THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 20028/2014

Reportable

In the matter between:

THE MINISTER OF TRANSPORT NO **FIRST APPELLANT**

THE ACTING DIRECTOR GENERAL FOR THE DEPARTMENT OF TRANSPORT NO **SECOND APPELLANT**

and

PRODIBA (PTY) LTD **RESPONDENT**

Neutral Citation: *Minister of Transport v Prodiba (Pty) Ltd* (20028/2014) [2015] ZASCA 38 (25 March 2015).

Coram: Navsa ADP, Wallis & Mbha JJA *et* Dambuza & Gorven AJJA

Heard: 19 February 2015

Delivered: 25 March 2015

Summary: **Agreement with service provider signed by Director-General without approval of Minister – held no authority to sign on behalf of the Department of Transport – decision with financial implications of approximately R1 billion – decision polycentric in nature – within province of the Executive – agreement signed without competitive process – if agreement upheld it would mean that following upon the award of a single tender in 1997 one service provider would have had a monopoly in the production of drivers' licences for over 20 years – militates**

against constitutional principles of transparent and accountable government – imperative statutory and treasury requirements flouted – agreement held to be void.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Ebersohn AJ sitting as court of first instance).

The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and substituted as follows:

‘(a) The application is dismissed with costs, including the costs of two counsel.

(b) The third addendum agreement is declared void *ab initio* and set aside.

(c) The respondent in the counter-application is ordered to pay the costs of the counter application, including the costs of two counsel.’

JUDGMENT

Navsa ADP (Wallis & Mbha JJA *et* Dambuza & Gorven AJJA concurring):

Introduction

[1] At the beginning of 1997 a tender was awarded by the Department of Transport (the Department) for the provision of a bureau service that would produce a personalised new style South African drivers' licence, administer the production process and keep the licences safe until they were delivered to the licencing authority. This service was to be provided for a period of five years. Shortly after the award of the tender, and the conclusion during February 1997 of an agreement, the rights vested in the successful tenderer were ceded to Prodiba (Pty) Ltd (Prodiba). Some extension periods were provided for in the agreement concluded upon the award of the tender. That fact and further proposals by Prodiba and negotiations with the Department resulted in the former providing the services referred to above at substantial remuneration until 28 February 2014. The present appeal by the first and second appellants, the Minister of Transport (the Minister) and the Acting Director-General in the Department (the ADG), respectively, followed on a successful application by Prodiba, in the North Gauteng High Court, to enforce an agreement concluded on 1 February 2013 by the erstwhile Director-General of the Department, whose authority is disputed by the appellants. In terms of that agreement Prodiba was entitled to produce new smart-card drivers' licences for a period of five years, commencing on 1 March 2014. The financial implications for the state were estimated at R1 097 billion. The present appeal, with the leave of this court, is directed against those results. If Prodiba were to succeed it would mean that following upon a single tender process during 1995-1997, a single contractor would have had an uncontested monopoly in the production of drivers' licences for a period of more than 20 years. Do our constitutional

norms and values countenance such a situation? The short answer is no. The present appeal might rightly be described as the Department belatedly coming to its senses. The detailed background and the reasons for the aforesaid non-affirmative conclusion are set out below.

Detailed background

[2] During 1995/1996 the Cabinet took a policy decision to migrate from the old drivers' licence regime to a new card system for drivers' licences. As a result the Department issued a tender through the State Tender Board to provide the services referred to in the preceding paragraph. After following proper tender processes the tender was awarded to Face Technologies (Pty) Ltd (Face Technologies), Idmatics and Nkobi Holdings (Pty) Ltd, which led to the Department and Face Technologies concluding a written agreement on 28 February 1997, for the manufacture of driver's licence cards. It is common cause that shortly thereafter Face Technologies ceded its contractual rights to Prodiba. The contract period was repeatedly extended. The last extension was from 1 March 2012 until 28 February 2014. These repeated extensions, by virtue of contractual provisions and negotiations, appear legally suspect but for present purposes need detain us no further.

