

SOUTH AFRICA / JUDGMENT

Special Investigating Unit v Chauke Quantity Surveyors & Project Management in association with listed entities and Others (45529/16) [2020] ZAGPJHC 257 (27 October 2020)

[2020] ZAGPJHC 257

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.A. Meyer

CASE / FILE NUMBER

45529/16

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

Case

No. 45529/16

In

the matter between:

SPECIAL
INVESTIGATING
UNIT Applicant
and
CHAUKE
QUANTITY SURVEYORS & PROJECT
MANAGEMENT
IN ASSOCIATION WITH LISTED ENTITIES First
Respondent
LUCAS
CHAUKE QUANTITY SURVEYORS CC Second
Respondent
CO-ARC
INTERNATIONAL ARCHITECTS
INC. Third
Respondent
AZIZ
TAYOB ARCHITECTS
INC. Fourth

Respondent
MALANI
PADAYACHEE & ASSOCIATES (PTY)
LIMITED Fifth
Respondent
GEORGE
BARBIC & ASSOCIATES
CC Sixth
Respondent
MAREPO
CC Seventh
respondent
NATHOO
MBENYANE ENGINEERING
CC Eighth
respondent
LETCHMIAH
DAYA MANDINDI JHB
INC. Ninth
Respondent
MINISTER
OF PUBLIC
WORKS Tenth
Respondent
Case
Summary: Contract – tender awarded for
professional services following procurement process – whether
organ of state on
principles of contract law entitled to an order
setting aside the contract and amendments thereto, as being unlawful,
invalid and
of no force and effect, and to a declaration that the
fees and disbursements paid for the services were due to an
unauthorised
increase in the scope of the project in contravention of
the contract and/or is unconstitutional, invalid and of no force and
effect.

JUDGMENT

MEYER J

- [1] Pursuant to a public procurement process, the Department of Public Works (the department) and an association of architects, quantity surveyors and engineers concluded a written ‘Standard Professional Services Contract’ on 12 October 2007, in terms whereof the consultants comprising the association performed civil, structural, electrical and mechanical engineering, quantity surveying and architectural services to the department during the period 2008 to 2013 in connection with the construction of one-stop border

facilities at the Lebombo Port of Entry between South Africa and Mozambique. As at November 2013, they were paid a total amount of R84 477 774.99 (excl. VAT) in respect of their professional fees and an amount of R5 876 344.30 (excl. VAT) for their disbursements; the total amount inclusive of VAT being R103 003 696.00.

- [2] The first respondent, Chauke Quantity Surveyors & Project Managers in Association with Listed Entities, is the unincorporated

association of professional service providers consisting of the second respondent, Lucas Chauke Quantity Surveyors CC, the third

respondent, Co-Arc International Architects Inc, the fourth respondent, Aziz Tayob Architects Inc, the fifth respondent, Malani

Padayachee & Associates (Pty) Ltd, the sixth respondent, George Barbic & Associates CC, the seventh respondent, Marepo CC, the eighth respondent, Nathoo Mbenyane Engineers CC, and the ninth respondent, Letchmiah Daya Mandindi Jhb Inc. trading as Chauke Mbenyane Co-Arc Consultants, provided the professional services to the department (the consortium). The Minister of Public Works (the minister) is the tenth respondent. He is cited in his official capacity as the executive authority responsible for the department, and no relief is claimed against him.

- [3] From December 2013 until June 2015, the applicant, the Special Investigating Unit established by Proclamation No. R118 of 2001

(published in Government Gazette No. 22531 dated 31 July 2001), pursuant to the provisions of s 2(1)(a)(ii) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act), investigated the affairs of the department as a result of a referral by the former President of the Republic of South Africa in terms of Proclamation No. R.38 (published in Government Gazette No. 33425 dated 30 July 2010) and as amended by Proclamation No. R27 (published in Government Gazette No.39005 dated 20 July 2015).

