Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 61/2021
Date heard: 21-02-2023,
29 05-2023
Date delivered: 18-08-2023

In the matter between:

DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT, NORTHERN CAPE PROVINCE, KIMBERLEY **Applicant**

and

MASTER OF THE HIGH COURT, KIMBERLEY **Respondent**

CORAM: PHATSHOANE DJP et WILLIAMS J et NXUMALO J:

JUDGMENT

Order:

a) **Condonation for the late filing of the review is granted.**
b) **The application for review is dismissed with costs, inclusive of the reserved costs of 23 July 2021.**

WILLIAMS J:

1. Argument in this matter was initially heard by myself and Nxumalo J on 21 February 2022 and thereafter by this Court as reconstituted on 29 May 2023.

2. I have read the judgment of Nxumalo J and agree with his findings only insofar as I too am of the view that condonation be granted for the late filing of this review. That aside and in light of the approach I take to the matter I consider it necessary for the sake of cohesiveness of this judgment, to reiterate in brief the background and events leading up to this review.

3. This is a review in terms of s23 of the Trust Property Control Act 57 of 1988 (the TPCA), which reads as follows:

> *"23.**Access to court**. – Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit."*

4. The applicant, the Department of Agriculture Land Reform and Rural Development, Northern Cape (the Department), seek orders setting aside the decision of the respondent, the Master, in which a cost order was made against it together with a cost order against the respondent in the event of him opposing this application.

Background

5. Confronted with certain challenges relating to the farm worker equity schemes which it had established to uplift and empower farmworkers, the Department held various meetings with the relevant stakeholders over the period October 2016 to September 2017 in an effort to resolve the issues which had arisen within the equity schemes.

6. The respondent, who had been invited to attend certain of these meetings launched an investigation in terms of s16 (2) of the TPCA into the affairs of the Badirammogo Trust which forms part of the equity scheme program of the Department on 5 September 2017. After receipt of the report of the investigator, the respondent addressed the issues which had come to light in a written report and made the following order:

"After applying my mind and in light of the above, I make the cost order in terms of Section 16(3) of the Trust Property Control Act No 57 of 1988, as amended that the Directorate of the Department of Agriculture, Land Reform and Rural Development (the Directorate: Farmer Settlement & Rural Development) to which Mr Jomo Bonokwane was attached to in 2017, dealing with the Equity Schemes, is liable for the cost of the investigation in terms of Section 16(2) (surpa) which was conducted by Mr Mpho Sebashe in the amount of R3 726 000,00." [1]

Grounds of review

7. The Department denies being liable for the costs of the investigation on the following grounds:

7.1 The Department did not instruct or authorize the respondent to appoint an investigator; and

7.2 Even if it is found that the Department had given an instruction to appoint an investigator, which is denied, the respondent failed to apply his mind and ignored the provisions of s 16(2) of the TPCA by appointing a person with whom he had prior contact and as per the request of Malepe Attorneys.

Discussion

8. In order to place these grounds of review in context it is necessary to set out the order of the events which form the backdrop to the dispute.

9. It appears from the minutes of the meetings convened by the Department, which are attached to the papers, that the first meeting regarding the equity schemes was held at Upington on 28 and 29 October 2016. These equity schemes being administered through trusts, it was noted by the chairperson, Mr Bonokwane, the Department's Director, Rural Development and Farmer

[1] Annexure X, p12

Settlement that it was an oversight that the respondent was not invited to the meetings.[2]

10. On 6 December 2016 Malope Attorneys sent an e-mail to the respondent, in which a certain Mr Mpho Sebashe was copied, requesting the respondent to intervene, on behalf of the beneficiaries, in the affairs of the Badirammogo Trust in terms of s16 of the TPCA. The email contained a list of complaints in respect of the trustees and requested the respondent to obtain from the trustees the records, books, accounts or documents relating to the Badirammogo Trust shares, specifically flowing from the Sonvrucht Equity Share Scheme shareholding in Sonvrucht Farmings (Pty) Ltd. The email indicated that should the respondent deem it fit to appoint an investigation team, the beneficiaries of the Badirammogo Trust have already appointed such consultants and undertake to bear the costs associated therewith.[3]

11. The second meeting of the equity scheme task team was held in Kimberley on 30 June 2017. The respondent attended this meeting at which he was requested to *"look at the possible transgressions of the Trust Property Act and to institute remedial action on all the Trusts that did not comply with the Act and its regulations."*[4] The *"Action Plan"* emanating from this meeting, which is attached to the respondent's answering affidavit, states that the meeting decided that Mr Sebashe and the respondent would be the persons responsible for this action and that the respondent would report back at the next meeting.[5]

12. After being assigned the shared responsibility of looking into the transgressions of the trusts at the meeting of 30 June 2017 it appears that the respondent and Mr Sebashe exchanged some emails and on 11 August 2017 the respondent sent an email to Mr Sebashe stating *inter alia* the following:

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[2]LLM3, p 25
[3]LLM8, p60
[4] LLM4, p38
[5]CD1, p87

"Since your first enquiry, we have not received any feedback from the appointed trustees.

. . . the accountants have also confirmed that they don't have any trust books. With the facts before me, I'm of the opinion that a section 16 investigation should be conducted.

Please indicate to me who specifically (by personal name) I should appoint to do the investigation and what terms of reference should apply.

Please also indicate to me whether Malepe Attorneys is still prepared to bear the costs associated to the investigation."[6]

13. On 4 September 2017 the respondent emailed Mr Sebashe saying that he needed the names of the person who would be conducting the investigation.[7]

14. On the same day, Mr Sebashe replied to the above email stating that he was willing to conduct the investigation and *"will definitely do with the Department been able to cover the costs of these investigation, since most of the work that date back from August last year has been completed and we are in possession of valuable Trust Documentations."*[8]

15. On 5 September 2017 the respondent sent the letter of appointment as investigator into the affairs of the Badirammogo Trust to Mr Sebashe.[9]

16. On 14 September 2017 the Department's equity scheme task team held their next meeting. It is not clear from the minutes thereof whether the respondent or Mr Sebashe attended this meeting. What is important though is that it was noted at this meeting that the respondent had issued a s16 investigation for the Badirammogo Trust and that *"there will be a need to develop an approach to this matter, because only the Badirammogo was issued with a section 16 investigation."*[10]

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[6] LLM 9, p64
[7] LLM 10, p65
[8] LLM, p65
[9] LLM 7, p58
[10] LLM 6, p50

17. Mr Ramavhale, who appeared for the Department at the second hearing of the review, argued that it was obvious from the above sequence of events that it was Malepe Attorneys, acting on behalf of the beneficiaries of the Badirammogo Trust who had instructed the respondent to investigate the affairs of the trust and not the Department. Further that the respondent had failed to advise the Department of his intention to appoint Mr Sebashe at the expense of the Department and that since the respondent did not base the cost order on maladministration or fault of the Department, but purely on the fact that the Department had requested the investigation, the respondent had misdirected himself in concluding that the Department had requested the investigation.

18. S16 of the TPCA reads as follows:

> **16. Master may call upon trustee to account.**—(1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.
>
> (2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property.
>
> (3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection 2.

19. S16 (2) does not state that a written request or authorization is required before the respondent may launch an investigation, as was argued by Ms Mankuroane, who initially appeared for the Department. In Honore's South African Law of Trusts: 5th edition, the authors state at 413 that an investigation in terms of s16 (2) *"may be prompted by a complaint from a beneficiary or other trust creditor or from an ordinary member of the public."* This being so and regard being had to the minutes of the Department's meetings referred to

herein, particularly those of the meeting of 30 June 2017 in paragraph 11 above, there can be no doubt that the Department requested the respondent to investigate the maladministration of the relevant trusts. That request having been made, it is thereafter entirely within the discretion of the respondent in terms of s16 (2) whether such an investigation should be carried out.[11] That, in my view should put to rest the first ground of review raised by the Department.

20. However, the allegation appears further to be that the respondent had colluded with either Malepe Attorneys on behalf of the beneficiaries of the Badirammogo Trust or Mr Sebashe and his firm Morwapheta Consulting Services, by asserting that he had launched the investigation at the request of the Department in order to saddle the Department with the cost order, when in fact the request had emanated from the beneficiaries of the said trust.

21. It is so that Malepe Attorneys had also requested the respondent to look into the affairs of the Badirammogo Trust at the behest of the beneficiaries. There is however no evidence before us that the respondent had reacted or responded to that request prior to the Department requesting him to investigate the various trusts. There can also not be anything sinister about the fact that the Badirammogo Trust was identified by the respondent to be investigated. In his report to the Department, at paragraph 18 thereof, the respondent explained that although the s16 (2) investigation (requested by the Department) did not only relate to the Badirammogo Trust, that trust was identified because of the number of complaints lodged with the respondent in respect of the trust and that it was used as a pilot project for the investigation of the other equity schemes."[12] The allegation by the Department of *male fides* against the respondent in this regard have no merit in my view.

