



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

DATE

SIGNATURE

CASE NUMBER: 38522/12
DATE: 19 May 2023

RENTWORKS AFRICA (PTY) LTD

Plaintiff

v

**MEC FOR INFRASTRUCTURE DEVELOPMENT
GAUTENG PROVINCIAL GOVERNMENT**

First Defendant

JUDGMENT

MABUSE J

[1] This is a claim by the Plaintiff against the Defendant for payment of money. The source of the Plaintiff's claim is a contract of lease called the Master Rental Agreement (the MRA). The Plaintiff's claim is resisted by the Defendant on a combination of pleas, special pleas and a counterclaim.

[2] The parties are:

[2.1] The Plaintiff, Rentworks Africa (Pty) Ltd (“Rentworks”), a company with limited liability duly registered as such in terms of the company statutes of this country,

the Republic of South Africa. Its registered address or principal place of business at the time of the institution of this action was situated at Turnberry Office Park, 48 Grosvenor Road, Bryanston, Gauteng.

[2.2] The Defendant, the MEC for Infrastructure Development, Gauteng Provincial Government. The Department is the member of the Executive Committee, Department of Infrastructure Development, Gauteng Provincial Government, with its *domicilium citandi et executandi* address at the time of the institution of this action situated at 51 Bloed Street, Pretoria, Gauteng.

[2.2.1] The Department of Public Roads and Works was de-established in 2009.

[2.2.2] Two new provincial departments came into existence upon its de-establishment, namely:

[2.2.2.1] the Department of Infrastructure Development; and

[2.2.2.2] the Department of Roads and Transport.

[2.3] Upon the de-establishment of the Department of Public Transport, Roads and Works, the Department of Infrastructure Development assumed all the rights and responsibilities of the Department of Public Transport, Roads and Works. For purposes of convenience, I shall refer to the Defendant as “the Department”.

THE HISTORY

[3] On 4 December 2006 and 7 January 2007 the parties herein concluded the MRA. The said Agreement, made on 1 December 2006, was signed on 4 December 2006 on behalf of the Department and on 7 January 2007 on behalf of Rentworks.

[4] On behalf of Rentworks, the said agreement was signed by a certain Maria Dulcy Martins while a certain S Buthelezi (Mr Buthelezi), the Head of the Department at the time, signed the said agreement on 4 December 2006.

[5] To the MRA, Annexure 'A' to the declaration, was attached the Rental Schedule, marked Annexure 'B', which was signed by Mr Buthelezi for the Department and Kuben Ryan (MR Rayan) for Rentworks on 29 January 2007.

[5.1] *Inter alia*, the agreement would endure for 60 months from the commencement date. In terms of:

[5.1.1] Rental Schedule B to the declaration, the term of the Agreement was 60 months commencing on 1 January 2007. According to Schedule B, the Agreement was to endure until 30 November 2011. This is what Rentworks has pleaded in paragraph [22] of its declaration, that:

"22. The Term of the Agreement of 60 months terminated on 30 November 2011 ("the date of termination");"

[5.1.2] in terms of Schedule E to the declaration, the term of the agreement was 60 months commencing on 1 January 2007. According to Annexure 'E', the termination date was 31 December 2011.

[5.2] The Department would rent the equipment referred to in the Rental Schedule on the terms and conditions set out in the Agreement and the Rental Schedule.

[5.3] In respect of each agreement for rental of equipment in terms of the Agreement, the Department would pay Rentworks the rental instalments specified in the

applicable Rental Schedule together with an amount equal to the prescribed rate of VAT.

[5.4] The rental instalments would be payable quarterly in advance on each payment date.

[5.5] The Department would pay the rental agreements on time and would not attempt to sell, dispose, encumber or part with possession of the equipment in any way without the Rentworks' written consent and would immediately replace lost, stolen, or damaged equipment in accordance with clause 8.1 of the MRA.

[5.6] The Department would be in default if it did not perform any of its obligations under the Agreement on time and if the Department committed a material breach under any other Agreement of whatsoever nature concluded between Rentworks and it.

Upon termination of the rental of equipment under clause 11.1 or 11.2 the Department became obliged to:

[5.6.1] return the equipment to Rentworks at a specified place;

[5.6.2] pay to Rentworks all money then due and payable under the Agreement;

[5.6.3] pay to Rentworks damages the amount calculated in terms of clause 11.3.c of the Agreement.

[5.7] Upon the termination of the Agreement any payment due by the Department would not affect any other rights that Rentworks might have under the Agreement.

[5.8] A certificate by Rentworks' auditors indicating the amount of residual value of goods would be *prima facie* evidence of the contents thereof.

[5.9] At the conclusion of the terms of the Agreement, the Department could either return all the equipment or request Rentworks, under clause 22 of the MRA, to agree to extend the term or vary the equipment rented.

[5.10] In the event of the Department not providing Rentworks with the notice as contemplated in terms of clause 13.1, then, unless otherwise advised by the

Plaintiff in writing, the Department agrees that it would continue to rent all the equipment from Rentworks on a quarterly basis upon the terms and conditions of the Agreement until all the equipment has been returned to Rentworks.

[5.11] In respect of any amount due or unpaid, the Department was obliged to pay to Rentworks on demand, interest at the overdue rate calculated on a daily basis.

[5.12] The Department was within its rights, subject to the prior written consent of Rentworks, which was not to be unreasonably withheld and on such terms, and conditions as Rentworks may have reasonably required, authorised to assign the Department's rights and obligations under the Agreement to a third party with the provision that the Department shall notwithstanding such assignment remain at all times liable as the principal debtor in terms of the Agreement.

[5.13] A certificate by one of the directors or managers of Rentworks, for the time being, setting out the amounts owing by the Department to the Plaintiff in terms of the Agreement, is *prima facie* proof of the facts stated therein and would be sufficient for all legal proceedings including summary judgment, a request for particulars and discovery procedures.

[5.14] Rentworks may sell or assign either absolutely or by way of security all or any of its rights and/or obligations under the Agreement and/or to the equipment without notice to the Department to any bank, duly registered and defined as such under the Banks Act 94 of 1990 (as amended). The said bank may also, without notice, on-sell or assign, as aforesaid, its rights and/or obligations under the Agreement to any subsidiary or associate within the said bank's group of companies.

[5.15] The agreement was subject to fulfilment of the suspensive condition that prior to the signature of the Rental Agreement, the Departments has furnished proof to Rentwork's satisfaction that the provisions of the Public Finance Management Act 1 of 1999, as amended ("the PFMA") have been fully complied

with, in relation to the hire of equipment and the conclusion of the Agreement, and Rental Schedule and the security referred to in the Agreement.

[5.16] By the Department's signature to the Agreement it warranted to Rentworks

that:

[5.16.1] it had complied with all provisions of the PFMA, and the Schedules and Regulations, as amended, in relation to the hire of the equipment, the conclusion of the Agreement, the Rental Schedule and any security given, and undertook to continue to do so for the duration of the Agreement;

[5.16.2] it will immediately notify Rentworks if the signatory to the Agreement on the Department's behalf was at any time during the currency of the Agreement no longer authorised, in terms of the PFMA, to sign Rental Schedules. The Department agreed that Rentworks shall be entitled to claim damages against them immediately upon it coming to Rentworks' attention that the said warrant have been breached. The Department further agreed that Rentworks' aforesaid right:

(a) would not be prejudiced in any way by the fact that Rentworks was originally satisfied with the proof furnished in terms of clause 28.1; and

(b) was without prejudice to any other rights which Rentworks may have had, whether in terms of the Agreement or otherwise.

[5.17] The suspensive condition, inserted solely for the benefit of Rentworks, was duly complied with, alternatively waived.

[6] Rentworks, duly represented by Ms Martins and the Department, duly represented by the said Mr Buthelezi on 21 January 2007 and at Bryanston, alternatively Johannesburg,

entered into a written Rental Schedule with reference number 09064DRW001, referred herein to as “the First Schedule” or Annexure “B” to the declaration.

[7] The material relevant terms of the said First Schedule or Annexure “B” were that:

[7.1] The commencement date of the Agreement was 1 December 2006;

[7.2] The rental instalments amounted to R2,571.912.80 quarterly plus VAT;

[7.3] The term of the Agreement was 60 months (it must be stated that from the commencement date);

[7.4] The rental would be paid quarterly by means of electric funds transfer directly into Rentworks’ bank account.

[8] On or about 4 April 2007, and pursuant to the acceptance by the Department of the revised payment terms reflected in Annexure ‘D’ to the declaration, Rentworks, duly represented by Martins and the Department, duly represented by Buthelezi, entered into a Second Written Rental Schedule (“the Second Rental Schedule”). A copy of the said Rental Schedule duly signed for and on behalf of Rentworks and the Department is attached to the declaration as Annexure ‘E’.

[8.1] The Second Rental Schedule superseded the First Rental Schedule.

[8.2] The material and relevant terms of the Second Rental Schedule were that:

[8.2.1] the commencement date of the Agreement was 1 January 2007 and the Agreement was to endure for 60 months or five years;

[8.2.2] the Department was afforded a six-month rental payment holiday followed by quarterly payments as set out in the Rental Schedule.

[9] Rentworks complied with all its obligations in terms of the Agreement by:

[9.1] timeously delivering the equipment as reflected in the First Rental Schedule to the Department;

[9.2] installing the equipment at the premises of the Department referred to in the First Rental Schedule; and

[9.3] the aforesaid equipment was in good working order when so delivered and installed.

TERMINATION OF THE AGREEMENT AND CONDUCT OF THE DEPARTMENT

[10] According to Rentworks the term of the Agreement of 60 months terminated on 30 November 2011 (the date of termination; see paragraph 22 of the declaration). The Department did not, at the date of termination or prior thereto:

[10.1] advise Rentworks in writing or otherwise of its intention to return the equipment to Rentworks;

[10.2] request Rentworks to extend the term of the agreement; and

[10.3] exchange the equipment rented; or

[10.4] return the equipment to Rentworks but on 24 January 2013 returned that portion of the equipment reflected in Annexure 'H1'.

