REPORTABLE/NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: 398/2016

Date heard: 29 August 2018

Further submissions: 28 September 2018

Date delivered: 6 November 2018

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY **PLAINTIFF**

AND

ERASTYLE (PTY) LTD
(Registration Number: 2012/038907/07) **1ST DEFENDANT**

MPILO SAKHILE MBAMBISA **2ND DEFENDANT**

MAMISA CHABULA – NXIWENI **3RD DEFENDANT**

MHLELI MLUNGISI TSHAMASE **4TH DEFENDANT**

TREVOR HARPER **5TH DEFENDANT**

MZWAKE CLAY **6TH DEFENDANT**

ROLAND WILLIAMS **7TH DEFENDANT**

WALTER SHAIDI **8TH DEFENDANT**

JUDGMENT

Goosen J

[1] The plaintiff instituted action against the defendants in which it seeks orders setting aside decisions and/or conduct of the second and third defendants (as former office bearers or employees of plaintiff) and, pursuant thereto, payment of certain sums of money paid to first defendant. The money claims formulated against the several defendants are founded upon separate causes of action.

[2] The plaintiff's claims arise from the appointment by it of the first defendant as a Lead Consultant for the development of a comprehensive communication and marketing strategy in respect of the plaintiff's Integrated Public Transport System (IPTS). The said appointment occurred in or about February 2014. Pursuant to said appointment certain sums (being R5 263, 2517. 89; R1 390, 800. 00 and R984, 197. 21) were first paid to the first defendant.

[3] The second defendant is a former Municipal Manager of the plaintiff. The third defendant was formerly employed by the plaintiff as Executive Director: Public Health and was from time to time appointed as Acting Municipal Manager of the plaintiff. The fourth defendant was formerly employed by plaintiff as the Project Manager: Integrated Public Transport System. The fifth defendant was employed as the Chief Financial Officer of the plaintiff. The sixth defendant was employed as the Chief Operating Officer of the plaintiff. The seventh defendant was employed as the

Director: Communications of the plaintiff. The eighth defendant is employed as the Executive Director: Infrastructure and Engineering.

[4] It suffices for present purposes only to outline the nature of the plaintiff's claims in broad terms. It is unnecessary to set out the detailed factual allegations and legal contentions upon which the claims are founded. In essence it is alleged that the appointment of the first defendant occurred in breach of the plaintiff's Supply Chain Management Policy duly adopted by plaintiff in accordance with its obligations set out in s 217 (1) of the ***Constitution***[1] and s 111 of the ***Local Government: Municipal Finance Management Act***[2] (***MFMA***). It is further alleged that payments made to the first defendant pursuant to the said appointment were irregular and/or were made in breach of the policy and the provisions of the ***MFMA***. The breaches are alleged to have occurred consequent upon conduct of the second to eighth defendants.

[5] Based on these essential allegations the plaintiff claims orders:

- declaring certain decisions of the second and third defendants to be unlawful and invalid and that certain payments pursuant thereto constitute unauthorised and irregular expenditure;
- declaring the appointment of first defendant to be unlawful and void *ab initio.*

[1] Constitution of the Republic of South Africa , Act No 108 of 1996
[2] Act No, 56 of 2003

The plaintiff also claims, contingent upon the aforesaid, re-payment of the amount paid to first defendant, as against the first defendant on the basis of unlawful enrichment; as against the second, third and fifth defendants on the basis of their alleged breach of the ***MFMA***. The plaintiff also claims payment of amounts paid to the first defendant as against the fourth to eighth defendants on the basis of the breach of their duties to the plaintiff as employer. The plaintiff's claim as against the sixth and seventh defendants is founded upon an unlawful and intentional, alternatively negligent, misrepresentation to plaintiff giving rise to unlawful and irregular expenditure on the part of plaintiff.

