IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

07/02/2018
DATE

SIGNATURE

7/2/18

CASE NUMBER: 15806/2016

In the matter between:

BOWMAN GILFILLAN INC Excipient

and

MINISTER OF TRANSPORT Respondent

In re:

MINISTER OF TRANSPORT Plaintiff

and

MANGISI GEORGE MAHLALELA First Defendant

BOWMAN GILFILLAN INC Second Defendant

NGIDI & ASSOCIATES INC Third Defendant

MORAR INC Fourth Defendant

JUDGMENT

MOKOENA AJ,

INTRODUCTION

[1] The second and third defendants (excipients in this application), approaches this court with an exception as envisaged in Rule 23 of the uniform rules of court.[1]

[2] The exceptions are opposed by the plaintiff (the respondent in these exception proceedings).

[3] This matter is not without its own unique history:

[4] Prior to 22 August 2011, the second, third and fourth defendants submitted a proposal to the Department of Transport to be appointed as consultants.[2]

[5] On 22 August 2011, the second, third and fourth defendants were appointed pursuant to having submitted a proposal to the plaintiff. The appointments were made by the first defendant in his capacity as the Director-General of the plaintiff and an accounting officer as contemplated in the Public Finance Management Act

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[1] Index to pleadings, second defendant's exception dated 4 July 2016, p. 70 – p. 75; third defendant's exception dated 15 July 2016, p. 76 – p. 84.
[2] Index to pleadings, annexure A to the plaintiff's particulars of claim, p. 25 – p. 38.

("*the PFMA*").[3]

[6] On 15 December 2011, the first defendant submitted a memorandum to the Bid Adjudication Committee requesting the Bid Adjudication Committee to note the procurement of the second, third and fourth defendants' services and their appointments.

[7] On 25 February 2013, the first defendant's contract of employment came to an end. He is currently no longer an employee of the plaintiff.

[8] On 19 August 2014, the investigations pertaining to the appointments of the second, third and fourth defendants were concluded.

[9] On 26 February 2016 (i.e. one (1) year six (6) months after the investigations were concluded and five (5) years six (6) months after the appointments of the second, third and fourth defendants), the plaintiff instituted action proceedings against the defendants.

[10] During June 2016, the second and third defendants delivered their notices in terms of Rule 23(1) calling upon the plaintiff to remove causes of complaint.[4]

[11] On 4 and 15 July 2016, respectively, the second and third defendants delivered their exceptions.[5]

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[3] Index to pleadings, annexures B, C and D to the plaintiff's particulars of claim (letters of appointment of the second, third and fourth defendants), p. 39 –p. 43.
[4] Index to pleadings, defendants' notices in terms of Rule 23(1), p. 58 – p. 69.
[5] Index to pleadings, defendants' exceptions, p. 70 – p. 84.

APPLICABLE LEGAL PRINCIPLES

Applicable rule (Rule 23 of the uniform rules of court)

Vague and embarrassing

[12] Exceptions serve as a means of taking objection to pleadings which are not sufficiently detailed, lack lucidity, or are incomplete and are thus embarrassing thereby affecting the ability of the other party to plead thereto.

[13] An exception that a pleading is vague and embarrassing strikes at the formulation of a cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in the **Jowell v Bramwell–Jones and others**[6]:

"I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the defendant does not know the claim he has to meet…"

[14] Vagueness amounting to embarrassment and embarrassment resulting in prejudice must therefore be shown. Vagueness would invariable be caused by a defect or incompleteness in the formulation and is therefore not limited in the absence to an absence of necessary allegations, but also extends to the way in which it is formulated.

[15] In **Kahn v Stuart**[7], the court held that:

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[6] 1998 (1) SA 836 (W) at 905E-H.
[7] 1942 CPD 386 at 392.

"In my view, it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the asking of particulars, as the result of the faults in pleading to which exception is taken. And, unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed."

[16] The purpose of a pleading is to state succinctly the grounds upon which a claim will either be asserted or resisted. Where the pleading is either meaningless or capable of more than one meaning, the pleading is vague. Such a pleading is embarrassing, in that the party to whom the pleading is addressed cannot ascertain from it what grounds will be relied upon *"and therefore it is also something which is insufficient in law to support in whole or in part the action or defence"*.[8] The test is whether an intelligible claim or defence, as the case may be, can be ascertained.[9]

[17] The approach to be adopted and applicable considerations were described as follows in **Trope v South African Reserve Bank**:[10]

"An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice,

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[8] Dharumpal Transport (Pty) Ltd v Dharumpal, 1956 (1) SA 700 (A) at 705D and 706D.
[9] Jowell v Bramwell-Jones and Others supra at 899E-F.
[10] 1992 (3) SA 208 (T) at 221A-E.

the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing - see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.

It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."

Lacking averment to sustain a cause of action

[18] The principal use of exception is to raise and obtain a speedy and economical decision on questions of law, which are apparent on the face of the pleadings, so as to avoid the leading of unnecessary evidence.

[19] Exceptions, should therefore be dealt with "*sensibly without using an over-technical approach and provide a useful mechanism to weed out cases without legal merit*".[11]

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[11] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA); *AB Ventures Ltd v Siemens Ltd* 2011 (1) SA 586 (GNP) at para 3.

[20] A defendant cannot plead a defence to a cause of action which does not exist or, which has not been set out.[12]

[21] In **Barclay's National Bank Ltd v Thompson**[13] the function of an exception on the ground that necessary averments are lacking and the circumstances under which it can be taken was restated as follows:

"It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea (cf Salzmann v Holmes 1914 AD 152 at 156; Barrett v Rewi Bulawayo Development Syndicate Ltd 1922 AD 457 at 459; Miller v Bellville Municipality 1971 (4) SA 544 (C) at 546). It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A). Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf Welgemoed v Sauer 1974 (4) SA 1 (A)) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of 'unnecessary' evidence."