[3] Prior to the last extension the Department considered updating and changing the technology related to drivers' licences. There was a dispute about whether the idea to change the technology and migrate to a new system, namely a smart-card driver's licence, emanated from the Department or Prodiba. That dispute was ultimately irrelevant.

[4] On 1 February 2013 the erstwhile Director-General of the Department, Mr George Mahlalela, signed the agreement at the centre of the present dispute. That agreement purported to bind the Department and South Africa to migration from the initial card system to a smart card microchip-based driving licence system, with Prodiba being responsible for its production, with the concomitant financial implications set out in

paragraph 1. The agreement was entitled 'the Third Addendum Agreement'. The agreements that followed on the one concluded upon the award of the tender were entitled and referred to as the First and Second Addendum agreements, respectively. I shall, in due course, deal with that description and the employment of what I consider to be semantic stratagems. In adjudicating the validity of the third agreement it is necessary to consider the events and processes leading up to its conclusion.

[5] During October 2012 an internal memorandum was prepared by the Department, which envisaged the migration to the new smart-card technology and anticipated negotiations in that regard with the current service provider, Prodiba. The internal memorandum was in line with a written business case prepared by the Department. What was ultimately intended was a Departmental takeover of the entire production process. The stated purpose of the memorandum was to seek approval from the Minister for the take-over 'of the services currently provided by the service provider and to change the current paper format driving licence card to plastic chip based card.'

[6] The documents reflect a commonplace process of seeking approval within the structures of government. The proposal was prepared by an Acting General Manager, Ms Zwane, in a memorandum addressed to the Minister of Transport. Its recommendations were supported by the Acting Chief Financial Officer and the Deputy Director-General: Roads Transport. It was then referred to Mr Mahlalela, who recommended it and who made a written note stating the following:

'Need to brief Deputy Minister and the Minister on their proposals.'

The memorandum was then sent to the Deputy Minister, who noted this recommendation and said that it was highly supported. That was on 20 December 2012. When the memorandum was placed before the Minister of Transport on 24 February 2013, he deleted the words 'APPROVED/NOT APPROVED' and added a hand-written note stating the following:

'Briefing to precede approval.'

[7] In the answering affidavit the Department was emphatic that the briefing of the Minister had not occurred prior to the conclusion of the agreement. It was adamant in its assertion that there had been no approval of this migration to the new technology or of the cost implications, by the Executive arm of Government, either in the form of a Cabinet decision or indeed even by the individual responsible member of the Cabinet, the Minister. The sequence of events, set out in the preceding paragraph, supported the Department's stance.

[8] I consider it necessary to record that in the litigation leading up to and including this appeal, Mr Mahlalela was conspicuously absent. No affidavit by him was filed by either party, setting out the basis on which he had purported to conclude the agreement. It was unchallenged that Mr Mahlalela was informed, during September 2012, that his contract as Director-General in the Department would not be renewed when it expired on 28 February 2013. Mr Mahlalela signed the agreement in question on 1 February 2013. The evidence demonstrates that he did so without having briefed the Minister and without having obtained his approval.

[9] On 5 February 2013, Mr Mahlalela, purporting to act on behalf of the Department, wrote the following letter to the Director-General of National Treasury, ostensibly to create the impression that he had complied with statutory or Treasury prescripts:

'1. The Department of Transport ("the Department") produced driving licence cards on a fully outsourced Bureau service since March 1998 on contract RT6969SA(G).

2. The original contract was for a period of 5 (five) years. The contract was then extended for a period of 13 (thirteen) months, before a second production period of 5 (five) years was included. The contract was subsequently extended on various occasions for multiple periods ranging from 1 (one) month to 18 (eighteen) months.

3. The Department on several occasions advertised tender specifications for a new service provider but failed to complete the process due to the technical nature, and due to legal challenges.

4. The Department subsequently took a strategic decision, supported by the Ministry and EXCO not to go out on open tender for the continuation of this service but rather to perform this function in-house.

