THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 792/10

In the matter between:

TEB PROPERTIES CC **Appellant**

and

THE MEC FOR DEPARTMENT OF HEALTH & SOCIAL DEVELOPMENT, NORTH-WEST **Respondent**

Neutral citation: *TEB Properties CC v The MEC, Department of Health and Social Development, North West* (792/10) [2011] ZASCA 243 (01 December 2011)

Coram: LEWIS, BOSIELO JJA and PETSE AJA

Heard 16 November 2011

Delivered: 01 December 2011

Summary: Contract – legality – whether contract concluded by acting head of the Department of Health and Social Development in breach of prescribed tender procedures is valid – whether the decision of acting head unsupported by rational reasons in concluding such contract is saved by Regulations 13.2 and 16A.6.4 of the Treasury Regulations.

ORDER

On appeal from: North-West High Court, Mafikeng (Semenya AJ, sitting as court of first instance):

The appeal is dismissed with costs which shall include the costs attendant upon the employment of two counsel.

JUDGMENT

PETSE AJA (LEWIS and BOSIELO JJA CONCURRING):

Introduction

[1] This appeal is against the judgment of Semenya AJ sitting in the North West High Court and is before us with his leave.

[2] It concerns the validity of a lease agreement purportedly concluded in November 2008 between the appellant represented by its managing member, Mr Tamsaqa Emmanuel Bozwana (Bozwana), and the Department of Health and Social Development (the department), represented by its former acting head Ms Kgasi (Kgasi) in respect of office accommodation. The lease was to have commenced from 1 December 2009 and to terminate on 30 November 2014. The monthly rental was R3 241 800 excluding VAT.

[3] Before the respondent took occupation of the leased premises Mr Malaka

(Malaka), who had, in the meantime, succeeded Kgasi as acting head of the department gave written notice to the appellant on 9 February 2010 – through its attorneys – of the department's summary termination of the purported lease agreement between the parties.

[4] In terminating the lease Malaka offered three grounds of justification for doing so. First, he relied on the basis that the lease was irregular for want of compliance with statutory prescripts. Second, he asserted that the appellant 'knowingly participated in an irregular acquisition of accommodation and/or office space'. Third, he claimed that the appellant failed to 'provide any proof of his participation in a public bidding [system] for the said office space' nor could it advance any cogent reasons why the irregular lease should not be terminated.

[5] Aggrieved at this change of stance on the part of the department, the appellant instituted legal proceedings on a semi-urgent basis seeking an order declaring the termination of the lease wrongful, and directing the respondent to furnish it with the department's installation requirements as contemplated in the lease and failing that, to pay the agreed rental – limited at the time to the office space available for occupation – with effect from 1 December 2009.

[6] The respondent opposed the appellant's application on a number of grounds, chief amongst which was that the lease agreement sought to be enforced by the appellant was invalid for want of compliance with peremptory provisions of the Constitution, relevant Acts
and Treasury Regulations. It also filed a counter-application in which it sought an order declaring the lease invalid for the same reasons.

[7] In elaboration the respondent contended that the department – to the knowledge of the appellant – purported to enter into a lease agreement without first putting out the proposed lease to tender as is required by s 217(1) of the Constitution, Public Finance Management Act 1 of 1999 (PFMA), North West Tender Board Act 3 of 1994 and the Treasury Regulations issued in terms of PFMA and promulgated in Government Notice No GNR225 in GG27388 of 15 March 2005. It was consequently asserted that all these

statutory prescripts have a common objective, which is to promote a 'fair, equitable, transparent, cost-effective and competitive' process in the procurement of goods or services from service providers.

[8] In the fullness of time the matter came before Semenya AJ who upheld the respondent's contentions granting its counter-application and consequently dismissed the main application with costs.

Relevant statutory matrix

[9] Before the facts in this case are examined and the respective contentions of the parties analysed, it is convenient to set out the statutory matrix relevant to the determination of the issues raised in this appeal.

[10] Section 217(1) of the Constitution reads thus:

'When an organ of state in the national, provincial or local sphere of government, or any other institution 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.'

[11] Section 4(1) of North-West Tender Board Act, as far as is relevant, provides as follows:

'Powers of the board. – (1) The board shall have power to procure supplies and services for the Government and, subject to the provisions of any other Act of the Legislature of the North West, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Government and to dispose of movable Government property, and may for that purpose –

(a) on behalf of the Government, conclude an agreement with a person within or outside the Province for the furnishing of supplies and services to the Government or for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Government property;

(b) with a view to concluding an agreement referred to in paragraph (a), in any manner it may deem fit, invite offers and determine the manner in which and the conditions subject to

which such offers shall be made;

(c) inspect and test or cause to be inspected and tested supplies and services which are offered or which are or have been furnished in terms of an agreement concluded under this section, and anything offered for hire;

(d) subject to the provisions of section 6, accept or reject any offer for the conclusion of an agreement referred to in paragraph (a);

(e) on behalf of the Government, resile from any agreement concluded under this section and, in appropriate cases, claim damages;

. . .