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[12] *Viljoen v Federated Trust Limited* 1971 (2) All SA 107 (O) at p 113-114.
[13] 1989 (1) SA 547 (A) at 553.

The requirements of Rule 18(4)

[22] The significance and requirements of Rule 18(4) were commented on in **Trope v South African Reserve Bank** *supra*[14] in the following terms:

"It is desirable that I first state certain general principles of the law relating to an exception on the grounds that a pleading is vague and embarrassing.

Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.

It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent

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[14] At 210G-J.

inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law." (Emphasis added)

[23] Rule 18(4) is interpreted and applied as requiring that a cause of action or defence must be contained in the pleading. The term "*cause of action*" was defined in **Mckenzie v Farmers Co-operative Meat Industries Ltd**[15] as *"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the Court. It does not comprise every piece of evidence which is necessary to each fact, but every fact which is necessary to be proved."*

Does the appointments of the second, third and fourth defendants constitute an administrative action

[24] PAJA now provides the most immediate justification for judicial review, drawing its own legitimacy from the constitutional mandate in section 33(3) to '*give effect to*' the administrative justice rights and to '*provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal*'.

[25] PAJA does not, of course, replace section 33 or amend it in any way, it is not possible for ordinary legislation to repeal or amend constitutional rights. However, PAJA is now the primary or default pathway to review. This follows logically from its main purpose, which is to give effect to the constitutional rights in section 33.

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[15] 1922 AD 16 at 23.

[26] This purpose is achieved largely by section 6 of the Act, which confers powers of review on a '*court or tribunal*' and which contains a fairly comprehensive list of grounds of review.[16]

[27] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**, O'Regan J, confirmed that '*[t]he cause of action for the judicial review of administrative action now ordinarily arises from the PAJA, not from the common law as in the past*'.[17] She summed up the post-PAJA position as follows:-

"The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution."[18]

[28] Section 33 of the Constitution confined its operation to "*administrative action*". PAJA does so too.

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[16] *eTV (Pty) Ltd v Judicial Service Commission* 2010 (1) SA 537 (GSJ).
[17] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environmental, Mpumalanga Province* 2007 (6) SA 4 (CC) at para 37.
[18] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 22.

[29] To determine whether a conduct is subject to review under section 33 (legality) and/or under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action.

[30] It therefore follows that the appropriate starting point is to determine whether the conduct in question constitutes an administrative action within the meaning of section 33 of the Constitution. If it does, it must then be determined whether PAJA nevertheless excludes it from its operation or is reviewable under the broader constitutional principles of legality.

[31] The test for determining whether conduct constitutes "*administrative action*" under section 33 is whether the *function* performed by the public official constitutes administrative action. The enquiry thus focuses on the nature of the function that the public official performs.

[32] In section 33, the adjective "*administrative*" not "*executive*" is used to qualify "*action*".

[33] This suggests that the test for determining whether conduct constitutes "*administrative action*" is not the question whether the action concerned is performed by a member of the executive arm of the government.

[34] What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.

[35] It is apparent from this formulation that some acts of a public official will constitute administrative action as contemplated in section 33 while others will not. This

must be so because public officials and public bodies may be entrusted with a number of responsibilities.

[36] Having regard to the applicable legal principles, alluded to above, I have no doubt in my mind that the appointments of the second, third and fourth defendants constitute an administrative action as contemplated in section 33 of the Constitution for the following reasons:

36.1 the plaintiff is an organ of state;

36.2 a decision to procure services of the second, third and fourth defendants constitute an administrative decision;

36.3 when appointing the second, third and fourth defendants, the plaintiff through its accounting officer was exercising a public power and/or performing a public function;

36.4 administrators, such as the first defendant, have no inherent powers. Every incident of public power must be inferred from a lawful empowering source, usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal or *ultra vires*, that is to say, beyond the powers of the administrator and cannot be ignored but must be challenged by means of review proceedings;

36.5 legislation is the most important source of administrative authority. Legislation of this kind usually establishes a public authority and/or sets out that public authority's powers and functions. Public authorities only have those powers which are granted to them (expressly or impliedly) by their constitutive statutes and ancillary empowering legislation (if any);

36.6 it therefore follows that, the plaintiff and/or its accounting officer when appointing and/or securing the services of the second, third and fourth defendants were performing those functions pursuant to section 217 of the Constitution, the PFMA and other applicable enabling legislation;

36.7 the decisions and/or conduct of the plaintiff and/or its accounting officer may directly or indirectly adversely affect the rights and has a direct, external legal effect.

ANALYSIS OF THE PLEADINGS

[37] The plaintiff's cause of action is set out in paragraphs 13, 14 and 15 of its particulars of claim, in the following terms:

"13.