- [4] After completing its investigation the SIU obtained a legal opinion at the end of October 2015, on whether it has a cause of action against the consortium. On 3 June 2016, it instituted the present application proceedings in terms of s 4 of the SIU Act for reimbursement of the professional fees and disbursements paid to the consortium. The SIU presently only seeks the relief set out in paragraphs 1, 2, 6 and 7 of its notice of motion, which is for: (a) a declaration ‘that the fees and disbursements paid to the [consortium] were due to an unauthorised increase in the scope of the project for the redevelopment and construction of border facilities at the Lebombo Border Post, in contravention of the agreement concluded between the [consortium] and [the department] on or about 12 October 2007, pursuant to the award of Tender no. HP07/07 (“the agreement”) and/or is unconstitutional, invalid and of no force and effect;’ (b) ‘setting aside the agreement and any purported amendments thereto, as being unlawful, invalid and of no force and effect;’ (c) ‘granting the [SIU] leave to institute action against any or more of the respondents, within 60 (sixty) days from the date of this order, to recover the amount of R103 003 696,00 or any portion thereof;’ and (d) ‘ordering the

[consortium], and any other respondent who opposes this application, jointly and severally the one paying the other to be absolved, to pay the [SIU's] costs of suit'.

- [5] The SIU no longer seeks the relief claimed in paragraphs 3, 4 and 5 of its notice of motion in the present proceedings, which is for: (a) a declaration 'that the consortium or the first to nine respondents, jointly and severally the one paying the other to be absolved, are liable to reimburse to the [SIU] all amounts paid pursuant to the agreement in the sum of R103 003 696.00;'
- (b) payment to the SIU of 'the sum of R103 003 696.00 with interest thereon calculated at the rate of 9% per annum a tempore morae;' and (c) such payment to be effected into the bank account of the State Attorney, Pretoria, within 10 days of an order being granted.
- [6] The application is opposed by all the respondents (the opposing respondents), except the minister. On 24 May 2019, the SIU also

instituted an application in which it seeks condonation for the late filing of the present application '[t]o the extent that this court finds that the main application is a review application, and that it was not brought without undue delay' (the condonation application). The opposing respondents, except for the fifth respondent, also oppose the condonation application. However, at the commencement of the hearing the SIU abandoned the condonation application without tendering the opposing respondents' costs of that application.

- [7] The SIU disavowed any reliance on administrative law. It made it abundantly clear that it does not seek a legality review of the procurement process, the decision to conclude the agreement with the consortium or any decision to extend the scope of the project. It accepts that the procurement process as well as the conclusion of the contract concluded between the department and the consortium pursuant thereto, were lawful. It seeks the declaratory relief and avoidance of the contract on contract law principles only. This accords with the stance adopted by the SIU from the outset.

- [8] In its founding affidavit in the condonation application the SIU states:

'5. The applicant took the view that the main application is based on contractual law principles as it sought the termination of the agreement based on the parties' failure to implement same.

6. The parties implemented a scope of works vastly different to that set out in the agreement and pursuant to briefings held after conclusion of the agreement but without following a procurement process in relation to the professional services to be rendered in respect of the extended scope of works of the project.'

In its replying affidavit in the main application the SIU states that it-

'... seeks the setting aside of the agreement concluded between the Department and the Consortium in October 2007 which is an ordinary civil or contractual remedy'.

And:

‘The applicant’s claim is contractual in nature and, thus, administrative law principles are not applicable.’

[9] In resisting the relief sought by the SIU, the opposing respondents raise a variety of defences, such as that the application is founded on inadmissible hearsay evidence; there are in any event irresolvable material disputes of fact that exclude the granting of final relief in favour of the SIU; its claim for reimbursement of the professional fees and disbursements paid to the consortium, which, according to the SIU, is founded on enrichment, has not been established and has in any event prescribed; upon a proper interpretation of the contract it was implemented in accordance with its terms and the scope of the professional services rendered by the consultants comprising the consortium (as opposed to the scope of the envisaged project) is what was contemplated in terms of the contract; and the SIU is not entitled to have the agreement set aside on contract law principles due to a failure on the part of the department to implement a fresh public procurement process as a result of any increased scope of the project. Some of the defences raised have become academic in the light of the SIU not proceeding with the relief claimed in paragraphs 3, 4 and 5 of its notice of motion and in the condonation application. Furthermore, the SIU does not require this court’s leave to institute action proceedings against the opposing respondents, and the relief claimed to that effect, therefore, requires no consideration.

[10] At the outset of the hearing I reminded the SIU’s counsel that an application for the hearing of oral evidence or referral to trial must, as a general rule, be made in limine and he expressly elected to argue the matter on the papers. In *De Reszke v Maras and others* 2006 (1) SA 401 (C) at 413G-H, Comrie J said the following:

‘Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions’.

And in *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195C-D, the Supreme Court of Appeal re-affirmed that general rule of practice. There, Harms DP said this:

‘An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (*De Reszke v Maras and Others* 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32-33).’

[11] Furthermore, in *National Director of Public Prosecutions v Zuma*

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) at 290D-E, Harms DP said the following:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.’

