



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

**Reportable**

Case no: 671/2020

In the matter between:

**AUDITOR-GENERAL OF SOUTH AFRICA**

**APPELLANT**

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
ECONOMIC OPPORTUNITIES, WESTERN CAPE**

**FIRST RESPONDENT**

**NATIONAL TREASURY**

**SECOND RESPONDENT**

**Neutral citation:** *Auditor-General of SA v MEC for Economic Opportunities, Western Cape and Another* (Case no 671/2020) [2021] ZASCA 133 (4 October 2021)

**Coram:** NAVSA ADP and SALDULKER, VAN DER MERWE, MOLEMELA and MOTHLE JJA

**Heard:** 3 September 2021

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 4 October 2021.

**Summary:** Accounting – expenditure of department – Modified Cash Standard applicable in terms of National Treasury instruction under s 76 of the Public Finance Management Act 1 of 1999 – no principal-agent relationships between department and payees – payments correctly classified in financial statements as transfers.

Administrative law – Promotion of Administrative Justice Act 3 of 2000 – not applicable to exercise of functions of Auditor-General under the Constitution and the Public Audit Act 25 of 2004.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Vos AJ sitting as court of first instance): judgment reported *sub nom Member of the Executive Council for Economic Opportunities, Western Cape v Auditor General of South Africa and Another* [2020] 3 All SA 524 (WCC); 2021 (1) SA 455 (WCC)

The appeal is dismissed with costs, including the costs of two counsel.

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## JUDGMENT

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**Van der Merwe JA (Navsa ADP and Saldulker, Molemela and Mothle JJA concurring)**

[1] The appellant is the Auditor-General of South Africa. The first respondent is the Member of the Executive Council (the MEC) responsible for the Western Cape Provincial Department of Agriculture (the Department). The matter concerns the proper classification, in its financial statements, of payments that the Department made to Casidra SOC Limited (Casidra) and the Deciduous Fruit Producers Trust. Casidra is a business enterprise wholly owned by the Western Cape Provincial Government. The Deciduous Fruit Producers Trust is an entity established by the deciduous fruit industry for the purpose, inter alia, of transformation of the industry. It carried out the activities relevant to this matter through its Hortgro programme and for convenience I refer to it as Hortgro.

### Background

[2] As I shall explain, the Auditor-General is constitutionally and statutorily obliged to audit and report on, inter alia, the financial statements of all provincial departments. The appeal is about the audits of the Auditor-General of the financial statements of the Department for the financial year ending on 31 March 2017 (the 2017 financial statements) and the year ending on 31 March 2018 (the 2018 financial statements). The Auditor-General determined that the payments that the Department had made to Casidra and Hortgro during these financial years, were wrongly classified as transfers. With reliance on the Modified Cash Standard, issued by the Accountant General in the National Treasury on 1 April 2013 (the Standard), the Auditor-General concluded that the Department's financial statements should have reflected these amounts as payments for goods and services. The reasoning that underpinned this conclusion was that Casidra and Hortgro had received the respective payments as agents of the Department.

[3] The Auditor-General accordingly issued qualified audit reports in respect of the 2017 and 2018 financial statements. The audit report in respect of the 2017 financial statements stated that the Department did not account for payments to 'implementing agents' in accordance with the Standard, that consequently transfers were overstated by R274 340 625 and that a corresponding amount was thus understated or not disclosed. According to the audit report this amount, therefore, constituted irregular expenditure. The amount of R259 191 000 was, in identical terms, regarded as irregular expenditure in the audit report in respect of the 2018 financial statements. In terms of the Public Finance Management Act 1 of 1999 (the PFMA), irregular expenditure, in essence, is expenditure incurred in contravention of applicable legislation. It follows that the qualification of the audit reports was not a trifling matter and that the Department and the MEC were rightly concerned.

