IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 22307/2018
Date of hearing: 31 July 2023
Date delivered: 23 August 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

23/8/23 .....
DATE SIGNATURE

In the matter between:

SPECIAL INVESTIGATING UNIT **First Applicant**

ACTING NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES **Second Applicant**

and

MASETLAOKA SCOTT WILSON (PTY) LTD ALSO KNOWN AS MSW PROJECT MANAGERS AND CONSULTING ENGINEERS (PTY) LTD **Respondent**

JUDGMENT

SWANEPOEL J:

BACKGROUND

[1] This is an application in which the applicants seek the review and setting aside of a decision by the second applicant ("DCS") to participate in an agreement concluded between the respondent ("MSW") as lead consultant for a consortium of companies and the Department of Higher Education and Training ("DHET"), for the design and project management of a number of DHET training facilities. Applicants also seek the setting aside of the subsequent agreement on 13 May 2014 between DCS and MSW which resulted from the decision to participate, for the renovation of three correctional facilities, and the replacement of two other facilities ("the renovation agreement"). Furthermore, applicants seek a declaration that DCS is not liable to MSW in terms of the renovation agreement, and they seek repayment by MSW of R 102 701 541.15 which was paid to MSW pursuant to the renovation agreement.

[2] Applicants also seek an order that a further agreement for the assessment of 221 correctional facilities, which was concluded on 11 July 2014 ("the assessment agreement"), be declared to be unlawful, the setting aside thereof, a declaration that DCS is not liable to MSW in terms of the assessment agreement, and repayment of the sum of R 56 215 582.77 which DCS paid to MSW pursuant to the assessment agreement.

[3] In the alternative to the order for repayment, applicants seek a just and equitable remedy in terms of section 172 (1) (b) of the Constitution.

[4] First applicant ("the SIU") and the DCS (second respondent) join forces in this application. The SIU was appointed by the State President on 15 April 2016[1], to investigate allegations of maladministration, improper and unlawful conduct by DCS employees, the unlawful expenditure of public money, and unlawful or irregular transactions entered into by the DCS. The SIU is tasked with recovering any monies expended as a result of unlawful, irregular or wasteful transactions.

THE RELEVANT STATUTORY PROVISIONS

[5] Section 217 of the Constitution provides that when organs of State contract for goods or services, they must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. In order to give effect to section 217, the Preferential Procurement Policy Framework Act, 5 of 2000 was enacted and Preferential Procurement Regulations were promulgated. This regulatory framework is intended to ensure that the procurement process complies with the Constitutional objectives of section 217. The tender process is painstakingly scrutinized to ensure that it fulfils the provisions of the Regulations.

[6] A further pillar of the procurement system is the National Treasury. In terms of section 76 (4) (c) of the Public Finance Management Act, 1 of 1999 ("PFMA"):

> 76 (4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning-
>
> (c) the determination of a framework for an appropriate procurement process and provision system which is fair, equitable, transparent, competitive and cost-effective."

[1] Proclamation No. R 20 of 2016, published on 15 April 2016 in Government Gazette 20 of 2016

[7] Treasury Regulation 16A6.4, issued in terms of PFMA reads as follows:

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

[8] Paragraph 2.4 of National Treasury Practice Note 6 of 2007/2008 dated 18 April 2007 provides as follows:

"Despite Treasury Regulation 16A6.4 being intended for cases of emergency or where goods and services are available from sole service providers, it has come to light that institutions are deliberately utilizing this provision to circumvent the required competitive process in order to, amongst others, enter into contractual commitments or incur expenditure at the end of a financial year with the view to avoiding the surrender of unspent voted funds to the National/Provincial Revenue Funds."

[9] Paragraph 2 of Practice Note 6 makes it clear that Regulation 16A6.4 is only intended for the procurement of goods and services of critical importance and only when it is impractical to invite competitive bids. It is not intended to be applied in order to avoid the return of unspent funds.