Even if I were to accept that the version of the opposing respondents is improbable in certain respects, I am called upon to decide this complex and voluminous matter without the benefit of oral evidence and have to accept the facts alleged by them ‘unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could

safely be rejected on the papers’. ‘A finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence’. (Per Wallis JA in *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 18A-B.) That test is not satisfied in casu.

[12] In *National Scrap Metal (Cape Town) (Pty) Ltd and another v Murray & Roberts Ltd and others* 2012 (5) SA 300 (SCA) para 22, Leach JA said this:

‘As was recently remarked in this court, the test in that regard is ‘a stringent one not easily satisfied’. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known dictum in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1970] 1 Ch 345 ([1969] 2 All ER 274 (Ch)) at 402 (Ch) and 309F (All ER):

‘As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.’

Insofar as disputes of fact have arisen on the affidavits I will therefore approach the matter in accordance with the Plascon-Evans test: if those facts averred in the SIU's affidavits which have been admitted by the opposing respondents, together with the facts alleged by the opposing respondents, justify the final relief which the SIU presently seeks (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-I.)

[13] I am also mindful that the SIU's application is almost entirely based on hearsay evidence. The deponent to the founding

affidavit is a former policeman who joined the SIU in 2005. He has no personal knowledge of the contract between the department and the consortium or the events surrounding the contract and the execution thereof. The SIU's case is founded on its

investigation, the documents and information obtained from various people and the view formed by itself. No confirmatory

affidavits by the persons who were interviewed are annexed to the founding affidavit. In *Asla Construction (Pty) Ltd v Buffalo City Metro Municipality* 2017 (6) SA 360 (SCA), Swain JA said this:

‘Strictly speaking, an enquiry as to whether the court a quo was correct in concluding that there had been a serious breach of s 217 of the Constitution in the award of the Reeston contract to the appellant is rendered unnecessary by this conclusion. I will nevertheless do so as the court a quo based its finding on evidence that was largely inadmissible. The contention of the respondent that the requirements of s 217 of the Constitution were not complied with was based entirely on the evidence of Ms York. The evidence was however in most parts inadmissible. The report which she compiled which formed the basis of her affidavit was based on documents provided to her by the respondent, as well as interviews with persons in the respondent’s employ. Documents relied upon in formulating her views were not annexed to her affidavit and not all of the documents referred to were placed before the court a quo. No confirmatory affidavits by the persons she interviewed were annexed to her affidavit. As a result, her evidence in these respects constituted inadmissible hearsay evidence. In addition, she purported to interpret and express her opinion on the contents of certain documents, which was the sole preserve of the court a quo. This constituted irrelevant and inadmissible opinion evidence. The remaining evidence of Ms York, which was admissible and upon which the court a quo was entitled to rely, did not prove that the award of the Reeston contract contravened the provisions of s 217 of the Constitution.’

(Cf. *SOS Support Public Broadcasting Coalition and others v South African Broadcasting Corporation SOC Ltd and others* (81056/14) [2017] ZAGPJHC 289 (17 October 2017) paras 21-23; *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and others* 2019 (4) SA 608 (GJ) paras 74-75.)

[14] The SIU contends that the department and the consortium did not implement the contract in accordance with its terms; they implemented

a scope of work that differed significantly from that which was contained in the contract. The increase in the scope work, it contends was contrary to the delegations, in breach of the agreement, illegal and contrary to public policy, which render the contract as a whole null and void ab initio in accordance with principles of contract law. It says that it no longer seeks the reimbursement relief in these application proceedings, because there are disputes of fact on this issue which cannot be determined in motion proceedings.

[15] The SIU’s case discernible from its founding affidavit is that in June 2007 the consortium submitted a bid to provide professional services in relation to a project for the redevelopment and construction of border facilities at the Lebombo Border Post for which a tender was advertised by the department. On 12 October 2007, the department advised the consortium that its bid had been accepted at a price of R40 028 914.00 (including VAT) subject to the terms and conditions contained in the document and the ‘Standard Professional Services Contract of 2005’. On the same day the department and the consortium concluded the contract for the rendering of professional services by the consortium. The fee of approximately R40 million was based on a percentage of the estimated cost of the project,

which was estimated to be an amount of R300 million.

