REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 102773/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

8 APRIL 2025

DATE SIGNATURE

In the matter between:

HLANIKI INVESTMENT HOLDINGS (PTY) LTD **APPELLANT**

And

THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

TWALA J (MOKOSE J and MOHOSI J Concurring)

Introduction

[1] There are two central issues which are raised in this appeal: first is whether the Court is entitled to *mero motu* raise a point of law when determining the issues; and second is the duration of the service level agreement.

[2] This is an appeal against the whole of the judgment and order of the court a quo, per Francis J, handed down on 3 November 2022 which dismissed the appellant's claim and that each party pays its own costs. An application for leave to appeal was dismissed with costs by the court a quo. Leave to appeal to this Court was granted on petition by the Supreme Court of Appeal.

Factual Background

[3] The facts foundational to this case are mostly common cause and are as follows: on 4 December 2015 the respondent awarded a tender and appointed the appellant as a project manager of a project known as the Lungile Mtshali Poverty Alleviation Project *("the Lungile Mtshali Project").* On or about December 2015 the appellant and the respondent concluded a contract, the service level agreement, *("SLA").* In terms of the preamble to the SLA, the appellant was appointed as the project manager for the Lungile Mtshali Project for a period of three years commencing on 11 December 2015 to 11 December 2018.

[4] It is undisputed that the letter of appointment mentions the period of appointment as thirty-six (36) months and the SLA concluded between the parties thereafter in its preamble mentions the period of the contract as from 11 December 2015 until 11 December 2018. It is further common cause that the SLA only mentions and deals with phase 2. There were disagreements between the parties as early as March 2016 with regard to certain provisions of the SLA. The disagreements persisted until September 2016 when the respondent instructed the appellant to suspend its performance under the SLA. Further, that under the mayoral decision the Lungile Mtshali project, as it was detailed in the SLA, would not continue and would no longer be honoured by the respondent.

[5] The appellant accepted the repudiation and demanded the damages arising out of the repudiation – hence the institution of these proceeding to claim damages for the loss of its bargain being the net profit which it would have made in relation to the portion of the outstanding period for phase 2 and phases 3 and 4 of the Lungile Mtshali project in the remaining years of 2017 and 2018.

[6] The appellant's claim for loss of profit in relation to the outstanding period of phase 2 was settled between the parties and the settlement agreement was made an order of Court in terms of Rule 34 of the Uniform Rules of Court.

[7] During the hearing of this case, the Court a quo, realising from the evidence that was tendered before it, that a point of law was implicated in terms of section 33 of the Local Government: Municipal Finance Management Act[1] *("MFMA")*, directed the parties to make submissions before judgment was made. The appellant failed to make submissions but instead debated the matter on its heads of argument.

[1] 56 of 2003.

Parties' Submissions

[8] The appellant submitted that the Court a quo had no power to invalidate the contract between the parties. The respondent never pleaded non-compliance with section 33(1) of the MFMA as a defence. There was no reason for the appellant to amend its plea to address the issue of compliance with section 33(1) of the MFMA since there was no case made out by the respondent in the papers for it to answer. The submissions requested by the Court a quo when it mero motu raised the issue of non-compliance with section 33(1) of the MFMA, so the argument went, are not evidence and can therefore not be relied upon.

[9] The respondent never sought the invalidation or review of the contract on the basis of section 33(1). The respondent sought the agreement, upon which already a settlement has been reached between the parties and made an order of Court, to be interpreted so as to cut down its duration to twelve (12) months to render it lawful. The Court a quo ignored the provisions of clause 9.1 of the SLA dealing with the interpretation of the SLA and granted an order which none of the parties sought.

[10] There is nothing wrong with the Court raising a point of law mero motu, so it was contended, but it is for the Court to deal with issues that are presented by the parties for adjudication. It is for the parties to set out and define the nature of their dispute in the pleadings and for the Court to adjudicate that dispute and that dispute alone. In the instance as in this case, where the Court mero motu raises a point of law that emerges from the evidence and is necessary for the decision of the case, the Court must ascertain that no prejudice will be caused to any party by it deciding the point of law.