THE INVALIDITY OF THE APPOINTMENTS

The purported procurement and/or appointments of the second, third and fourth defendants are invalid, null and void and of no force and effect on one or more or all of the following grounds:

(a) No proper procurement processes as prescribed by the procurement prescripts set out below were followed prior to such appointments;

(b) The purported appointments were in violation of the provisions of section 217(1) of the Constitution of the Republic of South Africa, 1996 and sections 38 and 39 of the Public Finance Management Act No. 1 of 1999 ("the PFMA") and regulations published there under in that they were made in breach of the legal requirements that procurement of goods or

services by the State must be done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;

(c) The purported procurement and/or appointments were unlawful in that they were made in violation of the provisions of:

(aa) section 38(1)(1)(a)(iii) of the PFMA in that the said appointments were made in breach of the Accounting Officer's duties to ensure that the department has, and maintains an appropriate procurement system which is fair, equitable, transparent, competitive and cost-effective;

(bb) section 38(1)(c)(ii) of the PFMA in that they were made in violation of the Accounting Officer's duties to prevent unauthorized irregular, fruitless and wasteful expenditure;

(cc) section 38(1)(h)(ii) of the PFMA in that the first defendant committed an act which undermined the financial management and internal control system of the department;

(dd) section 38(1)(h)(iii) of the PFMA in that the first defendant made or permitted unauthorised, irregular and fruitless and wasteful expenditure;

(ee) section 39(1)(a) of the PFMA in that the expenditure incurred in the purported procurement of the services of the second, third and fourth defendants were not in accordance with and/or was in excess of the vote of the department and the main divisions within that vote;

(ff) section 39(2)(b) of the PFMA in that the first defendant failed to report the non-compliance referred to in paragraph (ee) above to the executive authority and the National Treasury;

(gg) section 39(1)(b) of the PFMA in that the first defendant failed to ensure that effective and appropriate steps were taken to prevent unauthorised expenditure;

(hh) Regulation 16A6.1 and/or Regulation 16A6.3 and/or Regulation 16A6.4 of the Treasury Regulations and the Departmental Supply Chain Management Policy in that the purported appointments were made without following the process of inviting competitive bids and/or invitation of quotations.

14.

Alternative to the above, and only in the event of the above Honourable Court finding that the first defendant acted in an urgent and/or emergency situation, the plaintiff pleads that the first defendant acted in violation of Regulation 16A6.4 read with clause 3.4.3 of the National Treasury Practice Note No. 8 of 2007/2008 issued in terms of section 76(1) of the PFMA read with the Departments Supply Chain Management Policy Clause 8.6.1 in that the first defendant failed to comply with these prescripts and to record the reasons for deviating from the prescribed procedures.

15.

At the time of the purported appointments of the second, third and fourth defendants, the first, second, third and fourth defendants knew or must have

known that they were obliged to comply with the above mentioned prescripts but failed to do so, thereby evading the provisions of the law, and embarked on a manoeuver which amounted to acting in fraudem legis."[19]

[38] The second and third defendants delivered their notices to the plaintiff to remove a cause of complaint as envisaged in Rule 23(1) of the uniform rules of court. The exceptions of the second and third defendants are premised on, more or less, similar grounds. The second defendant's grounds of exception are formulated and couched in the following terms:

*"**First ground of exception ("first exception")***

1 The plaintiff alleges in paragraph 19 that the first defendant purported to appoint the second defendant by annexure B, a letter dated 22 August 2011, to render the services described in the letter to the Department of Transport.

2 The plaintiff alleges in paragraph 20 that the appointment was "illegal and therefore invalid" on the grounds listed in paragraphs 13 and 15 or paragraph 14.

3 But the decision to appoint the second defendant,

3.1 constitutes "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);

3.2 is binding on the plaintiff, whether illegal or not; and

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[19] Index to pleadings, plaintiff's particulars of claim, p. 10, para 13 – p. 13, para 15.

3.3 can only be set aside by judicial review in terms of section 6 of PAJA.

4 As a result, the plaintiff does not have a claim for recovery of the payments made to the second defendant pursuant to its appointment.

Second ground of exception ("second exception")

5 The plaintiff says in paragraph 21 that it paid the second defendant "a total amount of R20 303 773.05" over a period of three years. This allegation is vague and embarrassing because the plaintiff does not specify the date and amount of each payment.

6 The plaintiff says in paragraph 23.3 that the defendant overcharged it by an amount of R2 634 364. This allegation is vague and embarrassing because the plaintiff does not specify the date, amount and computation of each overcharge.

7 The plaintiff says in paragraph 23.4 that the second defendant overcharged it by an amount of R3 455 889.59 as overheads. This allegation is vague and embarrassing because the plaintiff does not specify the date, amount and computation of each overcharge.

8 The plaintiff says in paragraph 24.3 that it paid the second defendant the amounts of R20 303 773.05 and R6 090 253.59. This allegation is vague and embarrassing because the plaintiff does not specify the date and amount of each payment."[20]

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[20] Index to pleadings, second and third defendants' exceptions, p. 70 – p. 84.

[39] During argument of the exception, the second and third defendants did not persist with the third ground upon which the exception was premised. This judgment only deals with the first and second grounds of exception as ventilated in the second and third defendants' notices of exception.

[40] At the heart of the plaintiff's cause of action is the following averments:

40.1 that the appointments of the second, third and fourth defendants are in violation of section 217(1) of the Constitution of the Republic of South Africa;

40.2 that the appointments of the second, third and fourth defendants are in violation of sections 38 and 39 of the PFMA;

40.3 that the appointments of the second, third and fourth defendants are in violation of Regulation 16A6.1 and/or Regulation 16A6.3 and/or Regulation 16A6.4 of the Treasury Regulations;

40.4 that the appointments of the second, third and fourth defendants are contrary to the Departmental Supply Chain Management Policy in that the appointments were allegedly made without following the process of inviting competitive bids and/or invitation of quotations.

APPLYING THE LEGAL PRINCIPLES TO THE FACTS WITH REFERENCE TO THE PLEADINGS

Excipients' submissions

[41] In relation to its first exception, the defendants contend that their appointments constitute an administrative action within the meaning of section 1 of PAJA.

[42] In addition, the defendants contend that an administrative decision is deemed to be valid and remains in force, even if it was unlawfully taken, unless and until that decision is reviewed and set aside.