[11] Ras NNo v Van der Meulen 2011(4) SA 17 (SCA) at paragraph 10
[12] Annexure X, p13

22. This brings me to the second ground of review i.e. that the respondent failed to apply his mind when he appointed Mr Sebashe to conduct the investigation.

23. The argument in this regard is closely linked to that discussed in paragraphs 20 and 21 above, i.e. that the respondent merely acceded to the request of Malepe Attorneys as contained in their email of 6 December 2016 without consulting the Department in this respect. In support of this argument we were referred to the respondent's enquiry to Mr Sebashe as to the particulars of the person from Morwapheta Consulting Services who would be conducting the investigation and whether Malope Attorneys were still willing to pay for the investigation.

24. One must be cautious not to view the correspondence referred to above in isolation and jump to conclusions of impropriety. Mr Sebashe had been present at all the Department's equity scheme meetings referred to in this review. He was tasked by the meeting of 30 June 2017 not only to share the responsibility with the respondent to investigate the transgressions of the TPCA, he was also tasked with the responsibility (with other organisations) to obtain the value of the shares of the beneficiaries before the alleged sale thereof to the white farmers and to develop policy guidelines based on the failed BBBEE schemes for farm workers and dwellers. These tasks all relate to the problems which had come to light and which emanated from the trusts and the equity schemes which had been established by the Department. It appears to me that common sense would dictate that Mr Sebashe or an appropriate person from his firm Morwapheta Consulting Services, who had already been involved in the investigation of the equity schemes on behalf of the beneficiaries and had then also been roped in by the Department to assist, would be the obvious choice to be appointed as the s16 investigator. The respondent himself alludes to the participation of Mr Sebashe in the equity scheme meetings in his report regarding the costs of the investigation. In these circumstances it can hardly be said that the respondent failed to apply his mind when he appointed Mr Sebashe.

25. I must also mention that the Department's Mr Bonokwane was copied in all the email communications between the respondent and Mr Sebashe. There were no objections to Mr Sebashe's appointment. At the Department's equity scheme meeting held on 14 September 2017 the meeting was aware of the fact that the respondent had launched a s16 investigation. Nothing was mentioned about the inappropriateness of the appointment of Mr Sebashe. The only concern raised at that meeting was that only the Badirammogo Trust was being investigated.

26. In my view it is nothing but disingenuous of the Department now, in this application for review which was launched more than 3 years after the appointment of Mr Sebashe, to deny that it had requested a s16 investigation and to accuse the respondent of appointing the investigator without authorization and of bias and worse only when confronted with a cost order against it.

Costs of the investigation

27. Mr Ramavhale has submitted in argument that the decision to award the costs of the investigation against the Department was based solely on who had requested the respondent to invoke the s16 investigation and not on any maladministration or fault on the part of the Department. The only reference that I could find in the papers which could possibly be seen to support the contention in this regard is the respondent's statement in paragraph 16(d) of his costs report that *"The costs of the investigations may also be paid by the requestor who initiated the Section 16(2) investigation."*[13]

28. What the respondent has stated is a fact. S16 (3) clothes him with a discretion as to who should bear the costs of such an investigation. In *Honore* it is stated at p415 that;

> *"Thus the Master may order them (the costs) to come wholly or in part out of the trust property or the income from it, or may impose them wholly or partly on the trustee to be paid personally (de bonis propiis) or may order*

[13] Annexure X, p13

them to be paid by the person at whose instance the investigation took place."

29. It does not mean however that the respondent made the cost order against the Department merely because it requested the investigation, or for that matter because Mr Sebashe indicated that he would *"do"* with the Department paying the costs of the investigation. The findings of the respondent in his cost report abound with instances of maladministration and questionable compliance with the Public Finance Management Act, 1 of 1999 (the PFMA) on the part of the Department. The respondent found *inter alia* at paragraph 30 of his report that:

> *"I am further of the opinion that the Department of Agriculture, failed to exercise due diligence and oversight management accountability over the spending of government funding on these farms or in Equity Schemes. This infringement of the rights of farm workers and the mismanagement of government funding . . . would not have occurred if there was accountability. They failed to take reasonable care*."[14]

30. It can hardly be said in these circumstances that the respondent did not exercise his discretion properly in finding that the costs of the investigation be borne by the Department and only made the costs order that he did because the Department had requested the investigation.

The applicability of s217 (1) of the Constitution of South Africa and the PFMA

31. In his judgment Nxumalo J refers in great detail to the obligations which s217(1) of the Constitution and the PFMA place on the respondent and which have been disregarded by the respondent in his interaction with the Department regarding the appointment of the investigator and the costs associated therewith. I do not agree with the stance taken by Nxumalo J for the following reasons:

[14] Annexure X, pp14, 15

31.1 It is trite that in motion proceedings the applicant must make out his case in his founding affidavit. All the necessary allegations upon which he relies must appear in the founding affidavit, although the court has a discretion to allow new matter in a replying affidavit, to which of course a respondent should be given an opportunity to file a further answering affidavit to prevent prejudice.

31.2 *In casu* the Department has not, either in its founding affidavit, or in the replying affidavit, invoked the provisions of s217(1) of the Constitution or that of the PFMA. It was only during the initial argument that Ms Mankuroane contended that the respondent had failed to follow proper procurement processes in contravention of s217 (1) of the Constitution. This issue was never ventilated in the papers and Mr Coetzee SC, who appeared for the respondent, quite correctly pointed out that counsel for the Department appeared to argue for the setting aside of the appointment of the investigator, which was not the case the respondent had been called upon to answer. This is exactly the danger inherent in litigating in this fashion

31.3 To find that the respondent had acted in contravention of s217(1) of the Constitution without the necessary allegations to sustain such a finding and without the respondent being given an opportunity to state his case in this regard is contrary to the rule of law and in my view would lead to a miscarriage of justice. I may at this stage mention that Mr Ramavhale who argued the application before this court, as reconstituted, did not even venture into the issue of improper procurement processes by the respondent.

31.4 As far as the provisions of the PFMA are concerned and with all due respect to Nxumalo J, this issue was not even argued by counsel for the Department, much less raised in its papers. If my

learned colleague had any concerns about the applicability of the PFMA to this matter he should have raised it with the legal representatives, at the very least on the second occasion this matter was argued. He failed to do this and once more made findings relating to improper procurement processes without affording the respondent an opportunity to address us on the issue. My concerns in this regard echo those I have made in relation to s217 (1) of the Constitution.

31.5 But more than that, as far as I am aware, the PFMA does not apply to the respondent. In terms of s3 of the PFMA the institutions to which this Act applies are listed as:

(a) departments;

(b) public entities listed in Schedule 2 or 3; and

(c) constitutional institutions.

31.6 In s1, the definition section of the Act, *"department"* is defined as *"a national or provincial department or a national or provincial government component."*

The Office of the Master is obviously not a national or provincial department and is also not listed as a component of the national or provincial government in Part A of Schedule 3 to the Public Service Act, 1994, as per the definition thereof in s1 of the PFMA. The Office of the Master is also not listed as a public entity in Schedule 2 or 3 of the PFMA, neither is it listed as a constitutional institution under Schedule 1 of the PFMA.

31.7 The provisions of the PFMA can therefore not *"trump"* the provisions of s16 of the TPCA, as found by Nxumalo J, if it does not apply to the respondent.

32. That being said, the Department has failed to show any reasonable grounds on which we are entitled to interfere with the discretion of the respondent in ordering that the Department pay the costs of the investigation. The application for the review and setting aside of the respondent's decision as to costs must therefore fail.

Costs

33. As far as the costs of this application are concerned there is no reason why costs should not follow the result. This application was initially enrolled for hearing on 23 July 2021. We were informed that on that date the matter was removed from the roll due to the fact that the applicant/the Department had not made provision for the review to be heard by two judges, as is the practice in this Division. As a consequence the matter was removed from the roll and the costs were reserved. There is no reason why the applicant should not bear the costs of 23 July 2021 as well.

In the premises the following order is made;

c) Condonation for the late filing of the review is granted.

d) The application for review is dismissed with costs, inclusive of the reserved costs of 23 July 2021.

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CC WILLIAMS

JUDGE

I concur

_____

V M PHATSHOANE
DEPUTY JUDGE PRESIDENT

***PER* NXUMALO J**

34. **I have read the majority judgment and must differ for the reasons that follow.**

35. The applicant in these proceedings is cited as "the Department of Agriculture, Land Reform and Rural Development, Northern Cape Provincial Government. I must interpose to point out that in any action or proceedings instituted against a national or provincial department, the correct procedure is to cite the executive authority of the department concerned as a nominal defendant or respondent, not the department.[15]

36. The respondent is the Master of the High Court, in the Province, appointed in terms of section 2 of the Administration of Estates Act 66 of 1965[16] and is also responsible, under the Trust Property Control Act 57 of 1988,[17] for the regulation and the control of trust property and matters incidental thereto within his jurisdiction.[18] Of significance is that the respondent, in the course and scope of his statutory functions exercises powers and duties assigned to him by the Accounting Officer of the relevant Department; subject to the control, direction and supervision of the Chief Master.[19]

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[15] Section 2, State Liability Act 20 of 1957; ***Jayiya v MEC for Welfare, EC Provincial Government*** 2004 (2) SA 611 (SCA) para 5.
[16]The Estates Act.
[17]"the Act."
[18]Section 3 of the Act.
[19]Sections 1 of the Estates Act and 44 -45 of the Public Finance Management Act 1 of 1999 ("the PFMA")

37. The applicant has approached this Court for an order in the following terms. That this Court should condone the late filing of its review brought in terms of section 23 of the Act to review and set aside the decision of the respondent taken which directed the applicant to bear the costs of investigation into the affairs of one Badirammogo Trust in terms of section 16 (3) of the Act. The impugned costs order is in the amount of R3 726 000.00.