[10] National Treasury Practice Note 32 of 2011 requires accounting officers of departments to submit a procurement plan for the financial year by 30 April of each year, in respect of the procurement of all goods or services exceeding R 500 000.00.[2] Furthermore, contracts may be expanded or varied by no more than 20% of R 20 million for construction related goods, works or services, whichever is the least.[3]

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[2] Para 3.1.1
[3] Para 3.9.3

DCS PARTICIPATION IN THE DHET AGREEMENT

[11] In January 2014 the DCS was faced with a problem. It had R 812 million worth of unspent funds which had to be returned to the National Treasury. At an Executive Management Committee meeting of DCS the then Minister of Correctional Services directed the DCS management to appoint a task team to ensure that the unspent monies were not returned to National Treasury, by entering into an agreement for the refurbishment of a number of correctional facilities.

[12] DCS had not budgeted for the proposed expenditure as is required by National Treasury Practice Note 32, and it was not possible to enter into a competitive bidding process given the time frame within which the contract had to be awarded. The Minister's instruction caused the then Acting National Commissioner, Ms Jolingana, and the Acting Chief Financial Officer, Ms Mareka, to conceive of a plan to prevent the return of the funds by fast tracking a capital works program for the renovation and replacement of the facilities, so avoiding a competitive bidding process. They did so by seeking to participate in an agreement previously entered into by the DHET with a consortium of ten companies known as the MSW Consortium ("the Consortium"), for the renovation of DHET training facilities.

[13] On 14 August 2013 the DHET entered into an agreement with the Consortium. The DHET agreement required the Consortium to project manage and design 12 or more new Further Education and Training ("FET") college campuses, and to refurbish two other campuses. The management and design fees were set at 12% of the actual cost of the project, before VAT. The Consortium was not entitled to any further payments save for the agreed management and design fee. The DHET was responsible for providing geotechnical reports to the Consortium.

[14] The DHET agreement terminated on 30 April 2014, but was extended to 11 June 2014 in an addendum to the agreement dated 30

April 2014. On 12 June 2014, in a further addendum, the agreement was purportedly extended further.

THE DCS/MSW AGREEMENT

[15] In furtherance of the DCS scheme, Ms Jolingana wrote to the DHET on 11 March 2014 and requested its consent for DCS to participate in what she called the 'transversal' contract no. DHET 026. (It is common cause that the agreement was not a 'transversal agreement', which is one entered into by National Treasury, and in which State Departments are entitled to participate.) According to Ms Jolingana's request, DCS required MSW to undertake project management services at five correctional facilities. The total budget for the DCS project amounted to R 1.37 billion.

[16] On 14 April 2014 the DHET approved the request, subject to "*the same Terms of Reference and Service Level Agreement for Contract no. DHET 026 and fulfilment of the regulations in terms of the Public Finance Management Act and Supply Chain Management Regulations*". The DHET specifically pointed out to DCS that there had been two different procurement processes, in respect of geotechnical work on the one hand, and project management and design on the other, and that the DHET contract did not provide for geotechnical work.

[17] On 13 May 2014 MSW agreed in writing to render the services "*in line with Contract DHET 026 and in accordance with the same Terms of Reference and Service Level Agreement*", and so the 'renovation' agreement came into being. The acceptance letter was written *"for and on behalf of MSW"*. There is no mention in MSW's letter of acceptance of the terms of the agreement by the other members of the Consortium, nor is the acceptance letter written on their behalf. It later transpired that at least four of the Consortium members never even knew of the DCS contract.

[18] Astonishingly, it seems that no subsequent written agreements were entered into between MSW and DCS. DCS was also not formally joined in writing to the DHET agreement as would normally happen by way of a service level agreement. The exact scope of the work was not agreed in writing, nor was the contract price on which the project management fee would be calculated.

[19] On 19 June 2014 MSW wrote to DCS and tendered an unsolicited offer to carry out conditional surveys of the condition of correctional facilities. On 11 July 2014 the then Acting National Commissioner, Mr. Z.I. Modise, appointed MSW to assess 221 correctional facilities, under the auspices of the DHET contract. On 18 July 2014 MSW accepted the offer *"in line with the contract DHET 026"*. The contract price was calculated at 35% of the total management fee calculated on 12% of the total project price. Once again, there were no further written agreements, nor was the scope of work or the project price recorded in writing.

