

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 5677/2018P

In the matter between:

INTEGRITY FORENSIC SOLUTIONS CC

Plaintiff

and

AMAJUBA DISTRICT MUNICIPALITY

Defendant

Coram: Seegobin J

ORDER

The plaintiff's claim is dismissed with costs, such costs to include the costs of counsel.

JUDGMENT

Seegobin J

Introduction

[1] On 18 May 2018 the plaintiff, Integrity Forensic Solutions CC, sued the defendant, Amajuba District Municipality, in respect of two claims sounding in money. No difficulty arose as far as claim 1 is concerned, which was for an amount of R276 297.51. The claim was admitted and settled by the defendant on 3 July 2018. The disputed amount related to claim 2 which comprised three different amounts, namely: R602 502.83, R127 317.82 and R24 736.50 together with *mora* interest and costs.

[2] The trial involving claim 2 was heard by me on 16 and 17 March 2020. The matter proceeded on the issue of liability only. The essential issue that I was required to determine was whether a valid agreement had been concluded between the parties which was capable of contractual enforcement, and thereby entitling the plaintiff to payment of claim 2.

[3] At the heart of the dispute between the parties lies the actions of the defendant's then municipal manager, Mr Linda Marshall Africa (Mr Africa) who was integrally involved in engaging with the plaintiff to procure certain services for the defendant. In the trial before me, Mr Africa testified on behalf of the plaintiff. The only other witness who testified for the plaintiff was Mr Leo Saunders, the managing director of the plaintiff. The defendant called the evidence of its current municipal manager, Mr Sipho Raynold Zwane.

[4] Apart from the *viva voce* evidence that was adduced, both parties also placed reliance on a number of documents which comprised the joint trial bundle. The documents were what they purported to be and were freely referred to by the witnesses in the course of the evidence.

[5] During the trial, the plaintiff was represented by Mr Tucker and the defendant by Mr Pretorius.

[6] To fully understand the basis of claim 2 and how it allegedly arose, it is necessary to set out the following background facts and circumstances which were largely undisputed:

- (a) The plaintiff conducts business as forensic auditors and investigators.
- (b) During the financial year of 2011/2012, the defendant had appointed a company known as Thabani Zulu and Company to conduct an investigative audit into certain alleged irregularities within the defendant. Thabani Zulu and Company in turn sub-contracted this assignment to the plaintiff.
- (c) On 23 May 2012 Thabani Zulu and Company presented a written report to the defendant in which they highlighted a series of irregularities taking place within the defendant. These irregularities had to do with the failure by some of the defendant's officials to comply with supply chain management (SCM) procedures, resulting in fruitless and wasteful expenses.
- (d) Efforts on the part of the defendant to obtain the assistance of COGTA (Department of Co-operative Governance and Traditional Affairs) to assist it with the investigations proved futile. The defendant then extended the scope of the work of Thabani Zulu and Company to assist the defendant with processes relating to possible litigation involving those persons in the defendant who were involved in misconduct giving rise to criminal conduct.
- (e) By 2015, however, Thabani Zulu and Company was liquidated. In order to ensure some continuity with regard to the investigations that were still required to be concluded, Mr Africa engaged the plaintiff to carry on with the investigations. It was agreed between Mr Africa and the plaintiff that in the event of the plaintiff being required to assist the defendant with litigation support, this would be subject to a variation of scope and an addendum to the engagement letter.
- (f) The total estimated fee quoted by the plaintiff to continue with the forensic investigation amounted to R1 242 800. The balance outstanding on this amount formed the basis of claim 1. This was eventually settled in full by the defendant, as mentioned above.
- (g) In or about July 2016 the plaintiff presented its final report to Mr Africa. The plaintiff's findings highlighted a number of irregularities relating to the SCM processes by certain officials, as well as some of the defendant's councillors who had allegedly benefitted from irregular expenditures.

(h) In order to ensure that persons who were involved in these irregularities were in fact prosecuted, a tri-partite agreement was concluded between the South African Police Services (SAPS), the defendant and the plaintiff for this purpose. The SAPS was represented by Brigadier Maqashalala who was the Provincial Commander of the Directorate for Priority Crime Investigations Serious Corruption Unit. The defendant was represented by Mr Africa and it seems that the plaintiff was represented by Mr Saunders.