38. The respondent, opposes the relief sought being granted and has delivered an answering affidavit to that effect. In essence, he maintained that in terms of section 16 (3) of the Act, he has "absolute discretion" to order a party to be liable for the costs of the section 16 (2) investigation. In the premise, the respondent submitted that the application fell to be dismissed with costs.

THE REGULATORY LEGAL FRAMEWORK

39. t is trite that the PFMA was promulgated to regulate financial management in the national and provincial governments to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively. The PFMA also provides for responsibilities of persons entrusted with financial management of those governments and matters connected therewith.[20] The object of the PFMA is thus to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of organs of state such as the parties before this Court, to which it applies.[21] Significantly, the PFMA trumps any other legislation, including the Act, which precedes both the Constitution and the PFMA, in the event of any event of any inconsistency between it and same.

40. Both parties are organs of state within the contemplation of sections 33; 217 and 239 of the Constitution. Section 33 (1) expressly provides everyone, including organs of state, the right to administrative action that is lawful, reasonable and procedurally fair. Section 217, for its own part, expressly enjoins all organs of state or other institutions identified in national legislation,

[20]Preamble of the PFMA.
[21]Sections 2 and 3, *ibid*.

when contracting for goods and services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 239, expressly defines what organs of state are.

41. Section 2, on the other hand, expressly proclaims the Constitution as the supreme law of the Republic, which renders all law or conduct inconsistent with it invalid, whilst requiring all the obligations imposed by it to be fulfilled. Section 38 of the PFMA, expressly stipulates the general responsibilities of accounting officers whilst section 45 specifically arrogates certain responsibilities with regard to other officials, within their respective areas of responsibility. The latter section applies to the respondent. It expressly provides as follows:

> ***"45 Responsibilities of other officials***
>
> ***An official in a department****, trading entity or constitutional institution –*
> *(a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;*
> *(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;*
> *(c) must take effective and appropriate steps to prevent, within that official's area of responsibility,* ***an unauthorised expenditure, irregular expenditure[22] and fruitless and wasteful expenditure[23]*** *and any under collection of revenue due;*
> *(d) must comply with the provisions of the Act to the extent applicable to that official, including any obligations and instructions in terms of section 44; and*
> *(e) is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility."[24]*

42. In terms of section 38 (1) of the PFMA, accounting officers are *inter-alia* enjoined to ensure that departments, trading entities or constitutional institutions have and maintain (i) effective, efficient and transparent systems

[22] In terms of section 1 of the PFMA, *"irregular expenditure"* means expenditure other than unauthorised expenditure, incurred in contravention of or that is not in accordance with the requirement of any applicable legislation, including the PFMA itself.
[23] *"fruitless and wasteful expenditure"* means expenditure which was made in vain and would have been avoided had reasonable care been exercised- *ibid*.
[24] Emphasis supplied.

of financial risk and management and internal controls; (ii) systems of internal audits under the control and direction of audit committees complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; (iii) appropriate procurement and provisioning systems which are fair, equitable, transparent, competitive and cost-effective; systems for properly evaluating all major capital projects prior to final decisions on projects.

43. Section 16 (2) and (3) of the Act, expressly provides as follows; respectively:

> *"(1) …*
> *(2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person* ***appointed by him*** *into* ***the trustee's administration and disposal of trust property.***
> *(3) The Master shall make such order* ***as he deems fit*** *in connection with the costs of an investigation referred to in subsection (2)."*[25]

BRIEF OVERVIEW OF THE COMMON CAUSE FACTS

44. The following facts and chronology are common cause or not seriously in dispute on the papers. During 22 September 2016, the respondent received complaints of maladministration from the trustees of the Badirammogo Trust, which is part of the equity scheme program initiated by the National Department of Agriculture, Land Reform and Rural Development (formerly known as Department of Rural Development and Land Reform).

45. As part of its post-settlement support function to all beneficiaries of land reform including Badirammogo Trust, on 28 and 29 October 2016, the applicant held provincial equity scheme task team meetings in Upington, with certain trustees of the different equity schemes, with the purpose of resolving grievances lodged by certain trustees.[26]

[25]Emphasis supplied.
[26]LLM3, Minutes of Provincial Equity Schemes Meeting, pp22-34, FA.

46. On 30 June 2017, the applicant convened another meeting between the task team and different stakeholders and trustees with the program of action being the restoration of shares; obtaining values of shares at the time of sale; fraud and corruption; non-compliance with the Act; security of tenure; 50/50 schemes; advocacy sessions; and consideration of reporting back to the Provincial Cabinet to keep government informed of the progress made.[27] Of significance is the fact that it appears that during the latter meeting, the respondent was expressly requested *"…to look at the possible transgressions of the …Act and to institute remedial [action] on all the Trusts that did not comply with the Act and its regulations."* To this extent, it was at least recorded that the respondent was to report back on progress on the said task, in the next meeting.[28]

47. On 14 September 2017, the applicant convened another task team meeting, as *per* the schedule outlined in the minutes of the previous meeting, dated 30 June 2017. Of significance, is the fact that, the meeting of the 14 September 2017, had the same programme of action or agenda, as the meeting of 30 June 2017.[29] Of significance also, is the fact that the minutes of the 14 September 2017 meeting, *inter-alia*; recorded that the respondent had already issued a section 16 investigation with regard to Badirammogo Trust. It was also recorded that there will be a need to develop an approach on this matter since only the said trust was being investigated, instead of all the trusts, as decided in the previous meeting.[30]

48. The following was also recorded in the said minutes:

> *"**DISCUSSION***
>
> *Aspects of Investigation – the working committee needs to identify which areas and aspects of the investigation must be embarked upon.*

[27] LLM4 and 5.
[28] p38, FA.
[29] LLM6.
[30] p50, FA.

- *In terms of the investigation, as far as the Section 16 is concerned, submissions will be that all the trusts must be encompassed and terms of reference must be developed. The Task Team must ensure that the restoration of the beneficiaries' rights as encapsulated in the business plans the initiated schemes happen, investigations has to take place, forensic audits must be embarked upon, all professional services that are supposed to work on this investigation, accountancy, legal services must come on board."*[31]

ISSUES FOR DETERMINATION

49. Regard being had to the foregoing; the following issues, in sum, fell for determination by this Court; to *wit*: (a) Whether this Court should condone the late filling of this application; (b) Whether the respondent had the necessary authority and/or instructions from the applicant to appoint an investigator; and (c) Whether the respondent exercised its section 16 (2) and (3) powers lawfully. I now turn to determine these issues, in turn hereunder.

Whether this Court should condone the late filling of this application

50. It is common cause that the impugned decision was served on the applicant on 30 June 2020. According to the respondent's dictates, this application ought to have been lodged on or before 31 July 2020, instead of on 13 January 2021, as the applicant did. It is against this backdrop that the applicant was constrained to pray for condonation for the alleged late filing of this application.

51. In paragraphs 6 to 14 of its founding affidavit (pp5-16 thereof), the applicant traversed why it has failed to lodge this application timeously and prays that this Court condones its non-compliance with the time frames stipulated by the respondent. The applicant contended that it has given a reasonable and

[31] pp53-54, FA.

acceptable explanation for its failure to lodge this application timeously. With regard to prospects of success, the applicant contended that it has good prospects of success.

52. This review is in terms of section 23 of the Act, which does not set out any timeframe within which to file the application. The respondent did not put the chronology or the facts relied upon by the applicant for condonation in serious dispute. Nor has it alluded to any substantial prejudice it may have suffered or might suffer, as a result of the alleged late lodging of this application. All it did was to barely deny that the applicant has given a reasonable and acceptable explanation for the failure to lodge this application timeously and baldly denied that the applicant is entitled to an order condoning the non-compliance with the time-frame stipulated in the impugned decision, without more.[32]

53. The basic principle with regard to condonation is that the Court has discretion, to be exercised judicially upon consideration of all the facts. In essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness; the explanation thereof; the prospects of success and the importance of the case.[33] Correspondence exchanged between the parties evinces that the applicant, before lodging this application, sought to resolve the current dispute in terms of the Intergovernmental Relations Framework Act 13 of 2005.[34] This came to naught. Soon thereafter, this was lodged. The application is not inordinately late. The respondent also does not appear to have suffered any prejudice whatsoever, as a result of the said delay.