(h) issue directives to departments in regard to the procurement of supplies and services, the hiring or letting of anything, the acquisition or granting of any right, or the disposal of movable property belonging to the Province in order to achieve the objects of the Act.'

[12] Section 38(1)(a)(iii) of PFMA provides that an accounting officer for a department must ensure that the department has and maintains 'an appropriate procurement or provisioning system which is fair, equitable, transparent, competitive and cost-effective' thus echoing the provisions of s 217(1) of the Constitution.

[13] The Treasury Regulations relevant for present purposes are regulations 13.2 and 16A6.4 which respectively provide as follows:

'<u>Regulation 13.2 Lease transactions</u>

13.2.1 For the purpose of this regulation, a lease is an agreement whereby the lessor conveys to the lessee in return for a payment or a series of payments the right to use an asset for an agreed period of time.

13.2.2 A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an asset. Title may or may not eventually be transferred.

13.2.3 An operating lease is a lease other than a financial lease.

13.2.4 The accounting officer of an institution may, for the purposes of conducting the institution's business, enter into lease transactions *without any limitations* provided that such transactions are limited to operating lease transactions.

13.2.5 With the exception of agreements concluded in terms of Treasury Regulation 16, the accounting officer of an institution may not enter into financial lease transactions.

Regulation 16 A 6.4

If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded by the accounting officer or accounting authority.'

[14] In *Chief Executive Officer, SA Social Security Agency* NO & *others v Cash Paymaster Services (Pty) Ltd*[1] this court held that it is implicit in the provisions of s 217(1) of the Constitution that a 'system' with the attributes contemplated therein 'has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of section 217(1) the question whether any procurement is "valid" must be answered with reference to the mentioned legislation or regulation.'

[15] Thus the North-West Tender Board Act 3 of 1994, Public Finance Management Act 1 of 1999 (PFM Act) and the Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the PFM Act are clear examples of legislation contemplated in s 217(1) of the Constitution.

[16] As to the import of regulation 16 A6.4 this court in *Chief Executive Officer, S A Security Agency*[2] said the following:

'The regulation permits an accounting officer or the chief executive officer to deviate from a

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[1] *Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd* [2011] 3 All SA 23 (SCA) para 15.

[2] Para 14.

competitive process subject to conditions. As mentioned it is not contended that a "system" may not provide for such deviations. First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures

that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of regulation.' . . .

Factual background

[17] The material facts relevant to the issues in this appeal are relatively straightforward and not in serious dispute. During June 2008 the department was looking for new office accommodation for its head office personnel as its existing lease agreement was due to
expire at the end of August 2008. The department, through Kgasi, approached Bozwana
and invited the latter to submit a rental proposal – on behalf of the appellant – to what Bozwana stated was a departmental task team headed by Kgasi. This, Bozwana duly did. After intense negotiations spanning some six months and an exchange of correspondence between the appellant and the department, a lease agreement was ultimately concluded in August 2008 in terms of which the department hired office accommodation from the appellant comprising 21612 square metres for a period of nine years and eleven months at a monthly rental of R3 241 800 exclusive of VAT.

[18] Bozwana further stated that during negotiations the appellant was assured by none other than Kgasi herself that the procedure adopted in the conclusion of the lease was above board and regular and that due to the urgency of the matter – given that the existing lease was on the verge of expiring by effluxion of time in August 2008–it was not practicable to procure the office accommodation required through a system of open tender as is otherwise required in terms of the requisite legal prescripts.

[19] As alluded to above the respondent contended that the lease was invalid for the reasons set forth in para 4 of this judgment. Moreover the department contended that the
appellant entered into the lease agreement 'with its eyes open' for it was, even during negotiations, aware that the department of Public Works, despite approving the lease,

had expressed a firm view that 'a lease agreement of this magnitude is normally subjected to an open tender process with a view of maximizing good value for the government and ensuring economic and effective service from the market'.

[20] A reading of the record reveals that a detailed exposition of the factual background is therefore not necessary. This is so because it is common cause that the conclusion of the lease under consideration came about without any reference to the tender board or open bidding process as enjoined by s 217(1) of the Constitution read with both s 38 of the PFMA and s 4 of the North West Tender Board Act. It is for this reason, amongst others, that the respondent sought to avoid the consequences of having concluded the lease in the first instance.