[4] The MEC approached the Western Cape Division of the High Court for the review and setting aside of the relevant findings in both the abovementioned audit reports (the findings). In addition to the Auditor-General, he cited the National Treasury as a respondent in the application. The National Treasury was established in terms of s 5 of the PFMA. The MEC brought the review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively, the principle of legality. The MEC's case rested on two main grounds. The first was that the Standard was not legally binding. Secondly, he

contended that, in any event, the Department had complied with the Standard. The foundation of the second contention was that the legal relationship between the Department and Casidra and Hortgro respectively, were not principal-agent relationships within the meaning of the Standard.

[5] Despite the fact that the Standard had emanated from the National Treasury, it did not participate in the proceedings. As will become apparent shortly, this was unfortunate and not in keeping with the duty of an organ of state that is a party to legal proceedings, to assist the court by providing it with material information at its disposal. In the event, the High Court (Vos AJ) found for the MEC on both grounds and granted the relief sought.<sup>1</sup> Despite its considered decision not to participate in the proceedings, the National Treasury applied for leave to appeal, as did the Auditor-General. The court a quo refused the application of the National Treasury but granted leave to the Auditor-General to appeal to this Court.

### **Standard binding**

<sup>1</sup> **‘IT IS ORDERED:**

1. That the following findings of the First Respondent in his audit report on the financial statements of the Western Cape Department of Agriculture (“the Department”) for the year ending 31 March 2017 are reviewed and set aside:

1.1 The qualification of his opinion that the financial statements present fairly, in all material respects, the financial position of the Department as at 31 March 2017 and its financial performance and cashflows for the year so ended;

1.2 The finding that the Department did not account for payments made to implementing agents in accordance with the requirements of the Modified Cash Standard;

1.3 The finding that the Department incorrectly budgeted and accounted for these payments as transfers and subsidies instead of either expenditure for capital assets or goods and services;

1.4 The finding that the Department irregularly entered into contracts with implementing agents without applying Treasury Regulations.

2. That the following findings of the first respondent in his audit report on the financial statements of the Department for the year ended 31 March 2018 are reviewed and set aside:

2.1. The qualification of his opinion that the financial statements present fairly, in all material respects, the financial position of the Department as at 31 March 2018 and its financial performance and cashflows for the year so ended;

2.2The finding that the Department did not account for payments made to implementing agents in accordance with the requirements of the Modified Cash Standard;

2.3 The finding that the Department incorrectly budgeted and accounted for these payments as transfers and subsidies instead of either expenditure for capital assets or goods and services;

2.4 The finding that principal-agent relationships were not disclosed;

2.5 The finding that the Department irregularly entered into contracts with implementing agents without applying Treasury Regulations.

3. That the Applicant shall pay the wasted costs of 6 February 2020, which shall include the costs of senior counsel.

4. That, save for the foregoing, the first respondent is directed to pay the costs of this application which shall include the costs of senior counsel.’

[6] Section 216(1) of the Constitution of the Republic of South Africa, 1996 provides:

‘National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—

- (a) generally recognised accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.’

The national legislation envisaged by s 216(1) is the PFMA.

[7] In terms of s 87 of the PFMA, the Minister of Finance established a juristic person known as the Accounting Standards Board (the ASB). Section 89(1) of the PFMA provides that the ASB must set standards of generally recognised accounting practice, as required by s 216(1)(a) of the Constitution, for the annual financial statements of organs of state. In terms of s 91(1)(b) of the PFMA, the Minister of Finance may, after consulting the Auditor-General, make regulations prescribing the standards set by the ASB under s 89(1). It is common cause that, despite a lengthy passage of time encompassing several audit periods, the ASB has not yet set standards of generally recognised accounting practice which are applicable to the issues in this case. However, in terms of s 76 of the PFMA, the National Treasury may make regulations or issue instructions applicable to departments or to all institutions to which the PFMA applies. On what was presented to it, the court a quo held that the Standard had not been afforded legally binding status under s 76.