(i) There was no dispute that the report prepared by the plaintiff identified R160 million worth of irregular expenditure. It further implicated about 163 people, many of whom were officials of the defendant.

[7] The question that arises is whether Mr Africa, as municipal manager and accounting officer of the defendant, was entitled to engage the plaintiff further with regard to litigation support to the SAPS without following proper procurement procedures.

[8] As a starting point it is necessary to have regard to s 217(1) of the Constitution. This section, couched in peremptory terms, provides *inter alia* that an organ of state in the local sphere, such as a municipality, which contracts for goods and services 'must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. This constitutional imperative has been echoed in a number of legislative enactments such as the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), the Public Finance Management Act 1 of 1999 (PFMA), the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), together with all other subordinate legislation such as the regulations made in terms of the PPPFA, as well as the Treasury Regulations made in terms of the PFMA, policies and guidelines such as the Supply Chain Management policies of local spheres such as the defendant herein.

[9] Since the issue to be determined herein turns largely on the conduct of the defendant's then municipal manager, it is helpful to briefly examine the role of such an officer as set out in the MFMA:

(a) Section 60 provides that the municipal manager of a municipality is 'the accounting officer' of the Municipality and who, as accounting officer must:

- '(a) exercise the functions and powers assigned to an accounting officer in terms of this Act; and
- (b) provide guidance and advice on compliance with this Act to -
 - (i) the political structures, political office-bearers and officials of the municipality; and
 - (ii) any municipal entity under the sole or shared control of the municipality.'

(b) Section 61 deals with the fiduciary responsibilities of accounting officers and provides as follows:

- '(1) The accounting officer of a municipality must –
 - (a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;
 - (b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor; and
 - (c) seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interest of the municipality.
- (2) An accounting officer may not –
 - (a) act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this Act; or
 - (b) use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.'

(c) Section 62 deals with general financial management functions. It provides as follows:

- '(1) The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure –
 - (a) *that the resources of the municipality are used effectively, efficiently and economically;*
 - (b) *that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;*
 - (c) that the municipality has and maintains effective, efficient and transparent systems–
 - (i) of financial and risk management and internal control; and

- (ii) of internal audit operating in accordance with any prescribed norms and standards;
- (d) *that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;*
- (e) that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15; and
- (f) that the municipality has and implements –
 - (i) . . .
 - (ii) . . .
 - (iii) . . .
 - (iv) a supply chain management policy in accordance with Chapter 11.’
 (My emphasis.)

[10] There is no dispute that the defendant’s SCM policy accords with Treasury Regulations. The powers of Treasury include the power to exercise regular oversight over municipalities and to ensure that they comply with their obligations in terms of the MFMA. For purposes of this judgment there is no need to delve deeply into every aspect of the defendant’s SCM policy.

[11] What is of relevance insofar as Mr Africa’s conduct is concerned, is regulation 36 of the policy which deals with ‘deviation from and ratification of minor breaches of procurement processes’. Under this heading, the policy provides as follows:

’36 (1) The municipal manager may –

- (a) dispense with the official procurement processes established by this Policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only –
 - (i) *in an emergency;*
 - (ii) if such goods or services are produced or available from a single provider only;
 - (iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile;
 - (iv) acquisition of animals for 2005 and/or nature and game reserves;

- (v) or in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and
 - (b) ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.
 - (2) *The municipal manager must record the reasons for any deviations in terms of sub-paragraph 1(a) and (b) of this policy and report them to the next meeting of the Council and include as a note to the annual financial statements.*
 - (3) Sub-paragraph (2) does not apply to the procurement of goods and services contemplated in paragraph 11(2) of this policy.'
- (My emphasis.)