[11] During the term of the Agreement, the Department failed and/or refused and/or neglected to make payment to Rentworks of the quarterly instalments due as agreed in terms of the Agreement, the Rental Schedules and amendments thereto.

[12] On the termination date of the Agreement, being 1 October 2011 (see paragraph 25 of the declaration), the Department was in arrears with the payment of the rental due to Rentworks in the sum of R18,737,714.71. On 2 October 2012 the Department made payment to Rentworks in the amount of R16,810,699.92, leaving a balance outstanding of R1,927,014.79 as at 2 October 2012. To that end a certificate of balance as contemplated in terms of the Agreement was attached to the declaration and marked Annexure 'I'.

[13] On 1 October 2015, the Department was in arrears with the payment of further rental for the period from 2 October 2011 to 1 October 2015 in the amount of R58,830,397.15. To that end a certificate of balance, as contemplated in terms of the Agreement, is attached to the declaration as Annexure 'J'.

[14] Rentworks complied with the provision of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

[15] Following the said breach, the Department is indebted to Rentworks in the following amounts:

[15.1] R2,192,397.59 being the aggregate of the arrear rentals of R1,927,014.77 together with interest in the amount of R985,383.59 calculated at the overdue rate in terms of clause 17.1 of the Agreement from 3 October 2012 to 3 June 2016. A certificate of balance as contemplated in terms of the Agreement is attached to the declaration as Annexure 'K'.

[15.2] R64,190,894.56 being the aggregate of the further rentals of R58,830,397.15 together with interest in the amount of R5,360,497.40 calculated at the overdue rate in terms of clause 17.1 of the Agreement from 1 October 2015 to 6 June 2016, a certificate of balance as contemplated in terms of the Agreement is attached to the declaration as Annexure 'L'.

THE CESSION AND RE-CESSION AGREEMENTS

[16] On or about 5 November 2003 and at Bryanston, alternatively Johannesburg, Rentworks Africa Partnership represented by a duly authorised representative, Arvino Gueta and Absa Bank Ltd, duly represented by an authorised representative, MN de Klerk entered

into an Agreement of Sale and Cession, a copy whereof is attached to the declaration as Annexure 'F'.

[17] On or about 1 June 2009, Rentworks and Absa Ltd, duly represented by W Mathee and D Financial Services Africa (Pty) Ltd, duly represented by an authorised representative, entered into a written addendum to the Sale and Cession Agreement. A copy of the said addendum to the Sale and Cession Agreement is attached to the particulars of claim as Annexure 'G'.

[18] The content of the addendum to the Sale and Cession Agreement, Annexure 'G', is incorporated herein as is specifically pleaded.

[19] On or about 14 March 2012 and at Johannesburg, Rentworks and ABSA Bank Ltd, both represented by duly authorised representatives, entered into a Re-cession of the Rental Agreement. A copy of the said Re-cession Agreement is attached to Rentworks' particulars of claim as Annexure 'H'.

[20] The material express and relevant terms of the Re-cession Agreement were:

[20.1] that on 1 December 2006 Rentworks and the Department of Public Transport, Roads and Works entered into a written rental agreement in terms of which Rentworks rented to the Department of Public Transport, Roads and Works the equipment reflected in the Rental Schedule Number 09060DRW0001;

[20.2] ABSA Bank Ltd ceded its rights, title and interest in the rental income, arrear rental and all interest and cost associated with the collection and recovery of such rental, arrear rental, interest, and costs owing to ABSA Bank Ltd in terms of the agreement to Rentworks;

[20.3] Rentworks ceded in *securitatem indebiti* any proceeds and/or funds recovered and/or realised by it from the Department of Public Transport, Roads and Works owing in terms of the Agreement to ABSA Bank Ltd.

[21] To Rentworks' claim the Department pleaded a number of defences. Alongside its counterclaim against Rentworks the list of some of the most prominent defences put forward by the Department is as follows:

[21.1] Rentworks has no *locus standi* to institute the current claim, in the alternative, Rentworks lacks the necessary *locus standi in iudicio*;

[21.2] the Department denies that it is properly before the Court;

[21.3] the Master Rental Agreement did not include or did not relate to Del Computers and Equipment introduced by D Financial Services Africa (Pty) Ltd;

[21.4] the terms relied on as set out in the Master Rental Agreement were not the only terms relied on;

[21.5] the written Rental Schedule with reference number 09064DW001 was not entered into as alleged by Rentworks;

[21.6] it was a term of the Agreement between the parties that the term of the Agreement would not exceed the useful life of the equipment as would be in accordance with the depreciation policy of the Department;

[21.7] the Department repeats its Fourth Special Plea;

[21.8] the term of 60 months of the Agreement was subject to the Department's policy of depreciation;

[21.9] the actions of the Department in terms of clause 13.1 of the Agreement was subject to Rentworks giving at least 30 days' prior notice of the Departments obligation to give 90 days' notice before the expiry of the Agreement;

[21.10] the Agreement made no provision for further rentals;

[21.11] the Department pleads its Seventh Special Plea.

I intend dealing with all the defences raised by the Department hereinabove and set out above singly:

[22] **Rentworks has no *locus standi* to institute the current claim, in the alternative, Rentworks lacks the necessary *locus standi in iudicio* [1]**

[22.1] Quite obviously the Department hangs its case on clause 3 of Annexure 'H', the Re-cession of the Rental Agreement, to argue that Rentworks does not have any *locus standi in iudicio* to institute this action against it. The said clause 3 of Annexure 'H' to the particulars of claim provides as follows:

"Rentworks Africa (Pty) Ltd cedes in securitatem indebiti, any proceeds and/or funds recovered and/or realised by it from Gauteng Provincial 201 Government, Department of Public Transport, Roads and Works, owing in terms of the agreement to ABSA Bank Limited."

[22.2] The Department, in burnishing its case that Rentworks does not have any leg to stand on, in this action, argues that it is trite that a cession in *securitatem indebititi* results in the cedent (in this case Rentworks) being deprived of the right to recover the ceded debt; retaining only the *bare dominium* or a reversionary interest therein.

[22.3] A pledge or cession in *securitatem indebiti*, also known as a cession in security or a security cession, occurs where the cedent pledges or incumbers its entire personal right or an aspect of such a right as against its debtor and transfers such rights or aspects of its rights to the cessionary to secure the fulfilment by the ceded or related party, of an

obligation owed to the cessionary. A security cession is used to create a security interest in the cedent's personal rights to book debts, monies in the bank account, insurance policies or shares. The ceded rights emanate from the contract between the cedent and its debtor. It is known as the principal debt. The obligation is typically the repayment of a loan or payment of a price for goods sold or services rendered. It is known to secure the debt as security is provided for the debt.

[22.4] Rentworks denies that it ceded in *securitatem indebiti* its rights, title and interest in the rental income, arrear rental, interest and costs associated with the collection thereof to ABSA. Its case is that it only ceded its rights to any proceeds or funds recovered or realised by it from the Department in these proceedings. Rentworks pleads that it ceded as *securitatem indebiti*, not its entire right but only an aspect of a right.

[22.5] If that is the case, the law provides that a cession is often made by way of a pledge to secure a debt owing, in the present case, to secure the sum of R43,868,067.97 owing by Rentworks to ABSA. This is known as a cession in *securitatem indebiti*. In such a case the debt, in other words, Rentworks retains a reversionary interest in what has been ceded which entitles it to recover it when the secured debt is paid and gives it a right of action against the cessionary to recover any excess received by the cessionary and Rentworks being deprived of the right to recover the ceded debt; retaining only the *bare dominium* or a reversionary interest therein. I have pointed out in paragraph

[25.3] above that a pledge or cession in *securitatem indebiti* also

known as a cession in security or a security cession or case where the cedent pledges or incumbers its entire personal rights or an aspect of such right against its debtor and transfers such rights or an aspect of

such rights to the cessionary to secure the fulfilment by the cedent or a related party of an obligation owed to the cessionary.

[22.6] In **Grobler v Oosthuizen [2009] 5 SA 500** (SCA), the Supreme Court of Appeal held that a pledge theory governs the security cession of rights and therefore the cedent retains the *bare dominium* or reversionary interest in the rights and the cessionary acquires the exclusive rights of action or the rights to enforce the ceded rights, unless the parties elect the opposing theory to govern the cession, which is a fiduciary security cession theory.

[22.7] After referring to a number of works by the writers of law books, pages 506 to 507 Brand J stated that:

“The one theory is inspired by the parallel with a pledge of corporeal assets and is thus loosely referred to as “the pledge security”.

In accordance with this theory, the effect of the cession in *securitatem indebiti* is that *“the principal debt is pledged to the cessionary while the cedent retains what has variously been described as the “bare dominium” or a reversionary interest in the claim against the principal debtor.”*

[22.8] He compared the two theories, at paragraph [17] the *“pledge theory”* and the *“pactum fiduciary theory”* and stated that:

“But despite the doctrinal difficulties arising from the pledge theory, this court has in its latest series of decisions - primarily for pragmatic reasons – accepted that theory in preference to the outright cession/pactum fiduciae construction.”

Brand J then referred to a number of authorities in which the *“pledge theory”* was accepted and in the end, he stated that:

“In the light of these decisions the doctrinal debate must, in my view, be regarded as settled in favour of the pledge theory.”

[22.9] The views of law book writers:

[22.9.1] In the Principles of South African Law by G Wille:

(i) according to this author, in the case of cession made as security the dominium in the ceded rights remains in the cedent, he merely pledges his right as security for a debt owed by him to the cessionary. In this case, as long as the debt remains unpaid, the cessionary alone can enforce the right. See in this regard *National Bank v Cohen's Trustee* **1911 AD 1945 251** but where he receives the proceeds or where the cessionary received the proceeds of the rights, he must refund to the cedent any surplus in excess of the debt secured.