[8] Subsequent to the judgment of the court a quo, however, the Auditor-General discovered that the National Treasury had indeed issued an instruction under s 76 of the PFMA that rendered the Standard legally binding on all departments and any other entity that is required by the National Treasury or the law to comply with the Standard. This took place on 26 March 2015, when a duly authorised official of the National Treasury issued National Treasury Instruction No 6 of 2014/2015. The Auditor-General applied for leave to adduce further evidence on appeal by, in essence, placing the instruction before the court. The MEC, properly in the circumstances, did not oppose the application and it was duly granted at the commencement of the hearing of the appeal. In consequence, the MEC accepted before us that the Department had at all relevant times

been bound in law to comply with the Standard in the compilation of its financial statements.

[9] The Standard is a comprehensive document. The chapter 'Expenditure' sets out the categories of expenditure of a department. These are: current payments, comprising compensation of employees, goods and services and interest and rent on land; transfers and subsidies; payments for capital assets; and payments for financial assets. It provides that the Department shall recognise expenditure in its financial statements on the date of payment. It proceeds to stipulate the particulars that a department shall disclose with regards to each category of expenditure.

### **Principal-agent relationships?**

[10] As I have said, the issue is whether the Department properly categorised the payments to Casidra and Hortgro as transfers, rather than as payments for goods and services, as contended for by the Auditor-General. On the facts of this case, the contention of the Auditor-General is wholly dependent on the existence of principal-agent relationships between the Department and Casidra and Hortgro respectively, within the meaning of the Standard. The Standard deals with this subject in the chapter 'Accounting by Principals and Agents'.

[11] The term 'agency' has a variety of meanings, depending on the context in which it is used. It may, for instance, be used to denote a contract of mandate. There a person (the principal) contracts with another (the agent) to perform some task, such as to find a buyer for the principal's property or to represent the principal in legal proceedings. A mandate is a contract by which the principal and the agent create rights and obligations only between them. It does not involve legal relationships with third parties. See 1 *Lawsa* 3 ed para 125.

[12] The expression is particularly used in respect of the phenomenon of representation. In such a case, a person (the agent) is authorised by another (the principal) to create, alter or discharge legal relationships between the principal and third parties. The essential characteristic of agency in the form of representation is that

authority is conferred on the agent to bind the principal to third parties. See J M Silke *De Villiers and Macintosh, The Law of Agency in South Africa*, 3 ed (1981) at 38-39.

[13] Counsel for the Auditor-General conceded that the Standard's chapter 'Accounting by Principals and Agents' envisages principal-agent relationships in the form of representation. That this contention was correct, is amply borne out by the provisions of this chapter of the Standard. I content myself with reference to the following:

'Definitions

.06 ***The following terms are used in this Chapter with the meanings specified:***

**An agent is an entity that has been directed by another entity (a principal), through a binding arrangement, to undertake transactions with third parties on behalf of the principal and for the benefit of the principal.**

**A principal is an entity that directs another entity (an agent), through a binding arrangement, to undertake transactions with third parties on its behalf and for its own benefit.**

**A principal-agent arrangement results from a binding arrangement in which one entity (an agent), undertakes transactions with third parties on behalf, and for the benefit of, another entity (the principal).'**

. . . .

.10 When a department directs another entity to undertake an activity on its behalf, it must consider whether it is a party to a principal-agent arrangement. The definition of a principal-agent arrangement refers to an entity acting on behalf of another entity in relation to transaction with third parties. In the absence of transactions with third parties, the arrangement is not a principal-agent arrangement, and the entity then acts in another capacity rather than as an agent. . . .

...

.11 **"Transactions with third parties"** in the context of this Chapter includes the execution of a specific transaction with a third party, e.g. a sale or purchase transaction, but it also includes interactions with third parties, e.g. when an agent is able to negotiate with third parties on the principal's behalf. The nature of the transactions with third parties is linked to the type of activities carried out by the agent in accordance with the binding arrangement. These activities could include the agent transacting with third parties for the procurement or disposal of resources, or the receipt of resources from a third party on behalf of the principal.'