[16] After the appointment of the consortium, the estimated project cost escalated when it was decided to unbundle the project into 12 different phases which resulted in a final estimated project cost of more than R1,9 billion. In December 2007, the consortium

provided a breakdown of the increase in the initially estimated project cost from R300 million to some R600 million. In a

report dated 25 June 2008, the consortium advised the department that the estimated project cost would escalate to an amount of

R1 664 015 924.57 and the estimated percentage-based fee payable to the consortium to an amount of R176 030 593.62.

In November 2008, in terms of a sketch plan report, the consortium advised the department that the estimated project cost would escalate to R 1 993 003 687.46, and the estimated fee payable to the consortium to an amount of R175 901 655.73. As at November 2013 the total fee paid to the consortium is an amount of R84 477 774.99 (excluding VAT) for completing eight of the twelve phases of the project.

[17] The escalation in the project cost from R300 million to almost R2 billion was, according to the SIU, due to an unlawful increase in the scope of the project. The increase in the scope of the work was, according to the SIU, not authorised or approved by the department. The escalation in the project cost was a significant change in the scope of works in respect of which a fresh procurement process was required but no such procurement process was undertaken. The SIU further contends that the increase in the scope of works was in contravention of the contract because there was no prior written approval from the department for the increase and no written amendment effected to the contract. The department was impoverished, and the consortium enriched at the expense of the department in the amount of R103 003 696, which is the total amount paid by the department to the consortium in fees for their professional services rendered and in disbursements they incurred.

[18] That briefly is the sum of the facts set out in the founding affidavit. (See *Molusi and Others v Voges NO and Others* 2016

(3) SA 370 (CC) paras 27-28; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636F.) The founding affidavit contains no facts which show that the administrative decision to appoint the consortium pursuant to the tender process was unlawful or invalid or that the conclusion of the contract between the department and the consortium was unlawful. The only relief which derives any support from the contents of the founding affidavit is the attack on the validity of the increase in scope of the project. Whether or not the department and the consortium implemented the contract in accordance with its terms calls for the determination of various factual disputes and an interpretation of the pertinent contractual terms. The terms of the contract need to be interpreted in accordance with the

established approach to the interpretation of written instruments set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, and approved by the Constitutional Court in *Airports Company of South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) para 29.

- [19] The consultants comprising the consortium, who are professional engineers, architects and quantity surveyors, maintain that the contract was implemented in accordance with its terms and the fees and disbursements paid to them were duly paid in accordance with the contract. The SIU failed to identify which professional services were rendered beyond the scope of the contract and what amount was paid in excess of the amount anticipated in the contract. It also fails to identify the ‘purported’

amendments to the contract it seeks to impugn.

- [20] The project originated in 1994, when the department appointed Smit and Fisher Architects to investigate the upgrading of the

Lebombo-Ressano Garcia Border Control Post. That was necessary because there had been a dramatic increase in cross-border traffic flow between South Africa and Mozambique. Officials from both countries decided that the project must provide for a one-stop border control post occupied by staff of both South Africa and Mozambique to allow all border facilities to be completed in a single operation. In April 2007, as I have mentioned, the Government of South Africa, through the department, invited tenders for the provision of professional civil, structural, electrical and mechanical engineering services and quantity surveying and architectural services. The consortium was awarded the tender and the contract was concluded on 12 October 2007.

- [21] On 26 October 2007, the consortium attended a meeting chaired by the deputy-director of the department, Mr Sollie Malebye. At this meeting they were informed that an agreement between South Africa and Mozambique had been signed and that a brief had been provided subsequent to the appointment of the consortium. The brief was now to encapsulate the provision of a one-stop border post between South Africa and Mozambique; improve border post flow; promotion of tourism; and the promotion of security. The facility was to be completed by 2010. The consortium set about executing these instructions and on 30 December 2007 delivered a report on its progress including an escalation of the construction cost from what it was in terms of the 1996-1998 design.

- [22] On 29 November 2007, the consortium was instructed to attend a briefing of all stakeholders at the Lebombo Border Post. It became clear at this meeting that the user client departments and the Border Control Operational Coordinating Committee (BCOCC) had an entirely different expectation from what had been envisaged in 1997 and that this would require changes to the design of the border post. On 6 December 2007, the department, in a meeting convened by the project manager, told the consortium that the initial brief was in fact outdated and did not represent the requirements of the BCOCC. The new brief was required consequent to an agreement between South Africa and Mozambique under the

auspices of Mr Alec Irwin and Mr Manuel Chang, ministers in the cabinets of the Republic of South Africa and Mozambique respectively, to operate a combined one-stop border post. The architects were instructed to design the border post in terms of an additional policy brief compiled by Mr Zarnowiecki, a specialist in one-stop and open border controls.

