FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case No. : A274/2017

In the matter between:-

VIP CONSULTING ENGINEERS (PTY) LTD Appellant

and

MAFUBE MUNICIPALITY Respondent

CORAM: DAFFUE, J *et* POHL, AJ *et* MENE, AJ

HEARD: 18 JUNE 2018

JUDGMENT BY J P DAFFUE_____

DELIVERED: 29 JUNE 2018

I INTRODUCTION

[1] This appeal raises interesting issues regarding the interpretation and validity of appointments of a company of consulting engineers by a municipality. Another crucial issue is whether or not the appointments were "on risk", *i.e.* on the basis that no fees shall be paid in the event of no government funding be obtained for certain infrastructure projects.

[2] The engineers were appointed by means of four separate letters of appointment dealing with four different projects. They were mandated to undertake the preliminary design stages and to prepare feasibility studies, technical reports and the required documentation to obtain government funding for the projects.

[3] In the event of a finding that the agreements are void and unenforceable, it needs to be considered whether claims based on enrichment should succeed.

II THE PARTIES

[4] The company, VIP Consulting Engineers (Pty) Ltd, is the appellant in this appeal, it being the unsuccessful plaintiff in the court *a quo*. Adv J A Venter appeared before us on behalf of appellant as was the case in the court *a quo*.

[5] Mafube Local Municipality is the respondent in this court, it being the defendant in the court *a quo*. Adv M C Louw appeared for it, both before us and in the court *a quo*.

III HISTORY OF LITIGATION

[6] On 27 November 2013 appellant caused summons to be issued against respondent for payment of the amounts of R556 542.30, R328 333.00, R164 680.13 and R799 258.33 in respect of its professional fees and disbursements calculated as per the Engineering Council of South Africa ("ECSA") scale. As is evident from the amended declaration reliance was placed on four separate letters of appointment. More in this regard will be said *infra*.

[7] An unsuccessful application for summary judgment followed upon respondent giving notice of intention to defend whereafter respondent filed its plea. The parties went on trial during the latter half of 2016 and on 16 February 2017 Mbhele J handed down judgment, dismissing the action.

[8] On 2 June 2017 Mbhele J dismissed appellant's application for leave to appeal, but on 24 August 2017 the Supreme Court of Appeal granted leave to appeal to the Full Court of the Free State Division of the High Court. It set aside the costs order of the court *a quo* in dismissing the application for leave to appeal and ordered that the costs of the two applications for leave to appeal shall be costs in the appeal.

IV THE ISSUES ON THE PLEADINGS

[9] Appellant relied on four partly written, partly oral agreements in alleging that four separate agreements came into existence. It is alleged that Mr Graeme Ambrose acted on behalf of appellant and respondent's municipal manager, Mr Isaac Radebe, acted for the municipality. The written portion of the agreements consisted of four letters of appointments, duly accepted by it, in terms whereof it was mandated to "undertake the preliminary design stage with the view to preparing the feasibility study, technical report and approval" pertaining to four different projects. In the one instance the Department of Water Affairs ("DWAF") had to approve and register the project relating to solid waste disposal sites and rehabilitation of existing sites in certain Mafube towns. In the other instances Municipal Infrastructure Grant ("MIG") registration was required which also included the availability of funds. Two of these projects had to do with sewerage reticulation networks and toilet structures in Qalabotjha township for 697 stands and in Ntswanatsatsi/Cornelia for 393 stands respectively. The fourth project related to the extension of the bulk water supply for Namahadi/Frankfort and Ntswanatsatsi /Cornelia.

[10] The four separate claims for which separate invoices were issued, dated 13 August 2013, are based on 25% of appellant's total fees in the event of implementation of the projects. The total project costs estimated by appellants were set out in its invoices and also pleaded in its amended declaration.

[11] Appellant pleaded in the alternative and on the basis of a finding that the contracts were null and void for non-compliance with s 217 of the Constitution and all relevant procurement processes, that respondent was liable to it in the amounts of its invoices based on enrichment.