[23] **The Department Repeats Its Fourth Special Plea.**

The departments what special claim does with the session in secret item integrity. This issue raised in this post specially it's already been covered under the department first defence. And therefore, I do not deem it necessary to deal with the same aspect even if it is under a different heading.

[24] **The MRA did not relate to Dell Computers and equipment introduced by D Financial Services Africa (Pty) Ltd:**

[24.1] In its plea, the Department stated that it is clear from the agreement of sale and cession attached as annexure 'F' to the Rentworks declaration that Rentworks is a mere agent for Rentworks Africa partnership and that Rentworks is therefore not the principal in terms of the agreement which it seeks to enforce.

[24.2] It contends that, looking at the terms of the agreement of sale and cession, it is abundantly clear that Rentworks was not entitled to conduct, manage, and

operate such business of the partnership relating to the rental of Dell Computers and equipment as was introduced by D Financial Services (Pty) Ltd, while annexure 'H1' demonstrates that many of the items or equipment were in fact Dell products.

[24.3] For that reason, the Department denies that the Plaintiff has the necessary *locus standi in iudicio* in respect of Dell computers and equipment introduced by D Financial Services (Pty) Ltd.

[24.4] Rentworks pleaded that it concluded the agreement with the Department as principal its own name, alternatively, on behalf of an undisclosed principal.

[24.5] Rentworks' cause of action is based on a written rental agreement. This written rental agreement was entered into by and between Rentworks, on one side, and the Department, on the other side. This rental agreement has nothing to do with Annexure 'F' to the declaration. It has no role to play in the agreement. There is, in my view, no reason to drag it into this action.

[24.6] The agreement did not specify the products that Rentworks could rent to the Department. No clause of the agreement prevented Rentworks from renting Dell products to the Department. At any rate, Rentworks denied that the Dell products in annexure 'H1' were introduced by D Financial Services (Pty) Ltd. It is Rentworks that had rented these products to the Department. Accordingly, this defence lacks merit and cannot be sustained.

[25] The written Rental Schedule with reference nr. 09064DRW0001 was not entered into as alleged by Rentworks:

[25.1] In terms of clause 6 herein supra, Rentworks pleaded that on 29 January 2007 and at Bryanston, Johannesburg, Rentworks duly represented by Ms Martins and the Department entered into a Rental Schedule with

reference number 09064DRW0001, referred to as the First Schedule and marked 'B' to the declaration.

[25.2] The Department pleaded that without derogating from the generality of the foregoing denials, it is denied that a written Rental Schedule with reference number 09064DRW 0001 [the first Rental Schedule] was entered into as alleged by Rentworks in this paragraph.

[25.3] This plea by the Department is unclear. It seems to suggest that there is another version of how the Rental Schedule was concluded. It is not clear what the basis of this denial is. What is abundantly clear though is that on 29 January 2007 this Rental Schedule was signed by the parties, Ms Martins on behalf of Rentworks and Mr Buthelezi on the half of the Department.

[25.4] One of the grounds of defence raised by the department against and Rentworks' claims is that:

"The written Rental Schedule with Reference nr. 09064BWW001 was not entered into as alleged by Rentworks."

[25.5] The Department does not disclose any other way the Rental Schedule was entered into. The Department does not disclose its version of how the Rental Schedule was concluded. That Mr Buthelezi had no power or authority to enter into the said Rental Schedule on behalf Department is another argument. It is sufficient however to state that that is not how the department had pleaded its case. Therefore, no merit exists in such a plea defence.

[26] **It was a term of the agreement between the parties that the term of the agreement would not exceed the useful life of the equipment and was to be in accordance with the depreciation policy of the department.**

[26.1] In its plea, the Department had admitted the contents of paragraphs 4; 4.1 to 4.27 of the declaration, in so far as it accorded with the contents of the MRA. It denied however that the terms relied on by Rentworks were the only relevant terms of the Agreement. It pleaded furthermore that the following were further relevant terms of the agreement. The Department boldly pleaded further that the Rental Schedule made no reference at all to the depreciation policy. This is so because, according to the Department's depreciation policy at the time was 5 to 7 years in respect of furniture and 3 to 5 years in respect of electronics.

[26.2] Finally, clause 3.1 of the MRA stipulates that:

"... We undertake that the Term of the Agreement, as originally stipulated in the Rental Schedule, will always be less in duration than the life of the Equipment. For the purpose of this Agreement, the useful life of the Equipment means the depreciable term of the Equipment as advised by you to us at the date of the signature of and stipulated in the Rental Schedule."

[26.3] The problem with allowing the Agreement to exceed its Term, like for instance when the provisions of clause 13.1 start to operate, as Rentworks has invoked them, is that such extra term of the Agreement causes exceeds the useful life of the Equipment.

[26.4] In its consequentially amended replication Rentworks pleaded that it the Department is not entitled to rely on the alleged depreciation policy of the Department. Rentworks gave no reason why the Department is not entitled on to rely on the alleged depreciation policy. In my view,

considering the provisions of clause 3.1, the Department is entitled to rely on depreciation policy. In the first place Rentworks has not disputed the Department's allegation that it was specially pleaded that it was a relevant term of the Agreement between the parties that the Term of the Agreement would not exceed the useful life of the equipment, as would be in accordance with the depreciation policy of the Department or as would be in terms of clause 3.1 of the Agreement.

[26.5] In addition, Rentworks pleaded that the term of the Agreement was sixty months and that the Term did not exceed the alleged depreciation policy in respect of electronics. This statement is not correct that the duration of agreement did not exceed the depreciation policy of the department respect of electronics. For instance, the Agreement was extended beyond 60 months by the provisions of clause 13.1 and when that happened no provision in the Agreement or anywhere else was made for the depreciation of the electronics notwithstanding the effluxion of a period of 3 to 5 years depreciation period of such electronics.

[26.6] It goes without saying that once the provisions of clause 13.1 are applied to the Agreement, the duration of the Agreement is extended for such further periods as clause 13.1 continues to apply without providing for the depreciation of the Equipment.

[27] The actions of the Department in terms of clause 13.1 of the Agreement were subject to Rentworks giving 90 days' notice before the expiry of the Agreement:

[27.1] In terms of clause 13.1 of the Master Plan Agreement, the Defendant was required, at the conclusion of the terms of the Agreement, to do one of the following three things:

[27.1.1] to return all the equipment; or

[27.1.2] to request Rentworks under clause 20 of the Agreement to amend the terms; or

[27.1.3] to vary the equipment rented.

He was required to inform Rentworks of his choice 90 days before the expiration of the term. Rentworks have undertaken, in clause 13.1 of the Agreement, to give the Department 30 days' notice of its obligation to give Rentworks the said notice of 90 days.

[27.2] Further, according to clause 13.1, if the Department failed to inform Rentworks of its choice, within 90 days before the expiration of the Agreement, the Department would be presumed to have agreed to continue renting all the equipment from Rentworks on a quarterly basis upon the terms and conditions of the Agreement until the Department had returned all the equipment, unless Rentworks otherwise notified the Department in writing.

[27.3] In paragraph [45] of its plea, the Department admitted the above allegations insofar as they accorded with the contents of the Agreement, Annexure 'A' to Rentworks' particulars of claim. However, the Department denies that the terms relied upon by Rentworks were the only relevant terms of the agreement and pleads other terms it deemed relevant. I will return to these other relevant terms of the Agreement when I deal with the defence raised by it but administered:

"It was a term of the agreement between the parties that the Term of the agreement would not exceed the useful life of the equipment as well as would be in accordance with the depreciation policy of the Department."

[27.4] In paragraph [23] of the particulars of claim, Rentworks pleaded that:

"[23] The Defendant did not at the date of termination or prior thereto:

23.1 advised the Plaintiff in writing, or otherwise, of its intention to return the equipment to the Plaintiff; and

23.2 request the Plaintiff to extend the term of the agreement; and

23.3 to exchange the equipment rented; or

23.4 return the equipment to the Plaintiff but on 24 January 2013

returned that portion of the equipment reflected in Annexure H1.”

[27.5] In paragraph [56.1] of the plea the Department denied, as is specifically traversed each and every allegation contained in the above paragraphs. In defence, it stated that the alleged actions of the Department were subject to the Plaintiff first giving at least 30 days' prior notice of the Department's obligation to give 90 days' notice before the expiry of the term.

[27.6] The Department pleaded furthermore that Rentworks had been required in terms of Rule 35(12) of the Uniform Rules of Court to submit proof that it had sent the Department the said notice in which it remanded the Department to serve its notice of choice 90 days before the expiry of the Term, that Rentworks' response was that no reference in the pleadings had been made to such a notice. It pleaded furthermore that failure by Rentworks to comply with the said notice amounted to a breach of contract which excused reciprocal performance on the part of the Department. It then concluded that the Agreement terminated on 31 December 2011.

[27.7] In brief, the Department's defence to this aspect is that it failed or deliberately refrained from complying with its obligation as set out in clause 13.1 by reason of the fact that Rentworks had first in itself failed to comply with its obligation as set out in the same clause.

[27.8] Rentworks argued vehemently against the Department's argument. It disputes the Department's version and submits in conclusion that it has preferred that the Department has proffered no defence in this regard.

[27.9] According to counsel for Rentworks, clause 13.1 does not make the Department's obligation to notify Rentworks of its choice before 90 days of the expiry of the Agreement dependent upon Rentworks given it 30 days' notice of its obligations. Even then, it did not follow that if Rentworks did not give the Department 30 days' notice, the Department was relieved of the obligation to give Rentworks the desired notice of 90 days before the end of the term or that the Agreement would simply terminate at the end of the initial term.