[11] The appellant submitted further that the Court a quo had no power to raise new issues not transversed in the pleadings and should not have insisted that the parties deal with the point of law by way of submissions since that is not

evidence. It was not the case for the respondent that there was a breach of section 33(1) of the MFMA nor was there any evidence before the Court that the SLA is in breach of the provisions of section 33(1). There was no basis – on the pleadings, facts or argument – for looking into whether and then holding that the contract was illegal.

[12] For the Court to raise and deal with the issue of illegality, so says the appellant, the illegality must have been obvious ex facie and it must be necessary. It was not clear from the face of it since there was no evidence led in court to demonstrate whether or not the contract was one contemplated in section 33(2) in which case section 33(1) would not apply. The Court a quo should have ignored the point of law since it was not clear from the papers and was not necessary to decide the case. There was no evidence before the Court that the contract was not one contemplated in section 33(2) to enable it to arrive at the decision to invalidate the contract as illegal.

[13] The appellant says the duration for the contract between the parties was a period of three years. The SLA states in its preamble that the appellant is the appointed project management company for the Lungile Mtshali Poverty Alleviation Project from 11 December 2015 to 11 December 2018. Further, clause 1.1.5 did not give the end term of the SLA but provided that the contract would be from the date of signature, which is 23 December 2015 until revised or amended.

[14] Clause 1 of the Bid Document[2] provides that the project duration for LMCHP Phase 2 is twelve (12) months from the start of the contract. However, the Project Management agreement will be for a period of 3 years (36 months) after signing the appointment letter and service level agreement, subject to performance reviews which will be undertaken on an annual basis. It was contended further that no performance reviews were undertaken, and no amendments were made

[2] Ekurhuleni Metropolitan Municipality Contract Number: A – CRM 01/2016.

to the contract. The letter of appointment has the duration of the appointment as from the date of award until 30 June 2018.

[15] Since it is not clear what clause 1.1.5 of the contract means, so it was argued, regard must then be had to the preamble to give it a meaning. Clause 1.1.5 leaves the contract operative beyond twelve months until it is 'revised or amended or updated'. In the interpretation of the preamble, one would never arrive at the conclusion that the duration of the contract is twelve months as contended by the respondent. The preamble should be read and interpreted as part of and embodying the terms of the contract, even if it is not an operative provision of the contract.

[16] Although the SLA mentioned only phase 2, the things to be done and services to be provided in phases 3 and 4 were for the same as those listed and provided in phase 2. The appellant says that the contract only specifies the duration of twelve months in relation to phase 2 and that this period applies solely to phase 2 of the project. However, the appellant, so it was contended, was appointed as project manager of the Lungile Mtshali project for a period of three years up until the 11 December 2018. The amount to be paid for the project was a sum of R9 025 800 (nine million, twenty-five thousand, eight hundred rand) (Exclusive of Vat) per annum and with an escalation clause based on the consumer price index.

[17] The appellant says that although the SLA provided for its bi-annual review, no such review had taken place. There is no provision in the SLA which entitles the respondent to terminate the contract – hence it was not entitled to repudiate the contract as it did on 3 September 2016. Furthermore, so it was contended, it is impermissible to import the post contractual conduct of the parties to vary, contradict or add to the terms of the contract. Most importantly, for subsequent conduct to be admissible, it must disclose the common intention of the parties.

[18] The post-contractual conduct the respondent relied upon is an impermissible attempt to say that the contract intended to say twelve months, even though it did not. The contract does provide for what its duration is, but does not say twelve months. The issue of twelve months, so the argument went, is only mentioned in the bid document which says the duration of phase 2 is twelve months. The post conduct of the parties sought to contradict what the preamble and clause 1.1.5 says and therefore is in admissible.