[12] Respondent raised two special pleas, the first which was later abandoned. In its second special plea respondent pleaded non-compliance with the applicable procurement processes with particular reference to s 217 of the Constitution and regulation 12(1) of the 2005 Municipal Supply Chain Regulations and its Supply Chain Management Policy. It pleaded that no competitive bidding process was followed. Such a process was peremptory insofar as the amounts involved were in excess of R200 000.00.

[13] Instead of pleading in the alternative, respondent proceeded to plead over in respect of the merits that appellant was mandated on a "risk basis" and that it would only be entitled to payment for its services when funds were approved for the projects. Funds were not approved and therefore appellant had no claim. An alternative defence based on cession of the claims was not pursued.

V **ADMISSIONS**

[14] It was conceded in the court *a quo* that appellant did the preliminary works it was mandated to do and that this

amounted to 25% of the total work, should the projects be implemented. Therefore it was also conceded that the total amount due to appellant in the event of it being successful on the merits amounted to R1 849 313.76, being the aggregate of the four claims set out *supra*. It may be pointed out already at this stage that Mr Louw conceded during argument before us that this amount would also represent appellant's claim in the event of a finding that respondent is liable towards appellant based on enrichment.

VI JUDGMENT OF THE COURT *A QUO*

[15] The court *a quo* correctly found that appellant did the work it was mandated to do. Bearing in mind the concession that appellant was entitled to 25% of its total fees which amounted to R1 849 313.76, three issues remained in dispute, to wit whether appellant was entitled to payment of this amount considering the "no risk" defence, the validity of the four contracts, it being alleged there was no compliance with procurement law and finally, whether or not appellants could successfully rely on enrichment in the event of a finding that the contracts are void.

[16] The court *a quo* found it necessary to approach the matter on the legality issue raised in *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623. No doubt, the principle has been established that a court has a duty to take a point of illegality *mero motu*, but the court is obliged to consider all relevant facts and cannot

make a finding of illegality "in the air". It can do so only when it is certain that all necessary evidence has been placed before it. I refer to the full quotation in *Yannakou infra* when I evaluate the judgment.

[17] The court *a quo* found that appellant was the respondent's sole provider for engineering services and that it never had to submit quotations or tenders for the services rendered. Consequently it found that appellant's "way of doing business put breaks (sic) on the wheels of procurement law long before they could start running." Appellant also obtained an unfair advantage over other potential service providers and respondent "was held at ransom to the desires" of appellant and as a result there was "no room to implement its supply chain management policy" or to comply with the applicable procurement laws. The appointment letters were issued without taking the procurement laws into consideration whilst it is clear that the costs of each project exceeded R200 000.00 by far.

[18] Appellant knew that the projects were not budgeted for and that invoices could only be issued once funding was approved and allocated through MIG. The court *a quo* found that it is clear from the undisputed evidence of Ambrose that the "on risk" appointment letters were accepted as such. Therefore it found that there was no agreement to pay appellant for any work before the approval of funds.

[19] In conclusion on the unlawfulness issue, the court *a quo* found that the fact that appellant was on respondent's database was

irrelevant and as a result of the non-compliance with procurement laws, the appointments were not in the interest of the communities. Therefore the contracts were found to be illegal and unenforceable.

[20] The court *a quo* decided not to label the enrichment action on which it believed appellant relied. It merely referred to *McCarthy Retail Ltd v Shortdistance Carriers* 2001 (3) All SA 236 (A) as authority for the four general requirements to be proven in enrichment actions. The SCA dealt with the claim of a garage business that as *bona fide* occupier repaired a customer's vehicle in the mistaken belief that the insurer had authorised repairs. The court held at paragraph [25] that all the general requirements for enrichment liability were present and found in favour of the garage against the vehicle owner. It appears as if the court found for the appellant based on the *condictio sine causa*. According to the court *a quo*, when entering into the contracts, appellant gambled well-knowing that its payment hinged on government funding. Also, there is no proof that respondent was enriched as a result of the work done by appellant, as Babereki was appointed by the National Government to complete two projects "similar to those plaintiff was appointed for." It then concluded that FLAGG derived benefit from the projects and not the respondent. Although not stated as such, it appears as if the court *a quo* distinguished the McCarthy judgment from the present matter on two bases, *i.e.* appellant was not mistaken when it delivered the services and respondent was not enriched.