[20] It is important to note that the above agreements were entered into in circumstances where the DCS had a pre-existing agreement with the Independent Development Trust ("IDT") for the latter to carry out the same work as that required from MSW, at more competitive rates. There is no discernable reason why the IDT could not have been tasked to render these services, save that there was a concerted effort by DCS personnel to avoid a competitive bidding process

ARE THE RENOVATION AND ASSESSMENT AGREEMENTS UNLAWFUL?

[21] On 19 June 2015 the same Mr. Modise who had represented DCS in entering into the assessment agreement wrote to respondent. He advised respondent that the renovation agreement was cancelled. He provided the following reasons for the cancellation:

[21.1] The agreement allegedly violated the provisions of the PFMA, Treasury regulations and the Treasury Instruction Note dated 31 May 2011;

[21.2] The agreement violated section 217 of the Constitution;

[21.3] A service level agreement had not been entered into.

[22] On the same date, in a separate letter, Mr. Modise wrote to respondent that the assessment agreement was also cancelled, essentially for the same reasons. When Mr. Modise experienced this Damascus-road moment which caused him to realize that the agreements were unlawful is unclear. It is certainly not dealt with in the papers. It must have been quite apparent, from the outset, to everyone involved in the agreements, that the instruction given by the Minister was unlawful. DCS officials had then contrived to avoid a competitive bidding process, in defiance of explicit Treasury instructions. DCS was not entitled to participate in the DHET agreement in these circumstances, and DCS must have realized that at the time. There was no critical need for the application of Regulation 16A6.4, and the only reason why it was relied upon was to circumvent the bidding process so as to retain unspent funds. There is also no evidence that the DCS accounting officer ever recorded and approved the reliance on Regulation 16A6.4, as the regulation itself requires.

[23] Not only was the overall scheme unlawful, the subsequent agreements purportedly entered into suffered from a number of difficulties.

[24] The first difficulty is that, although DCS purported to enter into the agreements with MSW on the same terms as those contained in the DHET agreement, the contractor in the renovation and assessment agreements were not the same as the contractor in the DHET agreement. DHET had contracted with the MSW Consortium, a consortium comprised

of a number of companies. In both the renovation and assessment agreements MSW did not purport to act for the Consortium, and only signified its own acceptance of the terms of the agreements. It later transpired, as I have said above, that at least four of the members of the Consortium did not even know of the existence of the renovation and assessment agreements. It is clear that MSW intended to enter into the agreements on its own behalf and not as lead consultant for the Consortium. MSW's suggestion that it acted on behalf of the Consortium in the renovation and assessment agreements is false.

[25] Furthermore, the pricing structure in the DHET agreement differed from the DCS agreement. In terms of the DHET contract, the fee was set at 12% of the project cost, before VAT, and no additional expenses could be charged. In both the renovation and assessment agreements MSW charged additional disbursements. MSW also charged additionally for geotechnical work, which the DHET contract explicitly excluded. Far from simply participating in the DHET contract, the DCS had entered into a substantially different agreement with MSW, under the pretense of having participated in the DHET contract.

[26] Moreover, in terms of paragraph 3.9.3 of National Treasury Practice Note 32 of 2011 the DHET contract could only be varied by 20% of its original value, or R 20 million, whichever was the least. The participation by DCS in the DHET contract resulted in a variation in that contract far in excess of R 20 million.

[27] The assessment contract arose from an unsolicited offer made by MSW to DCS. In terms of National Treasury Note 11 of 2008/2009 an unsolicited offer may only be considered in the following circumstances:

[27.1] Where a comprehensive and relevant project feasibility study has established a clear business case; and

[27.2] If the product or service involves an innovative design; or

[27.3] When the product or service involves an innovative approach to project development and management; or

[27.4] Where the product or service presents a new and cost-effective method of service delivery.

[28] Not only is there no evidence that the services offered by MSW were at all innovative, it is common cause that no feasibility study had been undertaken to establish a clear business case for the procurement of these services. In fact, the same services were available from the IDT at better rates. The DCS was therefore not entitled to accept the unsolicited offer.

[29] The rule of law, which is at the heart of the principle of legality, is a cornerstone of our Constitutional dispensation. All public power has to be exercised lawfully, and if it is not lawful, such conduct is not legitimate.[4] In this case the DCS implemented an unlawful plan to avoid the return of unspent funds. They did so in the face of explicit Treasury regulations and practice notes that prohibited such conduct.