- [23] There were significant differences between the consortium's initial brief and the brief contained in the policy document compiled by Mr Zarnowiecki. The brief allowed for the restructuring of the project into distinct sub-projects in view of the bilateral agreement between South Africa and Mozambique for shared facilities. The consortium proceeded with the project based on this briefing as received from the department and in accordance with the instructions of the department. On 20 January 2008, the consortium, under instruction of the project manager, had a workshop with the department, the BCOC and Mr Zarnowiecki to align the design with the accepted border post policy.
- [24] The consortium presented the master plan capturing the changed requirements to the project manager, the BCOC steering committee and other officials on 7 February 2008, to obtain their approval before further work continued. On 21 and 22 February 2008, it was unanimously agreed by all departments and interested and affected parties present at a meeting attended by more than 150 people in Maputo, Mozambique, that the master plan should be approved and more detailed design should urgently proceed. On 28 February 2008, the deputy director-general of the department, Mr Malebye, instructed the consultants to proceed on the basis of the approvals obtained at the Maputo workshop. The approval had defined the brief for the project. During March and July 2008, several major new items affecting the cost of the project were introduced. On 15 July 2008, the BOCC made a presentation to the National Treasury and on 25 July 2008 the architects reported that the scope of works had been approved and an application for funding of the budget had been made to National Treasury.
- [25] There was a degree of urgency in continuing with the work because the department insisted that all work had to be completed by 2010. As a result, the project manager instructed the consortium to continue with the detailed documentation for the tender in accordance with the overall programme determined by the department. It is the consortium's case that at all stages the escalating costs and scope expansion occurred as a direct result of instructions and approvals received from both the South African and Mozambique departments.
- [26] On 21 September 2008, Mr Thabo Mbeki resigned as President of South Africa. The ministers of finance and of public works were replaced. This resulted in a shift in senior personnel and a realignment of the department's priorities. During this process, the Lebombo one-stop border post was reviewed and new priorities were defined. On 28 November 2008, the consultants comprising the consortium were unofficially informed that the necessary funding for the next financial year had not been budgeted and the project was at risk of being materially modified, phased out or abandoned.

[27] On 16 January 2009, the consortium was informed that cut-backs in the project would seriously affect the project and the one-stop border post was to be placed on hold. At the same time the consortium was asked and agreed to work on an extension to the contract to prepare for the 2010 World Cup to relieve congestion and to speed up border processes. It is the consortium's version that at no stage did any person in government raise any concern with the consultants regarding the estimated cost of the project or budgetary concerns in any shape or form up until the consultants were unofficially notified on 28 November 2008 that the necessary budget for the following year had not been allocated.

[28] On 21 April 2009, after the consortium's request to the department to pay outstanding fees, there was a meeting, and the consultants also wrote a formal letter to the department addressing the queries it had raised. There followed an extensive

engagement between the consultants and the department concerning the payment of the consortium's fees. The consortium

explained the reasons for the increases in the fees of the consultants in detail. The ultimate resolution in January 2010

was that a mutually acceptable estimated project cost had been reached and that the consortium compile its invoices for payment of its percentage based fees on that basis. Over a period of eight months from September 2009, the department's professional

services directorate satisfied itself that the fees claimed by each consultant was contractually due and valid and had been calculated in terms of the contract. The department's chief architect confirmed this.

[29] In March 2010, the consultants reduced their fees to meet the arbitrary construction value established by the department's

quantity surveyor and waived interest on the unpaid fees. Their fees were paid on this basis on 26 November 2010. Most of the projects which form the subject of the contract between the consortium and the department were completed satisfactorily and the department has the benefit of using and occupying the infrastructure which was built.

[30] I now turn to the specific provisions of the contract on which reliance is placed. Clause C3.1 describes the nature of professional

services to be provided as follows:

'This tender is for:

A Professional Service Provider Consortium performing civil, structural, electrical and mechanical engineering, as well as quantity surveying and architectural work on a building and engineering Project and for the Architect to act as principal agent.'

'Clause C3.2 continues with a description of the services required of the civil, structural, electrical and mechanical engineering disciplines (C3.2.1(a)), the quantity surveying discipline (C3.2.1(b) and the architectural discipline (C3.2.1(c)).

[31] Clause C3.2.2 reads as follows:

'Project description

There has been a dramatic increase in cross-border traffic flow between South Africa and Mozambique in recent years.