[27.10] It is common cause, according to Rentworks' counsel, that in fact Rentworks gave the Department the necessary notice on 30 August 2011, in other words, 30 days prior to the Department's obligation to notify Rentworks of its choice on 30 September 2011, 90 days before the expiry of the Agreement. The notice had been given by Rentworks to Ms Mdluli Nobantu, the departments senior director at the time.

[27.11] There is therefore no merit in the Department's defence that Rentworks had failed, in terms of clause 13.1, to give it 30 days' notice in which it remanded the Department to comply with its obligations in terms of clause 13.1, 90 days before the expiry of the terms.

[28] **The Agreement made no further provision for further rental payment after 31 December 2011.**

[28.1] it is of paramount importance to remember that the duration of the Agreement was 60 months or 5 years commencing on 4 December 2016 and was to terminate on 31 December 2011 by effluxion of time;

[28.2] according to Rentworks, the Agreement did not terminate on the termination date, in other words, on 1 December 2011. This was due to the provisions of clause 13.1 of the Master MRA. This clause provided that:

“At the conclusion of the Term, you may, either return all the equipment or request us under clause 20 to agree to extend the Term or vary the equipment rented. You must in either case give us written notice of your intention at least 90 days prior to the expiry of the Term. We will give you at least 30 days’ notice of your obligation to give us the said notice. If you elect not to give us written notice within the abovementioned period, you agree that unless we otherwise notify you in writing, you agree that you will continue to rent all the equipment from us on a quarterly basis upon the terms and conditions of this agreement until you have returned all the equipment to us.”

[28.3] it is the underlined part of clause 13.1 that kept the Agreement that should ordinarily have ended on 31 December 2011, alive;

[28.4] clause 13.1 of the Master Rental Agreement provided that in the absence of notification 90 days before the end of the Rental Agreement to the effect that the Department would return the rental goods at the end of the rental term, then it will be regarded that the Department requested to extend the Agreement for a further quarterly period upon the terms and conditions of the Agreement, until the Department would have returned the goods. This was at a rental in an amount equal to the rental of the last quarter of the rental period, which in this case was R4.2 million, as provided for in the Replacement Rental Schedule. In this regard, it was alleged by Rentworks that the Department did not furnish Rentworks with the necessary termination notice and this was of course common cause;

[28.5] for as long as the Department failed to give notice in terms of clause 13.1, or for as long as the agreement endured, the terms of the Agreement would continue to apply. In terms of clause 13.1, the Department was obliged to pay quarterly rental for the first two quarters of 2012. This obligation

was, however, terminated when the Agreement terminated, according to the Department either by Rentworks' letter dated 13 February 2007 in which Rentworks made it abundantly clear that it did not intend to continue with the Rental Agreement unless the Department pay the arrear instalments in full within 30 days of 13 February 2007, which condition of the Agreement was not fulfilled or on 4 July 2012 when Rentworks terminated the Agreement;

[28.6] on 4 July 2012, 7 months, 3 days after the termination date, Rentworks terminated the Agreement between the parties. Notification of termination of the agreement by Rentworks to the Department was by way of delivery of the application consisting of a notice of motion and a founding affidavit. No formal notice of cancellation of the Agreement was sent by Rentworks to the Department. Nevertheless, the notice of motion and founding affidavit fulfilled this function;

[28.7] the founding affidavit set out that the Department was in breach of the Agreement by failing or neglecting or refusing to pay the rental instalments as agreed; that the Department was notified of Rentworks' intention to cancel the agreement; that the Department did not pay the instalments within 30 days of the letter of demand. Payment of the arrear rental up to the end of 2011 plus further rentals for the periods of the first three quarters of 2012. Rentworks referred to the provisions according to which it was entitled to cancel the agreement. It is evident that the notice of motion made out a proper case which entitled Rentworks to cancel the Agreement;

[28.8] in this regard, counsel for the Department found support in **Nash v Golden Pumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D-F** where the court had the following to say:

“Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, is said to “repudiate” the contract (see Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A) at 845 A-B). Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated (see Joubert Law of South Africa Vol. 5 para 226). The consequence of this is that the rights and obligations of the parties in regard to the further performance of the contract come to an end and the only forms of relief available to the party aggrieved are, in appropriate cases, claims for restitution and for damages. Where, however, a right to performance under a contract has accrued to one party prior to rescission, this right is not affected by the rescission and may be enforced despite rescission.”

He also found support in paragraph [16] of the judgment of ***Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA)***. See also ***Swart v Vosloo 1965 (1) SA 100 (A) at page 105***;

[28.9] although clause 11.1 of the Agreement deals with termination, it does not specify how the termination should occur. If a particular mode of communicating the cancellation has been agreed between the parties and the party desiring to cancel chooses another, such a party does so at the risk of it having to prove ineffective. See ***Swarts*** case at page 112. In a line of decisions collected in the ***Swarts*** case at 115, it has been held that notice of cancellation can effectively be given by service on the defaulter of a summons or other legal process clearly showing a

decision to cancel. See in this regard

Swarts case at pages 114 A - to 115

C:

*“This court was referred to a number of decided cases where consideration was given to the question whether the launching of civil proceedings constituted a sufficient intimation to the defendant or the respondent, as the case might be, of an election to exercise the rights of cancellation. In my opinion, the judgments in these cases appear to be based upon acceptance of the proposition that our law requires a party who elects to exercise a right of cancellation to notify the defaulting party of its intention to terminate the contract. It is, furthermore, implicit in those judgments that, if a party relies upon an intimation contained in legal process, such intimation operates to terminate the contract if it is brought to the notice of the defaulting party by the actual service upon him of the process embodying the intimation. For a notice of cancellation to be effective, it must clearly and unambiguously convey that the contract is cancelled. See in this regard **Tutor v Smith 1971 (1) SA 453***

at 456 H-J where the court had the following to say:

“Die beëindiging van ‘n kontraktuele verhouding is geen onbenullige saak nie en die besluit om ‘n kontrak ten einde te bring, verander die kontraktuele verhouding van die kontrakterende partye teenoor mekaar. Dit is ‘n stap wat ernstige materiële nadeel vir die party teenoor wie gekanselleer word kan berokken. Hierdie oorweging is, myns insiens, uiters belangrik en is ‘n geldige rede om te vereis dat die daad van kansellasië van ‘n andersins regverdige ooreenkoms duidelik en ondubbelsinnig geskied.”;

[28.10] in the application that Rentworks had issued on 4 July 2012, and which was emailed to the Department on the same day according to paragraphs 54.1 and 54.2 of the said papers, Rentworks had claimed, *inter alia*,

confirmation of the cancellation of the agreement, alternatively the cancellation of the contract and an order for a return of the rental equipment to Rentworks within 7 days from the granting of the order and also for payment of the arrear rental up to the end of 2011, plus further rentals for the periods of the first three quarters of 2012. This was due to the fact that the rental payments for the first three quarters of 2012 fell due on 1 July 2012. Counsel for the Department submitted that therefore the notice of motion with the founding affidavit served as notification of the cancellation of the agreement and that what the Court was asked to do was simply to confirm that the cancellation was, duly effected, see **Nash's** judgment, paragraph [29] where the Court held that:

"11. The submission made by counsel for the Department is in line with the authorities cited in Swart's case.";

[28.11] referring to the heads of argument by counsel for the Department nowhere did it state that the application was granted. Nowhere does counsel state that the application proceeded to Court and that the Court granted an order in which it confirmed the cancellation of the Agreement between the parties;

[28.12] it would appear that it is immaterial whether the Court granted a confirmatory order. It was argued by Counsel for the Department and, in my view, correctly so, that such a cancellation is a unilateral action. It is not the Court that must cancel the Agreement. That is the choice of a contracting party. Once a party has chosen to cancel a contract and has, in addition, communicated its choice to the other party, it cannot change its decision. Once the party's right to cancel has accrued to him by virtue of the other party's breach, the victim must elect whether or not he will avail himself of it. Having made his election, he must abide by it. In **Ravisto Dairy (Pty) Ltd v Auto Production Insurance Co Ltd** 1963 (1) SA 632 (AD) at

640 C-D the insurer of a motor vehicle's conduct was held to give rise to an estoppel in circumstances where he had received a notice of a claim against the insured in January. The insurer delayed in repudiating the liability until September. It was held that by his delay it had lost its right to cancel. Counsel for the Department put a high premium in this regard on ***Schuurman v Davey 1908 TS 664 at 670 - 671*** where the Court stated the following:

"The agreement is added for the benefit of the vendor, who consequently can avail himself of it or not as he pleases; subject to the restriction, however, that he ought to make his election immediately on expiration of the appointed time, and having once made it he cannot afterwards change his mind The seller's right to cancel accrues by reason of the bringer's default on that day and the seller must then elect whether or not he will avail himself of it. Having once made his decision, he must abide by it. The cancellation takes effect as soon as the seller notifies his intention to avail himself of the right to cancel."

[28.13] Based on the authorities referred to by counsel for the Department, the judgment of ***Mash*** and the cases cited therein, I find that:

[28.13.1] Rentworks cancelled the argument it had with the Department on 4 July 2012;

[28.13.2] that Rentworks communicated its cancellation of the agreement clearly and unambiguously by notice to the Department in the notice of motion and founding affidavit on 4 July 2012;

[28.13.3] that the Department received such notice of cancellation on 4 July 2012.

The inescapable conclusion I arrived at is therefore that the parties' contract was terminated on 4 July 2012.

