CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 78/18

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY Applicant

and

METGOVIS (PTY) LIMITED Respondent

Neutral citation:	*Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited* [2019] ZACC 9
Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgment:	Khampepe J (unanimous)
Heard on:	21 November 2018
Decided on:	28 February 2019
Summary:	Section 217 of the Constitution — development of the common law relating to tacit agreements entered into with organs of state Jurisdiction — misapplication of an accepted common law rule does not ordinarily raise a constitutional issue — factual dispute

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ORDER

On appeal from the High Court of South Africa, Eastern Cape Division, East London:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the costs of the respondent in this Court.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] This is an application for leave to appeal against a decision of the High Court of South Africa, Eastern Cape Division, East London (High Court) in terms of which the applicant, the Buffalo City Metropolitan Municipality (Municipality), was ordered to pay the respondent, Metgovis (Pty) Limited (Metgovis), their monthly fees and costs incurred in terms of a tacit extension of an agreement between the parties. The agreement was a software licensing agreement for the use of Metgovis' Metval property valuation management system (Metval System).

Factual background

[2] On 4 February 2008, the parties entered into a software license agreement (agreement) in terms of which Metgovis granted the Municipality a license to use its Metval System. This system assists municipalities in the compilation, administration and maintenance of their property valuation rolls. Metgovis also provided technical staff and support to enable the Municipality to use the Metval System properly. The agreement terminated on 30 June 2011, but provided for automatic renewal for a further period of three years on the same terms and conditions if the agreement had not been expressly terminated on three months' written notice.

[3] Metgovis submits that the Municipality failed to give any notice of its termination of the agreement and that it (Metgovis) proceeded on the basis that the agreement had been automatically renewed. Despite a number of outstanding payments, including R474 126.23 for the 2011/2012 financial year and R477 006.82 for the monthly support period for July to December 2011, Metgovis indicated that it would continue to render the service because of its essential nature pending the finalisation of the dispute and receipt of payment.

[4] A meeting was held on 17 October 2012 between representatives of the parties. During the meeting, it was decided that the Municipality would put out a new tender for the provision of the relevant service in the circumstances. On 31 October 2012, the Municipality informed Metgovis that it would terminate the agreement a year early (on 30 June 2013). The contract for July 2013 to 2016 went out to tender. Metgovis tendered but was unsuccessful.

[5] On 15 March 2013, the Municipal Manager, Mr Andile Fani, wrote to Metgovis agreeing to an interim arrangement between them "to the extent that the license agreement be renewed until 30 June 2013 only".

[6] When 30 June 2013 dawned, the Municipality had no alternative system in place to enable it to perform its functions regarding the maintenance of a proper valuation roll. Being mindful of the deleterious consequences for the Municipality if it simply terminated access to the system on 1 July 2013, Metgovis continued to render the service until a new service provider could be appointed. It contends that it was therefore agreed, through a tacit agreement, that it would continue to render the service on a month-to-month basis, as per the previous service level agreement. During this period, the Municipality continued to use the system, Metgovis continued to occupy municipal offices and it provided technical support in the same way it had since 2008.

[7] On 4 July 2013, Metgovis sent a letter to Mr Fani, as well as to the Municipality's Contracts and Procurement Manager, Mr Ayanda Sakwe. The letter requested an urgent meeting to address the continued use of the Metval System in the 2013/2014 financial year as well as the procedure for billing for the use of the software until the new appointment was finalised.

[8] Metgovis did not receive any reply to the letter. Consequently, on 15 July 2013, it addressed another letter to Mr Fani stating that in the light of the fact that it had not received a reply to the previous letter "and as a result of the continued use by the city of the Metval system", it proposed to continue rendering the service on the basis of the existing agreement. The invoice for the annual advance payment of the license fee was also attached to the letter.

[9] The Municipality's municipal valuer, Mr Christopher Lourens, testified that on 30 June 2013 he instructed Metgovis' on-site technician, Mr Mathew Duminy, that the agreement had expired and that he should vacate the premises, but that he did not heed this instruction.

[10] On 10 October 2013, Mr Lourens received an instruction from his supervisor, Mr Mapasa, to tell Mr Duminy again to vacate the premises. Mr Lourens admitted that he and other officials made use of the Metval System from 1 July 2013 until 10 October 2013 but said he was under the mistaken impression that the Municipality had purchased the software.