The existing border control port of entry at Lebombo/Resano Garcia has serious shortcomings which lead to congestion and long waiting periods. There is a lack of adequate parking and inspection facilities, with particular reference to heavy vehicles. No facilities exist for the inspection of rail traffic.

It is the intention to provide a cross-border, one-stop border control port of entry, occupied by staff of both South Africa and Mozambique. Traffic will be able to comply with all formalities in one exercise, without having to travel a short distance across the border for a repeat performance.

Due to the topographical constraints of the area, separate commercial areas will be developed (on both sides of the border) which will also serve as truck back-up areas.'

[32] Clause C3.2.2.1 describes the scope of the project in broad terms as follows:

'The Project will include the following:

- Cross-border, one-stop customs and custom and immigration facilities in a neutral international zone, established by means of a Protocol Agreement and operated in terms of a Bilateral International Agreement.
- The one-stop facilities will consist of-
 - o A facility for freight inspection;
 - o Separate facilities for pedestrians, taxis and passenger busses;
 - o Drive-through fast lane processing of passenger cars;
 - o Passengers with goods to declare or requiring VAT refunds will use the main administration building.
- Separate commercial areas on both sides of the border to allow for freight clearance, inspection and processing. The commercial areas will also provide extensive parking to serve as truck back-up area.
- A cross-border, one-stop rail inspection facility.

The Port of Entry will have to remain in operation throughout the construction of the one-stop Port of Entry which will require a phased approach, and may consist of multiple contracts, to be recommended by the Professional Service Provider Consortium during the preliminary design stage.'

[33] The origin of the estimated project cost of R300 million appears from clause C3.2.2.5 read with clause C3.2.2.3. Clause C3.2.2.5 reads thus:

'Information available from Employer

A preliminary design was prepared (between 1996 - 1998) by the Department of Public Works in preparation for a "Design, Finance, Construct and Operate" contract. The Project was aborted in 1999.

Some previous preliminary design documentation is made available as part of this tender, the detail of which may be used by the Successful Service Provider Consortium. It should be noted, however, that the entire preliminary design process will have to be revisited, to allow for:

- Review of preliminary design provided by client (1998 Version)
- Consultation and liaison with client departments on all technical matters and making modifications to the preliminary design of the works arising out of such consultations
- Refinement of the Preliminary Design and preparation and submission to the client of preliminary plans, drawings and estimates.'

And in relevant parts clause C3.2.2.3 reads as follows:

'For tender purposes, it is assumed that the project will be divided into two contracts as follows:

(a) Bulk Earth Works & Civil Services: Cost Estimate – R160 000 000

...

(b) Construction of Buildings, Inspection Facilities and Related Services: Cost Estimate – R140 000 000'.

[34] The details of the design and scope of the project were yet to be finalised. In terms of the contract the details of the scope of the project was to be determined by the department and conveyed to the consultants comprising the consortium after the award of the tender. In this regard clause 4.1.1 provides as follows:

'Briefing meeting:

The departmental Project Manager shall arrange a briefing meeting, compulsory for all appointed Service Providers, as soon as practicable after the appointment of the professional team as referred to in C3.5.1 hereof, or after the appointment of the core members of the professional team required to commence with the Services if not appointed at the same time; during which meeting the departmental Project Manager, together with any supporting advisers,

will verbally brief the professional team comprehensively regarding the requirements of the Project and the scope of works and hand over, to the Service Providers, all documentation relevant to the execution of the Service.'

[35] In terms of clause C1.1 '[t]he offered price for Professional Service Provider Consortium, inclusive of value added tax, is R40 028 914.02'. That amount was a percentage-based fee on the initial estimated project cost of R300 000.00. Clause C2.1.2.2 specifically provides that '[t]he amount value tendered herein (C1.1) is for tender purposes only and will be amended according to the application of the percentage fee scales vis-à-vis the actual cost of construction' and the contract then has detailed provisions for the calculation of the percentage based fees as well as the payment of disbursements.

[36] Clause 5.5 provides as follows:

'The Service Provider is required to obtain the Employer's prior approval in writing before taking any of the following actions:

4. Deviate from or change the scope of work.'

[37] Clause 3.9 provides as follows

'Sole agreement

The Contract constitutes the sole agreement between the Parties for the performance of the Services and any representation not contained therein shall be of any force or effect. No amendments will be of any force or effect unless reduced to writing and signed by both Parties.'