[6] The defendants have each filed special pleas and have pleaded over in relation to the merits of the plaintiff's claims. The first defendant raised two special pleas. The first is to the effect that the plaintiff is obliged, since it seeks a review of its own decisions on the basis of legality, to institute proceedings in terms of Rule 53 and pursuant thereto to file a record. Since it has not done so and has not sought condonation therefor, the procedure adopted constitutes an abuse of the process and the summons therefore falls to be set aside. I shall refer to this as the "Rule 53 Special Plea". The second special plea is to the effect that a review must be brought within a reasonable time. Since it has not been and since no condonation application has been brought, the court is precluded from entertaining the action. I shall refer to this as the "Delay Special Plea".

[7] The second defendant has filed special pleas in identical terms to the first defendant's special pleas. He has also specially pleaded that insofar as the plaintiff

seeks recovery of irregular expenditure as defined by s 32(1)(c) of the ***MFMA***, the plaintiff is obliged to allege and prove that such claims are not precluded by the exception contained in s 32(2)(b) of the ***MFMA***. It is alleged that in the absence of an investigation contemplated by the section the claim against second defendant is premature. I shall refer to this as the "Section 32(2) Special Plea". The third, fourth, fifth, sixth, seventh and eighth defendants all rely on an identical special plea.

[8] At a pre-trial conference held on 9 July 2018 an agreement was reached between the parties[3] to separate certain issues for adjudication and an application was brought pursuant to this agreement, on notice to all the defendants and on 30 July 2018 an order was granted in terms of Rule 33(4). Accordingly when the matter came to trial on 29 August the following issues fell to be determined:

> "1. That the questions of law and fact which arise from the Defendants' special pleas in the main action which are more specifically described in 1.1 to 1.3 below ("the separated issues") be heard separately from and determined prior to the remaining question of law and fact (if any) arising from said special pleas and the questions of law and fact which arise from the Plaintiff's particulars of claim and the Defendant's pleas ("the remaining issues"):
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> 1.1 The questions of law and fact arise from:
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> 1.1.1 Paragraphs 1 to 5 of the First Defendant's special plea;
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> 1.1.2 Paragraphs 1 to 5 of the Second Defendant's first special plea;

[3] The third, fourth and seventh defendants were not represented at the Pre-Trial Conference.

1.2 The questions of law and fact which arise from:

1.2.1 Paragraphs 9 and 12 of the First Defendant's second special plea;

1.2.2 Paragraphs 9 and 12 of the Second Defendant's second special plea;

1.3 The questions of law and fact which arise from:

1.3.1 Paragraphs 13 to 18 of the Second Defendant's third special plea;

1.3.2 Paragraphs 1 to 6 of the Third Defendant's special plea;

1.3.3 Paragraphs 1 to 4 of the Fourth Defendant's special plea;

1.3.4 Paragraphs 1 to 6 of the Fifth and Eighth Defendant's special plea;

1.3.5 Paragraphs 1 to 6 of the Sixth Defendant's special plea;

1.3.6 Paragraphs 1 to 6 of the Seventh Defendant's special plea.

2. That only the separated issues be determined on the date of setdown of the trial being 29 August 2018.

3. That all further proceedings be stayed until the separated issues have been disposed of.

4. That the Third, Fourth and Seventh Defendants pay the costs of this application."

[9] At the hearing counsel for the plaintiff indicated that second defendant's legal representative had advised that he was not proceeding with its special plea. In

addition the third and seventh defendants had filed notices to abide the decision of the court in the separated issues. The fifth and eighth defendants had withdrawn their special pleas and tendered the plaintiff's costs. Only the first defendant was represented at the hearing of the separated issues.

[10] It will be gleaned from the aforegoing that, in effect, two special pleas need to be determined, namely the Rule 53 special plea (which includes the aspect relating to the condonation for non-compliance with the Rule) and the Section 32 special plea. I was advised that the factual question as to whether the proceedings seeking review relief were brought within a reasonable time is to be determined at trial.