[30] The scheme adopted by DCS ensured that the procurement process was not fair nor was it equitable, competitive and transparent. The process was most certainly not the most cost-effective, as the same services could have been procured for less money. From the above it is clear that the entire scheme to participate in the DHET contract was unconstitutional and thus invalid from the outset, and that the manner in which the agreements were concluded with MSW was unlawful and equally invalid.

DELAY IN LAUNCHING REVIEW PROCEEDINGS

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[4] Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council1999 (1) SA 374 (CC) at para 59

[31] MSW took the point that these proceedings had been launched some years after the irregularities were uncovered. This is a review under the principle of legality. Whereas a review under the Promotion of Administrative Justice Act, 2000 has to be launched within 180 days after the person concerned about an administrative action becomes aware thereof[5], a legality review only has to be launched without undue delay. A further difference between PAJA reviews and legality reviews is that whereas formal condonation has to be sought for non-compliance with the 180-day bar in PAJA, it is not necessary to file a formal application in a legality review. Applicants were criticized for not filing a formal condonation application, but in these circumstances it was not necessary to do so.

[32] The concept "undue delay" must be seen within the context that it is undesirable to unduly delay the review of unconstitutional conduct, as a delay might well cause prejudice, and it is generally necessary to obtain certainty as to the validity of the conduct complained about. In *Gqwetha v Transkei Development Corporation*[6] the Supreme Court of Appeal laid out the test for considering undue delay in a legality review. The *Gqwetha* test was endorsed by the Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education KwaZulu Natal*[7]. The first enquiry is whether the delay is unreasonable or undue. If it is found that the delay was undue, then a Court must consider whether it should exercise its discretion so as to overlook the delay.

[33] The reasonableness of the delay must be assessed within the context of the facts of each case. The entire period of the delay must be explained, and where it is not, then the delay is necessarily undue.[8] In *Khumalo*[9] it was explained that:

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[5] Section 7 (1) of PAJA
[6] 2006 (2) SA 603 SCA (at para 33)
[7] 2014 (5) SA 579 (CC) (at para 49)
[8] Khumalo (supra) para 78
[9] At para 45

"[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirements that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay."

[34] It is clear that there is some tension between the Constitutional obligation to declare unlawful conduct invalid, and the procedural requirement that a review must not be unduly delayed. This tension can only be resolved by a consideration of the particular facts in each case, and the interests of justice.

[35] This application was launched on 28 March 2018. The conduct which is complained of occurred between March and July 2014. The agreements were cancelled on 19 June 2015, after Mr. Modise had apparently had some momentary insight. The DCS only says that it had received legal advice as to the validity of the purported DCS participation in the DHET contract in May 2015, at which point it was realized that the purported participation in the DHET contract was unlawful.

[36] The DCS says that it then did nothing to resolve the matter, save to request the President to involve the SIU, for fear of "prejudicing" the SIU investigation. What the potential prejudice to the investigation might have been is not explained in the papers. This averment seems to me to simply be an attempt at justifying the delay.

[37] It took nearly a year for the proclamation appointing the SIU to be published. Three years elapsed from when Mr. Modise suddenly realized that the agreements were unlawful, until the application was launched, and two years elapsed after the SIU was appointed. One can hardly accuse the applicants of being over-hasty in bringing this application. In my view the delay was without doubt unreasonable and a substantial part of the delay is not explained at all.

[38] The further question is whether the delay should be overlooked. Although the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd* ("OUTA") held that one must consider the issue of delay without reference to the merits of the review[10], that approach has been held to be incorrect. In *South African National Roads Agency v Cape Town City*[11] Navsa JA wrote regarding OUTA that:

"It cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case, to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious."

[39] In *Khumalo* Skweyiya J also explained that one of the factors to be considered is the impugned conduct. Consequently, the "*factual, multi-factor, context-sensitive*" approach referred to in *Department of Transport and Others v Tasima*[12] must include a consideration of the merits of the review, to the extent that the nature of the conduct complained of may justify overlooking an undue delay.