[38] With reference to the facts averred by the consultants comprising the consortium and the pertinent clauses of the contract to which I have referred, it seems to me that the department and the consortium indeed implemented the contract in accordance with its terms. The contract clearly contemplated a material deviation in the scope of works from the preliminary design that was prepared between 1996 to 1998 and merely sets out the scope of works that were required in broad terms in order to construct a world-class cross-border, one-stop customs and custom and immigration facilities in a neutral international zone between South Africa and Mozambique, established by means of a Protocol Agreement and operated in terms of a Bilateral International Agreement. The details of the design and scope of the project were yet to be finalised and were to be determined by the department and conveyed to the consultants comprising the consortium after the award of the tender. The consultants, in terms of the contract, received percentage-based fees on the estimated cost of the project, and certain of their disbursements as stipulated in the contract were paid.

[39] There was also not a breach of clause 5.5 of the contract, which clause enjoined the consultants to obtain the department's

prior written approval before they deviated from or changed the scope of work. First, the scope of work was only finally determined at the Maputo conference on 21-22 February 2008, and the subsequent introduction of several major items affecting the costs of the project during March and July 2008. Second, the decision to put the project on hold and to reduce the scope of work to cater for border-crossing during the World Cup in 2010 was not that of the consortium, for which it then would have been obliged to obtain the written approval of the department, but that of the department. Third, there is no evidence that the consortium or any of the consultants at their instance and of their own volition deviated from or changed the scope of the project as finally determined. They at all times acted on the instructions of the department.

[40] In any event, even if an obligation was performed in a manner other than that provided for in the contract, and if such performance was accepted by the department as sufficient compliance, then the obligation was discharged. In such a case actual performance is substituted for that contracted for. Here, the department requested and agreed to the manner of performance by the consortium,

it accepted the performance, paid the consortium for the performance, and the consortium's obligations were discharged. As was said by Mpati P in *Kovacs Investments 724 (Pty) Ltd v Marais* 2009

(6) SA 560 (SCA) para 16:

'The principle that emerges from these decisions, and others not mentioned here, including decisions of this court, is that provided the obligations under a written agreement are to be complied with in full, performance of one of the obligations in a manner different from that stipulated in the agreement, and accepted by the other party, would be considered as sufficient, or substantial, compliance and the obligation as having been discharged. And where the different manner of performance was at the request of one party, and orally (or tacitly) agreed to by the other, the fact of such performance, ie that the obligation has been discharged, may be proved by extrinsic evidence. The agreement for a different manner of performance does not have to be in writing.'

(Footnote omitted.)

[41] A critical premise of the SIU's case (as pleaded in the founding affidavit) that the scope increase occurred without the authorisation or authority of the department and outside the scope of the contract, which was lawfully awarded to the consortium, has not been established and is inconsistent with the accepted facts. The SIU's further contention that the extensive increase in the scope of works from what it were in terms of the 1996-1998 design to what it became after the department's briefing on 26 October 2007 and Mr Zarnowiecki's briefing on 6 December 2007 (which briefing sessions with the consortium took place after the contract had been concluded on 12 October 2007), justifies the setting aside of the contract and any 'purported' amendments thereto in terms of contract law principles, as being unlawful and invalid *ab initio*, on the ground that a new procurement process was required within the constitutional and legislative procurement framework (provided by

section 217 of the Constitution, the Procurement Act 5 of 2000 and the Public Finance management Act 1 of 1999), conflates the principles of administrative law and the principles of contract law and is diametrically inconsistent with its express abandonment of any reliance on the principles of administrative law. The principles of administrative law have no role to play in the dispute between the SIU and the consortium.

[42] In *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* [2008] ZASCA 112; 2009 (1) SA 163 (SCA), the State Tender Board cancelled a contract that was concluded pursuant to the acceptance of a tender. There, Brand JA said the following:

‘[18] What remains are observations originating from comments by the court a quo which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the tender board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these comments by the court a quo, let me clarify: I do not believe that the principles of administrative law have any role to play in the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection Services (Western Cape CC) and Others* 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) at paras 11 and 12). The fact that the tender board relied on authority derived from a statutory provision (ie S 4(1)(sa) of the State Tender Board Act) to cancel the contract on behalf of the government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the tender board relied were, *inter alia*, reflected in a regulation. All that happened, in my view, is that the provisions of the regulations – like the provisions of ST36 – became part of the contract through incorporation by reference.’