[11] The service terminated on 10 October 2013 when Metgovis' technicians were instructed to vacate the municipal premises and were escorted off the premises by security guards. The Municipality disputed the existence of any agreement for the period from July 2013 to October 2013.

Litigation history

[12] Metgovis' claim was based on contract and, in the alternative, it was a claim for damages based on losses incurred in the months between July and October 2013. It is not in dispute that the written "renewed agreement" (after 30 June 2011) was terminated on 30 June 2013. Metgovis contended that the Municipality's continued use of their system and technical support after 30 June 2013 created an "express, alternatively tacit agreement . . . in terms whereof [the Municipality] would continue to use the services of [Metgovis] on a month-to-month basis, on the same terms and conditions as contained in the agreement, until a new service provider could be appointed".

[13] The Municipality denied the existence of the contract for the period of June to October 2013. In the alternative, the Municipality pleaded that any implied month-to-month extension was unlawful and void, since, if any of the Municipality's officials had purported to act on its behalf during negotiations, these officials lacked the necessary authority to do so. Metgovis then included an alternative claim based on unjustified enrichment to which the Municipality responded with a special plea of prescription.

[14] Both Metgovis and the Municipality raised procedural issues but the matter was nevertheless decided by the High Court on its merits, and these procedural issues are not relevant in the matter as it stands before this Court.

[15] In determining whether a tacit contract existed, the High Court applied the test set out by the Appellate Division in *Ocean Commodities*.[1] This required Metgovis to show "by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged".[2] It found that the Municipality did not dispute that

[1] *Standard Bank of South Africa Ltd v Ocean Commodities Inc* [1984] ZASCA 2; 1983 (1) SA 276 (A) (*Ocean Commodities*).

[2] Id at 292A-C.

Metgovis' pleadings contained sufficient details of the terms of the tacit contract or the conduct from which a contract could be deduced. The Municipality was required, in the terms of *McWilliams*,[3] firmly to repudiate the existence of a contract, and it failed to do so. The High Court held on the basis of the Municipality's continued use of the software and technicians that a tacit agreement existed.[4] The High Court held further that the Municipality did not bring sufficient evidence to prove that the agreement was unlawful.[5] Last, the High Court held that, even if the finding of the existence of the month-to-month contract was wrong, Metgovis was still entitled to rely on its alternative claim that was founded on unjustified enrichment.

[16] The High Court therefore found in favour of Metgovis with costs. Both the High Court and the Supreme Court of Appeal denied leave to appeal.

In this Court

Applicant's submissions

[17] The Municipality persists in disputing the existence of any tacit agreement for the period in question and, in the alternative, submits that any agreement of that nature is unlawful and void from the onset because of its non-compliance with public procurement legislation.

[18] To found jurisdiction, the Municipality submitted that the central issue for determination, being whether the High Court misapplied the law on the conclusion of a tacit contract with an organ of state, is an issue of public importance. It submitted that this Court should finally determine the nature of the onus on a party alleging a tacit contract between itself and an organ of state. In doing this, this Court should develop the common law to harmonise it with section 217 of the Constitution.[6]

[3] *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A); [1982] 1 All SA 245 (A).

[4] *Metgovis (Pty) Limited v Buffalo City Metropolitan Municipality* [2017] ZAECELLC 21 (High Court judgment) at para 24.

[5] Id.

[6] Section 217(1) of the Constitution provides:

Respondent's submissions

[19] Metgovis persists with its contention that there was a tacit agreement. In response to the Municipality's allegation of unlawfulness, Metgovis also persists with its alternative claim based on unjustified enrichment which it denies has prescribed. Metgovis submits that, if this Court does not uphold any of its claims, this Court should exercise its discretion to grant a just and equitable remedy by ordering the Municipality to pay for the service it rendered during the period in question.

[20] In response to the Municipality's submissions that this Court has jurisdiction, Metgovis submits that this is not an issue of public importance. The Municipality merely misconstrued the nature of the onus it was required to satisfy in the matter.