54. I am of the view that the applicant has shown good cause why its non-compliance with the time limit stipulated by the respondent should be condoned. I am therefore of the view that, regard being had to the facts and circumstances of this case; the importance of this case and the interests of justice require that condonation be granted. I am inclined to order accordingly.

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[32] paragraphs 11 to 20, pp76-79, AA.
[33] ***Melane v Santam Insurance Company*** 1962 (4) SA 531 (A)
[34] "IRFA"

Whether the respondent had the necessary authority and/or instructions from the applicant to appoint Mr Sebashe and/or the respondent exercised its section 16 (2) and (3) powers lawfully

55. The applicant in paragraphs 22-28 of its founding affidavit, *inter-alia*; averred as follows. That the respondent appointed an investigator without any instructions from the applicant to cause any investigation into the alleged transgressions of the relevant equity schemes and as such, the applicant cannot be liable for any costs associated with such investigation.[35]

56. It was also submitted for the applicant that the respondent should have realised that where there is authority to act from the applicant, section 217 of the Constitution, would be triggered. It is so since section 217 (1) of the Constitution, clearly stipulates that contracts for goods or services must be done in accordance with a system which is fair, equitable, transparent, competitive and cost effective. The applicant has thus clearly denied the authority of the respondent to appoint Mr Sebashe to conduct the said investigation.

57. How the respondent appointed Mr Sebashe may be gleaned from *inter-alia* paragraphs 50-54 of annexure X;[36] as follows. That on 04 September 2017, Mr Sebashe indicated in an email to the respondent, including one Mr Jomo Bonokwane from the respondent's department, his willingness to conduct the said investigation. That no response or any form of objection was received from the applicant. That the respondent accordingly appointed Mr. Sebashe as the investigator in terms of section16(2) on 05 September 2017, in line with item 4 of the applicant's Action Plan dated 30 June 2017. That although there was no Service Level Agreement Contract in place between Mr Sebashe and the applicant, the respondent has discretion to appoint a fit and proper person to conduct the investigation in terms of section 16(2) of the Act.

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[35] para23, p8, FA.
[36] pp16-17, FA.

That therefore, the respondent acted in accordance with the request of the applicant.

58. Also in paragraphs 1 and 3 of LLM7, which is predicated against section 16 of the Act, the respondent purports to have appointed Mr Sebashe, after it has come to its attention that certain irregularities might have occurred in the affairs of Badirammogo Trust; thus:

"1….

2….

3. In terms of the powers vested in him as the Master of the High Court of the Northern Cape Province, under whose jurisdiction the trust falls, I hereby appoint you as the investigator in the affairs of the trust with reference, but not limited to the following…."[37]

The respondent, thereafter says the following, with regard to its alleged authority and/or instruction to appoint Mr Sebashe, as an investigator of the impugned investigation; to *wit*:

"It is also evident that Mr Mpho Sebashe had full participation in these meetings. He was allowed to move for the adoption of the agenda of the meeting on 30 June 2017….

Mr Mpho Shebashe's participation could also be found on pages 3 and 5 of Annexure B, as well as in items 2, 4 and 6 of Annexure C.

By confirmation from Mr Mpho Sebashe, the Department…partially also compensated him for his attendance and participation at these meetings and for previous endeavours.

In line with the Action Plan, Item 4, Annexure C, the Master issued a letter of investigation in terms of the provisions of Section 16…, with(sic) by implications (sic) referred to Section 16(2) of the Act (supra), with Mr Mpho Sebashe as the Investigator…."[38]

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[37] p 58, FA.
[38] pp12-13, *ibid*.

59. The foregoing stands in stark contrast with the respondent's bald claim in the impugned costs order that the respondent *"…**was requested by the Department…**, to institute a full scale investigation into the transgressions in the Trust…."*[39]

60. As far as the impugned cost order is concerned, same seems to be predicated against *inter-alia*; the following findings of the respondent.[40] That when the applicant made the investments with the said equity schemes, no checks and balances were put in place in respect of accountability and responsibility. In the Badirammogo Trust Farm and other equity schemes, the applicant invested a substantial amount of money and made the farm workers shareholders and trustees of the said farms. That the "white farmers "exploited the situation and drew up "sale agreements" for these farm workers, whereby the said farmworkers sold their shareholding in these farms for far below their market value. That the said transactions are fraudulent and corrupt. After selling, some of the farmworkers were evicted from the said farms.

61. That the applicant failed to exercise due diligence, oversight management and accountability over the spending of government funding on the said farms and equity schemes. That this infringement of the rights of the farm workers and the mismanagement of government funding would not have occurred, if there was accountability on the part of the applicant. That the applicant failed to exercise reasonable care in this regard.

62. It is trite that organs of state may only act within the powers lawfully conferred upon them. In the celebrated case of ***Fedsure v Greater Johannesburg Transitional Council***, [41] the apex Court said the following, which in my view, is apposite in these proceedings:

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[39] p 12, *ibid*.
[40] paras 28-30, pp14-15, FA.
[41] 1998 (12) BCLR 1458 (CC).

"[I]t is a fundamental principle of the rule of law,[52] *recognised widely, that* ***the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.*** *This has been recognised in other jurisdictions. The principle is also expressly recognised in the 1996 Constitution…*

It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law…" *At least in this sense, then, the principle of legality is implied within the terms of the Interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the Interim Constitution is a principle of legality…"*[42]

63. It is so that in terms section 16(1) of the Act, the respondent has a wide discretion to call upon trustee at any time to account to him.[43] Section 16(2) of the Act expressly and unambiguously provides as follows:

> *"(2) The Master may, if he deems it necessary, cause investigation to be carried out by some and proper person appointed by him into* ***trustee's administration and disposal of trust property.****"*

64. In terms of section 9 of the Act only trustees, are required in the performance of their duties and exercise of their powers, to act with care, diligence and skill

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[52] See Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (Macmillan Press, London 1959) at 193, in which Dicey refers to this aspect of the rule of law in the following terms:
"We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
. . . .

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." [Footnotes omitted.]

[42] Emphasis supplied.

[43] ***Ras NNO v Van Den Meulen*** 2011(4) SA 17 (SCA).

which can reasonably be expected of a person who manages the affairs of another. It follows that section 16, read holistically and purposively limits the respondent's "wide" powers or jurisdiction to trustees, the administration of trusts and disposal of trust property. This jurisdiction does not extend to founders or funders of trusts.

65. Section 23 of the Act, on which the applicant has based its application, expressly provides as follows:

> *"23. Any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master or by a decision,* ***order*** *or direction of the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make an order it deems fit."*

66. In Honore's, The South African Law of Trusts (5th ed), the authors say the following at p 415 thereof:

> *"The Act provides that the Master is to make such order as he or she deems fit in connection with the costs of the investigation.* ***Thus the Master may order them to come wholly or in part out of the trust property or the income from it, or may impose them wholly or partly on the trustee to be paid personally (de bonis propriis), or may order them to be paid by the person at whose instance the investigation took place****. The Master's decision is subject to challenge by a trustee who feels aggrieved."*[44]

67. Of significance from the foregoing is that this "Special statutory review" (so the SCA held at 113) is distinct from a PAJA and other types of review. Honore points out that this is sometimes a wider power than ordinary review and thus more akin to an appeal but that it might well be narrower with the court being confined to particular grounds of review or particular remedies.

[44] Emphasis supplied.

That it would, of course, depend on the relevant statutory provisions.

68. Of significance also is that at paragraph 154 (page 251) of Honoré, the learned authors note that all the Master's decisions in terms of the Act are subject to reassessment by this Court. They go on (at page 252), to state that section 23 makes it plain that the substantive justification for any action by the Master may be scrutinised. They further correctly stated the following:

> ***"[T]he substantive justification for any action by the Master may be scrutinised. The applicant will in other words not have to establish that the Master committed a reviewable irregularity but only that there are grounds for the court to substitute a decision it considers better.*** *The court is expressly empowered 'to consider the merits' of the matter, to take evidence 'and to make any order it deems fit'. This goes further than the entitlement to administrative justice now embodied in statute under the Constitution."*

69. In ***Nel and Another NNO v The Master*** **(*ABSA Bank Limited and Others*** 2005 (1) SA 276 (SCA) at paragraphs 22-23, the Penultimate Court, with reference to ***Johannesburg Consolidated Investment Co v Johannesburg Town Council*** 1903 TS 111, discussed statutory reviews of the kind in question and endorsed Professor Hoexter's exposition. In page 191, paragraph 119, the authors, in dealing with the powers of this Court when there is a challenge in terms of the Act in relation to the Master's appointment of trustees point out, that the terminology of that section makes it plain that the court may consider that disputed issue anew. By parity of reason, the same applies in this matter.

70. In ***Fesi and Another v Trustees Elect of the Ndabeni Communal Property Trust*** *(IT 1056/98 [2018]* JOL 39823 (SCA), the Supreme Court of Appeal discussed the nature of the review envisioned in terms of s 23 of the Act in paragraphs 54 and 55 thereof. The SCA supported the view

of Honore (at page 251 of the work), that all the Master's decisions in terms of the Act are subject to reassessment by the Court.