[43] It is the defendants' contention that the plaintiff cannot simply ignore the existence of a decision which led to their appointments and it must apply to court under PAJA for the setting aside of the aforesaid decision. The defendants therefore contend that the assertion to the effect that their appointments were unlawful and therefore invalid are unfounded in law and fails to disclose a cause of action.[21]

[44] In relation to the second exception, the defendants contend that the plaintiff's particulars of claim are vague and lacks particularity as stated in their notices of exception read with their heads of argument.[22]

Plaintiff's submissions

[45] The plaintiff seeks a declaratory order to the effect that the appointments and contracts concluded between the plaintiff and the second to fourth defendants are null and void and of no force and effect.

[46] In addition, the plaintiff further claims from the defendants specified amounts which were paid to the second, third and fourth defendants on the basis of the alleged invalid contracts.

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[21] Second defendant's heads of argument, p. 3, para 11 – p. 4, para 14; **see also** third defendant's heads of argument, p. 5, para 5 – p. 8, para 5.7.
[22] Second defendant's heads of argument, p. 4, para 15 – p. 6, para 25; **see also** third defendant's heads of argument, p. 8, para 6 – p. 11, para 6.15 (**see also** Index to pleadings, defendants' notices of exception, p. 70 – p. 84).

[47] Fundamentally, the plaintiff alleges that the contracts concluded with the second, third and fourth defendants were illegal and unenforceable in that they were concluded in contravention of the Constitution, the PFMA and the Treasury Regulations.[23]

[48] Furthermore, the plaintiff relies on paragraph 116 of the **Merafong City v Anglo Gold Ashanti Ltd**[24] and submits premised on the principle enunciated therein, that the appointments of the second, third and fourth defendants contravenes the Constitution and statutory provisions and therefore they are illegal and null and void.

[49] The plaintiff submits that the contracts which were concluded between the parties are governed by the principles of law of contract and not administrative law as its case merely deals with offers and acceptance and that the contracts should be visited with the same illegality and nullity as they were made contrary to the constitutional principles relating to procurement of services for the state.[25]

[50] In its supplementary heads of argument handed on the day of the argument, the plaintiff advances a slightly different argument compared to the one advanced in its previous heads of argument, as the plaintiff now submits that "*the relationship between the parties was not purely contractual but also administrative in nature because of an exercise of public power*", even though this contention (according to the plaintiff) is advanced for the purposes of argument, but not conceded.[26]

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[23] Plaintiff's initial heads of argument, p. 2, para 2.
[24] 2017 (2) SA 211 (CC) at para 116.
[25] Plaintiff's initial heads of argument, p. 7, para 6.5 – p. 12, para 6.9.
[26] Plaintiff's supplementary heads of argument (first exception), p. 3, para 3.

[51] In addition, in its supplementary heads of argument, the plaintiff submits that PAJA does not apply to the plaintiff as it seeks to review its own administrative action. Furthermore, that the appointment of the second, third and fourth defendants as consultants was not an administrative action within the meaning of section 1 of PAJA and as a result the plaintiff is not obliged to review and set aside its decision to appoint the second, third and fourth defendants in terms of section 6 of PAJA.[27]

[52] The plaintiff further submits that even if review and setting aside is considered to be the appropriate remedy (which it does not concede), the declaratory relief which it seeks, serves as a review.[28]

[53] In its opposition of the defendants' second ground of exception, the plaintiff submitted further heads of argument and contends that the exception is without merit as its particulars of claim are not vague and embarrassing as more fully ventilated, therein.[29]

Analysis of the contentions with reference to the applicable legal principles

[54] On a proper analysis of the plaintiff's cause of action, there is no doubt that the plaintiff premises its cause of action on the common law principles governing the law of contracts. This conclusion is supported by the relief which the plaintiff seeks in its particulars of claim with particular reference to paragraph 20 wherein the plaintiff alleges that "*The said appointment was illegal and therefore invalid by reason of the grounds listed in paragraphs 13 and 15, alternatively paragraph 14*

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[27] Plaintiff's supplementary heads of argument, p. 3, paras 3 – 4.
[28] Plaintiff's supplementary heads of argument, p. 9, para 6.10 – p. 10, para 7.
[29] Plaintiff's supplementary heads of argument (on the second exception), p. 4, para 6 – p. 13, para 22; **see also** plaintiff's initial heads of argument, p. 13, para 8 – p. 18, para 15.

above".[30]

[55] Procurement of goods and services is governed by section 217 of the Constitution. The conduct pertaining to the appointments of the second, third and fourth defendants, as consultants, constitute an administrative action. The plaintiff's cause of action is, *inter alia*, also premised on the alleged violation of section 217.

[56] In **Steenkamp NO v Provincial Tender Board, Eastern Cape**[31], the Constitutional Court held as follows:

> *"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford*

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[30] Index to pleadings, plaintiff's particulars of claim, p. 14, para 20; **see also** p. 22, para 40.1 "*A declaratory order be made that the appointment in the form of annexures B, C and D of the second, third and fourth defendants are null and void and of no force and effect*".
[31] 2007 (3) SA 121 (CC) at para 29, 30, 33 and 35.

the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.

[30] *Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA. It is indeed so that s 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable'. Yet it is clear that the power of a court to order a decision-maker to pay compensation is allowed only in 'exceptional cases'. It is unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case. Suffice it for this purpose to observe that the remedies envisaged by s 8 are in the main of a public law and not private law character. Whether a breach of an administrative duty in the course of an honest exercise of a statutory power by an organ of State ought to be visited with a private law right of action for damages attracts different considerations to which I now turn.*

[33] *Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in s 195(1).*

[35] There can be no doubt that in procuring goods and services for the State, a tender board must act consistently with its statutory mandate. It must act fairly, impartially and independently. Equally, it may not act with negligent or reckless disregard for the protectable interests of tenderers. It must act within the legislative power conferred on it and properly and honestly exercise the discretion it may have. A tender board must in doing its work act transparently and be held accountable, when appropriate. In other words it must in its work observe and advance the basic values and principles governing public administration as envisaged by s 195 of the Constitution."