VII GROUNDS OF APPEAL

[21] Appellant's grounds of appeal are set out in 38 paragraphs. It unnecessarily complicated the issues as the grounds of appeal really boil down to four issues only. These are set out in the following paragraphs.

[22] The first ground of appeal is in respect of the court *a quo's* alleged incorrect finding that the required procurement processes in terms s 217 of the Constitution, the respondent's Supply Chain Management Policy and the regulations were not followed and the finding that the contracts were null and void.

[23] Secondly, the court a quo's finding that appellant was mandated to do the work "on risk," *i.e.* on a speculative basis of no funding, no fee.

[24] Thirdly, the unilateral termination by respondent of the contracts prevented appellant from proceeding with the implementation and finalisation of the projects as conceded by Ambrose.

[25] Finally, the court *a quo* should have found in appellant's favour based on the just and equitable principle even if the work was done in terms of illegal contracts, alternatively, the requirements for valid enrichments claims have been met.

VIII EVALUATION OF THE COURT *A QUO'*S JUDGMENT BASED ON APPLICABLE LEGAL PRINCIPLES

Adjudication of appeals

[26] A court of appeal assumes as a starting point that the trial court's findings of fact were correct and these findings are normally accepted, unless there is some indication that a mistake has been made. See: Schmidt and Rademeyer, *Law of Evidence,* loose leaf edition at 3-40, relying *inter alia* on *R v Dhlumayo* 1948 (2) 677 (A) 696 at 705 and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623 – 624. It is also confirmed that a trial court enjoys a particular advantage when the demeanour of witnesses is of importance. The trial court was, unlike the court of appeal, absorbed in the atmosphere of the trial from start to finish.

[27] Notwithstanding the above comments it cannot be ignored that a court of appeal may often be in a better position to draw inferences, particularly in regard to secondary facts, bearing in mind the benefit of an overall conspectus of the full record. See: *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) para [14] and *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA) at para [24]. If it emerges from the reasons of the trial court that it erred in respect of its findings on the facts, the court of appeal is free to reject the findings in total or in part, including those findings based on credibility and to reach its own conclusions. See:

Santam Beperk v Biddulph 2004 (5) SA 586 (SCA) where Zulman JA stated the following in para [5]:

> "Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706). This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal 'becomes illusory' (Protea Assurance Co Ltd v Casey 1970 (2) SA 643 (A) at 648D - E and Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 623H - 624A). It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration."

I shall in my evaluation of the court *a quo's* judgment deal with the reasons advanced by it in order to come to a conclusion as to whether its findings should be supported.

Evaluation of the evidence

[28] A court confronted with two mutually destructive and incompatible versions should evaluate the evidence by taking cognisance of and adopting the reasoning of Nienaber JA in *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para [5]:

> "[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court

must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail." (emphasis added)

[29] Mr Prinsloo testified for appellant and Messrs Ambrose and Hlubi for respondent. Prinsloo and Ambrose contradict each other in respect of the risk applicable to the appointments, but

more importantly, in respect of whether or not appellant's claims were due and payable at the stage when invoices were issued in 2013 or when respondent terminated the contracts. Prinsloo confirmed that appellant was entitled to payment notwithstanding the fact that government funding was not approved yet at that stage. Appellant relied on the goodwill normally shown to municipalities by not insisting on payment for the preliminary work until funding is approved. However, and as is clear from the objective facts – the written agreement between Ambrose and his erstwhile company, the appellant – the fees for the work done by appellant was taken into consideration to calculate the appellant's value in order to establish what was Ambrose's interest. His shareholding was therefore valued by including the approximately R1.8 m now claimed by appellant. The completed work, being 25% of the total fees on the four contracts, was agreed to be for appellant's account, whilst outstanding work, to wit the balance pertaining to 75% would be for the account of the new firm created by Ambrose. In summary, Ambrose benefitted from agreeing that the amounts were due and payable for work already done by appellant. On such version appellant was entitled to payment equal to 25% of their total bill in respect of each of the four projects.