[11] The Section 32 special plea may be disposed of readily. The essence of the plea is that in order to sustain a claim for recovery of irregular expenditure it is necessary for the plaintiff to allege and prove that such claim is not precluded by s 32(2)(b) of the ***MFMA***. Since the plaintiff has not pleaded this and since the investigation contemplated by the section has not been conducted the claim is premature. Section 32(2) provides as follows:

> "(2) A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure-
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> (a) in the case of unauthorised expenditure, is-
>
> (i) authorised in an adjustments budget; or

(ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council."

[12] In ***Nelson Mandela Bay Metropolitan Municipality v Petuna*** Chetty J was called upon to consider, on exception, a similar contention relying upon s 32(2)(b) of the ***MFMA***. The learned judge said the following:

"[4] The second and third exceptions are similarly without any merit and spawned by disingenuousness. The fallacy in the submissions advanced arises from an erroneous understanding of Chapter 4 of the Act. Civil proceedings to recover unauthorised, irregular or fruitless and wasteful expenditure is an obligation which a municipality is statutorily enjoined to institute. The plaintiff's cause of action is clearly posited upon the provisions of s 32(1)(c) of the Act which provides that "any political office bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure;"."

The learned judge, after quoting the section, went on to state that:

> "The language of the section is clear and unambiguous and has only one meaning. The submission advanced on behalf of the excipient that the proviso thereto precludes the institution of civil proceedings in the scenarios *postulated appears to be based upon a misconception."*

[13] The judgment of Chetty J is dispositive of the matter. A reading of s 32(2)(b) makes it plain that a municipality is obliged to recover unauthorised, irregular or fruitless expenditure unless the expenditure has been authorised or has subsequently been certified to be irrecoverable and written off. No preconditions are set out for recovery in terms of s 32(1)(c). In the circumstances the Section 32 special pleas raised by second, third, fourth, sixth and seventh defendants fall to be dismissed. That leaves only the Rule 53 special plea to which I now turn.

[14] The first defendant's special plea is premised upon the contention that Rule 53 provides for an obligatory procedure by which a review – whether founded upon a legality challenge or not – is to be conducted. It was submitted that Rule 53 confers certain rights upon parties to the procedure and that the failure to comply with the Rule, in this instance, would occasion prejudice to the first defendant. In the absence of an application for condonation such prejudice cannot be countenanced.

[15] In argument Mr *Beyleveld*, for the first defendant, conceded that Rule 53 is not peremptory, inasmuch as non-compliance therewith may be condoned. He

argued however, that a party may not circumvent the Rule and thereby impact upon the procedural rights of an interested party. In developing the argument reliance was placed as a passage in ***MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute***[4](***Kirland***) where Cameron J (writing for the majority) held:

> "[82] All this indicates that this court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable, the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

[16] It was submitted by Mr *Beyleveld* that ***Kirland*** is authority for the proposition that the plaintiff, in this instance, was obliged to bring an application in terms of Rule 53 to set aside the decision/decisions of its officials as condition precedent to its claims against the first defendant. Mr *Beyleveld* argued that review proceedings are

[4] 2014 (3) SA 481 at par 82

rarely commenced by way of summons. In this regard he pointed to ***Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd***[5] (***Adfin***) as being one of the very few instances where this procedure was countenanced.

[17] Mr *Buchanan*, for the plaintiff, argued that Rule 53 does not establish an obligatory procedure. With reference to the Rule it was argued that its provisions, in any event, find no application in circumstances where the review is one sought at the instance of the decision-maker. The Rule confers upon the applicant – the party seeking to challenge an administrative decision – the right to secure production of the record upon which the decision-making was founded and the further right to supplement or vary the grounds upon which it invokes the court's jurisdiction. These provisions seek to ensure that the party who ordinarily would have no access to the process of decision-making is able to place the relevant material before court for its consideration. These mechanisms, it was submitted, cannot apply to the decision-maker, as applicant, since it is already in possession of the record and no basis exists to allow it to supplement or vary the grounds for relief. If such party is to succeed it must necessarily place before the court the relevant record as foundational to its cause of action. In the instant case no procedural prejudice is occasion to the first defendant. It has notice of the pleaded grounds upon which the plaintiff seeks to impugn its own decisions; and it is entitled to discovery of all relevant documents which would otherwise form part of the record. (It is apposite to mention here that the question of delay (i.e. compliance with the obligation to bring a review within a reasonable time) is a matter which the parties agreed would be dealt

[5] 1991 (2) SA 366 (C)

with at trial. Accordingly such 'prejudice' as may arise in regard to that question is irrelevant for present purposes.)

