [9].

not do. It clearly could not enforce payment under a void tender but it could consider whether an amount should be paid on the basis that it was just and equitable for the municipality to do so.'

[22] Moseneke DCJ gave guidance in *Steenkamp NO v Provincial Tender Board of the Eastern Cape,*[6] when he said:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate 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. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.' (Footnote omitted.) If properly examined and considered, the facts of each matter will often reveal whether an appropriate remedy is necessary. Once that has been established, the remedy must be crafted to ameliorate the injustice of suffering a loss that can be avoided.'

[23] In *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others,*[7]the Supreme Court of Appeal reiterated that neither party should benefit

[6] 2007 (3) 121 (CC) at para [29].

[7] (119/2021) 2022 (5) SA 56 (SCA) at para [39] – [42].

from an unlawful contract. Innocent parties, although not entitled to benefit from an unlawful contract, are not required to suffer any loss as a result of the invalidation of the contract.

[24] Roux Property Fund contended that it was not privy to the applicant's, SAPS's, or the National Cabinet's internal processes. Counsel submitted on behalf of Roux Property Fund that even though the DPW asks for a 'pure declaration of rights,' this court has a remedial power to ameliorate the effect of such an order, if granted. Counsel submitted that on the grounds of justice and equity, the court should 'preserve any rights Roux Property accrued under the Sanlam Midcity Centre lease.'

[25] This proposition should, however, fail on two grounds. The first is that Nedbank obtained Roux Property Fund's rights in terms of the lease agreement after Nedbank became the owner of the property subject to the lease agreement. The second is that the Supreme Court of Appeal already found that Roux Property Fund's failure to timeously give notice in terms of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 constitutes a bar to Roux Property Fund proceeding with its damages claim against the DPW in the amount of R340 million arising from the alleged breach of the written lease agreement by the DPW.[8] Even if it was found that it is just and equitable, and competent to preserve the rights that the first respondent accrued in terms of the lease agreement, despite the second respondent having obtained the ownership of the building and stepped into its shoes as lessor, the SCA's decision renders such an order nugatory.

[26] I agree with the applicant's submission that Roux Property Fund did not retain any interest in the subject matter of this application, nor retained a residual role in the proceedings since Nedbank took its place as lessor under the lease agreement and acquired all the rights which Roux Property Fund had in terms of the lease agreement. Since Nedbank does not oppose the application and settled the matter with the applicant, and due to the effluxion of time, no need exists to limit the

[8] *Minister of Public Works v Roux Property Fund* (Pty) Ltd (779/2019) [2020] ZASCA 119 (1 October 2020).

retrospective effect of the declaration of invalidity or to suspend the declaration of invalidity.

[27] Is it necessary to restore Roux Property Fund to its status *quo ante*? The timeline of events indicates that although Roux Property Fund's loan agreement with Nedbank was approved as early as 30 June 2010, the deed of sale regarding the property was only concluded with C-Max Investment in January 2011. This agreement was concluded with Roux Property Fund being fully aware of the Public Protector's investigation into the conclusion of the agreement, the Public Protector's request that the implementation of the agreement be suspended, and well-knowing that the Public Protector's report was pending.

[28] One would expect that a party who contends that it was not privy to the internal processes that preceded the conclusion of a lease agreement to the value of millions of rands for a period of 9 years and 11 months, who initially received written confirmation that all internal processes were duly adhered to only to be informed some 3 weeks thereafter that contrary to the first communication everything does not seem to be in order as far as the contract is concerned, who was informed of, and interviewed during, an investigation by the Public Protector and Special Investigation Unit, who perceived the Public Protector to be hostile towards it, who subsequently received written confirmation that the DPW will proceed with the agreement irrespective of what the outcome of the Public Protector's investigation might be, would be very reluctant to purchase a building and acquire financial obligations in excess two hundred and forty-eight million rand, based on the agreement that is the subject of the Public Protector's investigation, without having had sight of the Public Protector's report. Even more so, where Roux Property Fund, on its own account, stated in its answering affidavit that the applicant's attorneys of record addressed a letter dated 30 September 2010 to its attorney of record wherein it is stated that:

i. The investigation into the lease has now been completed;
ii. Such investigation has established, to the satisfaction of the DPW, that the lease is invalid and not legally enforceable;

iii. DPW accordingly intends not to implement the lease, and

iv. An entirely new procurement process will be conducted in due course in respect of the National Head Quarters of SAPS.

[29] Roux Property Fund stated in its answering affidavit that 'but for the State's express undertaking that the decision to proceed with the lease **in the face of the** Public Protector investigation, the transaction [regarding the purchase of the property] would not have been concluded.' Incurring a significant financial obligation on the premise that the lease agreement that is subject to the Public Protector's investigation will proceed, is reckless. In these circumstances, granting remedial relief is not just and equitable.

Costs

[30] Although the application stands to be granted, I am of the view that it is just in the circumstances for the applicant and the first respondent to each bear their own costs. The first respondent cannot be expected to bear the applicant's costs in circumstances where the applicant failed to follow its own prescribed processes to ensure that the lease agreement was concluded in accordance with a system that is fair, equitable, transparent, and competitive. The first respondent, in turn, should not have opposed the application in the factual circumstances of this case. Not only did it recklessly engage with the DPW well knowing that an investigation was conducted because of the DPW's apparent failure to follow the prescribed procurement processes, but it was also aware of the fact that Nedbank obtained all its rights and interests in the lease agreement and the validity thereof, after acquiring ownership of the property. The first respondent contributed to the protracted litigation. As a result, each party stands to bear its own costs.

Miscellaneous: Application to introduce the supplementary affidavit of Mr. Vukela

[31] The first respondent filed a substantive application that the supplementary affidavit deposed to by Mr. Samuel Vukela, the deponent to the applicant's founding affidavit, be admitted as evidence.

[32] This affidavit is, however, attached to the first respondent's answering affidavit, and as such, I had regard thereto. I found it somewhat peculiar that the first respondent, who stated in the answering affidavit that Mr. Vukela was not sufficiently involved in the administrative actions of the applicant to testify positively to such actions, launched this application.

[33] After considering the content of the affidavit and considering that it already formed part of the body of evidence before this court, I dismissed the application.

ORDER

In the result, the following order is granted:

1. The decision to conclude the Standard Lease Agreement between the applicant and the respondent for office accommodation at the Sanlam Middestad Building Pretoria, entered into during July 2010, is reviewed and set aside;
2. The Standard Lease Agreement, concluded between the applicant and the respondent for office accommodation at the Sanlam Middestad Building Pretoria, entered into during July 2010, is declared invalid *ab initio*;
3. The applicant and the first respondent are to bear their own costs.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. John Peter SC
With:	Adv. K.M. Mokotedi
Instructed by:	The State Attorney, Pretoria
For the first respondent:	Adv. J.J. Botha

Instructed by:	Naude & Naude Attorneys
Date of the hearing:	11 October 2022
Date of judgment:	19 December 2022