[57] The remedy contemplated in declaring the challenged administrative action to be unlawful in section 172(1)(a) of the Constitution is by means of a review. The review may be in terms of PAJA or a legality review, but not by means of an action proceedings where a relief sought is for the payment of the contractual amounts premised on the principles of law of contracts and a relief that the appointments and contracts should be declared null and void without the plaintiff having applied to set aside such an administrative conduct by means of a proper process.

[58] For further reasons which I advance below, I do not agree with the plaintiff's argument that the common law contractual remedy (i.e. a declaratory order, declaring the appointments of the defendants and subsequent contracts concluded between the parties to be null and void and of no force and effect), can be equated to a review.

[59] Review, in the circumstances of this case and having regard to the plaintiff's pleaded case, is indeed a remedy which ought to have been relied upon by the plaintiff in order to set aside the alleged conduct which the plaintiff submits that it contravened and violated the provisions of the Constitution, the PFMA and the applicable regulations.

[60] The starting point is that the decision must be set aside once a ground for review has been established. In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**[32] (*"Allpay No. 1"*), the Constitutional Court formulated the principle as follows:-

> *"[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy."*[33]

[61] Even if it may be accepted that the defendants acted in *fraudem legis* (an issue which I do not have to determine for the purpose of these exception proceedings), the decision which led to their appointment and the subsequent contracts

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[32] 2014 (1) SA 604 (CC) at paras 22 - 25, 28, 56 and 58.

[33] *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA) at paras 22 – 27; **see also** *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No. 2)* 2014 (4) SA 179 (CC) at paras 29 – 32 and 67; *Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Limited and Others* 2011 (4) SA 113 (CC) at para 84.

concluded, constitutes an administrative action which remains valid, binding and continue to have legal consequences until set aside by proper process.

[62] Contrary to the argument advanced on behalf of the plaintiff,[34] the trite principle in the *Oudekraal* and *Kirland* judgments, is to the effect that a defective and/or unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

[63] The plaintiff, as an organ of state, cannot ignore the alleged defective administrative action which appointed the defendants and simply proceed by way of action proceedings whereby it is seeking to be paid back the amounts claimed without having set aside the administrative action by means of a proper process.

[64] In opposing the defendants' exceptions and contending that its particulars of claim discloses a cause of action and are not vague and embarrassing, the plaintiff relies, mainly, on two judgments (i.e. **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading**[35] and **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd**[36]).

[65] The Supreme Court of Appeal in the *Qaukeni* matter, in paragraph 26 held as follows:-

> *"[26] While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which*

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[34] Plaintiff's supplementary heads of argument, p. 4, para 6 – p. 8, para 6.9.
[35] 2010 (1) SA 356 (SCA).
[36] (CCT254/16) [2017] ZACC 40 (14 November 2017) at para 37.

no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. 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. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief." (Emphasis added)

[66] Even though the dictum in *Qaukeni*, at first sight, appears to support the plaintiff's contention to the effect that it is entitled to seek a declaration of unlawfulness of the contracts leading to the appointments of the second, third and fourth defendants, and that by so doing it would be a sufficient manner of raising a question of legality just as it would have done in a formal review. It is important to highlight that *Qaukeni* must be scrutinised in the light of the Constitutional Court decisions which pronounced on the relevant issues raised by the parties, in these proceedings.

[67] Prior to dealing with the Constitutional Court decisions which were decided subsequent to the *Qaukeni* case, it is important to highlight what the Supreme Court of Appeal stated in *Qaukeni*, with particular reference to portions of paragraph 26 of the judgment, where the following is stated "*While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard*".[37] (Emphasis added)

[68] The Supreme Court of Appeal in the *Qaukeni* case did not reach any final conclusion in relation to whether or not "*it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest*". This question was left open by the Supreme Court of Appeal and a more decisive approach was adopted by the Constitutional Court in the subsequent decisions, which I canvas, below.

[69] The Constitutional Court in *Allpay No. 1*[38], held as follows:

> *"[22] This judgment holds that:*
>
> *(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.*

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[37] *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading* 2010 (1) SA 356 (SCA) at para 26.
[38] 2014 (1) SA 604 (CC) at paras 22(c) and (d), 26, 31, 32 to 37, 40, 41 and 56.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).

[26] This clear distinction, between the constitutional invalidity of administrative action and the just and equitable remedy that may follow from it, was not part of our pre-constitutional common-law review. The result was that procedure and merit were sometimes intertwined, especially in cases where the irregularity flowed from an error of law. This was not, however, a general rule and did not necessarily apply where procedural fairness was compromised. Even under the common law the possible blurring of the distinction between procedure and merit raised concerns that the two should not be confused:

> *'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'*

[31] In Steenkamp Moseneke DCJ stated:

> *'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable,*

transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in section 195(1).'

In Millennium Waste the Supreme Court of Appeal (per Jafta JA) elaborated:

'The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be "fair, equitable, transparent, competitive and cost-effective". Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of [PAJA] apply to the process.'

[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus s 217 of the Constitution:

'(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.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

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

[33] The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act (Procurement Act). The Public Finance Management Act is also relevant.

[34] An 'acceptable tender' under the Procurement Act is any 'tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document; . . . .' The Preferential Procurement Regulations (Procurement Regulations) define a tender as —

> *'a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals; . . . .'*

[35] An organ of state must indicate in the invitation to submit a tender —

(a) if that tender will be evaluated on functionality;

(b) that the evaluation criteria for measuring functionality are objective;

(c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;

(d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and

(e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems.