[14] The Department made the payments in question in terms of five written contracts. They are: (a) the contract in respect of the Vegetable Industry Project (the Vegetable Project), entered into between the Department and Casidra on 9 May 2016, for payment of the amount of R10 million; (b) the contract in respect of 23 LandCare Projects (the LandCare Projects), entered into between the Department and Casidra on 30 June 2016 for payment of the amount of R4 106 000; (c) the contract in respect of the Flood Relief Project 2013-2014 (the Flood Relief Project), entered into between the Department and Casidra on 30 May 2016 for payment of the amount of R40 852 000; (d) the contract in respect of the Drought Relief Scheme 2015/16 (the Drought Relief Scheme), entered into between the Department and Casidra on 29 March 2017 for payment of the amount of R31 689 000; and (e) the contract in respect of the Fruit Industry Project (the Fruit Project), entered into between the Department and Hortgro on 9 May 2016 for payment of the amount of R19 020 000.

[15] The Vegetable Project was aimed at increasing the production of vegetables, particularly by small-scale farmers. The purpose of the LandCare Projects included the clearing of alien vegetation, fencing and river protection, as well as awareness projects. The payment to Casidra in respect of the Flood Relief Project was for purposes of providing relief to farmers who had been the victims of floods in the Western Cape. Similarly, the Department allocated funds to Casidra to provide relief to farmers affected by drought within the province under the Drought Relief Scheme. The purpose of the Fruit Project was to enhance the capacity and production of small-scale fruit farmers.

[16] The project that each contract related to, was delineated in a business plan, including a budget. The business plans were attached to the contracts and each contract expressly incorporated the relevant business plan attached thereto. Thus, the question is whether on a proper interpretation of the contracts (incorporating the business plans) the Department authorised Casidra and Hortgro to create legal relationships between the Department and third parties.

[17] The preamble of each contract recorded that the parties thereto had reached an agreement in terms of which the Department would allocate a specified amount (the funds) to 'the Beneficiary' (either Casidra or Hortgro) towards the relevant project. Apart



from these particulars, the terms of the five contracts were virtually identical. For convenience, I set out the material operative terms of the Vegetable Project contract with Casidra.

[18] Clause 3 of the contract provided that the Department would pay the funds to Casidra in four instalments on specified dates. Apart from the first instalment, the further payments would be subject to progress reports by Casidra (in terms of clause 5) to the satisfaction of the Department. Clause 4 circumscribed Casidra's obligations. In essence, they related to the utilisation of the funds, the keeping of proper records and reporting to the Department. Clause 4.5 obliged Casidra to utilise the funds only for the purpose for which they had been approved as detailed in the business plan. In terms of clause 4.6, Casidra was obliged to allocate the fund only in accordance with the business plan. Casidra was obliged by clause 4.10 to 'maintain complete documentary evidence of all and any payments' from the funds. Clause 4.11 obliged Casidra to furnish the Department with a certified income and expenditure statement indicating the total allocation and total expenditure in respect of the project, within two months of the completion thereof. And in terms of clause 4.12 Casidra was obliged to adhere to the provisions of clause 5.

[19] Clause 5 was headed 'Reporting, Monitoring and Evaluation'. It provided the Department with rights of access to Casidra's records. In terms of this clause Casidra had to submit quarterly progress reports as well as a final progress report to the Department. The final progress report had to be accompanied by a report by senior management in respect of, inter alia:

' . . .

5.5.1 The extent to which the Beneficiary achieved its objectives for the financial year concerned;

5.5.2 Appropriate performance information regarding the economical, effective and appropriate utilisation of the Funds. . . .'

[20] All the projects and business plans were aimed at achieving the objects of the Department in terms of its approved programmes. Because the Department paid public funds to Casidra and Hortgro for these purposes, it was, of course, obliged to have proper oversight over the implementation of the business plans. But in terms of the contracts,

Casidra and Hortgro, respectively, undertook the obligations to execute the business plans, by providing goods and services to the beneficiaries of the projects, that is the selected or qualifying farmers. Beneficiaries were selected by the relevant Commodity Project Allocation Committee (CPAC). The CPAC terms of reference provided that the Department and Casidra or Hortgro would each have two representatives on it, but without a vote.