[21] Whilst accepting that the lease was concluded without any reference to an open bidding process as required by the law the appellant contended that it was nonetheless not invalid, because it was not practicable to do so in this instance: concluding that the contract was urgent as contemplated in the very legislative prescripts upon which the respondent relied in voiding the lease. But the respondent's counter to this contention is that the lease agreement was concluded in November 2008 and was to commence on 1 December 2009. The time lapse between the conclusion of the lease and its commencement was intended to afford the appellant time to construct the office accommodation let by it to the respondent. Thus, so the respondent contended, the matter was not urgent and did not justify non-compliance with or waiver of the peremptory statutory prescripts. Nor could lack of proper planning – so it was contended – constitute urgency as contemplated in the Treasury Regulations.

[22] In *Eastern Cape Provincial Government & others v Contractprops 25 (Pty) Ltd*[3] this court said that the statutory prescripts such as the ones under consideration in this appeal in terms of which organs of State are obliged, in concluding agreements for the supply of goods or services, to act openly and in accordance with a system that is fair, equitable, competitive and cost-effective are aimed at 'ensuring good governance in the field of procurement policies and procedures and the priority accorded to fair dealing and equitable relationships among parties to provincial contracts. It is difficult to

[3] *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) paras 7-8.

see any room for the co-existence of a power residing in other entities or persons within the provincial administration to do, without any reference whatsoever to the tender board, that which . . .

empowers the tender board to do. That the tender board acts "on behalf of the province" in arranging to hire premises or in concluding a lease . . . disables the province from acting autonomously in that regard'.

[23] In this court it was argued on behalf of the appellant that in determining the validity or otherwise of the lease under consideration, a clear distinction ought to be drawn between the nature of the powers conferred on Kgasi by, on the one hand, Treasury Regulation 13.2.4 and, on the other hand, Treasury Regulation 16A6.4. This is necessary, so went the argument, because on a proper construction Regulation 13.2.4 confers powers on an accounting officer, such as Kgasi was at the relevant time, to enter into lease transactions without any limitations, provided that such transactions are limited
to operating lease transactions. On the other hand Regulation 16A6.4 authorizes
the accounting officer or accounting authority, if in a specific case it is impractical, to invite competitive bids to procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids are recorded.

[24] Thus with respect to Regulation 16A6.4 Kgasi was at liberty to deviate from following the bidding process only if to do so was impractical, whereas Regulation 13.2.4
gave her a free hand untrammeled by the requirement of a bidding process for as long as the 'exercise of [her] discretionary powers was fair and in accordance with the law and …. with the requirements of empowing legislation'. In support of its contentions in this regard the appellant relied on *Bel Porto School Governing Body & others v Premier, Western Cape & another*[4]. Whilst I have no qualms with the dictum of the Constitutional Court (para 87) which affirms a trite principle upon which the appellant pins its hope, I should, however, say that it does not offer any authority that is tenable

[4] *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) para 87.

in the context of this appeal. Accordingly the argument that Kgasi was not obliged to follow the bidding process required in matters of procurement is unsustainable.

[25] This is particularly so if it is borne in mind that the perceived conflict or

inconsistency between regulation 13.2.4 and regulation 16A6.4 is more apparent than real. If these regulations are read purposively – as we are enjoined by sound judicial authority to do – it becomes plain that the intention of the framers of these regulations was to distinguish between two different situations, the one falling within the purview of regulation 13.2.2 which precludes an accounting officer of an institution from entering into a finance lease, and regulation 13.2.4 in terms of which the accounting officer of an institution is empowered to enter into lease transactions without limitations. To construe the words 'without limitations' to mean that regulation 13.2.4 gives the accounting officer carte blanche would not only lead to an anomalous result but also fly in the face of peremptory statutory prescripts dictating otherwise.

[26] Counsel for the appellant also called in aid the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA)* paras 27 – 31 in support of the proposition that the decision taken by Kgasi to hire office accommodation from the appellant amounts to administrative action, and as such ought to be given effect until it has been set aside, which the respondent did not do. I do not think that the appellant's reliance on *Oudekraal* avails it in the context of this case. In my view, that the respondent filed a counter-application in the court below to have the lease declared unenforceable, is a clear indication that it sought to prevent the implementation of the administrative action concerned on the ground that it was unlawful. Thus the practical effect of the declarator granted by the court below is that the administrative action preceding the conclusion of the lease was of no force and effect. Accordingly it is, under those circumstances, illogical to speak of administrative action that is extant as though the declarator issued in relation to the juridical act flowing from the administration action concerned counts for nothing. In the circumstances there is, to my mind, much to be said for the view that where an organ of state seeks to have a contract, concluded pursuant to administrative action, declared invalid a declaration of invalidity must have the effect of nullifying the administrative action that is the fons et origo of the contract concerned.