Jurisdiction

[21] Section 167(3)(b) confers jurisdiction on this Court to determine constitutional matters or arguable points of law of general public importance.[7]

[22] The Municipality has attempted to found this Court's jurisdiction by submitting that this Court needs to develop the common law relating to the test for the conclusion of tacit contracts with public functionaries, so that it accords with the provisions of section 217 of the Constitution. It is not clear from the Municipality's papers what this "enhanced" test would entail. The Municipality, however, seems to submit that the test would require that the onus of proving that the tacit contract was concluded lawfully and with the requisite authority would rest on the party alleging the existence of the contract. This is a higher standard than the current common law position

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

[7] Section 167(1)(3)(b) states that the Constitutional Court may decide—

> "(i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

relating to tacit contracts. Once the existence of the contract has been established,[8] the onus of proving a defence of unlawfulness currently shifts to the party alleging that the tacit contract is unlawful.[9] The Municipality submits that this is a constitutional issue that warrants this Court's intervention.

[23] It is so that the development, or failure to develop, a common law rule by a lower court may constitute a constitutional matter in circumstances where that development, or failure to develop, the rule is inconsistent with that court's obligation under section 39(2)[10] of the Constitution, or another constitutional right or principle.[11] The question is therefore whether the High Court erred in not developing the test for a tacit agreement with a public functionary.

[24] In our law, there are currently two supposedly conflicting tests for determining the existence of a tacit contract. There is the "no other reasonable interpretation" test and the "preponderance of probabilities" test.[12] The "no other reasonable interpretation" test was established in the *Ocean Commodities* case where Corbett JA stated:

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*."[13]

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[8] *Butters v Mncora* [2012] ZASCA 29; 2012 (4) SA 1 (SCA) at para 34.

[9] *Pillay v Krishna* 1946 AD 946 at 952.

[10] Section 39(2) states that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[11] *S v Boesak* [2000] ZACC 25; 2001 (1) SACR 1 (CC); 2001 (1) BCLR 36 (CC) at para 15. See also *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 16 and *Shabalala v Attorney-General of Transvaal* [1995] ZACC 12; 1995 (2) SACR 761 (CC); [1996] 1 All SA 64 (CC) at para 9.

[12] Bradfield *Christie's Law of Contract* 7 ed (LexisNexus, Durban 2016) at 99.

[13] *Ocean Commodities* above n 1 at 292A-C.

[25] After criticism that this test created a higher standard of proof than the usual standard in civil cases, in *Joel Melamed*, Corbett JA suggested the "preponderance of probabilities" test, namely:

> "[A] court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence."[14]

[26] In the recent judgment of *Nurcha*, the Supreme Court of Appeal held that the two supposedly conflicting tests can be reconciled.[15] The test to be applied is whether the party alleging the existence of the tacit contract "has shown on a balance of probabilities unequivocal conduct" on the part of the other party that proves that it intended to enter into a contract with it.[16] This application was filed before the *Nurcha* judgment was handed down and was not dealt with in any of the parties' papers. However, for the purposes of this judgment, it is not necessary for this Court to make a pronouncement on this issue.

[27] The Municipality does not allege in any of its papers that the current common law tests are inconsistent with the Constitution insofar as they relate to public functionaries. Nor does it allege that applying one test rather than the other would make any difference here. Instead, the Municipality submits that on either of the above common law tests, there was no tacit contract between the parties and that the High Court erred in holding otherwise.

[28] During oral argument, counsel for the Municipality submitted that, regardless of which test is applied, Metgovis did not prove the existence of a tacit contract. On this approach, the matter concerns factual findings, rather than any constitutional issue. Because no constitutional issue falls to be decided, and the existence of a tacit

[14] *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A); [1984] 2 All SA 110 (A) (*Joel Melamed*) at 165A-B.

[15] *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd* [2018] ZASCA 122 (*Nurcha*).

[16] (*urcha* at paras 16-22, relying on *Butters* above n 8 at para 34.

contract depends on the factual findings made by the High Court, this Court's jurisdiction is not engaged. This is set out in greater detail below.

[29] Whichever test is adopted, tacit contracts are required to be lawful. If a tacit contract is unlawful, it will ordinarily be void at the outset.[17] A tacit contract that does not comply with the requirements of section 217 of the Constitution and the relevant public procurement legislation will be unlawful and therefore void from the outset. No case was made out as to why the provisions that regulate written contracts with government entities are not sufficient to regulate tacit contracts with government entities.