5. The bureau service for the production of driving licence cards will be performed by the Driving Licence Trading Entity ("DLTE"). The Department together with the entity is currently planning and creating capacity within the entity to take over this service. Technical services will be supplied by the Department's integrated transport information technology hub ("IT Hub").
6. The Department developed a service level agreement between the entities to regulate this arrangement (attached and marked Annexure A). The Department developed a business case (attached and marked Annexure B) for the handover of services from the current service provider to the DLTE.
7. The Department had successful negotiations with the current service provider and has agreed that following the upgrade of the current card production infrastructure to enable it to print smart cards, export of biometric and spatial data to the IT Hub and upgrade the live capture infrastructure, the bureau service will be transferred to the DLTE. The current service provider further agreed to assist the Department in capacitating the DLTE including training personnel, operations, transfer of staff and equipment.
8. The Department is of the opinion that this is a major milestone achieved in taking essential services performed on an outsourced basis in-house. The Department intends to follow the same strategy with the eNaTIS contract RT1194KA. However a protracted legal battle with the service provider is currently delaying this process.
9. Your co-operation in this regard is appreciated.'

[10] As pointed out above, the contested agreement contemplated that Prodiba would produce the new licence cards and be responsible for the related administrative processes for a further period of five years, commencing on 1 March 2014. As can be seen, there was no mention of that fact in the letter that appears in the preceding paragraph. In fact the second annexure referred to in paragraph 6 of the letter said expressly that the existing contract would expire at noon on 1 March 2014 and that the current extension of that contract was final. It added that from 1 March 2014 Prodiba would 'no longer provide any services' and the entire process of producing drivers' licences would be managed in-house. The letter could not have been construed as reporting on the conclusion of the Third Addendum Agreement.

[11] In an answering affidavit filed in support of the appellant's case, it was pointed out that there had been an unseemly haste in signing the agreement, prior to Mr

Mahlalela's departure, at a time when he knew that the Department had taken a strategic decision that the appointment of service providers for the migration to the new system was not a viable option and that it intended to provide the service itself. The Department insisted that it had acquired the technology to do so. Prodiba, on the other hand, disputed the Department's ability to produce the new cards. That was neither here nor there. One cannot create a contract with a government department by asserting its inability to perform the work that is the subject matter of the alleged contract. In the replying affidavit on behalf of Prodiba there was no effective challenge to the assertion that the Department had taken a policy decision not to continue to employ a service provider to provide the services described at the commencement of this judgment. The following part of the executive summary of the internal memorandum is significant:

'4.1.3 In order for the Department to proceed with bringing the card production services in-house, the Department will need to cancel the Current Tender and inform the bidders by publication in the state tender bulletin.'

In other words, because the Department was to undertake the production of drivers' licences in-house, there was no need to continue with a tender process to appoint an outside contractor to do so.

[12] It is also necessary to record that in 2008 and 2009 two tenders had been issued by the Department for a new smart-card drivers' licence system. In response to the 2009 tender, 16 bids were received, six of which were susceptible to further evaluation and one of which was Prodiba's. However, the Department decided, for undisclosed reasons, not to proceed with the tender process.[1]

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[1] In the appellant's heads it is postulated that this was done because the Department was to take the card production in-house. However, in the answering affidavit the following appears in relation to the 2009 tender:

'This tender was however not proceeded with for reasons that are not relevant to this application. The applicant was one of the entities that submitted a bid for this tender.'

These statements were followed immediately by the following:

'What the new agreement has now done was to essentially award a tender for migration to a new drivers license system in a manner that is unfair and clearly not transparent. It has also taken away the principle of cost effectiveness in a sense that the Department is now not in a position to assess which of the bidders could deliver a cost effective service, if it still needed to procure these services.'

[13] Subsequent to the conclusion of the agreement, and in anticipation of it being implemented, Prodiba placed orders with suppliers for the necessary materials and equipment to enable it to comply with its contractual obligations. A cash flow schedule appears to have been agreed with Mr Mahlalela in terms of which a total amount of R122 037 084 would be advanced to Prodiba. In April 2013, when Prodiba sought to obtain payment from the Department of three invoices totalling some R38,5 million, it met with resistance.