[21] In some instances the business plans provided that Casidra or Hortgro would appoint service providers to supply goods and services to the farmers. In respect of the LandCare Projects, for instance, Casidra would enter into contracts for the removal of alien vegetation and the erection of fences. The Flood Relief Project business plan provided that Casidra was responsible for the appointment of professional service providers, such as engineers, for the various project components. The bulk thereof was engineering works. It also provided that once both Casidra and the Department were satisfied with the specifications for infrastructure projects, 'approval will be granted and Casidra will award the tender to the successful bidder to commence work'. In terms of the business plan, the Drought Relief Scheme would be operated as follows. Casidra would issue vouchers to qualifying farmers, which would enable them to purchase fodder from service providers appointed by Casidra. In all these instances Casidra would make payment to the service provider but only after the Department had verified the relevant documentation or invoices and approved payment in terms thereof by the Department.

[22] In answering the question that I have posed, substance must prevail over form and proper regard must be had to context. Labels used by the parties are not decisive. Therefore, nothing turns on the fact: that each contract was entitled 'Transfer Payment Agreement'; that the LandCare Projects and Fruit Project business plans referred to Casidra and Hortgro respectively as 'implementing agents' (the Flood Relief Project and Drought Relief Scheme business plans classified Casidra as 'external stakeholder'); or that the Vegetable Project business plan stated:

' . . . (CASIDRA) will provide project management function and the delivery of approved projects across the Province . . . . In addition, CASIDRA will provide the following services to the Vegetable CPAC:

. . .

b) Management procurement on behalf of the Department in line of the PFMA.' (Whatever this may mean.)

[23] It is clear from what I have said that the terms of the contracts in no way authorised Casidra or Hortgro to bind the Department to third parties. On the contrary, they appeared to have been carefully framed to avoid saddling the Department with liabilities to third parties. The same applies to the business plan provisions. They also envisaged that Casidra and Hortgro would contract with beneficiaries and service providers in their own names and not as the authorised representatives of the Departments. The Department's approval of payments to service providers, formed part of its oversight function and did not involve it as a party to a contract with a service provider.

[24] Thus, Casidra and Hortgro were not authorised to and did not create legal relationships between the Department and the beneficiaries or service providers involved in the projects. Neither the beneficiaries nor the service providers had the right to sue the Department. It follows that the findings were based on a material error of law. The error of law would vitiate the findings under the principle of legality and the provisions of PAJA, if the latter were applicable. In the result, it is unnecessary to deal with the other review grounds relied upon by the MEC. It follows that the appeal must fail, irrespective of whether PAJA was applicable or not.

### **PAJA applicable?**

[25] However, as the court a quo expressed the considered view that the findings had constituted administrative action under PAJA, I deem it necessary to address this issue. Also, the question is of some importance to the Auditor-General who argued that PAJA was not applicable. For the reasons that follow, I agree with this submission.

[26] In *Minister of Home Affairs and Another v Public Protector* [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) para 37, this Court was confronted with the question whether a decision of the Public Protector was administrative action under PAJA. It had regard to the relevant provisions of the Constitution, the Public Protector Act 23 of 1994 and PAJA and concluded:

'First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them.

Secondly, it is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, although the State Liability Act 20 of 1957 applies to the Office of the Public Protector to enable it to sue and be sued, it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action. That being so, the PAJA does not apply to the review of exercises of power by the Public Protector in terms of s 182 of the Constitution and s 6 of the Public Protector Act. That means that the principle of legality applies to the review of the decisions in issue in this case.'

[27] The court a quo attempted to distinguish the decisions of the Public Protector from that of the Auditor-General. It said:

'I think that the AGSA differs from the Public Protector, because the AGSA fits squarely into the institutions of public administration. The AGSA's function is indeed to administer, by auditing the accounts and financial statements of the relevant organs of state. The AGSA does not have broad discretionary powers as to what work he undertakes. He is obliged to audit and report on the accounts, financial statements and financial management of the departments and entities listed in section 108(1) of the Constitution.'