[18] The question regarding whether Rule 53 is peremptory or not was considered in ***Jockey Club of South Africa v Forbes***[6](***Jockey Club***). The court explained the Rule as follows[7]:

> "Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record. In terms of para (b) of subrule (1) the official concerned is obliged to forward the record to the Registrar and to notify the applicant that he has done so. Subrule (3) then affords the applicant access to the record. (It also obliges him to make certified copies of the relevant part thereof available to the Court and his opponents. The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of

[6] 1993 (1) SA 649 (A)
[7] At 660E-H

an interlocutory application, to 'amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit'. Subrule (5) in turn regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under Rule 6 for the filing of the applicant's reply and for set down."

The court went on to state[8]:

"Counsel for the Jockey Club made much of the peremptory language in which Rule 53 is couched, for example 'all proceedings . . . shall be . . .' in subrule (1) and the repeated use of 'shall' in the succeeding subrules. Clearly that use of language cannot be overlooked, but equally clearly it is to be understood conceptually and contextually. The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the Rule, slavishly - and pointlessly - to adhere to its provisions. After all:

'(R)ules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts. . . .'

(Per Van Winsen AJA in Federated Trust Ltd v Botha 1978 (3) SA 645 (A) at 654C-D.)

[8] At 661E-J

I am in full agreement with the view expressed by Eloff DJP in S v Baleka and Others 1986 (1) SA 361 (T) at 397 in fin-398A:

'Rule 53 was designed to facilitate the review of administrative orders. It created procedural means whereby persons affected by administrative or quasi-judicial orders or decisions could get the relevant evidential material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could be attacked.'

I am also in agreement with the observation of the learned Judge in the succeeding sentence:

'There are numerous decisions in our own Courts in which the validity of administrative rulings was considered and adjudicated on in proceedings other than conventional review proceedings. . . .'"

[19] The finding, in the ***Jockey Club*** matter, that it cannot have been the intention that the Rule obliges a party seeking to have a decision or conduct set aside on review, to employ the procedure provided by the Rule, is particularly apposite to the present. No purpose could be served by the facilitative procedure of the rule in circumstances where the plaintiff, who seeks the relief, is possessed of both the reasons for the decisions and the record relevant thereto. In any event such procedural benefits as the Rule confers upon a party seeking to impugn administrative action or conduct on review can be waived by that party (see ***Adfin*** (*supra*) at 368G-H).

[20] Mr *Beyleveld* conceded, properly in my view, that the only 'procedural prejudice' to which the first defendant could notionally point was the fact that no record is filed. He accepted however that this 'deficiency' can be adequately addressed by the discovery process for which provision is made in trial matters. In the circumstances the 'prejudice' is illusionary.

[21] The first defendant's reliance upon the ***Kirland*** passage referred to above also does not assist. The passage must be read in its proper context. In the introductory paragraph of the majority judgment Cameron J framed the issue as follows:

> "[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective — as the evidence here suggests — government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it."

[22] The court then furnished its essential reasoning in the following terms:

> "[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. 36 Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.
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> [66] That has not happened here. Kirland instituted these proceedings to ensure that an approval communicated to it, and in reliance on which it acted, prevails. In answer, the government respondents made no move to set aside the approval. They took the attitude that they could withdraw or ignore it. They branded the approval a 'non-decision'. Their principal deponent resisted Kirland's application on the simple basis that the defective decision did not exist. That was a fundamental error. For the decision does exist. It continues to exist until, in due process, it is properly considered and set aside."