[36] The object of the Public Finance Management Act is to 'secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions' to which it applies, SASSA being one of them. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; . . . .'

[37] The Treasury Regulations issued pursuant to s 76 of the Public Finance Management Act require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that must be fair, equitable, transparent,

competitive and cost-effective. In the case of procurement through a bidding process, the supply chain management system must provide for the adjudication of bids through a bid adjudication committee; the establishment, composition and functioning of bid specification, evaluation and adjudication committees; the selection of bid adjudication members; bidding procedures; and the approval of bid evaluation and/or adjudication committee recommendations. The accounting officer or accounting authority must ensure that the bid documentation and the general conditions of contract are in accordance with the instructions of the National Treasury, and that the bid documentation includes evaluation and adjudication criteria, including criteria prescribed by the Procurement Act and the Broad-Based Black Economic Empowerment Act (Empowerment Act).

[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to

be reasonable and justifiable, and the process of change must be procedurally fair.

[41] This court has stated that a cause of action for the judicial review of administrative action now ordinarily arises from the provisions of PAJA and not directly from the right to just administrative action in s 33 of the Constitution. The grounds for judicial review under PAJA are contained in s 6, which reads in relevant part:

> *'(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
>
> *(2) A court or tribunal has the power to judicially review an administrative action if —*
>
> *(a) the administrator who took it —*
>
> *(i) was not authorised to do so by the empowering provision;*
>
> *(ii) acted under a delegation of power which was not authorised by the empowering provision; or*
>
> *(iii) was biased or reasonably suspected of bias;*
>
> *(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
>
> *(c) the action was procedurally unfair;*

(d) the action was materially influenced by an error of law;

(e) the action was taken —

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself —

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to —

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

[56] Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context."

[70] It follows from *Allpay No. 1* that where an administrative conduct is challenged on the basis that it offends section 217 of the Constitution, procurement legislation, the PFMA and applicable Treasury Regulations, such a decision must be subjected to a review process in order for the affected decision or conduct to be declared unlawful and only then will the court exercise its discretion pertaining to a just and equitable remedy.

[71] A party cannot ignore the affected decision or conduct and proceed by way of action proceedings, while such a decision remains valid, binding and effective, and proceed to seek relief premised on common law principles of contract and/or enrichment action.

[72] The Constitutional Court in **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute**[39], held as follows:

> *"[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective — as the evidence here suggests — government should generally not be exempt from the forms and processes of review. It should be held to the*

[39] 2014 (3) SA 481 (CC) at paras 64, 65 and 98 to 106.

pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.

[98] The outcome does not change if we consider the approval from the perspective of whether the decision-maker acted within her jurisdiction in granting approval. Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist before the exercise of power, and the procedures to be followed when exercising that power. It is true that we sometimes refer to lawfulness requirements as 'jurisdictional facts'. But that derives from terminology used in a very different, and now defunct, context (namely where all errors, if they were to be capable of being

reviewed at all, had to be construed as affecting the functionary's 'jurisdiction'). In our post-constitutional administrative law, there is no need to find that an administrator lacks jurisdiction whenever she fails to comply with the preconditions for lawfully exercising her powers. She acts, but she acts wrongly, and her decision is capable of being set aside by proper process of law.

[99] *So the absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable, usually on the grounds of lawfulness (but sometimes also on the grounds of reasonableness). Our courts have consistently treated the absence of a jurisdictional fact as a reason to set the action aside, rather than as rendering the action non-existent from the outset. The absence of jurisdictional facts did not entitle Mr Boya to withdraw the approval, but only to approach a court to set it aside.*

[100] *It was on these principles that the Supreme Court of Appeal drew in Oudekraal. The court explained at the outset that the question before it was wide: it was 'whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts'. The narrow dispute for decision was whether the invalidity of a preceding administrative act (the administrator's grant of township development rights) entitled a local authority to refuse to do something (approve an engineering services plan for the township) it would have been obliged to do if the administrator's preceding act had been valid. The court said No. The local authority could not simply treat*

the administrator's act as though it did not exist. Until it was properly set aside by a court of law, it engendered legal consequences.

[101] The essential basis of Oudekraal was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process. The court expressed it thus:

> *'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. . . . But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of*

producing legally valid consequences for so long as the unlawful act is not set aside.'

[102] In the present case the Supreme Court of Appeal relied on this passage in concluding that the department was not entitled simply to ignore the approval. And rightly. In doing so, the court acted in accordance with the stature Oudekraal has acquired over the last decade. It has been consistently applied by the Supreme Court of Appeal, as well as by this court. The underlying principle, that public officials may not take the law into their own hands when seeking to override conduct with which they disagree, has also been given effect in three cases involving schools' policies on admission of learners.

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

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

For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of

governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.

[104] It does not assist the debate to point out that what happened in this case seems to have been highly unscrupulous and deplorable. This is because, in the next case, the official who seeks to ignore departmental action may not be acting with pure motives. Though the official here seems to have been on the side of the angels, the risk of vindicating the department's approach lies in other cases where the revoker may not be acting nobly.

[105] The approval communicated to Kirland was therefore, despite its vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat. This approach does not insulate unconstitutional administrative action from scrutiny. It merely requires government to set about undoing it in the proper way. That is still open to government.

[106] In summary: having failed to counter-apply during these proceedings, the department must bring a review application to challenge the approval granted to Kirland, which remains valid until set aside. In those proceedings, the department will no doubt explain its dilly-dallying by accounting for the long months before it acted. As respondent, Kirland will in turn be entitled to defend the decision, whether on the ground of its validity, or on the ground that it should not be set aside, even if it is invalid." (Emphasis added)

[73] As pronounced in the *Kirland* matter, the plaintiff may not simply ignore the administrative decision which led to the appointment of the defendants as it remains valid and enforceable until it is properly set aside by a court of law. The rule of law dictates that organs of state are obliged to use proper legal processes in order to challenge their own decisions.

