

**REPORTABLE**

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**CASE NO: 414/99**

In the matter between

**THE PROVINCIAL GOVERNMENT OF THE  
EASTERN CAPE**

**1<sup>st</sup> Appellant**

**THE PREMIER OF THE EASTERN CAPE  
Appellant**

**2<sup>nd</sup>**

**THE MEMBER OF THE EXECUTIVE COUNCIL  
FOR THE EASTERN CAPE DEPARTMENT OF  
EDUCATION, CULTURE AND SPORT  
Appellant**

**3<sup>rd</sup>**

**THE MEMBER OF THE EXECUTIVE COUNCIL  
FOR THE EASTERN CAPE DEPARTMENT OF  
ROADS AND PUBLIC WORKS  
4<sup>th</sup> Appellant**

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR  
THE EASTERN CAPE DEPARTMENT OF FINANCE  
5<sup>th</sup> Appellant**

and

**CONTRACTPROPS 25 (PTY) LIMITED  
Respondent**

**CORAM: MARAIS, OLIVIER, SCOTT, STREICHER JJA *et*  
BRAND AJA**

**DATE HEARD: 8 MAY 2001**

**DATE DELIVERED 25 MAY 2001**

**Leases concluded by Department without reference to Tender Board – leases invalid for want of compliance with s 4(1) of the Tender Board Act (Eastern Cape) 2 of 1994 –**

**doctrine of estoppel inapplicable.**

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## **JUDGMENT**

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**MARAIS JA**

**MARAIS JA:**

[1] The central issue in this appeal is whether or not two leases of buildings concluded between respondent (Contractprops 25 (Pty) Ltd) as lessor and the Department of Education, Culture and Sport of the Eastern Cape Province as lessee are invalid because the Department purported to enter into the leases without the Tender Board established by the Tender Board Act (Eastern Cape) 2 of 1994 (the Act) having arranged the hiring of the premises in terms of s 4(1) of the Act. The court *a quo* (Pickard JP) granted respondent's application for a declaratory order that they are not but granted leave to appeal to this Court.

[2] That provision is in these terms:

“4 (1) Within the framework of the principles set out in the guidelines, the Board shall have the sole power to procure supplies and services for the Province, and, subject to the provisions of any other Act of the Provincial Legislature, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Province, and to dispose of movable Provincial property, and may for that purpose –

(a) on behalf of the Province conclude an agreement, which shall be in writing, with a person within or outside the Republic for the furnishing of supplies and services to the Province or for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Province or for the disposal of movable Provincial property;

(b) with a view to concluding an agreement referred to in paragraph (a), in

any manner it may deem fit, invite offers and determine the manner in which and the conditions subject to which such offers shall be made;

- (c) inspect and test or cause to be inspected and tested supplies and services which are offered or which are to have been furnished in terms of an agreement concluded under this section, and anything offered for hire;
- (d) accept or reject any offer for the conclusion of an agreement referred to in paragraph (a);
- (e) take steps or cause steps to be taken to enforce an agreement concluded under this section;
- (f) on behalf of the Province, resile from any agreement concluded under this section and, in an appropriate case, claim damages;
- (g) subject to the provisions of subsection (2), on such conditions as it may determine, exempt any person with whom such an agreement has been concluded from compliance with such agreement or condone the failure or such person to comply with such agreement;
- (h) subject to the provisions of subsection (2), negotiate a settlement with a person referred to in paragraph (g), or amend the agreement concerned with the approval of such person;
- (i) issue directives to Provincial departments with regard to the procurement of supplies and services for, the disposal of movable property of, and the hiring or letting of anything or the acquisition or granting of any right for, or on behalf of, the Province, in order to achieve the objects of this Act;
- (j) invite expert or technical advice, and call upon any officer or employee to provide expert or technical advice in so far as it is legally permissible for such officer or employee to provide the required advice to the Board;
- (k) exercise such other powers as may be prescribed by regulation under section 9.”

[3] A detailed exposition of the factual background is unnecessary. It suffices to say that the Department purported to conclude the leases in June 1996

without any reference to the Tender Board, that it entered into occupation of the premises, and that it has been paying the rent for some three years, but that it no longer wishes to occupy the premises. To that end it gave three months' notice of its intention to terminate the leases. When its right to do so was contested by respondent, it fell back upon the contention that the leases were void for the reason set forth in par [1] of this judgment.

[4] Counsel for the parties referred us to the well-known reported cases relevant to the interpretation of statutory provisions which require formalities (such as, for example, reduction to writing) to be complied with when certain types of agreement are entered into. The criteria to be taken into account in solving the perennial problem of whether or not the legislature intended non-compliance to be visited with invalidity were reventilated in argument. To cite the case law yet again will serve little purpose other than to swell the ever growing number of annotations of them in the law reports. It is by now well-established that the language of the Act, its nature and scope, the mischief it seeks to prevent, and the consequences of visiting invalidity upon the transaction are all relevant considerations.

[5] Here of course we are dealing not with the form in which a statute requires a transaction to be clothed but with something more fundamental: the express conferment of sole power upon a specified entity, to the exclusion of any other person or entity, to arrange leases. (I say "to the exclusion of any other person or

entity” because that is undeniably the plain and ordinary meaning of the words “shall have the sole power ----- to arrange the hiring ----- of anything ----- for or on behalf of the Province”.) That does not mean of course that the criteria other than language which are taken into account when the consequences of non-compliance with statutory requirements going to form (as opposed to *vires*) are under consideration are entirely irrelevant when interpreting the provision. But their persuasive impact would have to be great indeed before a departure could be justified from what unambiguously and plainly appears to be a severely restricted confinement of *vires* to enter upon a particular kind of transaction.