[29] **The consequences of termination of the contract**

[29.1] It is common cause between the parties that the contract was lawfully terminated on 4 July 2012. In essence, when a contract has lawfully been terminated, neither party may lawfully claim from the other of them performance based on the terms of the agreement, save in respect of rights that have already accrued. See in this regard *Nash's* case cited above. When an agreement is terminated, the primary rights and obligations flowing from such an agreement are immediately terminated, so that no party is obliged to perform, and no party is entitled to claim performance from the other side based on the terminated agreement. Cancellation of an agreement is an unequivocal intimation by one party to the other party that he puts to a stop further performance of the contract. Thereby he puts to a stop his own future performance and also the future performance by the other party, which he cannot thereafter be required to accept. Therefore, Rentworks claim for rentals for the full third quarter of 2012 and the fourth quarter of 2012 and any claim - for the period after December 2012 is not sustainable and as counsel for the Department argued, "constitutes a claim for more than Rentworks was entitled to". Rentworks attempts to claim for rental in respect of a period that was not covered by the agreement amounts to an attempt to enforce rights or obligations on a non-existent agreement.

[30] **What Rentworks should claim after the second quarter of 2012**

[30.1] In the case where the agreement of lease has been lawfully terminated but the lessee has refused or neglected or failed to return the leased property or some of them, the lessor is entitled to claim damages based on "holding over". This is in law a claim for damages, so submitted the counsel for the Department. He found support in *Hyprop Investments v NCS*

Carriers and Forwarding**CC 2013 (4) SA 607 (GSJ).** In paragraph

[42] of the said judgment the court

had the following to say:

“A claim for holding over is founded on a breach of the contractual obligation to give vacant possession on termination as requested by the relevant clause in the lease agreement, or as in incidents of the common law Nonetheless, the lease is at an end and therefore the amount claimable is not rental but damages, which according to certain law is the market rental value of the premises....”

[32] The Defendant repeats its Seventh Special Plea.

[32.1] In paragraph [26] of the declaration, Rentworks has pleaded as follows:

“On 1 October 2015 the Defendant was in arrears with the payment of further rental for the period from 2 October 2011 to 1 October 2015 in the amount of R58,830,397.15.”

The Department contends that Rentworks has:

[32.1.1] failed to set out what this further rental is because the agreement made no provision for further rental;

[32.1.2] besides, the agreement does not provide how further rental is calculated in the event of the incomplete return of the

equipment;

[32.1.3] the agreement does not provide how further rental is to be calculated in the event the Department only returns some of the equipment and not all.

[32.2] A further complaint raised against the agreement by the Department is that Rentworks does not plead the respects in which the goods returned were incomplete or what the legal consequences of the incomplete return of the equipment are.

[32.3] The Department contends that in any event the contract terminated on 31 November 2011, alternatively, in 2009, further alternatively on 24 January 2013 and from that point onwards no rental was payable. For those reasons, it is the Department's case that Rentworks has failed to establish a cause of action in relation to its second claim.

[32.4] In its consequentially amended replication, Rentworks denied all the allegations levelled against it by the Department. According to it, Rentworks relied on clause 14.6 of the agreement which provided that:

"In the event of the Department of Public Transport, Roads and Works not providing the Plaintiff with a notice as contemplated in terms of clause 13.1, then, unless otherwise advised by the plaintiff, in writing, the Department of Public Transport, Roads and Works agree that it would continue to rent all the equipment from the Plaintiff on a quarterly basis upon the terms and conditions of the agreement until all the equipment has been returned to the Plaintiff."

The Plaintiff is therefore correct that the agreement did not provide for partial return of the equipment. I fully agree with the Department that the agreement did not provide for the partial rental payment in respect of goods or equipment that was not included in Annexure '81' to the declaration. It is therefore not clear how the amount claimed by the Plaintiff in its second claim is determined.

[32.5] The Department has raised many other defences against Rentworks' claims. Some of such defences were pointed out in the heads of argument of Rentworks' counsel. I did not deem it necessary to deal with them because I have concluded that none of those defences are genuine defences that go to the core of Rentworks claims.

THE COUNTER CLAIM

[33] Besides its plea on the merits, the Department put up a counterclaim against Rentworks claims and sought an order declaring that the contract between Rentworks and the Department is void as *ab initio*, alternatively it is hereby voided. The Department sought the said relief on the following pleaded grounds:

[33.1] prior to the conclusion of the agreement, which is the subject matter of this litigation, the Department did not follow any of the procurement processes as required by the Public Finance Management Act 1 of 1999 nor its regulations, nor any of the treasury directives issued in terms of the Act;

[33.2] in terms of Section 217 of the Constitution, 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 effective;

[33.3] the activities of the Department were at all times governed by the provisions of the Constitution and the Act. Its conclusion of the agreement without following tender processes was in contravention of Section 217 of the Constitution. Therefore, the contract falls to be set aside in terms of Section 217 of the Constitution, alternatively on the grounds that it offends against public policy;

[33.4] In its plea to the Department's counterclaim, Rentworks pleads that the Department warranted and represented that it had complied with all the provisions of the PFMA and regulations;

[33.5] Furthermore, it pleaded that the Department has since 4 December 2006, when the agreement was signed, taken no steps to set it aside on the ground now alleged;

[33.6] according to Rentworks' plea, the Department is not entitled to benefit from its conduct in this regard;

[33.7] finally, Rentworks pleads that if the Court sets the agreement aside in terms of Section 172 of the Constitution or on the grounds of legality, Rentworks is, despite the invalidity of the agreement, entitled to a just and equitable order under Section 172(1)(b) of the Constitution that it does not lose its rights under the agreement;

[33.8] I will first deal with the counter claim and, if necessary, turn my attention to the merits of the matter as pleaded by the counter claim:

[33.8.1] besides plea on the merits, the Department put up a counter claim against Rentworks and sought an order declaring that the contract between the Plaintiff and the Department is void *ab initio*, alternatively is hereby void;

[33.8.2] the Department sought the said relief on the following pleaded grounds:

[33.8.2.1] prior to the conclusion of the agreement, which is the subject of this litigation, the Department did not follow any of the procurement processes as required by the Public Finance Management Act No. 1 of 1999 ("the PFMA"), nor any of the treasury directions issued in terms of the Act;

[33.8.2.2] the activities of the Department were at all material times governed by the provisions of the Constitution and the Act. Its conclusion of the agreement, without following tender processes was in contravention of s 217 of the Constitution. Therefore, the contract falls to be set

aside in terms of s 172 of the Constitution,
 alternatively on the grounds that it offends against
 public policy;

[33.8.2.3] in its plea to the Department's counter claim, the
 Plaintiff pleads that:

[33.8.2.3.1] the Department warranted and
 represented that it had complied with
 all the provisions of the PFMA
 and Regulations;

[33.8.2.3.2] furthermore, it pleaded that the
 Department has, since 4 December
 2006, when the agreement was
 signed, taken no steps to set it
 aside on the grounds now
 alleged.

[33.8.2.4] According to Plaintiff's plea, the Department is not
 entitled to benefit from its conduct in this regard;

[33.8.2.5] finally, the Plaintiff pleads that in the event that
 the Court sets the agreement aside in terms of s 172
 of the Constitution, or on the grounds of legality,
 Rentworks is, despite the invalidity of the
 agreement, entitled to a just and equitable order
 under s 172(1)(b) of the Constitution that it does
 not lose its rights under the agreement.

[34] Section 38(2)(iii) of the PFMA provides that every contract for procurement of goods or services that the State enters into must be in accordance with a system that is fair, equitable, transparent, competitive, and cost effective.

[34.1] Rentworks itself was unable to produce any evidence that the conclusion of the MRA (“MRA”) followed upon proper compliance with the PFMA. Mr Ryan testified that he never saw any tender documents before the conclusion of the MRA. He was unable to tell the Court whether there was any tender published in a bulletin. In fact, the evidence of the Defendant’s witness, a certain Lerato Mabyo Danielle (Ms Danielle), who became the Acting CEO in 2012, was that they researched whether a tender had been issued in respect of the MRA. She realised that the tender process was not followed in awarding the MRA to Rentworks.

[34.2] She testified further that the process of establishing whether any tender process preceded the conclusion of the MRA started from the period in 2005. She and her team scoured their system to check if any tender in respect of the MRA, in which Rentworks was involved, had been advertised. They could not find any proof of the existence of a tender that was awarded to Rentworks.

According to her evidence, they searched thoroughly for any trace of an advertised tender involving Rentworks in:

[34.2.1] the Treasury websites;

[34.2.1.1] the Provincial websites; and

[34.2.1.2] the National website, without any success.

They found no such tender advertisement. As recent as 2018 they took steps to source additional information about the existence of any tender, but they still did not find anything. According to her evidence, the National Treasury Website is a site in which all the nationally advertised tenders, which included, even provincial tenders, should

be found. All the tenders should be reflected in this site.

Absent any tender in the National Treasury website means that no tender was advertised for that particular service provided.

[34.2.3] This evidence of Ms Danielle was not contradicted. It was never Rentworks' evidence that there was any tender advertised that preceded the conclusion of the MRA. It was never the evidence of Rentworks that there was a tender advertised in one form or another that preceded the conclusion of the MRA;

[34.2.4] the Department's other witness, Ms Germina Malatji ("Ms Malatji"), testified that she became aware towards the end of 2012 that the Department was involved in litigation. It had become clear to her that the Department did not want to continue with the agreement. That was because the procurement processes had not been followed before the MRA was concluded. This evidence was not in dispute.

[34.2.5] I am satisfied that there was no compliance with the provision of s 38(2)(iii) of the PFMA before the conclusion of the MRA. The MRA is therefore invalid as it is inconsistent with the provisions of s 217 of the Constitution or s 38(1)(iii) of the PFMA. The question whether any procurement is valid must be answered with reference to national legislation or the regulations. In this regard, see **Chief Executive Officer, South African Social Secret Agency v Cash Pay Master Services (Pty) Ltd 2012 (1) SA 216 SCA at para [15], page 221** where Tshiqi JA, as he then was, stated that:

"[15] Section 217(1) of the Constitution prescribes the manner in which organs of State should procure goods and services.