[74] It must be emphasised that the appointment of the defendants was made by the incumbent of the office empowered to make such a decision and who was an accounting officer as envisaged in the PFMA. Such an administrative decision remains effectual until properly set aside by means of review proceedings and not by simply invoking common law principles of contract.

[75] It therefore follows that the appointment of the defendants remains an administrative action that is binding to the parties until properly challenged and set aside by means of a review application.

[76] The Constitutional Court in the matter of **Merafong City v AngloGold Ashanti Ltd**[40] ("*Merafong matter*"), held as follows:

> *"[41] The import of Oudekraal and Kirland was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.*

[40] 2017 (2) SA 211 (CC) at paras 41 and 42.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to Kirland, in Economic Freedom Fighters. He pointed out that our constitutional order hinges on the rule of law:

> *'No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'"*

[77] The *Merafong* matter confirmed the principle enunciated in the *Oudekraal* and *Kirland* matters that government cannot simply ignore an administrative decision that is binding on the basis that it is invalid. Such an administrative action remains legally effective until properly set aside by a court of law.

[78] The process and the procedure in challenging and setting aside administrative actions that offends section 217 of the Constitution and/or the provisions of the

PFMA is by means of a review application and not action proceedings wherein a party merely seeks the contracts concluded to be declared null and void *ab initio*.

[79] The principle, in the *Kirland* and *Merafong* Constitutional Court matters, was confirmed by the Constitutional Court in the matter of **Department of Transport and Others v Tasima (Pty) Ltd**[41] ("*Tasima matter*"), where the Constitutional Court held as follows:

> *"[145] The first judgment's approach resuscitates an argument advanced by the minority in Kirland, and extended by the minority in Merafong. After noting that the conduct of a government official was inconsistent with ss 33 and 195 of the Constitution, the minority in Kirland argued for the proposition that '(a) decision flowing from [conduct violating ss 33 and 195(1)] must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside'; and further that '(u)nder our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional'.*

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[41] 2017 (2) SA 622 (CC) at paras 145 to 149; **see also** *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at para 18, where the following was held "*What remains are observations originating from comments by the court a quo which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the tender board in accordance with the audi alteram partem rule prior to the cancellation. Lest I be understood to agree with these comments by the court a quo, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) at para 18; Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) at paras 11 and 12). The fact that the tender board relied on authority derived from a statutory provision (ie s 4(1)(eA) of the State Tender Board Act) to cancel the contract on behalf of the government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the tender board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the regulations - like the provisions of ST36 - became part of the contract through incorporation by reference.'*

[146] *But these sentiments did not prevail in those cases. The majority judgment in Kirland held that the court should not decide the validity of the decision because 'the government respondents should have applied to set aside the approval, by way of formal counter-application'. In the absence of that challenge — reactive or otherwise — the decision has legal consequences on the basis of its factual existence. One of the central benefits of this approach was said to be that requiring a counter-application would require the state organ to explain why it did not bring a timeous challenge. The same was required of the municipality in Merafong.*

[147] *This position does not derogate from the principles expounded in cases like Affordable Medicines Trust and Pharmaceutical Manufacturers. These decisions make patent that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. This includes the exercise of public power. Moreover, when confronted with unconstitutionality, courts are bound by the Constitution to make a declaration of invalidity. No constitutional principle allows an unlawful administrative decision to 'morph into a valid act'. However, for the reasons developed through a long string of this court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.*

[148] This important principle does not undermine the supremacy of the Constitution or the doctrine of objective invalidity. In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally effective, despite the fact that it may be objectively invalid.

[149] This approach was endorsed and explained by a unanimous court in Economic Freedom Fighters. There, Mogoeng CJ concluded that our constitutional order hinges on the rule of law:

> *'No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would amount to a licence to self-help. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'"* (Emphasis added)

[80] The message which the *Tasima* matter was conveying to the government litigants was that their administrative decisions remains valid and binding until such time that they are challenged by means of a proper process (i.e. a formal counter application or a review application) to set aside the purported defective administrative conduct. It therefore follows that in absence of that challenge, the

decision has legal consequences and cannot be ignored.

[81] In the *Tasima* matter, the Constitutional Court highlighted the obvious and central benefits in review proceedings which is that when an organ of state challenges its own decision it must do so by means of a counter application or a review application which would require the state organ to explain why it did not bring a timeous challenge.

[82] The other obvious benefits for the state organ challenging its own decision to follow a proper process is to afford those litigants who might be affected by the envisaged challenge to raise the defences which the law affords them in review proceedings.

[83] Such benefits will obviously be lost (to the detriment of the review defendants) in the circumstances of this case wherein the plaintiff initiated action proceedings and premising its relief on the common law principles of contract without having sought to set aside the alleged defective administrative action by means of an application in review proceedings.

[84] Having regard to the authorities canvassed above, it therefore follows that:-

84.1 the decision to appoint the second, third and fourth defendants constitute an administrative action which must be challenged by means of a review application and not by merely ignoring the alleged defective administrative action and to proceed with action proceedings premised on common law principles of contract and remedy;

84.2 an administrative decision to appoint the second, third and fourth defendants remain valid until set aside by means of a review application;

84.3 even where the plaintiff is entitled to set aside its own decision, it cannot do so without having regards to the interest of the second, third and fourth defendants who are indeed third parties who may be directly affected. In this instance, the second, third and fourth defendants are entitled to the procedural benefits and defences which they may raise in a review application, be it on PAJA and/or premised on legality and/or as envisaged in Rule 53. A declaratory relief sought by the plaintiff will deny the defendants, in *casu*, and other parties who might find themselves in their situation to rely on the remedies afforded to them, in review proceedings.

