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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH, PRETORIA DIVISION

In the matter between:

Case no 52530/11

28/6/2012

NATIONAL DEPARTMENT OF PUBLIC WORKS

Applicant

(DELETE WHICHEVER IS NOT APPLICABLE)

and

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

ROUX PROPERTY FUND (PTY) LTD

3/6/12

Respondent

SIGNATURE

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JUDGMENT

On the application in terms of Rules 6(15), 23(2) and 30

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1. This is an unusual interlocutory application launched by the applicant in the principal application. In this principal application the applicant seeks a declaratory order that a lease agreement entered into between the parties to the principal application on the 13<sup>th</sup> July 2010 is and was invalid *ab initio*.
2. The applicant is the National Department of Public Works of c/o the State Attorney, Manaka Heights, 8<sup>th</sup> floor, 167 Thabo Sehume Street (formerly Andries Street), Pretoria; hereinafter referred to as the applicant.
3. The respondent is Roux Property Fund (Pty) Ltd, a company of 5 Alexander Road, Irene; hereinafter referred to as the respondent.

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4. The main affidavit upon which the applicant relies for the relief sought in the principal application is sworn to by Mr Samuel Vukela, who deposed thereto in his then capacity as the acting Director-General of the applicant National Department. In essence the applicant's case in the principal application rests upon the assertion that the lease agreement was entered into by the applicant without observance of essential statutory and administrative procurement procedures that constitute conditions precedent for the lawful conclusion of such agreements. The individuals who acted on behalf of the applicant in concluding the lease agreement are, *inter alia*, alleged not to have been authorised to do so. This case is presented by Mr Vukela acting in his aforesaid capacity on behalf of the applicant.
  5. The respondent opposes the principal application but did not participate in the interlocutory proceedings other than instructing counsel on a watching brief. It is unnecessary to delve into the issues that are contested in the principal application.
  6. Shortly after the founding affidavit was sworn to Mr Vukela was placed on 'special leave' and is of the view that he is made the 'sacrificial lamb' being led to slaughter to atone for the errors of others in entering into the lease agreement, which has been the subject matter of an investigation and report by the Public Protector, has achieved notoriety and has become a contentious issue in the political arena.
  7. After unsuccessfully attempting to engage the former Minister of Public Works and the present incumbent of that office on the issue of his status within the Department, Mr Vukela decided to prepare what is termed a 'supplementary affidavit' revealing 'further disclosure' of facts not mentioned in the founding

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affidavit which is said not to contain any 'false or misleading allegations', but not 'the full picture and all the facts'. The reason for the failure to make a full disclosure in the founding affidavit is described as follows:

*'...I deposed to an Affidavit which was prepared by the Attorneys of the Applicant, who is my employer. I did not sign the aforementioned Affidavit without difficulties. As stated in my Founding Affidavit, I had to sign the Affidavit as I was "directed" by the then Minister of Public Works to do so. In such circumstances, to be brave and refuse to sign the Founding Affidavit would have been regarded as being disloyal, insubordinate and would have conceivably also prejudiced my employment.'*

8. This explanation is in dispute, but the implications of the 'supplementary affidavit' and the reasons for its composition need not be considered at this stage. The 'supplementary affidavit' was filed on behalf of Mr Vukela himself by his own attorneys under the present case number and was served on both parties to the principal dispute. This elicited a Notice in terms of Rules 6 (15), 23 (2) and 30 by the applicant, describing the filing of this document as an irregular step liable to be set aside because the 'supplementary affidavit' was filed by a person who is not a party to the principal suit and has no personal interest in the outcome of the principal application; quite apart from which, and in addition, the contents of the 'supplementary affidavit' are vexatious, irrelevant and scandalous. Mr Vukela has instructed counsel to oppose the application to set aside the filing of his affidavit or to have part or all of it struck out.
9. The applicant's case is clearly unanswerable. It is common cause that the deponent to the 'supplementary affidavit' is not, cannot be and does not

intend to become a party to the principal proceedings. This status disentitles him from participation in the fray. The principle that a witness whose only interest lies in the personal effect the outcome of proceedings between third parties may have upon him has no *locus standi* to participate in the latter has been succinctly stated by the unanimous Court in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (A) at para [85]:

*'[85] Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal.<sup>12</sup> The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal.<sup>13</sup>*

12. Mr Erasmus SC has argued that the facts averred by Mr Vukala are relevant and even essential to a proper consideration of the principal dispute and that it is in the interests of justice to place the same on record in these proceedings. However much the allegations made in the 'supplementary affidavit' may be of interest to the parties to the dispute – some, if not the majority, are clearly aimed at blaming the respective political heads of the applicant and their attorneys for the deponent's personal predicament and are therefore indubitably irrelevant, vexatious and liable to be struck out on that ground – the approach adopted by Mr Vukela loses sight of the manner in which civil litigation is conducted in our law. Absent any extraordinary circumstances – none exist in this matter – the courts decide disputes as formulated by the parties and on the facts presented by them. Judges generally have no investigative functions. If any of the factual averments contained in the 'supplementary affidavit' are of importance to the disputing parties the latter can ensure that they find their way into the arena in the usual fashion.

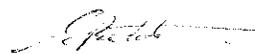
11. The 'supplementary affidavit' must therefore be struck out. Although the issue is a limited one and raises no new points, the applicant and Mr Vukela were both represented by

senior counsel. Applicant employed two counsel. Given the profile of this matter, the personalities involved, the very considerable amount of taxpayers' money at stake and the fact that both counsel have been involved in the matter from its inception this was a prudent decision and the applicant is entitled to the costs occasioned thereby.

The following order is made:

The 'supplementary affidavit' is struck out with costs to be paid by Mr Vukela, including the costs of two counsel.

Signed at Pretoria on this 28<sup>th</sup> day of June 2012.



E BERELSMANN

Judge of the High Court

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Case no: 52530/11

Date of the hearing : 21 May 2012

Judgment delivered on : 28 June 2012

Counsel for the Applicant : Adv J J Gauntlet SC with Adv F B Pelsler

Instructed by : State Attorney , Pretoria

Counsel for the Deponent : Adv M C Erasmus SC

Instructed by : Langa Attorneys, Johannesburg