[27] However, the appellant had a second arrow to its bow. It argued in the alternative

that s 217(1) of the Constitution provides no more than that when organs of State contract

for goods or services they must do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective' without further providing in terms that 'every procurement contract must comply with these requirements'. It was consequently contended with reference to a number of judgments of the Constitutional Court and this court which held that s 217(1) of the Interim Constitution – which was in identical terms to s 217(1) of the Constitution, '. . . contains no direct prescription regarding legislative content. It merely imposes a minimum desiderata for the system to be created. The content of that system is bound only by the stipulation that it be "fair, public and competitive". The rest is left undefined. Both the legislative framework and its detail are left to the national and provincial legislatures'.[5] The same, it was similarly argued, is the situation in relation to s 38(1)(a)(iii) of the PFMA which in essence echoes the words of s 217(1) of the Constitution. Consequently Treasury Regulation 16A6 which contains a number of general provisions was the system contemplated in both s 217(1) of the Constitution and s 38(1)(a) of the PFMA which, inter alia, allows for the procurement of goods or services by organs of State either by way of a competitive bidding process or by way of quotations which need not be competitive; Regulations 16A6.2 and 16A6.3 set out the requirements for a competitive bidding system for the procurement of goods or services; Regulation 16A6.4 permits of exceptions in circumstances where it would be impractical to invite competitive bids.

[28] It was accordingly argued that regard being had to the fact that: (i) Kgasi was, as the acting head of the department, its accounting officer; and (ii) in that capacity, had the authority to deviate from the bidding process, it was not incumbent upon the appellant to enquire as to whether internal procedural requirements pertaining to procurement of
goods or services without any reference to a bidding process had been complied with by Kgasi. For these propositions the appellant relied on, inter alia, two judgments of

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[5] *Olitziki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 23; *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121(CC) para 33; *City of Tshwane Metropolitan Municipality v RPM Bricks* 2008 (3) SA 1 (SCA) para 15.

this court in *CEO, SA Social Security Agency NO & others*[6] and *City of Tshwane Metropolitan Municipality v R P M Bricks (Pty) Ltd.*[7]

[29] This argument cannot be sustained. In *CEO, SA Social Security Agency*[8] this court, in considering the import of s 217(1) of the Constitution, said the following: (paras 15 and 17)

'Section 217 (1) of the Constitution prescribes the manner in which organs of State should procure goods and services. In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation. The main object of the PFM Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies. . . The PMF Act, read with the Treasury, Regulations, is such legislation . . .'

[30] When the head of a department, as the accounting officer, deems it prudent to deviate from the requirements of the bidding system he would nonetheless still be required to provide 'rational reasons for that decision' as this is a material requirement. The
rationale for this requirement was described as 'obvious' *in Chief Executive Officer, SA Social Security Agency* NO[9]

[31] Moreover the appellant's reliance on *City of Tshwane Metropolitan Municipality* is, in my view, misplaced for at least three reasons. First, the requirements of s 217(1) of the Constitution read with the provisions of s 38(1)(a)(iii) of PFMA and Regulation 16A6.4 are not of a formal nature but are material. Second, the provisions of s 217(1) are peremptory as are the requirements of s 4 of the North West Provincial Tender Board Act. Third the
mischief that these statutory prescripts seek to prevent would be perpetuated and the objective that they seek to promote would be undermined 'if contracts were permitted to be concluded without reference to them and without any resultant sanction of

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[6] Para 15.
[7] Para 11.
[8] Para 21.
[9] Para 21.

invalidity.'[10] As to the provisions of s 4(1) of the North West Tender Board Act, they make it plain that the exclusive power to, inter alia, arrange the hiring and letting of anything on behalf of the Government vests in the Provincial Tender Board. It is thus axiomatic, as this court in fact

found in *Eastern Cape Provincial Government & others*[11], that 's 4(1) disables the province from acting autonomously in that regard'.