[85] In addition, the plaintiff relies on the matter of **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd**[42], wherein the following was stated:-

"[37] The Supreme Court of Appeal also makes the point that no sane applicant would submit to PAJA's definition of administrative action or to the strict procedural requirements of section 7 if he or she had a choice and that, as a result, PAJA would soon become redundant. We do not agree. The point of the matter is that no choice is available to an organ of state wanting to have its own decision reviewed; PAJA is simply not available to it. That is the conclusion we have been led to by an interpretation of,

[42] (CCT254/16) [2017] ZACC 40 (14 November 2017) at para 37.

primarily, section 33 of the Constitution and, secondarily, PAJA itself. Thus there is no basis for suggesting that an organ of state seeking a review of its own decision may simply choose to avoid review under PAJA for reasons of expediency."

[86] It is important to contextualise this judgment by further having regard to paragraphs 1, 35, 38, 40, 44 and 52 to 54, where the Constitutional Court held as follows:

"[1] By what means may an organ of state seek the review and setting aside of its own decision? May it invoke the Promotion of Administrative Justice Act (PAJA)? Or, is the appropriate route legality review? These are the questions that must be determined in this matter. An answer given by a majority of the Supreme Court of Appeal was that PAJA is the appropriate avenue. This is an application for leave to appeal against that decision.

[35] In sum, SITA ought not to have been non-suited on the basis of the time limit in section 7 of PAJA because PAJA does not apply to the review of its own decision.

[38] The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so under PAJA. In Fedsure this Court said that "[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". It also said that—

"a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that:

> *'Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.'"*

[40] *What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.*

[44] *The reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of utmost importance. In Merafong Cameron J said:*

> *"The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself."*

[52] *We concluded earlier that, in awarding the DoD agreement, SITA acted contrary to the dictates of the Constitution. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The award of the contract thus falls to be declared invalid.*

[53] However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity. Here it must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with SITA repeatedly. SITA assured it that a proper procurement process had been followed.

[54] Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the 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 the declaration of invalidity – it might have been entitled. Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction." (Emphasis added)

[87] It is important to highlight that the *Gijima* matter did not in any manner change the principle enunciated in the *Kirland* matter. The Constitutional Court simply held that in those instances where a public body reviews its own conduct, it must do so on the basis of legality and/or rule of law and not premised on PAJA.

[88] The plaintiff in its action proceedings seeks a remedy that purely lies in the common law principles governing contracts, more so, that the plaintiff contends that its case has nothing to do with administrative law, of which I disagree, for reasons already ventilated elsewhere in this judgment.

[89] The plaintiff as an organ of state and a party that is challenging its own administrative action on the basis that it offends section 217 of the Constitution, the PFMA, procurement legislation and regulations, it is obliged not to ignore such an administrative conduct, but to approach a court of law in order to review and set aside such a decision under legality review and not to initiate action proceedings wherein it seeks a remedy founded on common law principles of contract.

[90] In relation to the second exception, as already stated above, the defendants contend that the plaintiff's particulars of claim are vague and embarrassing with particular reference to paragraph 21 of the plaintiff's particulars of claim where an amount of R20 303 773.05 is claimed against the second defendant and an amount of R18 226 987.08 is claimed against the third defendant.

[91] The defendants allege that they are not able to plead to the globular amounts which are said to have been paid over a period of three (3) years without the plaintiff furnishing particularity in relation to what is stated in the notices of

exception read with the defendants' heads of argument, as already alluded to above.

[92] I have already canvassed the legal principles governing exceptions, above. The plaintiff, in its supplementary heads of argument, appears to be furnishing more particularity in relation to the claim, in question as compared to the averments contained in the plaintiff's particulars of claim.

[93] The amount claimed against the defendants constitute a huge sum of money and which may impact on the operations of the respective defendants.

[94] Rule 18(4) of the uniform rule of court provides that:-

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[95] It therefore follows from Rule 18(4) that a party must plead facts with sufficient particularity to enable his opponent to reply thereto. It is a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto.[43]

[96] The issues which are raised in the trial proceedings between the parties are complex issues and are important to the parties. It is, in such matters, expected from the plaintiff to provide greater particularity in order to enable the defendants to plead and to appreciate the case which they are called upon to meet.

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[43] *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210G.

[97] I therefore conclude that the plaintiff's particulars of claim is indeed excipiable premised on the grounds advanced by the second and third defendants.

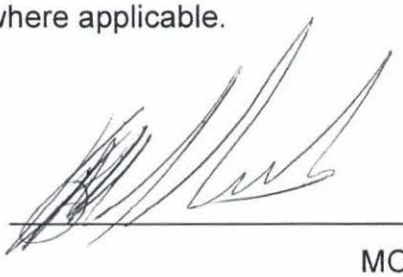
ORDER

[98] In the circumstances, I make the following order:

98.1 the first and second exceptions are upheld;

98.2 the plaintiff is granted leave to amend its particulars of claim within ten (10) days of this order;

98.3 the plaintiff is ordered to pay the costs of the first and second excipients, including costs of two counsel, where applicable.



MOKOENA AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

first excipient (second defendant in the main trial):	Adv WH Trengove SC
	Adv KD Iles
Instructed by:	Norton Rose Fullbright
second excipient (third defendant in the main trial):	Adv K Potgieter
Instructed by:	Couzyn Hertzog & Horak Inc
respondent (plaintiff in the main trial):	Adv JH Dreyer SC
	Adv DT Skosana SC
	Adv T Lupuwana
Instructed by:	State Attorney, Pretoria