71. It can be deduced from the foregoing that whilst the respondent's powers to order costs of the investigation are indeed "wide" same is limited to ordering same to come only out of the trust property (wholly or partly) or the income from it, or may be impose them wholly or partly on the trustees to be paid personally (*de bonis propriis*), or may be ordered to be paid by the person at whose instance the investigation took place. Anything to the contrary *ipso jure* attracts what s 23 of the Act envisions in the form of judicial review at the instance of any person aggrieved by such decision.

72. The coterminous question is also whether the respondent's wide powers include the authority to compel the applicant to participate in a contract arranged by means of uncompetitive bidding process without any written approval of the relevant contractor. In this regard, the following averments on the part of the applicant are relevant.

73. That the respondent appointed the investigator as a result of a request letter from Malepe Attorneys and not the applicant as stated in the costs order. The applicant then cannot be held liable for the costs in any manner. It is clear that the respondent did not appoint the investigator as *per* the empowering provisions of section 16(2) of the Act- *paras 24-25, pp8-9, FA.*

74. That even if the respondent was given instructions to appoint the investigator by the applicant, of which is not the case, he failed to apply his mind and/or ignored the provisions of section 16 (2) of the TPCA, by appointing a person with whom it had communicated with regarding the appointment prior to the appointment. The applicant says it is so since to the extent that the respondent at page 2, paragraph 22 of the impugned costs order states that Badirammogo Trust was identified because of the amount of complaints

lodged with the master in this trust, which is also part of the equity scheme. It is clear from the costs order that the respondent exercised his discretion after he allegedly received certain complaints that was lodged in his office in respect of the said trust of which the applicant was not a party and as such cannot be held liable for the costs of the investigation- *p9, ibid.*

75. On 06 December 2016, one Malepe Attorneys of Johannesburg, acting on behalf of the beneficiaries of Badirammogo trust, in writing requested the respondent to intervene in the affairs of the said trust in terms of section 16 of the Trust Property Control Act. In particular, the respondent was entreated to demand from the current trustees to furnish the respondent with any records, books, accounts, or documents relating to trust shares specifically flowing from one Sonvruncht share equity scheme shareholding in one Sonnvruncht Farming (Pty) Ltd.[45] Of significance is what the said attorneys unequivocally stated on behalf of their clients in paragraph 4 (p62, FA), of the said letter; to *wit*:

> *"It is our instructions that in the event that the Master of the High Court deems it fit that an investigation team should be appointed,* ***the beneficiaries have already taken the liberty of appointing such consultants and undertake to bear the costs associated therewith****."*[46]

76. On or about 11 August 2017 at 10h37, the respondent forwarded an electronic mail headed: *"Subject: RE: Emailing Letter To Master of the High Court Kimberley.pdf"* to one Mpho Sebashe, a managing director of one Merwapheta Consulting Services, contemporaneously copying one Mr Jomo Bonokwane (the chairperson of the task team and a director in the applicant/department);[47] one Ms Mbalenhle Baduza, *et al,* to *wit:*

> *"Dear Colleague*
>
> *Your emails refers. (sic)*

[45]LLM8, pp60-62, FA.
[46]Emphasis supplied.
[47]pp66-67, FA.

Since your first enquire (sic), we have not received any feedback from the appointed trustees.

As per the attachment hereto, the accountants have also confirmed that they don't have any trust books.

With the facts before me, I am of the opinion that a section 16 investigation should be conducted.

Please indicate to me who specifically (by personal name) I should appoint to do the investigation and what terms of reference should apply.

Please also indicate to me whether M/S Malepe Attorneys is still prepared to bear the costs associated to the investigation.

I await to hear from you. [48]

Regards

CD Davids

Master of the High Court-Kimberley

Department of Justice and Constitutional Development

……"[49]

77. Thereafter, on 04 September 2017, at 10h50, the respondent transmitted another electronic mail to Mr Sebashe, thus:

"Dear Sir

My previous email refers.

I'm in the process of drawing up the section 16 terms of reference.

I require the names of the person from the firm who will be conducting the investigation. I require his or her full names.

This person will be responsible to report to me.

Thanking you.

……"[50]

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[48] Emphasis supplied.
[49] LLM9, pp63-64, FA.
[50] LLM10, p65, FA.

78. Mr. Sebashe then replied to the foregoing electronic mail, shortly after noon on the same day 04 September 2017, at 12h26, as follows:

> *"Dear Master Craig*
>
> *This serves to confirm receipt of your email and content thereof, as indicated in my previous email that I am willing to conduct the investigation,* ***however it must be noted that I will definitely do with the Department been (sic) able to cover the cost (sic) of these investigation, since most of the work that date back from August Last year has been completed and we are in possession of valuable Trust documents.***
>
> *Regards,*
>
> ***Mpho B Sebashe.***[51]
>
> *…."*[52]

79. The following day on 05 September 2017, the respondent, in writing appointed the same Mr Sebashe of Merwapheta consulting services, as an investigator into the affairs of Badirammogo trust, in terms of section 16 of the Trust Property Control Act. Strikingly, in terms of the said appointment letter, Mr Sebashe and/or Merwapheta was also *inter-alia* engaged as follows:

> *"1….*
>
> *2….*
>
> *3….*
>
> *4.* ***You are authorised to procure the assistance of professionals to assist you in the investigation including procuring the assistance of an auditor or any Government Department.***
>
> *5. You are further authorised to conduct interviews with all trustees (past and present) beneficiaries, auditors of the trust, as well as any other person/entity (sic) that may be of assistance in the investigation.*

[51] Emphasis supplied.
[52] LLM10, P65, FA.

6. *You are further required to submit a comprehensive report on your findings and recommendations to my office* ***within 3 months after conclusion of this investigation including a Forensic Audit Report and books and accounts of the trust prepared and verified by a qualified credible and registered Accountant.***[53]

….” [54]

80. According to the applicant, the respondent acted *mala fide* in making a costs order against the applicant on the following grounds. There is no letter from the applicant authorising the respondent to appoint the investigator. The investigator was appointed at the behest of Malepe Attorneys. The respondent deviated from exercising his discretion in terms of section 16 (2) of the Act, as it is supported by the electronic mail communication dated 04 September 2017, marked annexure LLM10. Consequently, on 05 September 2017, the respondent appointed Mr Sebashe c/o Morwaphetha Consulting Services; regard being had to annexure LLM7 -*pp9-10, ibid.*

81. At all material times hereto, there was no involvement and/or participation of the applicant in this appointment. It defeats logic that the applicant can be held liable for the costs of investigation as the applicant clearly did not request nor instruct and/or authorise that the respondent appoints the said investigator.[55] Therefore, the applicant cannot be held liable for the costs of the investigation-*p10, ibid.*

82. The respondent appointed the said investigator on 05 September 2017, without any instructions from the applicant, a day after communicating with that investigator. In that sense, it defeats exercising discretion on the part of the respondent in appointing a “fit and proper” person as outlined in section 16 (2) of the Act. It is therefore inappropriate on the part of the respondent to hold the applicant liable for costs of the said investigator. The respondent cannot turn around and make a cost order against the applicant as he was not requested nor instructed and/or authorised by the applicant to cause any

[53]Emphasis supplied.
[54]LLM7, pp58-59, FA.
[55]LLM8-9, pp60-64.

investigation. This is evident from Mr Sebashe's electronic mail dated 04 September 2017 and addressed to the respondent, *per* annexure LLM10; to *wit*:[56]

> "…*as indicated in my previous email that am willing to conduct the investigation,* ***however it must be noted that I will definitely do with the Department been able to cover the costs of these investigation*** *(sic) ...*"[57]

83. According to the applicant, the foregoing, evinces that the respondent is using it as a "scapegoat" to be liable for costs that the applicant never initiated and which it disputes.[58] It is clear that even if the applicant gave the respondent authority to appoint the said investigator, which is not the case, the respondent is compromised and conflicted as *per* annexure LLM10, above. The applicant therefore cannot be liable for the costs order with regard to which the respondent misdirected itself. So the argument went.

84. For its own part, the respondent *inter-alia* averred that it took the following considerations into account in the exercise of its section 16 (2) powers. That the applicant did not perform its post-settlement support functions, although in paragraph 18 of the founding affidavit, it has admitted that it has a post-settlement support function to all beneficiaries of land reform which confirms a legal duty on the part of the applicant to execute the said duties diligently. That the said function was not exercised diligently, hence the problems that arose in the management of the equity trust schemes- *para 22, p80, AA.*

85. It is clear from annexure LLM4, that the respondent was requested to investigate the transgressions of the Act and that the responsible persons for this investigation were the respondent and Mr Sebashe as *per* action plan equity meeting of 30 June 2017, a copy which is attached to the answering

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[56]The relevant document is annexure LLM10 and not LLM7.
[57]pp 65, FA.
[58]The "scapegoat" allegation was subsequently withdrawn in reply, after the respondent took exception to it.

affidavit as annexure CD1- p87. In an attempt to play with words, the applicant is now attempting to water down the meaning of the request as indicated in the minutes of the said meeting to a mere request, but what is certain is that the request was accepted and an agreement came into existence at that point in time.[59] The respondent appointed the investigator at the request of the applicant.[60]

86. The respondent argued in sum that it is common cause and clear that the investigation was requested by the applicant to make the impugned appointment. The applicant, on its own version, had a "post-settlement support function to all beneficiaries of Badirammogo trust". It is on that basis that the applicant led and held the meetings on 28 and 29 October 2016. It is therefore correct that the respondent accepted the request to investigate the matter and that the applicant would, by necessary implication bear the costs of the investigation. In the premise, the application ought to be dismissed with costs.