[19] The appellant contended further that, there are four addenda which were proposed amendments to the terms of the SLA. However, all of these proposed amendments were never intended to address the duration of the SLA. Instead, they focused on the provisions of clause 5, which dealt with the project value, the onboarding of phases 3 and 4, the five deliverables on phases 3 and 4 (similar to phase 2) and the escalation which is in line with CPI.

[20] Only the fourth addendum, so says the appellant, attempts to amend the duration of the SLA since it states that the contract extends beyond the respondent's third financial year end, which is 30 June 2018. Accordingly, the respondent will have to apply for a deviation to extend the contract period from 30 June 2018 until 11 December 2018 to be in line with the dates stipulated in the initial agreement. Again, there is no proposed amendment of the duration of the SLA from twelve months to any other period.

[21] There was no common understanding that the contract was for twelve months which period is revealed by the subsequent conduct of the parties. The fourth proposed amendment discloses a different intention which is that the contract was always intended to be of three years' duration. Again, so the argument went, it is clear from the letter of support for appellant from Mr Murphy on 1 August 2016, the report to the mayoral committee on 12 January 2017 and the evidence of Ms Ntsikeni, who was involved in the project on behalf of the respondent, that the contract was for a period of three years.

[22] The respondent in its submission conceded that it never requested an order to set aside the SLA, nor did it seek to review or launched the review proceedings against the SLA. It further conceded that, on 3 September 2016 it repudiated the contract between itself and the appellant. However, the appellant in these proceedings sought to claim damages to place itself in a better position than it would have been had the respondent performed in terms of the SLA.

[23] The respondent says that the Court is entitled to mero motu raise a point of law where it has not been pleaded by a litigant, and it appears from the evidence which is led before the Court. This is permissible provided that it is necessary and is clear from the evidence before the Court and there is no prejudice to any party to the proceedings. The Court a quo was correct and conducted the issue of the point of law properly by requesting submissions from the parties in order to avoid a miscarriage of justice, and the contract itself was sufficient evidence before the court.

[24] The MFMA was supposed to have regulations promulgated to put into effect certain of its provisions including section 33(2). But no regulations have been promulgated for the MFMA and therefore the evidence the appellant asserts should have been placed before the Court a quo to determine whether the agreement is one contemplated in section 33(2) was not required as section 33(2) does not find application in this case. The evidence required which implicates section 33(1) is the contract itself and no other evidence was necessary for the determination of this case.

[25] Furthermore, so it was argued, the proposed amendments were cognisant that the contract was going to run beyond three financial years and Mr Maluleke also accepted under cross examination, that the deviation approval was intended to address the fact that the amendments would allow the contract to run beyond the normal three-year budgetary cycle of the respondent. Since the contract was to

run beyond the normal three-year budgetary cycle, then it implicated the provisions of section 33(1) of the act.

[26] The respondent says that clause 3 of the SLA is clear in that it states that the role of the appellant as the appointed project management company is to facilitate a fair transparent selection and recruitment of phase 2 participants. Under the heading of 'key tasks', the appellant is to implement the LMCDP phase 2 at approved wards in accordance with the Norms and Standards of the programme throughout the contract period. Clause 5 of the SLA deals with the total contract amount to be paid for phase 2 as a sum of R9 025 800 (nine million, twenty-five thousand and eight hundred rand (excluding VAT) and has five items as deliverables.

[27] The respondent submitted further that the SLA was for a period of one year and it was in relation to phase 2 - hence no mention of phases 3 and 4 is made in the SLA. There was no contract for phases 3 and 4, so the argument, for it was meant to be attended to later by the parties and that is why there was an attempt to amend the SLA, but those amendments were not effected. When considering the subsequent conduct of the parties, it is clear that the proposed amendments were intended to include phases 3 and 4 which are not part of the SLA since it pertained only to phase 2 which was to run for a period of twelve months.