[30] Ambrose misled respondent by providing it with an incomplete version of the agreement between him and appellant and on all probabilities his interaction with respondent caused the municipality to unilaterally terminate the contracts with appellant. This was to the advantage of Ambrose's new

company as is apparent from the evidence. Ambrose's version should have been rejected as untrustworthy and unreliable, or at best for respondent, improbable insofar as Prinsloo's version was not only credible, but could and should have been preferred based on the probabilities.

[31] It does not automatically follow that the rejection of a witness' version on one or more aspects should mean that his/her evidence should be rejected *in toto. In casu* I am satisfied that the court *a quo* misdirected itself when it found that there was no procurement process undertaken by the respondent at all. According to the undisputed evidence led by Mr Louw, Ambrose confirmed that a roster system was in place and that appellant had to tender to be recognised as a service provider. Hlubi confirmed this to an extent although he submitted that no tender process had to be followed *in casu* because the work was done "on risk." Hlubi's repeated references to "risk" in his evidence, even from the onset, appear suspicious, especially bearing in mind the version of Radebe in his answering affidavit in the summary judgment proceedings where this was not an issue at all. On Hlubi's version a competitive bidding process had to be followed only once funds were secured. This probably led the court *a quo* to state that in performing the preliminary work appellant received an advantage over other potential bidders. Hlubi's version is directly in contrast with the terms of the appointment letters. The language used in paragraph two is unambiguous. On approval and funding being obtained appellant "should then proceed with the final design, preparation of necessary documents, and the project management of the

project during implementation phase of the project." Two of the four letters qualify "documents" to be "tender documents."

[32] Ambrose and Hlubi contradicted each other as alluded to in the previous paragraph. Hlubi was an arrogant witness that did not even understand that appellant was claiming for preliminary work only. In any event his evidence did not and could not contribute to the court *a quo*'s decision. In fact, no mention is made of his evidence in the judgment.

[33] Although Prinsloo had a reason to testify in appellant's favour, he made concessions when necessary. Ultimately the court could not and did not reject his version as not true or even improbable. His evidence provided background, as was the case with Ambrose's evidence (although to be considered carefully) and based on that it is possible to utilise such evidence as a tool in interpreting the appointment letters. Interpretation of the contracts will be considered under the next heading.

Interpretation of contracts and the terms and conditions of appellant's appointments

[34] Throughout this judgment I interchangeably refer to appointment letters and contracts between the parties. The written parts of the contracts consist of the appointment letters and the written acceptance thereof. The wording of the letters of acceptance does not assist us in the interpretation of the contracts, save insofar as it is evident that both appellant

and respondent accepted that appellant would be part of the project team in respect of all four projects until finalisation thereof. The parties accepted that funds would be obtained some time in future as the projects relate to much needed infrastructure and would obviously be in the interest of the local communities. Therefore, as Ambrose testified, fees were not discussed. It is common cause that the ECSA fee structure would apply as set out in the letters of acceptance. It is also clear from the evidence that some of, if not all, the letters of appointment were issued after appellant had already started with the preliminary works. I shall deal with other factual issues once I have referred to the authorities *infra*.

[35] In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal and Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is

> objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." (emphasis added)

Thus, the matter must be approached holistically and context and language must be considered together with neither predominating over the other. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10] - [12].

[36] In *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) Lewis JA stated the following in a unanimous judgment at para [11]:

> "It is settled law that a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract …. It is also clear that the provision must be given a commercially sensible meaning …" (emphasis added)

[37] In *Novartis v Maphil* [2015] ZASCA 111, 3 September 2015, Lewis JA stated the following at para [28]:

> "[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA

494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing." (emphasis added)

[38] The heading of all four letters reads "Risk appointment ...." followed by a description of the particular project. In one of the four letters the words "at risk" are found in respect of the appointment to undertake preliminary work. The preliminary work is costed at 25% of a consulting engineer's total remuneration for the project, whilst the work in respect of detail design, preparation of necessary documents and project management during the implementation phase of the project is costed at 75%. The witnesses, except Hlubi who was out of his depth, agreed that the work undertaken in paragraph one of the four letters of appointment entitled appellant to payment of 25% of its total fee (bearing in mind the difference of opinion whether it could lawfully be claimed) and the work to be undertaken in paragraph two, *i.e.* when the project is implemented and finalised entitles an engineer to 75% of the total fee. *In casu* there is no issue about the 75%, but the 25% only.