[6] Far from a consideration of those other criteria casting any doubt upon the linguistically plain meaning of the provision, in my view, they reinforce it. As to the nature and scope of the Act, there can be no doubt that it is designed to interpose a Tender Board between the Province and those with whom it might wish to contract for “supplies and services ---, the disposal of movable property ---, --- the hiring or letting of anything or the acquisition or granting of any right”. The preamble to the Act and the substantive provisions of s 2, 3, 4, 7 and 10 show that to be so. The Tender Board is to be appointed in a manner which gives the public at large an opportunity to nominate candidates for half of the positions on the Board, and to hear them being interviewed by the Executive Council. (s 3(4).) The Board is to “exercise its powers and perform its functions fairly, impartially and independently”. (s 2(3).) A tendering system devised by the Board “shall be

fair, public and competitive”. (s 4(2).) The powers conferred upon the Board by s 4(1) are extremely wide and show the extent to which it alone has been deputed by the legislature to regulate the procurement of supplies and services for, the disposal of movable property of, and the hiring or letting of anything or the acquisition or granting of any right for, or on behalf of, the Province. The matters in respect of which it must advise the member of the Executive Council responsible for financial matters are:

- “(a) Promoting competition in procurement;
- (b) establishing policies, procedures and practices to ensure procurement of the requisite quality within the time available at the lowest practicable cost, to minimise fraud, and waste in procurement and to eliminate unnecessary overlapping or duplication of functions and effort,
- (c) achieving greater uniformity and simplicity in procurement;
- (d) promoting economy, efficiency and effectiveness in procurement;
- (e) minimising disruptive effects of Provincial procurement on particular industries, areas or occupations;
- (f) improving understanding of Provincial procurement policy and procedures by everyone concerned with Provincial procurement in both the public and private sectors;
- (g) promoting fair dealing and equitable relationships among parties to Provincial contracts; and
- (h) any other matters relating to Provincial procurement.” (s 10.)

[7] All these provisions show how important a role the Tender Board is

intended to play in ensuring good governance in the field of procurement policies and procedures and the priority accorded to fair dealing and equitable relationships among parties to Provincial contracts. It is difficult to see any room for the co-existence of a power residing in other entities or persons within the provincial administration to do, without any reference whatsoever to the Tender Board, that which s 4(1)(a) and (b) empowers the Tender Board to do. That the Tender Board acts “on behalf of the Province” in arranging to hire premises or in concluding a lease cannot derogate from the fact that s 4(1) disables the Province from acting autonomously in that regard. Indeed, even the Tender Board’s power to delegate any of its powers is restricted. Section 5(2) precludes it from doing so without the prior approval of the member of the Executive Council responsible for financial matters.

[8] As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil Provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award Provincial contracts. If contracts were permitted to be concluded without any reference to the Tender Board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.

[9] As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the

Province to a contract which burdens the taxpayer to an extent which could have been avoided if the Tender Board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.

[10] I have not lost sight of the qualification in s 4(1) of the Act to the conferment upon the Tender Board of sole power to arrange the hiring or letting of anything. It is “subject to the provisions of any other Act of the Provincial Legislature”. We were not referred to any other relevant Act so that the qualification is of no relevance in this case.

[11] The central question therefore falls to be answered adversely to respondent and Pickard JP’s contrary conclusion must be taken to be erroneous. It remains to consider an alternative contention advanced by counsel for respondent: estoppel. There are formidable obstacles in the way of a successful invocation of estoppel. However, even if it be assumed in favour of respondent that estoppel was pertinently raised in the papers (the matter came before the court *a quo* by way of motion proceedings) and that all the necessary factual requirements for the doctrine to be applicable were canvassed, this is not a case in which it can be



allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. (See *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 AD at 411 H – 412 B.)

[12] This is such a case. It was not the Tender Board which conducted itself in a manner which led respondent to act to its detriment by concluding invalid leases of property specially purchased and altered at considerable expense to suit the requirements of the Department. It was the Department. If the leases are, in effect, “validated” by allowing estoppel to operate, the Tender Board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large. Here again the very mischief which the Act was enacted to prevent would be perpetuated. (Cf *Strydom v Die Land-en Landboubank van SA* 1972 (1) SA 801 (AD) at 815 E – F.)

[13] This is not a case in which “innocent” third parties are involved. It 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 ever had it) in the public interest. The fact that respondent was misled into believing that the Department had the power to conclude the agreements 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*.

[14] Finally, it is necessary to record that a foreshadowed application by respondent to apply for leave to reopen the case to enable it to lead evidence to endeavour to prove that the Tender Board did not exist in law at the time because its appointment had not been duly promulgated, was not made. Accordingly, no more need be said about it.

[15] The appeal is upheld with costs. The order of the Court *a quo* is set aside and the following order is substituted for it:

“The application is dismissed with costs”.

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**R M MARAIS**

**JUDGE OF APPEAL**

**OLIVIER     JA    )**  
**SCOTT        JA    )**

**STREICHER   JA    )**

**BRAND        AJA)    CONCUR**