[28] It is clear from Clause 1 of the Bid Document that the duration of the LMCDP phase 2 was for a period of 12 months from the start of the contract because the respondent was anticipating a merger with Lesedi Local Municipality which merger would have added a further 14 wards which would have translated to a further 420 learners. The preamble is merely a recital and is formulated and framed as a statement of fact, but it is not a term of the agreement between the parties, nor can it impose substantive obligations on the parties.

[29] Further, so it was contended, the preamble says that the appointment is from the date of award whereas the clause 1.1.5 of the SLA says it is from the date of signature of the agreement. Clause 1.1.5 says that the agreement is until it is revised/amended or updated whereas the preamble says the appointment is until 11 December 2018. Therefore, so says the respondent, the SLA must be interpreted on its terms and no consideration must be given to the preamble for it is inconsistent with the terms of the SLA. Further, the preamble contradicts the letter of appointment which records that the appellant was appointed for the period 3 December 2015 until 30 June 2018.

[30] The respondent says that the appointment of the appellant was an administrative decision, and nothing should be made of the letter of appointment since it is superseded by SLA which was concluded by the parties. The appointment letter, so it was argued, appointed the appellant for a period of two and half years from December 2015 to June 2018 as a project management service provider subject to the appellant concluding an SLA. The terms of the SLA do not have to be the same as those contained in the letter of appointment.

[31] The respondent submitted that, a final and critical interpretative principle relevant to this case is that, where the contract is capable of more than one meaning, the Court should place that construction upon it which upholds it rather than that which makes it illegal and void.

[32] On the proper interpretation of the SLA, so it was argued, the SLA was only to endure for a period of 12 months and was subject to a bi-annual review. Because of the bi-annual review, which was meant to either revise, amend or terminate the SLA, the respondent was entitled to review and to terminate the SLA. The respondent terminated the SLA in September 2016 and since it terminated the agreement earlier than it was entitled to, which was in December 2016, it settled the claim of the appellant's damages for the remaining period of 2016.

[33] The plain contextual evidence of paragraph 1 of the Bid Document, so says the respondent, is that bidders were asked to submit on the basis of performing in respect of phase 2, a one-year project. The successful bidder would be appointed for a longer period to also address subsequent phases subject to performance reviews. The SLA provided for phase 2 only and left it to the parties to negotiate amendments and revisions that would incorporate the subsequent phases. The price escalations were not included in the SLA which reflects that the parties would price phases 3 and 4 once they were incorporated into the bid.

[34] The respondent says that the appellant attempted to introduce the annual escalation clause to the amounts as proposed in the pricing for phases 2, 3 and 4 only during the proposed amendments long after the SLA was concluded. This is so, so says the respondent, because as at March 2016 the appellant's understanding was that the SLA made no provision for escalations and would have to be amended if escalations were to be addressed. The SLA did not make provision for a duration of 11 December 2015 to 11 December2018 – hence the proposed amendment of clause 1.1.5 which defines the duration of the SLA.

[35] The understanding of Mr Murphy and Ms Ntsikeni that the SLA was to operate until December 2018, so it was contended, is consistent with an interpretation of the SLA providing for only phase 2 and leaving it to the parties to negotiate the terms of phases 3 and 4. There can be no doubt that the parties intended when signing the SLA only to regulate only phase 2 of the project – hence no mention of other phases, the pricing for those phases, nor was the escalation included in the SLA nor did the parties address the possible incorporation of the Lesedi Municipality into the respondent.