The evidence

[12] The overall evidence adduced by the parties must be seen in the context of certain relevant correspondence which form part of the documentary evidence contained in the trial bundle:

- (a) On or about 25 August 2015, Mr Saunders of the plaintiff addressed a letter to Mr Africa. The important aspects of this letter are the following:
 - (i) The letter relates to claim 1 which deals with the investigation into the alleged corruption at the defendant, and the subsequent compiling of a report containing the findings and conclusions resulting from the investigation.
 - (ii) The defendant had appointed Thabani Zulu & Company to conduct an investigative audit into the circumstances surrounding the alleged irregularities at the defendant and Thabani Zulu & Company subcontracted this assignment to the plaintiff.
 - (iii) The defendant thereafter *requested* the plaintiff to conduct further work and bring the investigation to a litigation ready stage.
 - (iv) The plaintiff would then assist the defendant with processes related to litigation against those persons implicated in misconduct, irregular conduct or criminal conduct, where found, *subject to a variation of scope*.
 - (v) With regards to litigation support, the plaintiff stated that it would assist the defendant with same, however, the extent to which the plaintiff would provide

litigation support would depend on the merits of each case and would be impossible to determine at the time of the letter. As such, the plaintiff *did not allocate any cost* in relation to the litigation support stage of the assignment. Further still, the appointment of the plaintiff to assist with the litigation process would be *subject to a variation of scope and an addendum to the engagement letter*.

(vi) The plaintiff proceeded, in this letter, to provide a *total estimated fee* in the amount of R1 242 800. (This was, in fact, the full amount of claim 1 less VAT).

(vii) Finally, the relevant letter seeks an acknowledgment of the agreement and acceptance of the contract.

(My emphasis.)

(b) On or about 12 October 2015, a 'Supply Chain Management Procurement Deviation Request' was duly filled in, as required by regulation 36 of the Municipal Supply Chain Management Regulations.¹ The above is, inter alia, significant from what is contained therein:

(i) The request contains the full amount of the estimated contract fee.

(ii) The request was approved and signed by the following persons: S S Ngoya (HOD); N Nzimande (Procurement Manager); S S Mhlongo (CFO); Linda Africa (Municipal Manager).

(c) On 14 October 2015 an order form was completed under order number 007202. The description on the order form read 'To provide service for conclusion of alleged irregularities at the Amajuba District Municipality'. The specific amount included in the order form was for R1 242 800 together with VAT in the amount of R173 992 giving a total amount of R1 416 792. This order was specifically addressed to the plaintiff at PO Box 604, Umhlanga Rocks, 4320.

(d) On or about 25 April 2016 a 'Letter of Appointment and Authority to Conduct a Forensic Investigation: Integrity Forensic Solutions' was sent to the following persons: all employees of the Department of Co-operative Governance and Traditional Affairs; all employees of the State; and all relevant external parties.

¹ Municipal Supply Chain Management Regulations, GN 868, GG 27636. 30 May 2005.

[13] When one has careful regard to the contents of the above documents, it is apparent that Mr Africa had already deviated from the normal requirements of the defendant's SCM policy by utilising the regulation 36 procedure with regard to claim 1. Prima facie, however, Mr Africa at least sought to ensure that the process was sufficiently transparent by (a) obtaining approval for the regulation 36 deviation; (b) filling out and completing the necessary forms for such deviation; (c) drawing an appointment letter; and (d) ensuring that a clear budgetary ceiling was set out. This process ensured that for budgetary purposes, the defendant at least knew exactly how much it would have to pay for such services and what the precise scope of the work would be. Most importantly, the process was a transparent one having regard to the provisions of s 217 of the Constitution.

[14] Inasmuch as a further scope of the work was foreseen, as evidenced by the above correspondence, this was never presented to all the role players of the defendant, including its full council or to Treasury for that matter. Apart from the further correspondence dealt with hereunder, the plaintiff was unable to point to any written approval concerning the further scope of work which forms the basis of claim 2.

[15] On 28 August 2016, the plaintiff, under the hand of Mr Saunders, wrote to Brigadier Maqashalala informing him that the defendant had mandated the plaintiff to conduct a detailed forensic investigation into alleged irregularities in the supply chain management component of the defendant. Brigadier Maqashalala is informed that the defendant has initiated the opening of a criminal enquiry with reference IR 02/08/2016 with a view of conducting further criminal investigations into the matter. Mr Saunders goes on to record the following:

'To this end, Amajuba has further mandated IFS to assist the SAPS and National Prosecuting Authority (NPA) and its delegates in performing any activity necessary to assist in bringing the aforementioned enquiry to a litigation ready stage. IFS intends to formalise its relationship herein with the SAPS or the NPA and outline the terms and conditions of such relationship.'