In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This implies that a 'system' with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with constitutional demands of s 217(1), the question whether any procurement is 'valid' must be answered with reference to the mentioned legislation or regulation."

Section 38(1)(iii) of the PFMA is one such system. It complies with the constitutional demands of s 217(1) of the Constitution.

Accordingly, the question whether the procurement of goods or services procured referred to in the MRA is valid, must be determined with reference to the said legislation.

[34.3] The requirements of s 217(1) of the Constitution are repeated in s 38(1)(iii) of the PFMA which came into effect on 1 April 2000 and s 33 of the Constitution.

This section 38(1)(iii) of the PFMA prescribes that:

"38(1) The accounting officer for a Department, trading entity or constitutional institution –

(a) must ensure that the Department or trading entity or constitutional institution has and maintains –

(i) ...

(ii) ...

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

S 36 of the PFMA defines what an accounting officer is. It states that:

"36(1) Every department and every constitutional institution must have an accounting officer:

(ii) *subject to subsection (iii) –*

(a) *the Head of the Department must be the accounting officer for that Department.”*

[34.4] We now know that when on 4 December 2006 he signed the MRA on behalf of the Department, Mr S Buthelezi was its accounting officer by virtue of him being the Head of the Department. There is no dispute about that. In that capacity there was a duty imposed on him by the provisions of the PFMA to make sure that before he signed the MRA, there had been compliance with the provisions of s 38(1)(iii) of the PFMA. His failure to do so rendered his conduct and the conduct of Rentworks invalid, as will be demonstrated when I deal with the provisions of s 2 of the Constitution hereunder or the consequences of failure to satisfy the requirements s 217(1) of the Constitution.

[34.5] In paragraph [17] of the **Pay Master** judgment *supra*, the Court stated that:

“[17] The main object of the PFM Act is to ensure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies (s 2). SASSA and SAPO, as mentioned, are such entities more particularly because they are both funded, fully or substantially, from the National Revenue Fund or by way of tax, levy or other money imposed in terms of national legislation, and they are accountable to Parliament (s 1).” The PFM Act, read with the Treasury Regulations, is such legislation. It should be noted that it was not the respondent’s case that the PFM Act or the Treasury Regulations were unconstitutional, only that SASSA did not comply with their regulations.”

Paragraph [18] stated as follows:

“[18] Section 51(1)(a) of the PFM Act states that an accounting authority for a public entity must, (inter alia), ensure that the particular public entity has

a

and maintains an appropriate procurement and provision system which, (echoing the words of the Constitution), is fair, equitable, transparent, competitive, and cost effective. The National Treasury may in terms of the PFM Act, make regulations or issue instructions applicable to all institutions to which the Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost effective (s 76(4)(c)).”

[36.6] According to Mr Van der Merwe’s heads of argument, referring to the provision of s 217 of the Constitution:

“Every contract for procurement of goods or services that the State enters into must be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

Money should be appropriated for any liability the accounting officer commits a Department to. There is no evidence in this current matter by the Department that any money was appropriated for the Department’s liability arising from the MRA. The head of the Department walked into the MRA blindfolded. He was seemingly ill-prepared for his task. He had a smattering of the work he had embarked on. He lacked any superficial knowledge of the provisions of s 217(1) of the Constitution and s 38(1)(iii) of the PFMA.

[34.7] As stated by the SCA in the **Pay Master** judgment *supra*, National Treasury, in terms of s 76 of the PFMA prescribed through regulations and instructions the framework to procure goods. According to Regulation 16(a) (6.1) by the National Treasury, the procurement of goods must be within the following threshold values. Some of these threshold values may also be regarded as deviations, in other words,

instances in which the tender processes requirements could be dispensed with:

[34.7.1] 1. Under R2,000.00:

Goods or services to the value of R2000.00 may be procured without any competitive bids or quotations. In this instance petty cash may even be used. This is according to Treasury Practice Note SCM 5 of 2005 paragraph [1].

2. Over R2000.00 but not exceeding R10,000.00:

According to Practice Note SCM5 of 2005 paragraph [7] goods or services valued at any amount over R2,000.00 but not exceeding R10,000.00 may be procured through three verbal or written quotations from a list of respective suppliers. This list should have been previously compiled after an open and competitive process. It is more important that both the compilation of the list of preferred bidders and the ultimate choice of a particular service provider satisfied the requirements of s 217(1) of the Constitution.

3. Over R10,000.00 but not exceeding R200,000.00:

In terms of paragraph 3 of the National Treasury Practice Note SCM 5 of 2005, goods or services whose value was over R100,000.00 but not exceeding R200,000.00 could be procured through the invitation of as many quotations as possible, but not less than 3.

4. Over R200,000.00:

In terms of Practice Note SCM 5 of 2005 the following procedure **must** be followed by an organ of state in the procurement of goods whose value was over R200,000.00:

- (1) the organ of State must invite competitive bids;
- (2) the invitation for the competitive bids must be published and other appropriate media; at least in the Government Tender Bulletin
- (3) the invitation for competitive bids must be open for procurement or remain published for at least 21 days from the date of publication.”

Before he signed the MRA, Mr S Buthelezi did not possess this knowledge. He acted unlawfully. He had no power to conclude the MRA on behalf of the Department.

5. Further requirements for deviation in respect of the threshold of over R200,000.00:

This manner of deviation of procurement of services or goods may be resorted to under the following circumstances:

- (1) where it is impractical to invite competitive bids in urgent or emergency cases or where the supplier is the sole supplier;
- (2) the reason for the deviation **must** be recorded and **approved** by the accounting officer.”

Certainly, purely because of ignorance, this system of deviation or procurement of goods or services offered by Rentworks was never used. If it was used, no evidence about it was placed

before this Court. The conclusion is therefore inevitable that it was never utilised.

[35] The most emphatic way an organ of State can show that it complied with the provisions of s 38(1)(iii) of the PFMA is through a public tender process in which all tenders are treated fairly and equitably. A public tender constitutes the most preferable, most candid and most effective method of engaging public procurement. In **Cash Pay Master Services (Pty) Ltd v Eastern Cape Province and Others 1999 (1) SA 324 Ck HC, at 350 F-H**, Pickard JP, as he then was, had the following to say about the benefits of tender procedures:

“Tender procedures, as we have come to know them over many years, have been the result of the above experience gained in the procuring of services and goods by Government. They have evolved over a long period of time through trial and error and have crystalized into a procedure that has become vital to the very essence of effective government procurement. Strict rules have developed over the years in order to ensure that the system works effectively. The very essence of tender procedures may well be described as a procedure intended to ensure that Government, before it procures goods or services or enters into contracts or procurement thereof, is ensured that a proper evaluation is done of what is available, at what price, and whether or not that which is procured serves the purpose for which it is intended.”

:

[36] Quite evidently, s 217 of the Constitution and s 38(1)(iii) of the PFMA do not demand a tender the process. They simply provide that the system used by an organ of State to procure goods or services, must be fair, equitable, transparent, competitive, and cost effective. As already pointed out in paragraph [...] supra, it is of paramount importance to repeat that generally a tender process will desirably constitute the most effective way of complying with the principles of fairness, equitability, and competitiveness. Accordingly, an open tender or in the list some comparable procedures should generally *have been followed by the Department* in relation to contracts of substantial

value, such as in the current matter. In this matter, no tender for the procurement of rental of equipment was advertised. This is not in dispute. The negotiations for the procurement of goods and services referred to in the MRA were only between the Department and Rentworks. There was no compliance with the provisions of the PFMA. As a consequence of failure to comply with the provisions of s 38(1)(iii) of the PFMA, no other person or company took part in the negotiations for these goods and services. Such negotiations were unfair to other people who would have been interested parties should they have been notified. There is no proof that Rentworks' prices were competitive and cost effective. In ***Qaukeni Local Municipality and Another v General Trading CC 2010 (1) SA 356 (SCA)*** in which Leach AJA held, at paragraph [15] thereof, that:

“Consequently, in a number of decisions this court has found that the contracts concluded in similar circumstances without complying with the prescribed process are invalid. In Premier, President and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA), this court set aside a contract concluded in breach of provincial procurement procedures, holding that such contract was entirely submissive of a credible tender process and that it would deprive the public of the benefit of an open competitive system.”

[37] In my view, there existed as at 4 December 2006 another acceptable and credible manner in terms of which the Department could have lawfully procured the goods or services with Rentworks. That method included, choosing from a list of quotations submitted from preferred bidders, which list should have been previously compiled, as I pointed out earlier after an open and competitive process. In the compilation of such list, it is of paramount importance that the requirements of s 38(1)(iii) of the PFMA should be adhered to. In *casu*, the Department did not try to use this method, in my view, basically because the accounting officer, did not possess any knowledge about it and because he took no steps to seek such advice.

[38] His ignorance is established or well demonstrated by the fact that already on 4 December 2006, in other words, the date on which he signed the agreement which would only come into operation on 1 January 2007, after the signature of Rentworks on 27 January 2007, admitted incorrectly that all goods had been delivered, had been properly installed and in a proper working condition despite the fact that the items on the rental list were only supplied to the Department from time to time over an extended period of time. That is the testimony from Mr Ryan. Some of the goods were delivered long after the commencement of the MRA. There was, of course, no complaint thereabout by the Department.

[39] The accounting officer had no knowledge of the National Treasury instructions, Note SCM2 of 2005. Because of such ignorance, no compilation of a list of such preferred bidders was made.

[40] The procedure or method that an organ of State employs in the procurement of goods and/or services must be procedurally fair and in keeping with the principles of fairness and equitability. Interested parties should be given a reasonable opportunity to make their own representations in connection with the award of the relevant contract period. This requirement of fairness and equitability, which was not adhered to by the Department, is also accorded in Section 33(1) of the Constitution. This Section provides that:

“Everyone have the right to administrative action that is lawful, reasonable and procedurally fair.”