Legal Framework

[36] In order to put matter in the correct perspective, it is useful to restate the provisions of the MFMA as they are relevant to the determination of the issues in this case which are as follows:

"Contracts having future budgetary implications

33(1). A municipality may enter into a contract which will impose financial obligation on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if –

(a) The municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved –

(i) Has, in accordance with section 21A of the Municipal Systems Act-

(aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and

(bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and

(ii) Has solicited the views and recommendations of –

(aa) the National Treasury and the relevant provincial treasury;

(bb) the national department responsible for local government; and

(cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department;

(b) The municipal council has taken into account –

(i) The municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;

(ii) The impact of those financial obligations on the municipality's future municipal tariffs and revenue

(iii) any comments or representations on the proposed contract received from the local community and other interested persons; and

(iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph *(a)* (ii) *(cc)*; and

(c) the municipal council has adopted a resolution in which-

(i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;

(ii) it approves the entire contract exactly as it is to be executed; and

(iii) it authorises the municipal manager to sign the contract on behalf of the municipality.

(2) The process set out in subsection (1) does not apply to-

(a) contracts for long-term debt regulated in terms of section 46 (3);

(b) employment contracts; or

(c) contracts-

(i) for categories of goods as may be prescribed; or

(ii) in terms of which the financial obligation on the municipality is below-

(aa) a prescribed value; or

(bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.

(3) *(a)* All contracts referred to in subsection (1) and all other contracts that impose a financial obligation on a municipality-

(i) must be made available in their entirety to the municipal council; and

(ii) may not be withheld from public scrutiny except as provided for in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(b) Paragraph *(a)* (i) does not apply to contracts in respect of which the financial obligation on the municipality is below a prescribed value.

(4) This section may not be read as exempting the municipality from the provisions of Chapter 11 to the extent that those provisions are applicable in a particular case.

[37] At this stage, it is apposite to mention the clauses of the service level agreement which are of relevance to the discussion that will follow which state the following:

"Preamble

WHEREAS the Department Customer Relations Management (CRM) is responsible for the implementation of the flagship poverty alleviation pro1ect – Lungile Mtshali within Ekurhuleni, Metropolitan Municipality (EMM),

AND WHEREAS Hlaniki Investment Holdings (Hlaniki) is the appointed project management company to manage the Lungile Mtshal1 Poverty Alleviation Project on behalf of the City of Ekurhuleni from 11 December 2015 until 11 December 2018.

NOW THERERFORE all parties to listed on this service level agreement agree as follows –

Clause 1. 1. 5

DURATION OF THE AGREEMENT:

from the date of signature of the Agreement until the agreement is revised/amended or updated.

Clause 1.2.3

REVIEW OF THE SLA:

SLA will be subject to biannual reviews by all Parties signatory to the agreement

Clause 3

ROLE Of HLANIKI INVESTMENT HOLDJNGS AS THE APPOINTED PROJECT MANAGEMENT COMPANY:

Hlaniki will play a critical role across the lifecycle of the Lungile Mtshali Poverty Alleviation Project programme including but not limited to –

(a) …

(b) ,

(c) Facilitate a fair transparent selection and recruitment of phase 2 participants

(d) …

KEY TASKS

TASKS

(a) …

(b) …

(c) Implement the LMCDP Phase 2 at approved wards in accordance with the Norms and Standards of the programme. Where a ward has a different approach to the one agreed, work with the ward in ensuring that they achieve the programme objective throughout the contract period.

Clause 5

PROJECT VALUE

The total amount for the completion of this project is R9 025 800.00 excluding VAT and escalations as set out below …….

Clause 7

DISPUTE RESOLUTION

7.1 The parties should always ensure and promote coordinated and harmonious working relationship to avoid disputes amongst the departments.

7.2 Should any party wish to declare a dispute in terms of this agreement the dispute shall be declared in writing an attempt to resolve the dispute via a meeting between the Head of Department Customer Relations Management within 7 (seven) calendar days of said declaration shall be made and a written copy of said dispute delivered by hand to the City Manager or his/her designated official

7.3 In the event that the Head of Department Customer Relations Management is unable to resolve the dispute for any reason the dispute

shall be referred in writing to the City Manager or his/her designated official within 7 (seven) calendar days for resolution The City Manager's decision shall be final and binding upon the parties.