[39] The last paragraph of three of the appointment letters reads as follows:

"Please note that the project implementation is subject to approval by the Municipal Infrastructure Grant and availability of funds."

The fourth letter is in similar terms but approval was required of the National Department of Finance. In my view the respondent made it abundantly clear in these last paragraphs that only the project implementation – that is in respect of 75% of the work as set out in paragraph two – is subject to approval and funding. The obvious and logical deduction from this is that funding and approval from MIG or National Government was not required for the first phase, *i.e.* the 25% set out in paragraph one. This should be clear to any reasonable person that embarks on interpretation of the appointment letters. The respondent, by its own admission and like so many municipalities in this country, does not have any skilled personnel in its service anymore and need to employ outsiders such as consulting engineers to assist them with proper service delivery. If appellant (or for that matter any other firm of consulting engineers) was not mandated to do the first part of the project, respondent and the government would not have a clue what the projects might cost and it would be impossible to advertise for tenders without feasibility studies and technical reports.

[40] Hlubi reckoned that the preliminary work done was nothing but a desktop exercise and he tried to cast doubt on the amount of work put in to arrive at the end of phase one. It is not clear whether he is guilty of extreme arrogance or merely a badly-informed person with some financial background, but a layman in the field of civil engineering. Be that as it may, his version

should have been rejected. It needs to be pointed out again that the court apparently did not rely on his version.

[41] Ambrose suggested that the work done in respect of phase one, or then paragraph one of the appointment letters, was done speculatively, or put otherwise, no fees would be charged if no funding was obtained. The last paragraph of the appointment letters does not allow for such an interpretation and even if it did, such possibility, if weighed with the one submitted by appellant and the surrounding circumstances, is untenable. I am not prepared to accept, for purposes of interpretation of the appointment letters, that any firm of consulting engineers would go around the country, offering its services, spending many manhours and employing several experts in order to prepare documentation based on their expertise in the hope that funding will become available and if not, that they would have done the work for free. We are not talking of desktop exercises and possibly advice that might have taken an hour or two of their time.

[42] Prinsloo explained that the reference to risk merely meant that if appellant would proceed to do work beyond that required for phase one in the hope that funding would be obtained, appellant would be doing such extra work on risk, meaning that if funds were not approved, it would not have any leg to stand on in order to claim fees in excess of 25% of the total fees.

[43] The author of the four letters, Radebe in his capacity as municipal manager, was available but not called to testify.

Messrs Motsoeneng and Mofokeng to whom enquiries could be directed *ex facie* the letters were also not called. Any of these persons might have clarified matters. It is important to note that Radebe did not raise the so-called "risk appointment" as a defence in his answering affidavit resisting the summary judgment application. There is merit in Mr Venter's argument that this "defence was conjured up" since then and during preparation for trial. I am not prepared to accept Mr Louw's argument that the appointment letters must be interpreted against the backdrop of s 15 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("MFMA"), dealing with approved budgets and certain treasury regulations to the effect that competitive bidding can be done away with if contracts are offered on a "risk-basis", i.e. a contingency fee basis of no success, no fee. No factual basis was laid in the evidence for such approach and it was not fully canvassed by relying on direct and credible evidence. It is reiterated that respondent bore the *onus* to prove illegality.

[44] The court *a quo's* conclusion that it "is clear from the undisputed evidence that the plaintiff accepted appointment letters based on risk as its marketing exercise to retain its position as a preferred provider for engineering services" is flawed for the reasons advanced herein. Also, the finding that there was no agreement that appellant would be paid for preliminary designs before approval of funds must be seen in light of a proper interpretation of the appointment letters. In the process of arriving at its conclusion the court *a quo* elected to rely on the fact that respondent had not budgeted for the fees relating to the preliminary work.