All the tenderers must enjoy fair and equal treatment and be furnished with the same information and be given equal opportunities.

[41] This principle of fairness, equitability and competitiveness of the process followed by an organ of State such as the Department *in casu* was referred and followed in **Premier, President & Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA)** in which the Court, Schultz JA, had the following to say at page 429, paragraph [30] H-I:

“While all the requirements ... is that the body judge intended be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may be tucked away, apart from these terms.”

This judgment represents a classical illustration of a process that could be referred to as one that undermined the principle of fairness, equitability, and competitiveness. In that judgment, the Supreme Court of Appeal struck down a contract for the provision of the cleaning material to the Free State Province by reason of the fact that the contract initially concluded with the Provincial Department, differed from the terms of the invitation to the tender and the letter of acceptance produced by the tender board. The effect of such process was to undermine the fairness of the process. In terms of the principle of fairness, the MRA may, on that ground alone, be set aside and declared invalid as *ab origine*. On the basis of competitiveness, counsel for the Department referred this court, in his heads of argument, to the judgment of **Saffy N.O. and Others v Minister of Public Works and Others (1227/2018) [2019] ZANHC 46 (30 August 2019)** in which the Court stated that:

“The Department has a duty to protect the fiscus and act reasonably when realising that there is a possibility of fruitless and wasteful expenditure in the process. Treasury Regulation 9.1.1 promulgated in terms of the Public Finance Management Act enjoins the Department to exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and should implement effective, efficient and transparent process of financial and risk management.”

[42] Counsel for the Defendant had argued that the contract constituted a wasteful expenditure in that it was clear that the Department could have obtained the use of the equipment for the first five years much more cost effective than in terms of the MRA. What he emphasized with the above argument was that the MRA was not cost effective. It flew against the spirit of competitive requirements embedded in s 38(1)(iii) of the PFMA. On this basis the MRA cannot be sustained.

[43] Organs of State must procure goods and/or services in accordance with a system that is fair, equitable, competitive, and cost effective. Support for this principle can be found in the judgment of Froneman J in ***AllPay Consolidated, Chief Executive Officer v SASSA 2014 (1) SA 604 CC 620 paragraph [40]*** where, after he had referred to Bolton in *The Law of Government Procurement in South Africa* at 57, stated that:

“While the primary reasons for the express inclusion of the five principles of section 217(1) of the Constitution is to safeguard the integrity of the Government Procurement Process, the inclusion of the principles, in addition to ensuring the prudent use of producers, is also aimed at preventing corruption.”

[44] Transparency promotes openness and accountability. These principles serve an especially important function. They encourage good decision making in relation to the procurement and prevent the ever-present possibility of corruption in the assessment and award of contracts. By so doing, they inculcate in the public, confidence in the procurement process. It is difficult for an organ of State to award a contract in the absence of some form of public process in the light of the Constitution and principles of open procurement. In the very least it is imperative that the public should be notified that a public body contemplates negotiating the contract with a particular entity.

[45] In his heads of argument, counsel for the Department submitted that clause 13.1 of the MRA was inconsistent with the Constitution and the PFMA. This, according to him, is

the case because it constitutes a huge wasteful expense that could materialise in case that a small oversight on the part of an official five years into the future and which assumption of risk had no benefit for the Department. In short, he means that clause 13.1 demonstrates that the MRA was not cost effective. He continued and submitted that such a provision should not have any place in the contract conducted with an organ of State. Such a clause could never have survived a competitive procurement system, nor could it survive a process that is fair. The conclusion of a contract contained such a clause can only be due to the decision to enter into a contract having been taken irrationally and without proper application of the mind.

[46] For the following fundamental reasons, the said MRA was not concluded in accordance with the prescripts of s 217(1) of the Constitution and Section 38(1)(iii) of the PFMA:

- [46.1] there was no public invitation to interested parties to submit tenders for the provision of goods and services provided for in the MRA;
- [46.2] the MRA was not concluded in a transparent manner;
- [46.3] Rentworks' goods and services were not assessed to determine if the agreed price was competitive and cost effective;
- [46.4] the process which led to the conclusion of the agreement was not fair in that other service providers were not invited to submit tenders or quotations for provisions of the goods and services in issue.

[47] Under the circumstances the conclusion of the MRA was constitutionally invalid in terms of Section 2 of the Constitution.

[48] In its plea to the counterclaim, Rentworks stated that:

“Safe to plead that the Department warranted and represented in that it had complied with all the provisions of the Act and Regulations, and further presented on 1 November 2006 that it had so complied, the Plaintiff continued in its plea and stated that:

3. *In addition to the aforesaid warranties and presentations, the Defendant has taken no steps, since 4 December 2006, when the agreement was concluded to set it aside on the ground now alleged.*

The Defendant is not entitled to benefit from its own conduct.”

[49] The starting point here is s 2 of the Constitution. Non-compliance with the provisions of s 217 of the Constitution or s 38(1)(iii) of the PFMA amounts to conduct which is inconsistent with the Constitution and that renders such a conduct invalid. Section 2 of the Constitution provides that:

“2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and, the obligations imposed by it must be fulfilled.”

The provisions of s 172(1) of the Constitution determine what should be done with conduct that offends the provisions of s 2 of the Constitution.

[50] In my view, it is otiose for Rentworks to plead that the Department warranted and represented that it had complied with all the provisions of the Act and Regulations. Nowhere in the Act or Regulations is it provided that it is enough if an organ of State gave a warrantee or made representations that it had complied with the Act and Regulations. So, no merit exists in such a plea. Compliance with the provisions of s 38(1)(iii) of the PFMA or s 217(1) of the Constitution is something that Rentworks should have seen and participated in. The onus was not only on the organ of State to ensure compliance with the process properly steeped in the provisions of s 38(1)(iii) of the PFMA or s 217(1) of the Constitution. Rentworks is equally guilty in rushing to conclude an MRA knowing fully well that the conclusion of the MRA was not preceded by any compliance with the prescripts of s 38(2)(iii) of the PFMA. Rentworks is not as innocent as it claims to be. Rentworks knew of this requirement. That it is so is clear from the evidence of Mr Ryan and from clause 28.1 of the MRA.

[51] In the judgment of the *Eastern Cape Provincial Department and Others v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA)* at para [13] the Court had the following to say:

“This is not a case in which innocent third parties are involved. This is a case between the immediate parties to leases which one of them had no power in law to conclude and had been deprived of that power (if it had it) in the public interest. The fact that the Respondent was misled into believing that the Department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the Department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were ultra vires the powers of the Department and they cannot be allowed to stand as if they were intra vires.”

[52] Rentworks miserably failed to insist on proper compliance with the provisions of s 38(1) (iii) of the PFMA and apparently attempted to protect themselves by obtaining a warranty of compliance with the very persons who may not have complied with their duties. Furthermore, it should have become rather clear to Rentworks, by the end of March 2007, that there was non-compliance with the PFMA in that there properly was no budget for this contract. Despite of them insisting on proof that the officials were officially authorised by the PFMA to have entered into the contract, being the first instance, that they were again authorised by the PFMA to enter into a further transaction to provide further credit, Rentworks failed to do so.

[53] Instead, the Plaintiff made use of the opportunity to cause a further breach of the PFMA to be committed. This was by inserting a provision for the incurrence of the wasteful expense into the contract from which it would benefit usually in the form of additional upfront profit and a huge increase windfall after the end of the term in terms of Clause 13.1.

[54] During cross-examination of Mr Ryan by counsel for the Defendant, Mr Ryan was asked whether he knew what compliance with the PFMA involved. He was evasive in his answer but ultimately, he was asked if he had seen the documents relating to the tender. Once again, he avoided the question by answering differently that he was given a pack of documents. Rentworks should not have concluded the MRA if it was certain that it was not preceded by a tender. It failed to make proper investigations. It did nothing to make sure that there was proper compliance because it was catching a bargain. Rentworks should not be allowed to benefit from a situation where it intentionally and knowingly contracted on the basis that there was no compliance by either of the parties with the requirements of s 217(1) of the Constitution and s 38(1)(iii) of the PFMA.

[55] Rentworks pleaded further that:

“The Defendant has taken no steps, since 4 December 2006, when the agreement was concluded, to set it aside on the ground now alleged.”

[56] This plea by Rentworks must be considered in the light of the following circumstances. The issue is whether the delay can be condoned when people who signed the MRA in 2006 did not comply with the PFMA. Initially the non-compliance escaped even the attention of the Auditor-General, as it is quite evident from his reports of the years 2006/2007 and 2007/2008. The contract provides a warranty and contains a reference to a tender. Under the circumstances it would be difficult for other officials who were not initially involved with the conclusion of the MRA to have raised this issue. Moreover, the people who were involved in the procurement process were no longer available. According to counsel for the Department, Mr Machotli was subjected to disciplinary proceedings. He resigned. Mr S Buthelezi who was at the centre of the conclusion of the MRA, also resigned. It is not correct that the Department never, at any one stage in the past, took any steps to set the agreement aside on any ground. The Department instructed attorneys to deal with the matter, firstly the State Attorney and later private

attorneys. That, however, does not prevent the Department from challenging the validity of the MRA based on legality and then for asking the contract to be set aside, where it is sued on the contract.

[57] This plea by Rentworks can, without any waste of time be answered with reference to what Skweyiya J stated in ***Khumalo and Another v MEC for Education, KwaZulu-Natal, 2014 (5) SA 579 (CC), paragraph [45]***, that:

“In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia, by seeking a redress of their Department’s unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge, the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court’s discretion to overlook the delay.”