[43] The dispute in Thabiso, as is the case in the present matter, turned on the contract entered into between two parties: In Thabiso whether the facts relied on by the government in cancelling a tender could sustain the cancellation under the relevant clause in the contract, and in the present case whether the facts relied on by the SIU could sustain an avoidance of the contract concluded between the department and the consortium on contract law principles. (Cf. *South African National Parks v MTO Forestry (Pty) Ltd and Another* 2018 (5) SA 177 (SCA) paras 23-26.)

[44] Our law of contract does not recognise any cause of action entitling an aggrieved party to have an agreement set aside as being void *ab initio* on the basis of a breach of that agreement or due to defects in the implementation of that agreement. Breach of contract gives rise to either an entitlement to cancellation and/or damages depending *inter alia* on the materiality of the breach and the terms of the contract. But no breach of the contract can result in that contract being held void *ab initio*. Christie’s *Law of Contract in South Africa* 7th Ed p 616 para 14.1 states:

‘The remedies available for a breach or, in some cases, a threatened breach of contract are five in number: specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice amongst these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be over-compensated.’

- [45] The SIU’s abandonment of their belated attempt at also seeking a legality review and of its application for condonation for not initiating such legality review proceedings without undue delay, are fatal to the granting of the relief they persist with in this application. The procurement of goods or services by an organ of state constitutes administrative action. (Mostert and Others v Nash and Another 2018 (5) SA 409 (SCA) para 30.) The SIU seeks the avoidance of the contract essentially on the ground that a new procurement process was required within the constitutional and legislative procurement framework once the decisions to expand the contract or, in the words of the SIU to ‘substantially altered the scope of the works’, had been taken. Those decisions, logic dictates, also constitute administrative action by an organ of state and are subject to the principles of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and of constitutional legality. An organ of state cannot bring a review of its own decision under PAJA, because the rights in s 33 of the Constitution are available only to private parties and PAJA was enacted to give effect to those rights, but it can initiate a legality review of its own decision. (See State Information Technology Agency SOC Ltd v Gijma Holdings (Pty) Ltd 2018 (2) SA 23 (CC).)
- [46] It is the legality of those decisions that are, in substance, under attack, but until invalid administration action is set aside by a court in proceedings for judicial review, they exist in fact and have legal consequences that cannot merely be overlooked. (See Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004
- (6) SA 222 (SCA) para 26; MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014
- (3) SA 481 (CC) paras 100-103). Section 172(1)(a) of the Constitution makes it mandatory for a court to declare conduct that is inconsistent with the Constitution invalid. Section 172(1)(b) gives a court the further power to make any order that is ‘just and equitable’. The SIU, however, did not seek to review and set aside those decisions in terms of a legality review. (Cf. Minister of Transport NO and Another v Prodiba (Pty) Ltd [2015] 2 All SA 387 (SCA).)
- [47] To sum up: On the facts presented by the consultants comprising the consortium and ex facie the terms of the contract it must be accepted that the contract contemplated that the consortium would be paid its fees as a percentage of the total estimated construction costs, in accordance with the ECC tariff, and that the total construction costs might escalate on the instructions of the department. The contract also contemplated the extensive increase in the scope of work from what it was in terms of the 1996-1998 design to what it became after inter

alia the department's briefing on 26 October 2007 and Mr Zarnowiecki's briefing on 6 December 2007. The instructions which led to the increased scope of work were repeatedly conveyed to the consultants by officials at the highest levels of the department and in accordance with the express terms of the contract. The consortium's performance was not only on the instructions of the department but was also accepted by the department.

[48] The SIU has not established a cause of action on principles of contract law that would entitle it to an order setting aside the contract and any 'purported' amendments thereto, as being unlawful, invalid and of no force and effect and a declaration that the fees and disbursements paid to the consortium were due to an unauthorised increase in the scope of the project in contravention of the contract and/or is unconstitutional, invalid and of no force and effect.

[49] In the result the following order is made:

(a) The application is dismissed, and the applicant is to pay:

(i) the first, second, third, fourth, sixth, eighth and ninth respondents' costs, including those of two counsel;

(ii) the fifth respondent's costs; and

(iii) the seventh respondent's costs, including those of two counsel.

(b) The applicant is to pay:

(i) the first, second, third, fourth, sixth, eighth and ninth respondents' costs of opposing the interlocutory application for condonation, including those of two counsel; and

(ii) the seventh respondent's costs of opposing the interlocutory application for condonation, including those of two counsel.

P.A. MEYER

JUDGE OF THE HIGH COURT

Judgment:

27 October 2020

Hearing: 02 June 2020

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Instructed by: State Attorney, Pretoria

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Prepared on 12 October 2026 · Esheria