Again, it was no doubt accepted that funds would become available at a stage and that the preliminary work was essential to make out a case for funds to comply with the needs of the local communities.

Procurement law and the validity of the appointments

[45] Respondent raised non-compliance with procurement laws in its plea. It elected not to file a review application or a counter-claim. Fact of the matter, and even if it can be accepted that review procedure was not required, which is doubtful in light of the authorities referred to *infra*, it attracted an *onus* to show that the contracts were illegal and null and void based on the principle of legality.

[46] In *Mothapo Consulting Engineers (Pty) Ltd t/a Mothapo Projects v Nala Municipality* (1053/2012) [2012] ZAFSHC 118 (21 June 2012) I stated the following at para [19]:

> "[12] Section 217 of the Constitution prescribes that when an organ of state in the National, Provincial or Local Sphere of Government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This is echoed in section 83(3) of the Local Government: Municipal Systems Act 32 of 2000. Section 112(1) of the Local Government: Municipal Finance Management Act, 56 of 2003 stipulates that the SCMP of a municipality must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal

> supply chain management. In this regard regulations were promulgated under GN R 868 in GG 27636 of 30 May 2005. Procurement law is prescriptive and not permissive. See SANYATHI CIVIL ENGINEERING AND CONSTRUCTION (PTY) LTD v ETHEKWINI MUNICIPALITY AND OTHERS 2012(1) BCLR 45 (KZP) paras 26 -36 and TEB PROPERTIES CC v MEC, DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, NORTH WEST [2012] 1 ALL SA 479 (SCA) para 31."

[47] More recently the Constitutional Court set out the proper legal approach pertaining to procurement processes in *Allpay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) at para [22]. It is not necessary for purposes hereof to quote the *dictum* fully, save to reiterate that "the constitutional and legislative procurement framework entails supply chain management that are legally binding" and "(t)he remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside."

[48] In *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and another* 2016 (3) SA 1 (SCA) the court reiterated at para [38] that fairness in the procurement process is a value in itself and at para [39] that proper compliance with the procurement process is necessary for a lawful process.

[49] In *Municipal Manager: Qaukeni Local Municipality and another v FV General Trading CC* 2010 (1) SA 356 (SCA) at para [16]

the SCA found as follows:

> "[16] I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced."

[50] In *Qaukeni* the SCA proceeded as follows at para [26] in respect of the procedure to be adopted by a public body confronted with its own irregular administrative act:

> "But it is unnecessary to reach any final conclusion in that regard (the review of the administrative action under PAJA). If the second appellant'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 would have done in a formal review. In these circumstances, substance must triumph over form." (emphasis added)

Review and setting aside of decisions

[51] In *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) the court found that s 38 of the Companies Act, 61 of 1973,

> "is fact-based and that, without the necessary facts, a court cannot make a finding on whether s 38 was contravened or not."

The SCA concluded as follows:

> "[24] In this matter it is plain that all the facts are not before court to enable the court to determine whether or not s 38 has been contravened."

See paras [23] and [24] at 498J – 499E. The SCA also relied on the following *dictum* of Trollip JA in *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G – H:

> "And if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded.
> It is true that it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it."

I have deliberately emphasised the last part of the quotation as the court *a quo* relied on the very same *dictum,* but failed to quote this extremely important part. A court cannot make a finding of illegality if all necessary and relevant facts have not been placed before it. I refer to *Mofomo* and *Kirland infra*.

[52] An administrative decision must be treated as though it is valid until a court pronounces authoritatively on its invalidity. See *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA) at paras [14] and [15] and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) at para [32]. See also Merafong City v Anglogold Ashanti 2017 (2) SA 211 (CC) at paras [41] – [44].