[14] On 27 April 2013 the ADG purported to cancel the agreement. The letter reads as follows:

'1. The above matter refers.

2. I advise that unbeknown and without instructions from the Minister of Transport, the former Director-General, Mr George Mahlalela concluded an addendum agreement no. 3 with Prodiba on 01 February 2013.

3. I advise that at present there is a contract between the parties (the Department and Prodiba) which terminates at the end of February 2014.

4. Mr Mahlalela was in full knowledge that during 2012, the Department took a strategic decision that the continued extension of the current contract with Prodiba (Pty) Ltd and any further appointment of service providers is no longer viable. The Department was to continue the services in-house with effect from 01 March 2014.

5. I advise further that Mr Mahlalela, has *inter alia*, acted:

5.1 in violation of the provisions of the Treasury Regulations;

5.2 without the authority of the Minister when concluding addendum agreement no. 3 on behalf of the Department of Transport;

5.3 in violation with the provisions of section 217 of the Constitution;

5.4 in breach of his fiduciary duties vice versa the Department of Transport;

5.5 in breach of his duties in concluding a further contract when an existing contract is still in operation.

6. I further advise that the card production extension is not affordable by the trading entity and it will cause the latter to become commercially insolvent and operate on an overdraft. This is not allowed by Treasury Regulation 19.2.3.

7. You have further submitted a claim for an advance payment of R32 million under payment Certificate 307 for upgrade. This is in violation of Treasury Regulation 15.10.1.2(c).

8. I further advise that Mr Mahlalela was not entitled to have concluded a further contract when an existing contract was still in operation.
9. I hereby advise you as I hereby do that the addendum agreement No. 3 concluded by Mr Mahlalela on the 1st of February 2013 with yourself is herewith cancelled.
10. Should you fail to accept the cancellation herewith, the Department will have no alternative but to approach the High Court to have the agreement set aside.'

[15] That letter caused Prodiba to launch an application in the North Gauteng High Court for an order declaring the decision by the ADG to cancel the agreement unlawful and directing the Department to comply with its obligations in terms of thereof. Although couched as a challenge to the validity of the cancellation it said expressly that it was seeking specific performance of the agreement. In a counter-application the Minister sought an order to the effect that the third addendum agreement was void *ab initio.*

Judgment and order of the court below

[16] The high court (Ebersohn AJ) considered the submission on behalf of the Minister and the ADG that Mr Mahlalela did not have the authority to enter into the agreement on behalf of the Department and rejected it. Ebersohn AJ stated that the 'objective facts' set out hereunder destroyed the respondent's allegation that Mr Mahlalela, the erstwhile Director-General of the Department, did not have the authority to enter into the third addendum agreement: First, the Department itself had prepared a written 'business case' for migrating to the smart-card drivers' licences. Second, the department had indicated, since 2009, that it intended to upgrade and update the technology relating to drivers' licence cards. Third, the Department was aware that Prodiba's contract would come to an end on 1 March 2014. Fourth, it had to consider who would manage the card production facility and it had to take into account the new technology to be employed post 1 March 2014. Fifth, the Department had various alternatives open to it, such as allowing a tender to be awarded to a service provider, partial in-house administration and technical functions, a turn-key solution whereby a new service provider manages the entire process, a public and private sector corroboration whereby a government department manages the technical functions, an

upgrading of the current manufacturing infrastructure together with a phased takeover of all functions by the Drivers Licence Card Account established by the Department.

[17] Ebersohn AJ held, with reference to the provisions of the agreement itself, that the Department had chosen a phased takeover of the production of the driving licence card and entered into negotiations with Prodiba which culminated in the Department concluding that agreement. He found that this was in line with the Department's own business plan and held in favour of Prodiba, having regard to the following part of the internal memorandum referred to earlier:

'Negotiations should be undertaken with the current service provider on the effective and smooth takeover including the upgrading, replacement of certain components of the production machine with the components capable of printing the new plastic chip based cards.'