[23] It is against this background that paragraph 82 of the judgment is to be understood. The case was not concerned with the procedural question as to whether Rule 53 ought to be employed. Rather it was concerned with a broader question – namely whether it is necessary for a state party which seeks to impugn its own decision or conduct to initiate a formal review process. The affirmative answer does not, in my view, translate to a finding that this can only be done in accordance with Rule 53.

[24] In this matter the plaintiff has indeed formally initiated a process to invoke the court's authority to review the conduct and decisions of plaintiff's office bearers. It has given due and proper notice to parties affected thereby; it has fully pleaded the basis upon which it seeks relief; and it has framed the declaratory relief it seeks as relief precedent to its consequential monetary claims against the defendants. It has therefore met the procedural requirements without prejudice to the rights of the defendants. Again it must be emphasised that the question of delay (which was relevant to the reasoning in ***Kirland***) is, for present purposes, irrelevant since that is to be addressed at trial. Since the plaintiff is not obliged to proceed in terms of Rule 53, it is not required to seek condonation for its so-called non-compliance with that procedure.

[25] In ***State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd***[9](***Gijima***) it was held that in seeking to review its own decisions an organ of state is entitled to rely upon the principle of legality. The court said[10]:

> "[39] Pharmaceutical Manufacturers tells us that the principle of legality is 'an incident of the rule of law', a founding value of our Constitution. In Affordable Medicines Trust the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:
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> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'
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> [40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what s 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review."

[26] The use of the phrase 'legality review', in my view, implies no specified procedure. It refers to the substantive legal basis upon which a court exercises its

[9] 2018 (2) SA 23 (CC)
[10] At par 39 and 40

adjudicative function and formulates relief appropriate to its findings as it is required to do in terms if s 172 of the ***Constitution***. The exercise of this power must of course be formerly initiated by due process so that the court adjudicating the matter may decide, in accordance with relevant legal principles, whether or not to exercise its powers.

[27] After judgment was reserved in this matter counsel for the first defendant referred me to a judgment of the Gauteng North Division, ***Bowman Gilfillan Incorporated v Minister of Transport in re: Minister of Transport v Mangisi George Mahlalela***[11](***Bowman Gilfillan***). Plaintiff's counsel filed further written submissions with leave of first defendant's counsel.

[28] The ***Bowman Gilfillan*** judgment deals with an exception taken to particulars of claim. The plaintiff in that matter instituted action in which it claimed a declaration that a contract between it and the excipient (amongst other parties) was invalid and of no force and effect. It also sought payment of amounts paid pursuant to the contract. Exception was taken on the basis that (i) the conclusion of the contract had occurred pursuant to an administrative decision to award the contract to excipient following a tender process; (ii) the administrative decision had not been set aside; and (iii) no cause of action was accordingly set out for the relief sought.

[11] (15806/2016) [2018] ZAGPPHC 474 (24 May 2018)

[29] The judgment of Mokoena AJ proceeds along the lines of determining (a) whether the contract was concluded pursuant to administrative action and (b) whether the claim seeks to impugn that action. It was found that the administrative decision constitutes administrative conduct; that unless it is set aside it remains valid; and that the claim purports to be based in contract rather than administrative law. Based on this the court concluded that the particulars do not disclose a cause of action.

[30] It is necessary to highlight a few passages in the judgment since it is these, no doubt, upon which first defendant relies. Relying upon ***Kirland***, Mokoena AJ said the following:

> "[73] As pronounced in the Kirland matter, the plaintiff may not simply ignore the administrative decision which led to the appointment of the defendants as it remains valid and enforceable until it is properly set aside by a court of law. The rules of law dictates that organs of state are obliged to use proper legal processes in order to challenge their own decisions.
>
> [74] It must be emphasised that the appointment of the defendants was made by the incumbent of the office empowered to make such a decision and who was an accounting officer as envisaged in the PFMA. Such an administrative decision remains effectual and told properly set aside by means of review proceedings and not by simply invoking common law principles of contract.