[53] In *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC* (A138/2016) [2016] ZAFSHC 196 (24 November 2016) I, writing for the full bench, stated the following at para [34]:

> "In its counter-application the Department was called upon to disclose the entire process followed prior to the appointment of Mofomo, the reasons for its decision and all relevant documents. In the process the Department as an organ of state seeking to repudiate its own administrative action disobeyed the essential requirements for a review application. The Department had to prove invalidity to the court *a quo*, but failed to do so."

[54] I proceeded in *Mofomo supra* to emphasise that a public body such as a municipality that wants to have its own decision reviewed and set aside must play open cards with the court. It

should provide the court with its record of decision, the reasons for the decision and all relevant documents as would have been the case if its decision was taken on review by a disgruntled member of public. I refer to paras [45] – [50] and *inter alia* relied on the judgment of Cameron J in *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) at para [65] where the learned judge said the following:

> "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 short cuts. Generally, 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 has been 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."

[55] The principle that a public body or state functionary may challenge exercises of public power, including their own, in appropriate circumstances, has been confirmed recently by the Constitutional Court in *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC). A collateral challenge to validity of a decision is allowed. See also: Merafong City supra at paras [25], [55] and [56].

[56] In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC)* at paras [37] & [38] the Constitutional Court found that a PAJA review is not available to an organ of state, but a legality review applies to enable the organ of state to apply for the review of its own decision. The court also considered the rule against delay in bringing review applications with reference to *inter alia Tasima and Kirland supra* and found that even in the case of a collateral or reactive challenge, due process must be followed by organs of state as there is no reason to exempt government. At paragraph [50] the court confirmed the following *dictum* by Cameron J in *Kirland* to be correct*:*

> "…there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution's primary agent. It must do right, and must do it properly."

[57] Respondent did not launch review proceedings. If it did that, the reasons for its decisions to issue the appointment letters would have to be provided. All relevant aspects pertaining to the history of the matter would have been placed before the court, such as *e.g.* advertisements for tenders (if it was done), the tenders received, the discussions by panel members (if it was the case), any possible deviation requests and discussions about that at council level, who, when and on whose authority a roster system was put in place and on what basis appellant was selected and by whom. All the facts have

not been placed before the court *a quo* for it to adjudicate whether an illegality has taken place. See: *Apollo and Kirland supra*. The evidence of Radebe, the municipal manager and perhaps the chief financial officer at the time, and/or even the persons referred to *supra* would be of crucial importance. Furthermore, there might be minutes of council meetings that could shed light on the matter. Respondent should have placed reliable and credible evidence of witnesses that were involved with the roster system and/or the bidding system before the court, but failed to do so. The court *a quo* was left in the dark in this regard and actually exercised its discretion "in the air."

[58] The contradictory versions of Ambrose and Hlubi should have been considered and I would have expected the court *a quo* to deal with that. Instead it accepted Ambrose's alleged uncontested version as correct. As shown *supra*, his version should have been found untrustworthy and rejected, except where he confirmed Prinsloo's version and where his evidence was not challenged in respect of the procurement process followed by respondent and the roster system introduced. Ambrose lied with an apparent purpose to support respondent's defence and to ensure that his company would in future obtain further work from respondent. He was biased and his evidence is not supported by the objective facts.

[59] If a court finds that a decision of an organ of state should be reviewed and set aside, an order should be made according to

what justice and equity dictate. See: s 8 of PAJA, the second Allpay judgment 2014 (4) SA 179 (CC) at para [61] and further as well as Gijima at para [54] where the Constitutional Court found as follows:

> "Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for declaration of invalidity – it might have been entitled."

[60] Even if it could be found that the contracts were null and void in their totality, the court *a quo* should have found that appellant was entitled to payment of the 25% claimed. See: *Gijima supra* and also *Ga-Segonyana Local Municipality v OJM consulting Engineers (Pty) Ltd,* an unreported judgment from the Northern Cape Division, case no 1224/15 delivered on 4 May 2018. It must be reiterated that although the facts in the *OJM* judgment are largely similar to that *in casu,* the municipality brought a review application and it must be accepted that all relevant evidence was placed before it which cannot be said to be the case *in casu.*

Effect of respondent's termination of the contracts

[61] We know that Prinsloo testified that two of the contracts, referred to at national level as a bucket eradication system, have been completed. His evidence is supported by photographs and is uncontested. Babareki was appointed as consulting engineers, allegedly as part of a national campaign by the President. Ambrose's firm has been appointed as sub-contractor. His version that the preliminary works done by appellant in respect of the two separate projects for sewerage reticulation networks and toilet structures were not the same as the work eventually completed, is another falsehood. The record speaks for itself.