[58] This statement, which speaks for itself, means that where conduct is to the court clearly unconstitutional, a court should not be manacled by a long delay or undue delay by the Department to bring the review before it can exercise its powers in terms of s 172(1)(a) of the Constitution. Therefore, because it has now been established that the conclusion of the MRA was unlawful as it was inconsistent with the Constitution, in particular, Section 217(1) of the Constitution and 38(1)(iii) of the PFMA. The fact that the Department took no steps before September 2006 when the agreement was entered into to set it aside has no merit. It cannot be raised as a defence where permitting it will result in a court perpetuating an illegality. The Department’s application to bring a review application to set aside a contract that is unconstitutional based on illegality is not time bound. In paragraph [79] of Tasima judgment, the minority judgment stated that:

[79] *The approach adopted by the Supreme Court of Appeal did not only deviate from section 172(1)(a) but resulted also in that court enforcing conduct that was in violation of the Constitution. As guardians of the Constitution, courts are under an obligation to uphold it. A decision that is invalid because of its inconsistency with the Constitution can never have legal force and effect. This is fundamental to the principle of constitutional supremacy.*

[80] *Consequently, the Supreme Court of Appeal held in quoting that:*

“According to the general principle laid down in Oudekraal (para 26) administrative actions must be treated as valid until set aside, even if actually invalid.

And again later:

‘(T)he import of section 7 of PAJA is that after the 180-day period, a court is only empowered to entertain the review application if the interests of justice require an extension under section 9. Absent such extension, the court has no authority to consider the review application at all. Whether or not the decision was in fact unlawful no longer matters. The decision would, as it were, be validated by a delay’.

[81] *This is in conflict with the rule of law and specifically the principle of legality. These principles require administrative functionaries to exercise only public power conferred on them and nothing more. No amount of delay can turn an unlawful act into a valid administrative action. This is because apart from the rule of law, Section 33(1) of the Constitution prescribes that administrative action must be lawful.”*

[59] The conclusion of an agreement such as the MRA, without following the procedure set out in s 217 of the Constitution or s 38(1)(iii) of the PFMA is inconsistent with the Constitution. It amounts to conduct inconsistent with the Constitution and is therefore invalid. It is invalid by reason of the fact that it is inconsistent with the provisions of s 2 of

the Constitution. It is a constitutional matter. S 172(1)(a) of the Constitution provides that:

“172(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its invalidity.”

[60] I have now pointed out above that in the circumstances the conclusion of the MRA was not done in the manner contemplated by Section 38(1)(iii) of the PFMA and is therefore invalid. In terms of s 172(1) of the Constitution, this Court is bound to declare it invalid, it is therefore hereby declared invalid.

[61] Counsel for Rentworks referred the Court to the judgment of Mbha J, as he then was, in which the Court refused to declare a contract invalid. This was the judgment of ***Buena Vista Trading 15 (Pty) Ltd & Another v Gauteng Department of Roads and Transport and Others 2012 JDR 2198 CGSJ***. This was a case upholding the core successor of the old Department and one of the entities identified in the Grand Thornton Forensic Report. In that case the action was instituted in 2011. The applicant sought payment of approximately R85 million from the Department who purported to cancel a lease agreement between the applicant and Inpophoma on the basis that a proper procurement process had not been followed in accordance with, *inter alia*, the PFMA. Even though there were strong indications that a proper procurement process had not been followed, the Court declined to set the agreement aside because it was neither ethical, fair, not desirable to do so. The applicant had acted in good faith and had discharged their obligations. They were entitled to ask that a proper procurement process had been followed. Accordingly, the Court awarded payment of approximately R85 million together with interest and costs. Counsel for Rentworks asked the Court to follow the same approach in this case.

[62] With due respect to Mbha J, I differ with his approach. In the first place, once it has been established, as it was done in the case before him, that there was no compliance with the procurement process, the Court has no choice but to make a declaration of invalidity. In other words, to declare such conduct to be inconsistent with the Constitution and to declare it invalid. A duty to do so was imposed on the Court by the provision of s 172(1)(a) of the Constitution. In my view, the Respondent in the **Buena** case had successfully demonstrated in paragraphs [26.1] to [26.7] that the procurement process was not adhered to. In my view, the court in the **Buena** case should have declared the agreement of lease invalid *ab origine* and having done so, adopted the approach set out in s 172(1)(b) of the Constitution.

[63] There are many aspects of this judgment that I do not agree with. Unfortunately, this is not a space to fully criticise the said judgment. In my view, the **Buena** judgment is not good authority for the proposition that a Court may decline to declare an agreement concluded contrary to the provision of the PFMA invalid.

[64] Unfortunately, the case of **Buena** was decided before the case of the Constitutional Court in the **Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC)**. In paragraph [37] of this judgment, Jafta J, who wrote for the minority, stated that:

“Where, as here. the validity of the source of the right the applicant sought to preserve was also impugned on the basis that it was an illegal source; a Court can hardly close its eyes to this and proceed to grant an order preserving an illegally obtained right.”

The validity of the MRA source, which is the source of the right Rentworks seeks to preserve, is impugned by the Department in its counterclaim.

[65] Again in paragraph [77] the Court stated that:

“In refusing condonation, the Supreme Court of Appeal did not only fail to take the allegations into account but also overlooked the overwhelming evidence on record that Mr Mahlalela violated section 217 of the Constitution when he extended the agreement. Once that was established, the Supreme Court of Appeal was obliged by section 172(1) (a) of the Constitution to declare the extension to be invalid. Under this section, the declaration of invalidity is a mandatory consequence of inconsistency with the Constitution. Section 2 of the Constitution proclaims that the Constitution is supreme law conduct that is inconsistent with it is invalid.

In paragraph [33] of the Buena Vista Judgment, Mbha J stated that:

“It is common cause the amounts involved in this case are far in excess of the threshold of R500,000.00 in terms of Practice Note 8 of 2007/2008 and that no written reasons in terms of the Treasury Regulation 16A6.4) for any deviation have been furnished in this case. Invariably this leads to the unavoidable conclusion that there was no compliance with the peremptory provisions of the applicable legislation and regulations and that the contracts concerned were unlawfully entered into.”

[66] Having made such a finding, the judge, contrary to the provisions of Section 2 and Section 172(1)(a) of the Constitution, declined to exercise his powers to declare an agreement invalid. He had no legal excuse, in my view, to refuse to declare the contract unlawful. What he did by failure to do so, he perpetuated an illegality.

[67] Then he proceeded and stated that:

“Ordinarily and in strict compliance with the requirements of the governing statutes, I would have set the contract aside. However, because of the reasons which I will set out fully hereunder, I have found it neither practical, fair, nor desirable to set these agreements aside.”

He then went to give reasons for declining to declare the agreement invalid. S 172(1) (a) of the Constitution is peremptory. The court has no discretion. It imposes an

obligation, using the word **must**, to make a declaration of invalidity. In **Harris v The Law Society of the Cape of Good Hope 1917 CPD 451**, the court had the following to say:

*“Modern doctrine and tendency are altogether against the Court assuming to itself a power to depart from or violate an express provision of the Statute law. This is indeed founded on a sound elementary principle, which distinguishes between the functions of parliament and that of the Courts of law. While the law speaks in clear and unambiguous language the maxim *Judicis est jus dicere sed non dare* applies, and hence we can appreciate the injunction of Justinian in the Code *Judicandum est ex legibus sed non exemplis*. If the law in any particular provision of a statute appears, under the circumstances of the given case to work a hardship, the proper course is for the Legislature to remedy the evil by amending the statute, and not for the Court to commit the greater evil by seeking to repeal the clear letter of the Act.”*

THE REMEDY

[68] I now turn to the remedy. S 172(1)(b) of the Constitution prescribes that:

“172(1) When deciding a Constitutional matter with its power, a Court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
- (b) may make any order that is just and equitable, including –*
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and*
 - (ii) an order suspending the declaration of invalidity for any period*

and on any conditions, to allow the competent authority to correct the defect.”

[69] The question now is what is “*just and equitable*”? It is clear from paragraph [105] of the **Buffalo City Metropolitan Municipality v Esla Construction (Pty) Ltd 2019 (4) SA**

331 (CC) at page 361 and paragraph [131] of the *Tasima* judgment that remedial power of “*justice and equity*” means preserving the rights in respect of what has been done in terms of the invalid contract. Accordingly, paragraph [105] of the *Buffalo City* judgment, it does not prevent a party to obtain further rights under the invalid agreement. In other words, what has been done by the service provider and paid for by the Department cannot be undone. And such service provider should, under Section 172(1) (b) of the Constitution, not be ordered to pay back whatever money it has received under the terms of the invalid agreement. But the service provider may not claim the outstanding payments under the invalid agreements. In other words, Rentworks may not obtain further rights under the invalid agreements.

[70] In paragraph [131] of *Tasima*, Jafta J stated that:

“However, in the exercise of remedial power on justice and equity, I would have preserved what had already been done in terms of the invalid agreement and ordered Tasima to transfer the eNatis System to the Corporation within 30 days.”

It is of paramount importance to point out that no other judgment in the *Tasima* judgments differed with his approach. It therefore means that it was approved by all the judges.

[71] In the *Buffalo Municipality* case the Constitutional Court merely endorsed, with regard to justice and equity and in order to be consistent in its application of the law, the approach adopted in the *Tasima* judgment. I therefore have no reason to depart from that approach.

COSTS

[72] With regard to costs I would follow the approach of the Constitutional Court as set out in paragraph [106] of the *Buffalo Municipality* judgment.

Accordingly, I make the following order:

1. The Plaintiff's claim is hereby dismissed.
2. The counterclaim is hereby granted.
3. The Agreement, Annexure "A" to the Plaintiff's declaration, between the Plaintiff and the MEC for Infrastructure Development, Gauteng Provincial Government, is hereby declared invalid *ab initio*.
4. There is no order to costs.

PM MABUSE
JUDGE OF THE HIGH COURT

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Date heard:

2-10 November 2020, 19-22 October 2021 &

1-10 June 2022

Date of Judgment:

19 May 2023