[28] I do not think that the distinction is valid. The office of the Auditor-General is one of the institutions established under Chapter 9 of the Constitution to 'strengthen constitutional democracy in the Republic'. Section 181(2) of the Constitution provides:

'These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'

In terms of s 181(3) other organs of state are obliged to assist and protect the Chapter 9 institutions to ensure their independence, impartiality, dignity and effectiveness. Section 181(4) prohibits any interference with the functioning of these institutions. They are, in terms of s 181(5), accountable only to the National Assembly.

[29] Section 188 of the Constitution deals specifically with the Auditor-General. It provides:

‘(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.’

[30] The national legislation envisaged by s 188(4) is the Public Audit Act 25 of 2004. Section 3 thereof provides:

‘**Constitutional and legal status.**—The AuditorGeneral—

(a) is the supreme audit institution of the Republic;

(b) has full legal capacity, is independent and is subject only to the Constitution and the law, including this Act;

(c) must be impartial and must exercise the powers and perform the functions of office without fear,

favour or prejudice; and

(d) is accountable to the National Assembly.’

The independence of the Auditor-General could hardly have been expressed in clearer terms.

[31] In terms of s 4(1) of the Public Audit Act, the Auditor-General must audit and report on the accounts, financial statements and financial management of the organs of state

listed therein and any other institution or accounting entity required by legislation to be audited by the Auditor-General. Section 4(2) provides that the Auditor-General must audit and report on certain consolidated financial statements of the national government, provincial governments and municipalities. For these purposes the provisions of ss 15 and 16 afford the Auditor-General extensive powers to obtain access to the documents and assets of an auditee. Section 20(2) of the Public Audit Act deals with the content of audit reports. It provides that an audit report must reflect at least an opinion or conclusion on:

- '(a) the financial statements of the auditee in accordance with the applicable financial reporting framework and legislation;
- (b) compliance with any applicable legislation relating to financial matters, financial management and other related matters; and
- (c) reported performance of the auditee against its predetermined objectives.'

[32] These provisions demonstrate that, not unlike the judiciary, the Auditor-General is subject only to the Constitution and the law. Its function is not to administer or to implement the policies of the executive, but to independently audit and report on the use of public funds. The Auditor-General acts, so to speak, as the public accounts watchdog. This function does not involve actions of an administrative nature. Unlike the Public Protector, the Auditor-General does not have a wide discretion to decide whether to audit and report or not. But that does not detract from her independence and does not, in this context, materially distinguish her from the Public Protector. In my view the exercise of the functions of the Auditor-General in terms of the Constitution and the Public Audit Act does not constitute administrative action in terms of PAJA, but is subject to review under the principles that stem from the rule of law.

### **Conclusion**

[33] To sum up, the findings fall to be reviewed and set aside on the basis that they were founded on a material error of law. On this basis, the order of the court a quo was correct and the appeal must fail.

[34] Finally there are two aspects that I am constrained to mention. First, it appeared from the evidence that Casidra and Hortgro did not charge fees in the normal sense for

the implementation of the projects. However, they included the costs of administration of the projects in the business plan budgets. We do not know from the evidence how exactly this was done or what amounts were involved. To pay the cost of administration of a project to Casidra and Hortgro, may possibly amount to payment for services. As this was not addressed in the affidavits, I do no more than raise a caveat for future consideration. Secondly, it emerged during argument that the Auditor-General is concerned about procurement procedures down the line, as it were. This was not alluded to in the papers and any legitimate concern in this regard may be addressed by appropriate measures under the relevant legislation.

[35] The appeal is dismissed with costs, including the costs of two counsel.

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C H G VAN DER MERWE  
JUDGE OF APPEAL

## Appearances:

For appellant: M A Chohan SC (with him L Kutumela)  
Instructed by: Fairbridges Wertheim Becker Attorneys, Johannesburg  
Phatshoane Henney Inc., Bloemfontein

For 1<sup>st</sup> respondent: G M Budlender SC (with him C Tabata)  
Instructed by: State Attorney, Cape Town  
State Attorney, Bloemfontein