Clause 8

NON-COMPLIANCE. WITH LEGISLATION AND EMM POLICY

Any Party to this agreement or any other interested person may report to the City Manager any alleged non-compliance with any provisions of the SLA or the laws of the Republic of South Africa

8.1 NON-PERFORMANCE OF HLANIKI AS PROJECT MANAGER

a) In the case of Hlaniki's contract not performing in line with the agreed SLA Objectives and scope of the Project, the issue wi11 be REPORTED to the City Manager in addition to being discussed with Hlaniki

b) The escalation to the City Manager in line with Service Delivery Commitments that EMM has to its citizens. It must therefore be noted that the City Manager will take appropriate "MEASURES and CHARGES" so that there is an improvement to the service delivery provisions for the citizens who are part of the Poverty Alleviation Project.

8.2 …

Clause 9

APPLICABLE POLICIES AND COMPLIANCE WITH THE LAW

9.1 The interpretation performance and implementation of this agreement shall be governed by and construed in accordance with the Ekurhuleni Metropolitan Municipality and policies and laws of the Republic of South Africa

9.2 Without limitation of any obligations and/or rights under any law, the Parties shall comply with any other by-law, policies, acts, regulations nationally and/or internationally recognized standards, in which by law and practice the party is required to adhere to."

Discussion

[38] There is no doubt in my mind that the determination of this case lies in the interpretation of the SLA. Furthermore, it is trite that where it is clear that the intention of the parties is to conform with the law, the court should interpret the contract, if possible, in such a way that it does not transgress the provisions of any statute[3].

[39] It is now settled that the general rule of interpretation of documents is that regard must be had to the ordinary grammatical meaning of the words used in the document, the context in which they are used and the purpose of the document. Put differently, in interpreting a document regard must be had to the triad which is the words, context and the purpose of the document.

[40] In *Tshwane City v Blair Atholl Homeowners Association*[4] the Supreme Court of Appeal stated the following:

> "It is fair to say that this Court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] All SA 262; [2012] ZSCA 13), stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an unbusinesslike result. These factors have to be considered holistically, akin to the unitary approach."[5]

[3] *Kotze v Frankel and Co* 1929 AD 418.
[4] 2019 (3) SA 398 (SCA).
[5] Id para 61

[41] It is trite law that a Court may mero motu raise a question of law even if it is not pleaded by any of the parties. However, there are certain requirements that need to be complied with to avoid a miscarriage of justice in the case. Put in another way, when a point of law is evident from the pleadings, but the parties have misunderstood or overlooked it, the court is not only entitled but also obliged to raise it and require the parties to address it. That is subject to the proviso that no prejudice will be caused to any party by it being decided.

[42] The appellant in its assertion that the Court had no power to invalidate the contract, referred this Court to the case of *Fischer v Ramahlele*[6] where the Supreme Court of Appeal stated the following:

> "Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.[7]
>
> It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is

[6] (203/2014) [2014] ZASCA 88 (4 June 2014)
[7] Id para 13

> sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.[8]"

[43] The Court a quo cannot be faltered in deciding this case on the question of law only. The Court a quo was dealing with a contract which has direct implications on the public purse which made it necessary for it to determine the issue of the point of law. To avoid any of the parties suffering any prejudice or to cause a miscarriage of justice in deciding the case on the point of law, the Court a quo correctly invited the parties to make supplementary submissions. It was clear ex facie the contract (SLA), which was the requisite evidence before the Court, and the extensive evidence led by the appellant's witnesses, that the parties had overlooked the question of law which was the provisions of section 33(1).

[44] There is no merit in the contention that there was no evidence before the Court a quo to demonstrate whether the contract falls within the remit of section 33(2) or 33(1). The evidence before the Court was that the contract is for a period of three years, from the date of 11 December 2015 to 11 December 2018, and the financial year end of the respondent is 30 June in each year. Thus, the contract was extending beyond the three-year budgetary cycle – hence compliance with section 33(1) was necessary.