[18] Ebersohn AJ reasoned that the Minister's lack of objection on the record was a factor in Prodiba's favour. He held that the letter from Mr Mahlalela to National Treasury, recorded in paragraph 9 above, was sufficient to fulfil the Department's legal obligation to apprise National Treasury in respect of the financial implications of the agreement. He had regard to the fact that the letter set out in paragraph 9 was copied to the Chief Financial Officer of the Department and the Chief Executive Office of the relevant division of the Department and considered this fact to support Prodiba's application to enforce the agreement.

[19] Ebersohn AJ considered the following objections to the validity of the agreement:

(a) that the Cabinet had not approved the policy change;

(b) that Mahlalela failed to obtain the Minister's approval;

(c) that, in terms of the Public Finance Management Act 1 of 1999 (PFMA), approval had to be obtained from National Treasury as the effect of the agreement was to increase the value of the existing contract in excess of fifteen per cent; and

(d) that Mahlalela failed to obtain the approval of a Bid Committee as required by the Department's supply chain policy.

[20] The court below was dismissive of these objections, stating that none bore scrutiny. Ebersohn AJ held it against the appellants that they failed to refer, in the letter of cancellation mentioned above, to the absence of the necessary approvals from National Treasury and Bid Committee. He reasoned that the belated introduction of these defences impacted negatively on the Department. He considered Prodiba to be an innocent party that would be prejudiced in the event that the Department was permitted to rely 'on non-compliance with its internal procedures'. He had regard to what he considered to be a concession by the Department in its answering affidavit that, up until 24 February 2013, Mr Mahlalela was its Accounting Officer and had the necessary authority to conclude the third addendum agreement.

[21] Ebersohn AJ held that there was no provision in the PFMA requiring Mr Mahlalela to obtain the Minister's approval before binding the Department by concluding the agreement. He considered the following statements in the internal memorandum to give the lie to the appellants' assertion that Cabinet approval was required:

'6.1 National Treasury must be [apprised], upon approval, of the Department's decision to take over the driving licence services currently provided by service provider.

6.2 Upon approval Cabinet must be apprised of the decision of the Department to change the current driving licence card.'

The court below reasoned that these statements proved that all that was required was that the Department had to apprise the Cabinet and National Treasury of its decision to change to the new technology. It is this reasoning that led to his conclusion that there was no substance to the contention that the migration to the new system involved a policy change which required Cabinet approval.

[22] Ebersohn AJ thought it decisive that the respondents were unable to identify any provision in either the Constitution, the PFMA or the Treasury Regulations dictating that approval had to be obtained from the Minister. He viewed a statement in the appellant's answering affidavit that the Department would produce the smart cards in conjunction with the Government Printing Works as proof that the Minister had approved the migration to the new system. In this regard he also took into account, in favour of

Prodiba, the statement on behalf of the Department that it had already migrated to smart card technology. He did not appear to consider it relevant that, in the affidavit under scrutiny, it was stated that the cards would be produced 'once the approval process has been completed'. In the view of the court below the failure by the Minister to supply an affidavit in which he denied that he had approved the agreement impacted negatively on the appellant's case.

[23] Ebersohn AJ rejected appellants' reliance on s 38(2) of the PFMA which provides:

'An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.'

In his view the existing card production and distribution services generated sufficient income to fund the requirements of the present agreement. He went on to state that the internal documents of the Department demonstrated that the services were self-funding.

[24] The court below considered the appellants' reliance on Treasury Regulations which provide that, when it is impractical to invite competitive bids, and when goods and services of over R500 000 are to be procured, an accounting officer has to record the reasons for not adopting a competitive procedure and can only deviate on the basis of recommendations of a Bid Adjudication Committee. It concluded that Mr Mahlalela had sound reasons for opting to use his powers to conclude the agreement without engaging a competitive process and that any omissions on his part could not be laid at Prodiba's door. He relied on the decisions in *Buena Vista Trading 15 (Pty) Ltd v Gauteng Department of Roads and Transport* 2012 JDR 2198 (GSJ) and the decision in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) to support his conclusions. Finally he held that the Department was estopped from relying on a failure of internal management processes. In the result the following order was made:

'2. The decision taken by the second respondent on 27 April 2013 to cancel the third addendum agreement and the attempted cancellation thereof by the respondents is reviewed and set aside and it is confirmed that the third addendum agreement is in force for the full contractual period thereof.