[62] Appellant's designs are intellectual property that were on all probabilities used as a springboard by Babereki to do final designs and oversee the remainder of the two projects – the 75% referred to in evidence. The designs for the other projects can be utilised the moment funding becomes available. Respondent's termination of the contracts prevents appellant from being any part thereof. If it is accepted that the appointments for all four projects were on total risk or 100% risk, which I am not prepared to do, then Ambrose's concession becomes relevant. Once the contracts were terminated, the projects could not be proceeded with by appellant. Respondent made it impossible for it to perform.

Enrichment

[63] I am of the view that appellant would be entitled to succeed based on enrichment as well. It is deemed unnecessary to deal with this alternative claim, save to say that the work done by appellant added value in the amounts claimed and respondent has been enriched. It will not have to instruct third parties to redo the work done.

IX CONCLUSION

[64] I conclude by firstly stating that there was insufficent evidence upon which the court *a quo* could have found that the contracts were null and void and unenforceble. The authorities quoted indicate clearly that respondent should have brought a legality review application for the court to consider all reasons provided and all documents and evidence relied upon for arriving at the decisions.

[65] Secondly, a proper interpretation of the appointment letters based on the authorities quoted leaves me with one conclusion only and that is that appellant was not appointed "on risk" as submitted by respondent. If such a meaning could be ascribed to the words used, the letters of appointment would in the words of Wallis JA lead to "insensible or unbusinesslike results" and/or "undermine the apparent purpose" thereof. As Lewis JA said, "the (contractual) provision must be given a commercially sensible meaning."

[66] The unilateral termination of appellant's contracts, no doubt based on incorrect information fed to respondent by Ambrose,

made it impossible for appellant to remain involved with the remainder of the work instructed to do – the 75% repeatedly mentioned in the evidence – and more importantly, to obtain payment from government funding as it used to receive in the past in similar situations. It was therefore entitled to issue invoices as it did and to claim payment for the 25% work done, the extent and amount which is not in dispute.

[67] In the light of these findings, I mentioned that it is unnecessary to consider the claims based on enrichment and refrained from doing so. I confirm, however, that I am convinced that a proper case has been made out for relief in this regard as well.

[68] Finally, and if it could be found that there was no compliance with the procurement laws, it would be just and equitable that appellant be paid for work done and which was either utilised or may (will) in future be utilised when funds are eventually granted. The local communities are in dire need for the services to be rendered based on appellant's preliminary work.

X **ORDERS**

[69] The following orders are issued:

(1) The appeal succeeds with costs, such costs to include the costs of the two applications for leave to appeal.

(2) The order of the court *a quo* is set aside and replaced by the following:

"(2.1) Judgment is granted in favour of plaintiff against defendant in the amounts of R556 542.30 (Five hundred and fifty six thousand five

hundred and forty two Rand and thirty cent), R328 333.00 (Three hundred and twenty eight thousand three hundred and thirty three Rand), R164 680.13 (One hundred and sixty four thousand six hundred and eighty Rand and thirteen cent) and R799 258.33 (Seven hundred and ninety nine thousand two hundred and fifty eight Rand and thirty three cent) in respect of claims 1, 2, 3 and 4 respectively.

(2.2) Interest on the aforesaid amounts *a tempore morae* from date of *mora* to date of payment.

(2.3) Costs of suit."

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J. P. DAFFUE, J

I concur

_____
POHL, AJ

I concur

_____
MENE, AJ

On behalf of appellant: Adv J A Venter

Instructed by:
WWB Botha Attorneys
c/o Phatshoane Henney attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv M C Louw
Instructed by:
Stander & Partners
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