[16] On the same day, a similar letter was written by Mr Africa to Brigadier Maqashalala. In this letter Mr Africa, inter alia, also mentioned that the defendant will be responsible for the fees of the plaintiff in respect of the activities that 'will be undertaken by IFS in the execution of our mandate'.

[17] In his evidence before me, Mr Africa had serious difficulties in trying to explain the basis of claim 2. With reference to the plaintiff's letter of 25 August 2015 (referred to above) Mr Africa was asked by Mr Pretorius to explain what his understanding was of the following extract which appears under the heading 'Litigation Support':

'We will assist Amajuba with processes related to the litigation of persons implicated in the irregular transactions. These processes may include disciplinary enquiries, criminal prosecutions and civil recoveries. The extent to which we will provide litigation support will depend on the merits of each case and is impossible to determine at this stage. Accordingly, we have not allocated any cost in relation to the litigation support stage of the assignment. Our appointment to assist Amajuba in its intended litigation processes will be subject to a variation of scope and an addendum to this agreement letter.'

[18] Mr Africa's specific response to this was 'that at the point when it comes to litigation there will be other processes that will emanate in that process which would then have to be costed and billed separately'. This response from Mr Africa indicates, in my view, that he expected something more to happen as far as litigation support by the plaintiff was concerned. Under cross-examination, Mr Africa conceded that even in circumstances where the regulation 36 procedure is to be employed, there would be certain processes which needed to be complied with as was done when the investigation report was procured from the plaintiff.

[19] Mr Africa further agreed that several issues had not been agreed to with regards to the scope of work, and that further meetings were necessary to reach a consensus.

[20] The nature of the concessions and admissions made by Mr Africa make it abundantly clear that (a) no requisite form/s were completed requesting a deviation; (b) no appointment letters were sent out; (c) no service level agreement was concluded; and

most importantly (d) no amount was agreed upon. The absence of these requirements indicates, in my view, that no formal mandate was ever given for the further work.

[21] The plaintiff contends that a municipal manager is entitled to unilaterally, without following any of the municipality's internal procedures, conclude agreements for procurement with third parties. If this contention were to be taken to its logical conclusion, it would mean that a municipal manager was entitled to bypass legislative precepts and a municipality's own SCM policy and procedures. The result is that a municipal manager could bind a municipality to procurement contracts and render it liable for amounts not catered for in its budget.

[22] As accounting officer of the defendant, Mr Africa was duty-bound to conduct himself in a responsible and diligent manner at all times. Sections 61 and 62 of the MFMA requires that an accounting officer must disclose to a municipal council and its mayor all material facts which are available to such accounting officer or reasonably ascertainable and which in any way might influence the decisions or actions of the council or mayor. Additionally, section 62(1) (c) and (d) of the MFMA (quoted above) place a legal obligation on an accounting officer to ensure that the municipality has and maintains effective, efficient and transparent systems of financial and risk management, and internal control of and internal audit operating in accordance with any prescribed norms and standards and further, that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented. Clearly, these obligations escaped Mr Africa when he allowed the plaintiff to continue with the contract without following acceptable procurement and SCM policy and procedures.

[23] In his evidence, Mr Saunders could do no more than rely on the correspondence referred to above as being an instruction from Mr Africa to proceed to provide litigation support to the defendant. Not surprisingly, Mr Saunders felt that it was not for him to enquire whether the internal processes of the defendant had been complied with. Interestingly, if one has regard to the letter of 25 August 2015 from the plaintiff, the idea of providing litigation support came from the plaintiff and not the defendant. However,

even at that stage Mr Saunders was well aware that such a process (to provide litigation support) was 'subject to a variation of scope and an addendum to this agreement letter'. Neither a variation of the scope nor an addendum relating thereto was concluded.

[24] The apparent failure on the part of the plaintiff and Mr Africa to formalise the extension of the contract in accordance with the defendant's SCM policy and procedures, presented huge difficulties for the defendant when it faced demands for payment from the plaintiff in respect of claim 2. As the municipal manager of the defendant, Mr Zwane, who succeeded Mr Africa, was required to deal with the claims made by the plaintiff. Whilst Mr Zwane saw no real difficulty in settling the amounts forming part of claim 1, the position was quite different when it came to claim 2.