3. It is directed and ordered that the Department of Transport is obliged to comply with its obligations arising from the third addendum agreement and to make payments to the applicant punctually and to facilitate full compliance by the applicant of its obligations in terms of the third addendum agreement.
4. The counter-application of the respondents is dismissed.
5. The respondents are ordered to pay the applicant's costs including the costs of two counsel, jointly and severally, payment by the one absolving the other respondents.'

Conclusions

[25] There are several fundamental flaws in the approach of the court below. First, it did not pause to consider that, on the undisputed facts, what was in contemplation by the Department was an entirely new technological framework for drivers' licences with major cost implications. The epithet 'Third Addendum Agreement' is deceptive. It creates the impression that the agreement in question was merely an extension of an existing agreement. As stated above, previous extensions of the agreement originally concluded by Face Technologies were termed 'First Addendum Agreement' and 'Second Addendum Agreement' respectively. The first two 'addendums' extended the five year period in respect of which the tender was awarded from 1997 to March 2014, a period of 17 years. The word 'addendum', in my view, was consciously and strategically employed. One must bear in mind that during that period there had been two tender processes embarked on by the Department which were abandoned. The abandonment remained unexplained.

[26] Policy decisions such as those to migrate to a new style drivers' licence system which impact meaningfully and, in this case nationally, on the population and which have significant fiscal implications, fall rightly within the province of the Legislature or the Executive. The decision to migrate to new technology on the scale envisaged in the agreement in question is typically a policy-laden or polycentric decision. The Constitutional Court and this court have recognised the importance of appreciating the proper role and functions of the legislature, the executive and the judiciary within the Constitution. In this regards see *Bato Star Fishing (Pty) Ltd v Minister of Environmental*

Affairs 2004 (4) SA 490 (CC) paras 46–48, *Logbro Properties CC v Bedderson NO and* 2003 (2) SA 460 (SCA) para 20 and also Cora Hoexter 'The future of Judicial review in South African administrative law' (2000) *SALJ* 484 at 501. See also *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) paras 57-59. Policy making is traditionally primarily the task of the highest ranking officials in government, namely, the Cabinet or its constituent Ministers or, at provincial level, the executive council or its individual members.[2]

[27] It is undisputed that the Cabinet made the decision during 1995/1996 to change from the old drivers' licence system to the smart-card system. This was clearly in line with what is set out in the preceding paragraph. To reason, as the high court did, from the statement in the internal memorandum that the Cabinet would be apprised of the Department's decisions to change the driving licence system, meant that Cabinet approval was not required, demonstrates, first, a lack of appreciation of where the power to make policy resides. Second, it does not appreciate the context in which the statement set out in paragraph 21 above appeared, nor does it appreciate that a Cabinet colleague, in the form of the Minister of Finance, would have had a material interest in the implementation of the new system. It also had the effect of letting the internal memorandum dictate the legal requirements for the validity of the agreement. I shall, in due course, deal with the reasoning of the court below that there were no budgetary implications since the licencing scheme was self-funding.

[28] The court below failed to appreciate that Mr Mahlalela was a Director-General operating within the Minister's department and subject to the latter's authority. This was expressly recognised in the internal memorandum, the purpose of which was to seek Ministerial approval for the new drivers' licence regime. The Department was best placed to say whether the Minister was briefed, as contemplated in the memorandum. It was emphatic that this did not occur. More importantly, the documentation disclosed in the litigation, bears this out. There is no effective counter in the replying affidavit to the assertion that, towards the end of his tenure, Mr Mahlalela, with unseemly haste,

[2] C Hoexter *Administrative Law in South Africa* 2ed (2012) at 6, 7 and 24.

concluded the agreement, ostensibly, on behalf of the Department when he knew that a decision had been taken not to continue with an outside service provider.