87. The respondent maintained that it never acted *mala fide* and took exception against the allegation that it is using the applicant as a scape goat because it is noticeable that the problems that occurred in the equity trust entities were in fact caused by the applicant not exercising its legal duties in overseeing the business of the equity trusts.[61] In the premise, the respondent maintained that the applicant is liable for payment of the impugned costs and submitted that the application falls to be dismissed with costs.[62]

88. One also has to turn to the impugned costs order to surmise what other considerations were taken into account by the respondent in the purported exercise of its section 16(2) powers. The following salient contentions can *inter-alia*, be gleaned therefrom. [63] It was only after applying his mind and

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[59]para 23, pp80-81, AA.
[60]para24, p81, AA.
[61]para 31, p83, AA.
[62]para33-34, *ibid*.
[63]Annexure X, pp12-17, FA.

intensive research that it was in a position to exercise its statutory powers in terms of section 16 (3) of the Act.

89. The respondent was requested by the applicant to institute a full scale investigation into the transgression in the said trust, in terms of the provisions of section 16 of the Act, at various meetings held on 28 and 29 October 2016 (i.e. annexure A); 30 June 2017 (i.e. annexure B); and the applicant's action plan dated 30 June 2017 (i.e. annexure C).[64]

90. The fact that it was so "requested" by the applicant to conduct the said investigation, is evident from paragraph 4, page 4 of annexure B. This was done because one of the core functions of the respondent's office is the administration of trusts, whether it is *inter-vivos* or testamentary (*mortis causa*) trust. It is also evident from paragraph 4 of the action plan, which is marked annexure C, that the respondent was once more "requested" by the applicant to investigate the said transgressions.[65]

91. It is also evident that Mr Sebashe had full participation in the said meeting because he was allowed to move for the adoption of the agenda of the meeting on 30 June 2017; regard being had to page 2 annexure B. His participation could also be found in pages 3 and 5 of annexure B, as well as items 2; 4 and 6 of annexure C. He also confirmed that the applicant partially compensated him for his attendance and participation at the said meetings and other endeavours.[66] So the respondent contended.

92. Whilst private parties are generically at liberty to decide whether, with whom, and on what terms to contract, it is so that as regards organs of state, there are some restrictions that apply by virtue of the principle of legality, which may render wholly or partially, ineffective agreements involving the contravention of specific rules or laws such as the Constitution and the PFMA. It is trite in our law that the procurement of goods and services by organs of state must

[64] The said annexure which were presumably attached to the impugned order are the same as annexure LLM3-4 and CD1, respectively.
[65] Annexure X, p12, FA.
[66] p13, *ibid.*

not only be either by way of quotations or through a bidding process, but must also be within the threshold determined by National Treasury.[67]

93. The deponent to the founding affidavit is the acting head of the applicant and the respondent's answering affidavit was deposed to by the master himself. The foregoing is significant because both deponents, as organs of state, are constrained by the Constitution and contemporaneously regulated by the Public Finance Management Act 1 of 1999 (the PFMA), when contracting for goods or services. It is so since, the Constitution obliges all organs of state or any other institution identified in national legislation, to contract for services, in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

94. Section 2 of the Constitution, for its own part, proclaims it as the supreme law of the Republic and renders any law or conduct inconsistent with it invalid and the obligations imposed by it peremptory. The PFMA, for its own part expressly stipulates that in the event of any inconsistency between it and any other legislation, it prevails. In other words, the PFMA trumps all other legislation inconsistent with it.

95. Section 38 (1) (a) of the PFMA, expressly requires accounting officers for departments, trading entities or constitutional institutions to *inter-alia* ensure that they have and maintain: (i) effective, efficient and transparent systems of financial and risk management and internal control; (ii) systems of internal audit under the control and direction of audit committees complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77 of the PFMA; (iii) appropriate procurement and provisioning systems which are fair, equitable, transparent, competitive and cost-effective; and (iv) systems for properly evaluating all major capital projects prior to final decision on the project.

[67] Treasury Regulation 16A.6.

96. Section 38 (1) (b) of the PFMA, on the other hand, renders accounting officers responsible for the effective, efficient, economical and transparent use of the resources of departments, trading entities or constitutional institutions. It requires accounting officers to take effective and appropriate steps to: (i) collect all monies due to departments; (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and (iii) manage available working capital efficiently and economically.[68]

97. Accounting officers are also responsible for the management, including the safe-guarding and maintenance of assets, and for the management of liabilities of departments, trading entities and constitutional institutions.[69] It is also the responsibility of accounting officers to comply with any taxes, levies, duties, pensions and audit commitments as may be required by legislation and to settle all contractual obligations and pay all monies owing; including inter-governmental claims, within the prescribed or agreed periods.[70] Accounting officers are further obliged to comply and ensure compliance by departments, trading entities or constitutional institutions, with all the provisions of the PFMA.[71]

98. Section 45 of the PFMA, for its own part, expressly enjoins other officials in any department, such as the respondent, to *inter-alia*; ensure that systems of financial management and internal control established for those departments are carried out within the areas of responsibility of those officials; to take responsibility for the effective, efficient, economical and transparent use of financial and other resources within those officials' areas of responsibility; to take effective and appropriate steps to prevent within those officials' areas of responsibility; to take effective and appropriate steps to prevent within those officials' areas of responsibility, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any other under-recollection of revenue due; to comply with the provisions of the PFMA, to the

[68]Section 38 (1) (c), PFMA.
[69]section 38 (1) (d), *ibid*.
[70]Section 38 (1) (e) and (f), *ibid*.
[71]Section 38 (1) (n), *ibid*.

extent applicable to those officials, including any delegations and instructions in terms of section 44 of the PFMA; and to take responsibility for the management, including the safeguarding of assets and the management of the liabilities, within those officials' areas of responsibility.

99. The foregoing notwithstanding, the respondent remained loudly mute with regard to whether or not its procurement of the services of the investigator complied with sections 217 of the Constitution or 38 (1) (a) and (c) of the PFMA. All the respondent averred in this regard is the following.

100. That in line with item 4 of the action plan, the respondent issued a letter of investigation in terms of the provisions of section 16 of the Trust Property Control Act, *"… with (sic) by implications referred to Section 16 (2) of the said Act, with Mr Mpho Sebashe as the Investigator…"* In terms of the provisions of section 16 (3) of the Trust Property Control Act, the respondent *"…has* ***an absolute discretion to make a decision to order a party to be liable for the cost of Section 16 (2) (supra) investigation."***[72]

101. That the section 16 (2) investigation did not only relate to the Badirammogo Trust, but also to other trusts or farms which are part of the applicant's equity schemes, as mentioned on page 6 of annexure B. Badirammogo Trust was only singled out because of the amount of complaints lodged with the respondent pertaining to same, which is also part of the said equity schemes. The said trust was only used as a "pilot" project for investigation in other equity schemes, due to the cost factor, and in order to determine whether the same *modus operandi* also happened in other equity schemes or trusts.

102. That although there was no service level agreement or contract between Mr Mpho Sebashe and the applicant, the respondent nevertheless has a "discretion" to appoint a "fit and proper person" to conduct the investigation in terms of Section 16(2) of the Act. Therefore, the respondent acted in

[72]Emphasis supplied.

accordance with the “request” of the applicant and item 4 of the task team’s action plan.

103. That on 04 September 2017, Mr Mpho Sebashe indicated by electronic mail to the respondent, including Mr Jomo Bonokwane, a director of the applicant and chairperson of the task team, his willingness to conduct the said investigation. No response or any form of objection was received from the applicant. The respondent granted the impugned costs order after applying its mind. In light of the above, it made the said cost order in terms of Section 16(3) of the Trust Property Control Act, that the applicant’s Directorate: Farmer Settlement and Rural Development, to which Mr Jomo Bonokwane was attached to in 2017, dealing with the equity schemes, be liable for the cost of the investigation in terms of Section 16 (2) of the Act, which was conducted by Mr Mpho Sebashe, in the amount of R3 726 000.00.[73]

104. That he granted the applicant the right to tax the said costs of the investigator by an independent taxing master, mutually agreed amongst them. The respondent also directed any party aggrieved by its decision or ruling to approach a court of law in terms of section 23 of the Act, read with section 95 of the Administration of Estates Act, for relief and to set aside same. This review application must be brought within 30 days from the date hereof. The respondent also directed any person alleging any wrongdoing by it to the provisions of Section 100 of the Administration of Estates Act. So the respondent contended.