[25] In the absence of any order note, written agreement or resolution authorising the plaintiff to provide litigation support to the defendant, Mr Zwane, quite understandably, sought guidance from National Treasury on how to deal with the claim. His letter dated 11 June 2018 to Treasury is instructive. It reads as follows:

1. ...
2. ...
3. Our Municipality is in the process of settling Claim 1 as per letter of demand;
4. We request your advice on how to deal with the issue of claim 2 for an amount of R602 502-83, taking into consideration that our Municipality does not have a valid order in respect of services rendered under Claim 2;
5. Our concern is not any payments made against this claim will amount to fruitless and wasteful expenditure.'

[26] Treasury's response to Mr Zwane was contained in a letter dated 12 June 2018. With reference to claim 2, it reads as follows:

'... The second question regarding Claim 2 should be dealt with, in terms of the council's approval, the MM should table the matter to the council and a decision should be taken from that level.'

[27] On 30 June 2018 Mr Zwane addressed a letter to the plaintiff's attorneys in which he, *inter alia*, said the following:

'With regards to claim 2, we wish to advise yourselves that National Treasury has advised our Municipality that since Claim 2, we wish to advise yourselves that National Treasury has advised our Municipality that since Claim 2 did not follow the normal procurement process of our Municipality, there any payments to be made in respect of Claim 2 should be supported by a council resolution. To this end we wish to confirm that our next council meeting is scheduled to sit on 28th June 2018. We undertake to advise you of the decision of our council after the 28th instant.'

[28] The relevant minutes contained in the trial bundle records that the municipal manager be authorised to pay the amounts due to the plaintiff for the amount of R602 502.83 plus VAT and legal costs incurred to date *once the scope of work has been obtained from the service provider* (my emphasis). It seems, however, that these minutes were not confirmed as being correct but were approved subject to a correction of the relevant resolution, namely Resolution C170: 28/08/2012, which was to read as follows:

'That the Municipal Manager must check if there is a resolution extending the scope of work before payment is (e)affected.'

[29] Of course, Mr Zwane was unable to find any such resolution simply because none existed. In my view, Mr Zwane acted most appropriately when approached for payment in respect of claim 2. As a responsible accounting officer, he had to satisfy himself that a valid contract had been concluded in respect of litigation services. There was, however, no tangible evidence from the plaintiff's side nor anything from the defendant to establish that a valid contract had come into being. There was no obligation on Mr Zwane to approach Mr Africa in this regard in order to search for some confirmation of an agreement. The overall duty, in my view, rested on Mr Africa to have ensured that the processes and procedures employed by him were fully transparent and complied with the defendant's SCM policy.

[30] Apart from the above considerations, one of the *essentialia* of a tender contract is the price that would be paid for the relevant services or goods. Another would be the

duration of the contract. As mentioned already, no price was agreed for litigation support. The effect of this is that the plaintiff would have been at liberty to charge for such services in amounts that would fall completely out of the defendant's budget. Additionally, it could go on charging for as long as the litigation process continued. This, in my view, would be contrary to the tenets of s 217 of the Constitution, and certainly not in the public's interest. In seeming to extend the contract as he did, I consider that Mr Africa violated the provisions of s 217(1) of the Constitution.

[31] In *Tasima*² it was pointed out by Jafta J that evidently the purpose of s 217(1) is to eliminate fraud and corruption in a public tender process and to secure goods and services at the best price in the market. In paragraph 103 of the judgment the following was stated:

'[103] The deleterious impact that corruption has on our society and its democratic institutions was aptly described by this Court in *Glenister*. In their joint judgment Moseneke DCJ and Cameron J stated:

"There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.'" (Footnotes omitted.)

[32] In paragraph 104 Jafta J had regard to what was said by Chaskalson P in *Heath*:³

'[104] Yet earlier in *Heath*, this Court cautioned against the threat posed by corruption to our democracy. There Chaskalson P said:

"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement

² *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 CC.

³ *South African Association of Personal Injury Lawyers v Heath & others* 2001 (1) SA 883 (CC).

of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution.”