[29] There was no effective response by Prodiba to the assertion on behalf of the Department that it had taken a policy decision not to continue with an outside service provider. The only counter on behalf of Prodiba appeared to be that the Department does not have the capacity to produce the new card on its own, something which, as pointed out in paragraph 11 above, was neither here nor there. It was clear from the documentation on record that the Department had decided to produce the new card in-house.

[30] Contrary to the finding of the court below, the letter written by Mr Mahlalela to National Treasury, the contents of which appear in paragraph 9 above, instead of supporting Prodiba's case, detracted from it. First, it recorded that a decision had been taken to perform the function in-house with effect from 1 March 2014. Second, it omitted to mention that Ministerial approval had not been obtained. Third, it did not record that a *new* agreement to provide a *new* service with significant cost implications had been concluded with Prodiba. Fourth, it did not record why a non-competitive process was not followed. Lastly, it was deliberately vague. All these factors were ignored in the reasoning of the high court when it dealt with Mr Mahlalela's authority to conclude the agreement. The court below took an unjustifiably benign approach towards Mr Mahlalela and Prodiba in its consideration of the documentation.

[31] To sum up, the court below failed to appreciate that policy decision-making power, particularly in matters such as the one under discussion, resides in the upper echelons of government, more particularly the Cabinet and the responsible Minister or Ministers. In contractual terms, there was a failure to appreciate that Mr Mahlalela not only acted without the approval of his principal, the Minister, but did so against an express decision by the Department, which he purported to represent, that it would no longer continue with an outside service provider. Proper representation can only occur if a person who acts on behalf of another has authority to do so. Whether a person has

authority is a question of fact. It is clear from what is set out above that Mr Mahlalela had no such authority.[3] I shall in due course deal with the question of estoppel which the court below held operated against the appellants.

[32] Perhaps even more fundamentally, the court below failed to pay sufficient attention to the procurement principles set out in the Constitution. Section 217 of the Constitution was designed to ensure transparency and accountability on the part of organs of state which we must all be intent on promoting. The relevant parts of s 217 read as follows:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

. . .

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[33] Section 38(1)*(a)*(iii) of the PFMA reads as follows:

'(1) The accounting officer for a department, trading entity or constitutional institution –

(a) must ensure that that department, trading entity or constitutional institution has and maintains –

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.'

Mr Mahlalela was the accounting officer of the Department. It was incumbent on him to have regard to Constitutional principles, the provisions of the sub-section set out above and other statutory prescripts. The high court erred by not having sufficient regard to constitutional norms and statutory requirements and concluding that the decision to produce the new licences in-house could only have been facilitated by an extension of Prodiba's contract and that a competitive bid would not have been viable where the supply of services would have been for a very limited duration. The high court ignored the very extensive period during which Prodiba enjoyed a monopoly and did not properly appreciate that the five year extension period was not of very limited duration.

[3] See S W J van Der Merwe *et al Contract: General Principles* 4ed (2012) at 222.

More importantly, the agreement was one in respect of which Prodiba was required to provide a new service dealing with new technology in respect of which potential competitors were not engaged. Moreover, in describing Prodiba as an innocent party which would be prejudiced if the agreement was to be terminated, the court below ascribed to it a level of naivety that was unjustified. At the outset it succeeded a successful tenderer. In 2009 it was a bidder when a new tender was invited and ultimately not proceeded with. Prodiba knew that new technology and a new process was required and that the cost implications for the State were enormous. It must have been obvious that what was required was a competitive process which was circumvented by the agreement under discussion.

[34] As indicated above, s 38(2) of the PFMA precludes an accounting officer from committing a department to any liability for which money has not been appropriated. The court below reasoned that the production of the cards would be self-funding in that a driver to whom such a card has been issued would be required to pay for it. This was a complete misapprehension about budgetary processes in general and more specifically in relation to the State. It ignored the fact that what precipitated the litigation leading up to this appeal was that Prodiba had sought an advance payment. The money would only be recouped (if at all) at intervals in the future upon the issue of the drivers' licences. In any event, it is in the prerogative of the Department to allocate its earnings as it sees fit. A budget for a financial year yet to commence would take into account what amounts are required in respect of capital expenditure and operational expenses and would make a decision about how any potential future earnings would come into play. It was unchallenged that money was not appropriated to ensure compliance with the Department's obligations in relation to the agreement in question. That, in itself, was sufficient ground on which to invalidate the agreement.