105. In reply, the applicant in sum, denied that it did not perform its post-settlement function diligently and reiterated that it never requested the respondent to appoint an investigator as there was no authorisation from it for the respondent to do so. Whilst it did not dispute that Mr Sebashe attended the 30 June 2017 meeting, the applicant maintained that Mr Sebashe attended as a representative of Badirammogo Trust as is evident from annexures LLM8 and 9; respectively.

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[73] p18, FA.

106. The applicant also denied any knowledge of an agreement that came into existence as there was never an authorisation from it to the respondent to appoint any investigator. The applicant further submitted that there was no authorisation from it for the appointment of the investigator by the respondent and that annexure LLM10, clearly evinces that Mr Sebashe was doing some investigations before his unauthorised appointment by the respondent on 05 September 2017.[74]

107. The applicant maintained that it cannot be held responsible for the impugned costs since it never authorised same to be incurred. According to the applicant, paragraph 18 of the impugned costs order is clear that the complaints lodged with the respondent pertained to the affairs of Badirammogo Trust and not the applicant's. It also maintained that the respondent acted *mala fide* and submitted that it cannot be held liable for costs it never initiated as the investigator was already doing the investigation as evinced by annexure LLM10.

108. That the respondent appointed Mr Sebashe at the behest of a third party[75] and not the applicant. That where there is no authority from the applicant for the appointment of the investigator, it cannot be held liable for the actions caused by the respondent. Due to lack of instructions and/or authority letter to the respondent, section 217 of the Constitution was not considered as the respondent was acting on the instruction of a third party, Malepe Attorneys.[76] It will be both prejudicial to the applicant and not in the interest of justice for the order sought not to be granted. So the applicant contended.

109. That when the respondent purportedly exercised its discretion in terms of section 16 (2) of the Act, the respondent did not have regard to the fact that to the extent that both parties are organs of state, they are bound by section 217 of the Constitution. That the respondent did not have any authority from the

[74]para 24-25, pp97-98, RA.
[75] Application founding affidavit, annexure "LLM9"
[76] Applicant founding affidavit, annexure "LLM8"

applicant to appoint an investigator and as such failed to follow proper procedure of procuring the said service provider. The procurement of the investigation services, which resulted in the impugned order was done in contravention of section 217 (1) of the Constitution.

110. It is so that a party wishing to rely on illegality must plead it. A court may also raise the question of illegality *mero motu* if the illegality appears *ex facie* the transaction or the surrounding circumstances, provided the court is satisfied that all the evidence relating to the illegality was led- ***Pratt v FirstRand Bank*** 2009 (2) SA 119 (SCA). It is also so that if reliance is placed on an illegality flowing from a provision of a statute, reference to the provision must be made in the relevant pleading, or the pleading must be so formulated that it is sufficiently clear on which statutory provision reliance is placed. When the illegality does not appear *ex facie* the transaction, but arises from surrounding circumstances, the circumstances must be pleaded and the party relying on the facts must prove them- ***Yannakou v Apollo Club*** 1974 (1) SA 614 (A) pp. 623–624

111. It is so in our law now that a contract prohibited by the Constitution, statute or common law (in the latter, unless a contrary intention appears) is illegal. The statutory prohibition may be express or implied- ***Cool Ideas 1186 CC v Hubbard and Another*** 2014 (4) SA 474 (CC). It is also so in our law that a contract (or a term of a contract) is illegal if it is against public policy or good morals- ***Bredenkamp and others v Standard Bank of SA Ltd*** 2010 (4) SA 468 (SCA). In its modern guise, public policy is rooted in the Constitution and in the fundamental values enshrined therein- *Bredenkamp and others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA). In sum, illegal contracts are unenforceable (*ex turpi causa non oritur actio*). This rule is absolute and has no exceptions, even when there has been part performance- ***Cool Ideas 1186 CC v Hubbard and Another*** 2014 (4) SA 474 (CC).

112. Section 16 (2) of the Trust Property Control Act, expressly and unambiguously stipulates as follows:

> ***"The Master may, if he deems it necessary,*** *cause an investigation to be carried out by some fit and proper person* ***appointed by him*** *into trustee's administration and disposal of trust property."* [77]

113. I can be deduced from the object and scope of the Act; the context in which the word "may" is utilised; the language employed to confer the power; the subject-matter of the power; the office of the respondent; and the class of persons for whose benefit it is to be exercised, that the said section grants the respondent an exclusive discretion to invoke the said section. In ***Ras v Van der Muelen***, the court observed thus:

> *"[10] The court a quo also erred in ordering the Master to carry out an investigation. Under s 16(1) of the Act, the Master has a wide discretion to call upon trustees at any time to account to him. Section 16(2) further provides that the Master may, 'if he deems it necessary, cause an investigation to be carried out . . . into the trustee's administration or disposal of trust property'* ***. The discretion to call for such an investigation vests solely in the Master****.* ***It is not alleged that the Master had in any way acted improperly in the exercise of that discretion, and it was therefore not competent for the court a quo to direct him to carry out an investigation."*** [78]

114. It is however trite that the principle of legality or lawfulness invariably requires that where a power is granted to a specific authority, that authority itself and nobody else should as a general rule excise the power so granted.[79] Wade and Forsyth state this principle aptly as follows:[80]

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[77] My emphasis.
[78] 2011 (4) SA 17 (SCA), Para 10
[79] ***S v Mabusela*** 1955 (1) 29 (T).
[80] Administrative Law, p315.

"An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and no one else. *The principle is strictly applied, even when it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable."*[81]

115. It is clear from the correspondence between the respondent and Malepe Attorneys, that it is the said trust's beneficiaries and not the respondent, who took *"the liberty of appointing such consultants"* and contemporaneously undertook *"to bear the costs associated therewith."*[82] The said consultants in all probability is Mr Sebashe and/or one Morwapheta Consulting Services. This can be deduced from the respondent's correspondence with Mr Sebashe dated 11 August and 04 September 2017, quoted above respectively; to *wit*:

"…Please indicate to me who specifically (by personal name) I should appoint to do the investigation and what terms of reference should apply.
Please also indicate to me whether M/S Malepe Attorneys is still prepared to bear the costs associated to the investigation.
I await to hear from you". [83]

116. It is also clear from the foregoing that the respondent did not only require the names of the person from the firm who were to be handpicked to conduct the investigation, but also what terms of reference should apply. Mr Sebashe thereafter replied as follows:

"*Dear Master Craig*

This serves to confirm receipt of your email and content thereof, as indicated in my previous email that I am willing to conduct the investigation, ***however it must be noted that I will definitely do with the Department been (sic) able to cover the cost (sic) of these investigation, since most of the work that_date back from August***

[81]Emphasis supplied.
[82]Emphasis supplied.
[83]Emphasis supplied.

Last year has been completed and we are in possession of valuable Trust documents.[84]

Regards,

Mpho B Sebashe.[85]

117. The following day, on 05 September 2017, the respondent issued an appointment letter in favour of Mr Sebashe and thereafter issued the impugned costs order- just as the said attorneys and Sebashe himself had unlawfully dictated. What is queer, is the following. Even though the letter of appointment purports to appoint Mr Mpho Sebashe himself, care of one Morwapheta Consulting Services.[86] The invoice relating to the impugned costs is issued *vide* one Morwapheta (Pty) Ltd.'s tax invoice and number whilst quoting Mr Sebashe's bank details. [87] It is trite that companies are legal entities separate and distinct from their members and directors. None of these entities have filed any confirmatory affidavits or were joined in these proceedings or sought to intervene.

118. The unlawful referral of a matter to another body or person is often referred to as "passing the buck" and akin to an unauthorised delegation of power.[88] It is clear from the foregoing that the respondent unlawfully "passed the buck" or referred the function of appointing a fit and proper person to carry out the investigation and whom should bear the costs thereof to Malepe attorneys and/or Sebashe himself.

119. Whist it might be permissible for an administrator to consult other officials or bodies or some members of the public before exercising a discretion or taking a decision. It is so in our law that an administrator may not abdicate its powers or usurp the powers of another body or organ of state by unlawful dictation or unlawful referral. These illegalities tend to be less obvious and

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[84]Emphasis supplied.
[85]Emphasis supplied.
[86]LLM7, pp58-59, FA.
[87]p18, FA.
[88]E.g. ***Vries v Du Plessis NO*** 1967 (4) SA 469 (SWA) where the administrator referred an application for a license to two other officials.

more difficult to prove because they are more covert and less official forms of delegation. This does not detract from the fact that like unlawful delegation, these practices flout the basic principle that the responsibility for the exercise of a discretionary power rests with the authorised body and no one else. It is also trite that the exercise of discretionary powers, wide and narrow, are always subject to the prescripts of the law. To this extent, it follows that the exercise of such powers must fall within the scope of the Constitution and any applicable laws.[89]

120. The following can also be deduced from the impugned correspondence. The respondent was biased or reasonably suspected of bias towards the appointment of Mr Sebashe as an investigator. The process of appointing Mr Sebashe was therefore procedurally unfair. It is so because he was clearly a referee and player in the process of his own appointment. It can also be deduced that the respondent appointed Mr Sebashe because of the latter's unauthorised and unwarranted dictates.