[33] In the circumstances, I have no difficulty in concluding that no valid agreement came into being for the provision by the plaintiff of litigation support to the defendant and for which the defendant would now be liable. As I mentioned already, the idea to provide the defendant with litigation support emanated from the plaintiff. This was not just an extension of the first agreement. It involved a completely new scope of work which had to be approved and formalised by the defendant in line with its budgetary constraints.

[34] This is really the end of the matter, but for the sake of completeness I briefly deal hereunder with two further contentions raised by the plaintiff. The first relates to the issue of estoppel and the second relates to whether the defendant ought to have launched a reactive or collateral challenge in order to set aside an agreement which it believed was invalid from inception.

Estoppel

[35] On the issue of estoppel, the submission by the plaintiff that the defendant is estopped from denying the validity of the subsequent agreement is, in my view, unsustainable. Estoppel cannot legalise an unlawful act. It cannot be used in such a way as to give effect to that which is not permitted or recognised by law.⁴ This was confirmed in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*⁵ as follows:

‘Estoppel cannot, as I have already stated, be used in such a way as to give effect to what is not permitted or recognised by law.’

⁴ *City of Tshwane Metropolitan Municipality v Altech Radio Holdings (Pty) Ltd & others* [2020] 1 All SA 99 (GP) para 74.

⁵ *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 23.

[36] As I already mentioned, the *essentialia* of a valid agreement, especially the price, were lacking. Inasmuch as the plaintiff may seek to hold the defendant liable on claim 2, the plaintiff itself had a duty to ensure that the procurement policy was properly complied with.⁶ There is nothing in the plaintiff's evidence to suggest, even remotely, that it took steps to ensure that a valid agreement was in place before it went about offering litigation support to the SAPS.

Collateral challenge

[37] On the issue of a reactive or collateral challenge, the plaintiff contended that if the defendant believed that the administrative action taken by Mr Africa in appointing the plaintiff was invalid, there was a duty on it to have it set aside.⁷ The legal principle established in *Oudekraal* has been met with approval and applied in a number of judgments since then.⁸ The legal principle established in *Oudekraal* is well-known and requires no repetition or analysis herein. When and how a reactive or collateral challenge is raised to an unlawful act will, in my view, depend on the circumstances in each case.

[38] In *Quakeni* the following was stated:

'[26] While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it

⁶ *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd* 2008 JDR 1014 (SE) para 31.

⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).

⁸ *Municipal Manager: Qaukeni & another v FV General Trading CC* 2010 (1) SA 356 (SCA); *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) and *Trudon (Pty) Ltd v National Prosecuting Authority & another* [2018] ZAGPPHC 872.

would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief.⁹

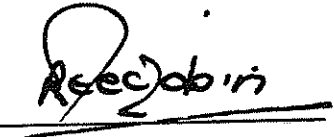
Conclusion

[39] In the present matter, I consider that the defendant was duty-bound not to submit to an unlawful contract and to oppose any relief being sought by the plaintiff. Whilst the defendant did not institute formal review proceedings or lodge a counter-claim in the present matter, in my view, it raised the issue of legality pertinently, not only in its correspondence with the plaintiff and National Treasury but also in its plea. Unlike the position in some of the authorities quoted above which flowed from motion proceedings, the added advantage in the present matter is that *viva voce* evidence was led by both sides to test the validity of the agreement. This evidence together with the documentary evidence persuades me that the defendant's challenge to the plaintiff's action involving claim 2 was fully justified. In the circumstances, I consider that there was no need for the defendant to institute separate proceedings in the nature of a formal review or counter-claim as suggested by the plaintiff. On the evidence, I have already found that no valid agreement was concluded between the parties relating to litigation support. The proper order to be made in the circumstances would be one dismissing the plaintiff's claim in this regard.

Order

[40] In the result, I make the following order:

The plaintiff's claim is dismissed with costs, such costs to include the costs of counsel.


SEEOBIN J

⁹ *Municipal Manager: Qaukeni & another v FV General Trading CC 2010 (1) SA 356 (SCA) para 26.*

APPEARANCES:**COUNSEL FOR THE PLAINTIFF:**

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COUNSEL FOR THE DEFENDANT:

J P Pretorius (instructed by
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DATE JUDGMENT RESERVED:

8 July 2020

DATE JUDGMENT HANDED DOWN:

16 September 2020