[35] There is a further regulation with which there was non-compliance. Section 76(4)*(c)* of the PFMA provides as follows:

'76. The National Treasury may make regulations or issue instruction applicable to all institutions to which this Act applies concerning –

(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.'

The applicable Reg, 16A6.4 reads as follows:

'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.'

In addition, National Treasury issued an instruction note, 8 of 2007/2008, paragraph 3.4.3 of which provided *inter alia*, that in urgent or emergency cases or in case of a sole supplier, other means such as reg 16A6.4 may be followed. It too provided that the reasons for deviation should be recorded and approved by the accounting officer.

[36] No reasons at all were recorded by Mr Mahlalela for not employing a competitive bid process. In *Chief Executive Officer, South African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) at 22 the following appears in relation to the National Treasury Regulations here under discussion:

'That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of reg 33.'

In *Cash Paymaster* this court was dealing with the review of a decision by the South African Social Security Agency to enter into an agreement with the South African Post Office Limited for the provision of basic banking services to eligible members of the South African public in order to facilitate the payment of social grants to them. It is true that this court in that case did not conclude that a failure to comply with the Treasury Regulations *ipso iure* rendered the decision void. It said the following at para 29:

'Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not.'

[37] On 31 May 2011 National Treasury issued an Instruction Note. In terms of paragraphs 3.9.3 and 3.9.4 of that Instruction Note, accounting officers and authorities were directed that as from 31 May 2011, no contracts may be expanded or varied by more than 20 per cent or R20 million (including all applicable taxes) for construction related goods, works and/or services and 15 per cent or R15 million (including all applicable taxes) for all other goods and/or services of the original value of the contract, whichever is the lower amount, without Treasury's written approval. The financial implications of the agreement were over R1 billion and these requirements must be met and for good reason – to ensure transparent and accountable governance.

[38] The court below erred in holding that Mr Mahlalela was acting well within his powers in concluding the agreement without a competitive process as the option he chose, namely to sign the agreement, was justified. In doing so, it ignored the principles set out above and misconstrued the facts.

[39] It is now necessary to deal with the conclusion of the court below, that in any event the appellants were estopped from relying on non-compliance with internal procedures. In my view the description of non-compliance with the fundamental principles referred to above can hardly appropriately be described merely a failure to comply with internal procedures. The decision in *Buena Vista,* contrary to the finding of the court below, is no support for its conclusions. In that case, Mbha J determined that the contracts there concluded were not *ulta vires* the powers of the Department concerned. The decision of this court in *RPM Bricks*, likewise does not assist Prodiba. In that case Ponnan JA said the following in para 23:

'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. Invalidity must therefore follow uniformly as the consequence. That consequence cannot vary from case to case. "Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in a particular case."'

[40] By not embarking on a competitive bid process, particularly given the nature and scale of the services to be provided, including the cost implications, Mr Mahlalela erred

fundamentally. By concluding the agreement without the approval of his employer and political principal and/or of the Cabinet, he acted without authority. By concluding the agreement and incurring a liability for which there had been no appropriation, he not only erred, but acted against mandatory statutory prescripts and against the constitutional principles of transparent and accountable governance. For all these reasons the agreement is liable to be declared void *ab initio*. Consequently the appeal must be upheld.

[41] The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and substituted as follows:

‘(a) The application is dismissed with costs, including the costs of two counsel.

(b) The third addendum agreement is declared void *ab initio* and set aside.

(c) The respondent in the counter-application is ordered to pay the costs of the counter application, including the costs of two counsel.’

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M S NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT:	Adv. D Unterhalter SC (with him M du Plessis and J A Motepe) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
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