121. It is also clear from the foregoing that the decision that the costs of the investigation be borne by the applicant emanated from Mr Sebashe and not the respondent. The foregoing clearly vitiates the respondent's contention that the respondent granted the impugned costs order objectively, after applying its mind. In ***JSE v Witwatersrand Nigel Ltd***, capricious decision- making was equated with the failure of an administrator to apply its mind to a matter.[90] It has been well said that applying one's mind to the matter may be equated with the umbrella requirement of lawful administrative action or administrative legality. It was therefore held that the failure to apply the mind might be demonstrated by the proof that:

> *"The decision was arrived at arbitrarily or capriciously or mala fide as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or the that the [administrator]*

[89] ***Dawood v Min of Home Affairs*** 2000 (8) BCLR 837 (CC).
[90] 1988 (3) SA 132 (A) at 151.

misconceived the nature of the discretion conferred upon him and took into account irrelevant consideration or ignored relevant ones."

122. The respondent contended that section 16 (3) of the TPCA, imbued it with *"an absolute discretion"* to make a decision to order a party to be liable for the costs of a section 16 (2) investigation. Whilst it is so that a discretionary power accorded to an administrator in terms of an empowering provision may be wide or narrow or more circumscribed.[91] I assume that the respondent here meant to say "a wide discretion". I do so because the concept of "absolute discretion" is out of step with the principles of supremacy of the Constitution, the rule of law and legality embedded in section 1 (c) of the Constitution.

123. It is so that unfettered discretion is a contradiction in terms in any constitutional state.[92] It is also so that "wide discretionary powers" often involve wide choices of possible options. Whilst an administrator may have what is termed "wide discretionary powers" as contended by the respondent, it is however trite that to the extent that such power must be exercised in accordance with the prescripts of the Constitution and the law in general, same is reviewable if exercised arbitrarily or capriciously.[93]

124. It follows from the foregoing that no power is unconstrained and that the exercise of all power, including discretionary power, is always subject to legal prescripts. To the extent that section 2 of the Constitution renders every law of conduct inconsistent with it invalid. It follows that the exercise of all discretionary powers, wide and narrow, must fall within the prescripts of the Constitution and other applicable laws. It has been well said that intervention on review will be justified in the case of a gross irregularity which has caused or is likely to cause prejudice to the applicant.[94] Section 217 (1) of the Constitution, expressly and peremptorily enjoins as follows:

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[91] Burns and Beukes, p356, ibid.
[92] ***Goldberg v Minister of Prisons*** 1979 (1) SA 14 (A).
[93] Section 6(2) (e) (vi), PAJA.
[94] ***Adonis v Additional Magistrate*** 2007 (2) SA 147 (C) para 22.

"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."***

125. It is so that tender procedures have been the result of vast experience gained in the procuring of services and goods by organs of state.[95] According to Pickard J:

"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 for the procurement thereof, is assured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended."[96]

126. The jurisprudential basis of our procurement system has been and will always be primarily to ensure that organs of state get the best price and value for what they pay for. Chief among these considerations in this regard is the question of price. In ***Metro Projects v Klerksdorp Local Municipality*** *2004 (1) SA 16 (SCA),* the court found that the awarding of tenders takes place within the exercise of public power and thus constitutes administrative action. The same applies with procurement of goods and services by organs of state, generically. As such, it follows that the procurement of goods and services by organs of state must be lawful, procedurally fair and justifiable.

127. The legal framework relevant was set out as follows by Plasket J in ***WDR Earthmoving Enterprises CC and Another v Joe Gqabi District Municipality and Others***; thus:[97]

[95] ***Cash Paymaster Services v Eastern Cape Province*** 1999 (1) SA 324 (Ck).
[96] *Ibid*.
[97] [2017] ZAECGHC 45.

"[6] Section 217 of the Constitution provides that when organs of state procure goods and services they must do so in accordance with a system that is "fair, equitable, transparent, competitive and cost-effective". These principles are given effect to by a complex web of primary and subordinate legislation as well as supply chain management policies. These instruments both empower organs of state in their procurement processes and place limits on their powers. Procurement processes, in order to be lawful and constitutionally compliant, must be undertaken in accordance with these provisions: compliance with them is legally required and they may not be disregarded.

[7] …. Framed in the obverse, a decision-maker in a public procurement process is required by Section 33(1) of the Constitution to act lawfully, reasonably and in a procedurally fair manner and if he or she does not, the impugned decision may be set aside.

[8] A court that is approached to review an administrative action does not have a free hand to interfere in the administrative process. Its powers are limited. As Lord Brightman stated in Chief Constable of the North Wales Police v Evans "judicial review is concerned, not with the decision, but with the decision-making process". This was made clear by Innes CJ more than a century ago in Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council when he said: 'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them."[98]

128. Regulation 16A.6 of the National Treasury Regulations, expressly requires the procurement of goods and services, either by way of quotations or through a process and to be within the threshold values as determined by National Treasury. In terms of regulation 16A.6.6, accounting officers or accounting authorities may only participate in contracts arranged by

[98] Footnotes omitted.

means of competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors. Regulation 16A.6, for its own part, expressly requires the procurement of goods and services, either by way of quotations or through a process and to be within the threshold values as determined by National Treasury.

129. There is nothing before this Court evincing that the foregoing was complied with before the respondent appointed Mr Sebashe. In the circumstances, I am therefore constrained, for the purpose of this application, to accept the applicant's allegations that the respondent never obtained any authority and/or instructions from the applicant to appoint any investigator into the affairs of the said trust, as correct.

130. The impugned costs flow directly from services allegedly rendered after same was procured without requesting quotations from any other service provider or through any bidding process. A procedure deliberately intended to ensure that government, before it procures goods or services, enters into contracts for the procurement thereof, is assured 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 tendered.

131. I could not find any legal authority to support the proposition that the powers of the respondent in terms of section 16 of the Act trump the provisions of the PFMA or the Regulations made thereunder. Nor could I find any, exempting the respondent from the prescripts of the same.

132. It follows from the foregoing that if the appointment of the investigator is hit by section 2 of the Constitution such that it is null and void, it cannot be enforced as a tacit or implied agreement as the respondent seeks to do. It is not only invalid – it is incurably invalid. It is so since a void agreement cannot be enforced indirectly, not even by *estoppel*.

133. It is against this backdrop that I find that the respondent has not exercised its section 16 (2) and (3) powers lawfully. I am therefore constrained to find that regard being had to the facts and circumstances of this case, the impugned order amounts to a gross irregularity, which in turn would clearly have amounted to an irregular expenditure on the part of the applicant, had same been paid. In terms of section 81 of the PFMA, certain contravention of it may amount to financial misconduct. Other contravention may amount to criminal offences, in terms of 86 of the PFMA.

134. It was submitted for the applicant that this Court's intervention will be justified; regard being had to the gross irregularity of the impugned order or the prejudice it is likely to cause to the applicant. In this regard, this Court was referred to ***Adonis v Additional Magistrate, Bellville*** *(supra)*; to *wit*:

> *"Intervention on review will be justified in the case of gross irregularity which is caused or is likely to cause prejudice to the applicant."*

CONCLUSION

135. It is clear from the foregoing that the impugned decision was arrived at arbitrarily or capriciously and as a result of unauthorised or unwarranted adherence to the dictates of another person. I also find that the respondent clearly misconstrued or misconceived the nature of the discretion conferred upon him by section 16 (2) and (3) of the Act and took into account irrelevant considerations or ignored relevant ones.

136. It is also clear, that the respondent in the procurement of the impugned services also did not follow the prescripts embedded in section 217 of the Constitution and the requirements of the relevant provisions of the PFMA and its Regulations. In the premise, I find that the said appointment and

cost arising therefrom, are null and void *ab initio* since same is inconsistent with the Constitution and of course, the PFMA.

COSTS

137. The applicant has prayed that the respondent be ordered to pay the costs of this application, only in the event of the respondent opposing same. The application was opposed by the respondent. There is no reason why costs should not follow the result.

ORDER:

138. In the result, the following order is granted:

(a) The applicant's late filling of the application is hereby condoned;

(b) The cost order of the respondent purportedly granted in terms of section 16 (3) of the Trust Property Control Act 57 of 1988, rendering the applicant liable for the costs of the investigation, in terms of section 16 (2) *ibid*, dated 30 June 2020, is hereby declared invalid; reviewed and set-aside; and

(c) The respondent is hereby ordered to pay the costs of this application.

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APS NXUMALO J

NORTHERN CAPE DIVISION

KIMBERLEY

18 August 2023

For Applicant:	Ms Mankuroane, Mr Ramavhale Office of the State Attorney
For Respondent:	Adv. W Coetzee SC Haarhoffs Inc.