[45] Moreover, when considering the subsequent conduct of the parties when they were negotiating the amendments to the SLA, one of the proposed amendments was the regularisation of the contract in order to make it to comply with the provisions of section 33(1). The parties realised that the contract was of long duration as it extended beyond the three budgetary years of the respondent. This was also confirmed in evidence by the witness, Mr Maluleke in his testimony

[8] Id para 14.

before the Court a quo. In my judgment the Court a quo was entitled and correctly decided the point of law which was ex facie before it and was necessary in deciding the case.

[46] Relying on the case of *Kotze* quoted above, the appellant contended that the Court a quo should have interpreted the contract in a manner that made the contract legal and not void since it is clear that the intention of the parties was to conform with the law. I disagree. It was impossible for the Court a quo to ignore the illegality of the contract which is dealing with the public funds and has direct impact on the budgeting of the respondent which in the end will affect service delivery. The Court cannot simply interpret the contract to save it when it is clear that it does not comply with the law.

[47] Before this Court and relying on the case of *South African Reserve Bank v Khumalo and Another*[9] that it was entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court a quo, the respondent persisted with its contention that the SLA was concluded in relation to phase 2 only and was to endure for a period of twelve months at a total sum of R9 025 800. Further, the respondent contended that the Court a quo made an error by not interpreting the contract to avoid making it illegal and void since the intention of parties was clearly not to engage in an illegal contract.

[48] In the *South African Reserve Bank* case, the Supreme Court of Appeal stated the following:

> "An appeal lies against an order that is made by a court and not against its reasons for making the order. It follows that on appeal a respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court G below. In this court the respondent did not seek to support the order on any ground other than that, given by the court below, which was that the regulation under which it was made did not conform to the authorising statute and was thus invalid, subject to one subsidiary issue that I will come to. This means that the principal

[9] (235/2009 [2010] ZASCA 53.

> issue on which the appeal turns is whether the full bench was correct in its conclusion on the invalidity of reg 22C (1) for the reasons that it gave. If the respondent fails on that issue and on the subsidiary issue that I referred to, then the order that it made falls to be set aside, and the challenge to the validity of the order falls to be dismissed. The remainder of the notice of motion did no more than foreshadow a review application that was yet to be brought and need not concern us."[10]

[49] Considering the finding of this Court that the Court a quo could not be faltered in its decision, it is unnecessary to devote time on the question and issues raised by the respondent regarding the duration of the SLA.

Conclusion

[50] The ineluctable conclusion is that the Court a quo cannot be faltered having decided the case on the question of law which it raised mero motu for it was entitled to do so when it appeared ex facie the evidence before it. The Court a quo could not simply ignore the illegality committed by parties on the basis that it was not intended for this case has implications on the public purse and the budget of the respondent which will impact on service delivery. The inescapable conclusion is therefore that the appeal falls to be dismissed.

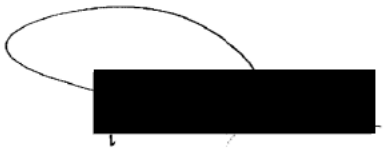
Costs

[51] In its judgment, the Court a quo found it necessary to order that each party pays its own costs. However, the Court a quo adopted a different view when it was dealing with the application for leave to appeal and ordered the appellant to pay the costs of that application. Thus, I can find no reason why the costs in this appeal should not follow the result.

[10] Id para 4.

[52] In the result, the following order is made:

The appeal is dismissed with costs including the costs of two counsel where employed on the Scale C.



TWALA M L

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Date of Hearing:	**19 March 2025**
Date of Judgment:	**8 April 2025**
For the Appellant:	Advocate L Sisilana SC Advocate S Scott
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Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 8 April 2025.