[30] Counsel for the Municipality conceded that the "additional requirements", which it submitted this Court should include in the test for the existence of a tacit agreement, are, in any event, pertinent when looking at the lawfulness of *any* tacit agreement. It is therefore not necessary for this Court to develop the common law relating to tacit agreements so as to bring it in line with the requirements in section 217 of the Constitution – the common law already provides that a contract that is unlawful (which includes a contract which is non-compliant with public procurement legislation and section 217 of the Constitution) is void at the outset.

[31] Where does this leave us? The High Court made a factual finding that a tacit contract existed based on the application of an accepted legal test and a thorough assessment of evidence and witness testimony. Even if the High Court erred in making that finding, this Court has repeatedly held that the mere misapplication of an

[17] *Schierhout v Minister of Justice* 1926 AD 99 at 109-10:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. . . . So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act. The maxim, '*Quod contra legem fit pro infecto habetur*', is also recognised in English law. And the disregard of peremptory provisions of a statute is fatal to the validity of the proceeding affected." (References omitted.)

See also *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 77 and *De Faria v Sheriff, High Court, Witbank* 2005 (3) SA 372 (T) at para 31.

accepted common law rule by a lower court does not ordinarily raise a constitutional issue.[18]

[32] In *Boesak*, this Court held that a challenge to a decision of a lower court on the sole basis that it was wrong on the facts does not raise a constitutional issue that would engage this Court's jurisdiction. In that case, this Court held:

> "In the context of section 167(3) of the Constitution the question whether evidence is sufficient to justify a finding of guilt beyond a reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the Supreme Court of Appeal would be illusory. There is a need for finality in criminal matters . . . . Disagreement with the Supreme Court of Appeal's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. . . . Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the Supreme Court of Appeal."[19]

[33] However, this statement was clarified in *Rail Commuters Action Group*, where this Court stated:

> "This reasoning [in *Boesak*] does not imply that disputes of fact may not be resolved by this Court. It states that where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the Supreme Court of Appeal, and no other constitutional issue is raised, no constitutional right is engaged by such challenge. Where, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of facts will constitute 'issues connected with decisions on constitutional matters' as contemplated by section 167(3)(b) of the Constitution."[20]

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[18] See *Boesak* above n 11 and *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9.

[19] *Boesak* above n 11 at para 15.

[20] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 52.

[34] In *Van Niekerk*, this Court reiterated that it would be slow to interfere with findings of fact by a trial court based on careful assessment of witnesses and the probabilities of their respective versions.[21]

[35] This Court therefore does not have jurisdiction to decide a case that raises only factual questions as these do not constitute constitutional matters.

[36] In this matter the High Court made certain factual findings which led to its conclusion that a tacit contract existed between the parties. This was based on the assessment of evidence and testimony of certain witnesses. This Court cannot, without revisiting the factual findings of the High Court, make a conclusion regarding the existence or not of the tacit contract. For the same reasons, this Court cannot determine that the contract was not concluded without the requisite authority and was not in accordance with the relevant legislative prescripts. Without further testimony, including that of Mr Fani and Mr Mapasa, it is not possible for this Court to determine whether there was indeed an agreement to enter into the contract and the lawfulness of this sort.

[37] This matter also does not raise an arguable point of law of general public importance. The Municipality's submission, that to let the High Court judgment stand would set a dangerous precedent that would directly impact on the manner in which municipalities are required to give effect to their constitutional obligations to provide cost-effective and essential services, is misplaced. This matter is merely a factual dispute as to the existence of a specific tacit contract in specified circumstances between these parties. The legal position relating to the manner in which municipalities are required to conduct themselves when procuring goods or services remains unchanged.

[21] *Minister of Safety and Security v Van Niekerk* [2007] ZACC 5; 2008 (1) SACR 56 (CC); 2007 (10) BCLR 1102 (CC) (*Van Niekerk*) at para 10.

[38] The application for leave to appeal therefore falls to be dismissed for lack of jurisdiction.

[39] Given the finding that this Court has no jurisdiction to entertain the matter, it is unnecessary to address the remainder of the parties' arguments, including those relating to a claim of unjustified enrichment and prescription.

Costs

[40] There is no reason to deviate from the general rule that costs should follow the result.

Order

[41] The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the costs of the respondent in this Court.

For the Applicant:	D C Mpofu SC and S Swartbooi instructed by Makhanya Attorneys
For the Respondent:	E van As instructed by Len Dekker Attorneys