The Turquand rule

[32] In *Niewoudt & another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA)

para 8, this court, quoting *Lord Simmons in Morns v Kanssen* [1946] AC 459 at 474 in the

course of considering whether a contract signed on behalf of a Trust which had two trustees was binding, despite that it had been signed by one Trustee only said, with respect to the modern formulation of the rule, that '[P]ersons contracting with a company and dealing in good faith may assume that acts within the constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.' The gist of the argument advanced by the appellant, under the rubric of the Turquand rule, is that logic dictated that the decision taken by Kgasi that it was impractical for the department to procure accommodation through a bidding system was, an internal matter. Consequently, so went the argument, the appellant was in no position to evaluate it to determine its rationality. For this proposition the appellant relied on a number of judgments of this court.[12] To my mind the concession made by the appellant that the Turquand rule only operates in favour of third parties who act in good faith and does not avail a third party

[10] *Eastern Cape Provincial Government & others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) para 8; *Municipal Manager: Qaukeni Local Municipality & another v F V General Trading CC* 2010 (1) SA 356 (SCA) para 11.

[11] Para 7.

[1112] *The Mineworkers Union J J Prinsloo* 1948 (3) SA 831 (A) 847; *National and Overseas Distributions Corporation v Potato Board* 1958 (2) SA 473 (A) 480; *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A) 623; *Grundling v Beyers* 1967 (2) SA 131 (W) 139; *Strydom v Die Land-en-Landboubank van SA* 1972 (1) SA 801 (A) 815*; Sanlam v Rainbow Diamonds* 1982 (4) SA 633 (C) 641.

[13] Para 13.

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who knew that the internal formalities had not been complied with, or was put on inquiry which he failed to make, is fatal to the appellant's argument on this score. I say this because in *Eastern Cape Provincial Government & others*[13]*,* which concerned the validity of two lease agreements of immovable property concluded without any reference to the provincial tender board – and thus peremptory statutory prescripts – this court said the following: 'This is not a case in which "innocent" third parties are involved. It is a case between the immediate parties to leases which one of them had no

power in law to conclude and had been deprived of that power (if it ever had it) in the public interest. The fact that respondent was misled into believing that the department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were *ultra vires* the powers of the department and they cannot be allowed to stand as if they were *intra vires*.'

[33] Although this dictum was made in the context of the doctrine of estoppel there is no reason in principle why it should not apply with equal force to the situation now under consideration, for even on the facts of this case Kgasi, in concluding the impugned lease with the appellant, and for reasons that are neither cogent nor rational, breached peremptory statutory prescripts which are 'designed to ensure a transparent, cost-effective and competitive tendering process in the public interest'. The resultant lease is therefore invalid and cannot be enforced.[14]

Estoppel

[34] I turn now to deal with the last of the appellant's contentions that the lease is valid. The foundation for this contention is that the department – through Kgasi – represented to the appellant by conduct and otherwise that, inter alia, the conclusion of a lease agreement without reference to a bidding process was regular. And relying on such representations the appellant altered its position to its prejudice in that it, inter alia, agreed to construct an office block at great expense in the expectation that it would be able to repay a Bank loan extended to it for the construction of the offices.

[13]

[14]Paras 11-12.

[35] This argument cannot be sustained. In dealing with a situation analogous to that raised in this appeal Marais JA, in considering the respondent's reliance on the doctrine of estoppel in *Eastern Cape Provincial Government & others,*[15] said the following:

'It remains to consider an alternative contention advanced by counsel for respondent: estoppel. There are formidable obstacles in the way of a successful invocation of estoppel. However, even if it be assumed in favour of respondent that estoppel was pertinently raised in the papers (the matter came before the Court *a quo* by way of motion proceedings) and that all the necessary factual

requirements for the doctrine to be applicable were canvassed, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. *(*See *Trust Bank van Afrika Bpk v*
Eksteen 1964 (3) SA 402 (A) at 411H – 412B. This is such a case. It was not the tender board which conducted itself in a manner which led respondent to act to its detriment by concluding invalid leases of property specially purchased and altered at considerable expense to suit the requirements of the department. It was the department. If the leases are, in effect, "validated" by allowing estoppel to operate, the tender board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large. Here again the very mischief which the Act was enacted to prevent would be perpetuated. (Compare *Strydom v Die Land-en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 815E–F)'
(See also *City of Tshwane Metropolitan Municipality*.)[16]

The counter-application

[36] As to the respondent's counter-application the appellant relied on a number of grounds for the proposition that it should have been dismissed. I do not propose to deal with those grounds in this judgment for in the light of what has been set out above, the conclusion reached by the court below cannot be faulted. It therefore follows that for all the foregoing reasons the court below rightly dismissed the main application and correctly upheld the counter-application. In the circumstances I am satisfied that the appeal must fail.

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[15] Paras 11 – 12.
[16] Para 13.

<u>Order</u>

[37] The following order is made:

The appeal is dismissed with costs which shall include the costs attendant upon the employment of two counsel.

X M Petse
Acting Judge of Appeal

APPEARANCES

APPELLANTS: J H F Pistor SC
C J Zwiegelaar
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