[75] It therefore follows that the appointment of the defendants remain an administrative action that is binding to the parties until properly challenged and set aside by means of a review application."

[31] As pointed out above, ***Kirland*** was not concerned with the question as to the **procedure** by which the review was to be conducted. In the ***Kirland*** matter the proceedings were application proceedings. It is in that context that the finding that the MEC could not ignore the administrative conduct and that a counter application would be required, was made. Mokoena AJ correctly concluded with reference to ***Department of Transport and Others v Tasima (Pty) Ltd***[12](***Tasima***) that a state party cannot simply ignore an administrative decision. What is required is an order of court to the effect that it is unlawful[13]. However, neither the ***Tasima*** not ***Gijima*** matters decided that such order may only be obtained by way of application proceedings. Mokoena AJ came to the following conclusion:

"[84] Having regard to the authorities canvassed above, it therefore follows that: –

84.1 the decision to appoint the second, third and fourth defendants constitute an administrative action which must be challenged by means of a review application and not by merely ignoring the alleged defective administrative action

[12] 2017 (2) SA 622 (CC)
[13] ***Tasima*** at par [149]

and to proceed with action proceedings premised on common law principles of contract and remedy;

84.2 an administrative decision to appoint the second, third and fourth defendants remain valid until set aside by means of a review application;

84.3 even where the plaintiff is entitled to set aside its own decision, it cannot do so without having regards to the interest of the second, third and fourth defendants who are indeed third parties who may be directly affected. In this instance, the second, third and fourth defendants are entitled to the procedural benefits and defences which they may raise in a review application, be it on PAJA and/or premised on legality and/or as envisaged in Rule 53. A declaratory relief sought by the plaintiff will deny the defendants, in *casu*, and other parties who might find themselves in this situation to rely on the remedies afforded to them, in review proceedings."

[32] It is clear from this that the learned judge based the decision upon the fact that the plaintiff was not seeking to invoke the court's review jurisdiction. The learned judge's reference; however, to 'review application' and 'review proceedings', in my view, goes beyond the authorities to which reference is made. To the extent that the findings suggest that application proceedings (more particularly Rule 53 proceedings) are peremptory, they are contrary to established authority. The further suggestion that a review (whether founded upon ***PAJA*** or the principles of legality)

by action proceedings necessarily denies an affected party procedural benefits and defences is equally contrary to authority.

[33] In my view, the judgment in ***Bowman Gilfillan*** goes no further than to determine that in the absence of proceedings to set aside administrative action or conduct a party is bound thereby and that in the circumstances of that case no cause of action was established. In this instance the plaintiff has initiated such proceedings. It has fully pleaded the basis for its challenge to the legality of the decision(s) and seeks a court order setting same aside as condition precedent to its monetary claims. It will no doubt be required, at trial in due course, to adduce evidence to prove the factual allegations made and the legal contentions on which it relies. The defendants remain vested with all of the procedural protections provided by the Rules, including the right to obtain full and proper discovery of the relevant records and documents.

[34] In the circumstances the first and second defendant's first special plea cannot succeed.

[35] I therefore make the following orders:

1. The first and second defendants' first special plea is dismissed with costs such costs to include the costs of two counsel.

2. The second defendant's third special plea and the third, fourth, sixth and seventh defendants' special pleas are dismissed with costs, such costs, if any, to include the costs of two counsel.

_____

G.G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the Plaintiff:	*Adv R.G. Buchanan SC assisted by Adv J.G. Richards*
Instructed by:	*Gray Moodliar Attorneys*
Obo the first Defendant:	*Adv A. Beyleveld SC*
Instructed by:	*Fredericks Incorporated*
Second Defendant:	*Tania Koen Attorneys*
Third Defendant:	*In Person*
Fourth Defendant:	*In Person*
Fifth & Eights Defendants:	*Kaplan Blumberg Attorneys*

Sixth Defendant: *Goldberg & Victor Inc*

Seventh Defendant: *Zolile Ngqeza Attorneys*