[40] In *Buffalo City Metropolitan Municipality v Asla Construction*[13] the Court said that the first factor to be considered in this enquiry is the potential prejudice to affected parties should the impugned conduct be set aside. In *Tasima* Khampepe J explained that there was no prejudice for Tasima should the delay be condoned, as the contract at the heart of that dispute had already expired. Furthermore, if there was prejudice for Tasima, the prejudice could be ameliorated by the application of

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[10] [2013] ZASCA 148 at para 45; Beweging vir Christelik-Volkseie Onderwys v Minister of Education [2012]2 ALL SA 462 (SCA)
[11] 2017 (1) SA 468 (SCA)
[12] 2017 (2) SA 622 (CC)
[13] 2019 (4) SA 331 (CC) para 54

appropriate remedies in terms of section 172 (1) (b) of the Constitution. Khampepe J said:

"In my view, the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in Khumalo that 'consequences and potential prejudice.... ought not in general, favour the Court non-suiting an applicant in the face of delay."

[41] In this matter the agreements were already cancelled in June 2015. If the delay were to be condoned, there would be no prejudice to MSW.

[42] A further factor to consider is the nature of the impugned conduct. Where the conduct is particularly egregious, the scales would be tipped in favour of condoning the delay. In this matter the scheme was unlawful from the outset, and each further step taken in furtherance thereof was unlawful. In Buffalo (*supra)* Theron J echoed the remarks by Cameron J in *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*[14] when he said that the State was subject to a higher duty to respect the law:

"There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights."

[43] The conduct by DCS officials was reprehensible. The public money expended was substantial. However, whilst the conduct of the DCS was dishonest, I do not believe that MSW was completely innocent in this scheme. The applicants tried to make out a case that there was a corrupt relationship between MSW and a DCS official, and that the agreements were the result of the corrupt relationship. In my view there is insufficient evidence to substantiate that allegation. However, I do not believe that MSW was completely unaware that the scheme was fraught

[14] 2014 (3) SA 481 (CC)

with problems. Although it knew that the DCS was piggy-backing on the DHET agreement, MSW arrogated the contracts for itself, excluding its Consortium partners in the DHET agreement from participation. Given the fact that the parties to the agreements differed, the costing structure differed, and the scope of work differed (all facts known to MSW), it is hard to believe that MSW was blind to the fact that the renovation and assessment contracts were irregular.

[44] It must also be considered that the financial loss to the State was substantial, in excess of R 150 million. It is in the interests of the fiscus that irregular and wasteful expenditure be recovered, and that such a blatantly dishonest scheme be reviewed. In my view it would be in the interests of justice to condone the delay in launching the application.

RELIEF

[45] Section 172 (1) (a) of the Constitution obliges a court to declare that conduct that is inconsistent with the Constitution is invalid.[15] That does not mean, however, that such conduct must be set aside, and whether such an order should be granted must be considered in terms of the Court's discretion to grant just and equitable relief under section 172 (1) (b).

[46] In *Gijima* the Court held that a court's powers in terms of section 172 (1) (b) are wide and only bounded by considerations of justice and equity.[16] The relief that applicants seek under section 172 (1) (b) is repayment of all monies paid to MSW, alternatively relief which is just and equitable.

[47] MSW says that it rendered services in terms of both the renovation and the assessment agreements. In terms of the renovation agreement it rendered services at five correctional facilities. For instance, MSW says

[15] See Gijima (supra) para 41
[16] At para 53

that in respect of the Brandvlei Prison it attended a briefing with prison officials and it prepared a screening report. The interviews and the screening report resulted in the production of an inception report. A project brief was then produced by DCS which included the design of a new center, and the refurbishment of the existing facility. MSW says that the inception report was detailed, and that it required considerable effort and resources to complete. It says that the work done in respect of Brandvlei is essentially the same as that done in respect of the other facilities.

[48] In respect of the assessment agreement, MSW says that it conducted surveys at 57 facilities. The reports on these facilities have all been handed to DCS, and, so MSW says, DCS has received full value for its money. It would be unjust, MSW argues, to allow DCS to use the reports while claiming repayment of all the monies at the same time.

[49] In reply, the applicants do not deny that work was done in terms of the renovation agreement, but they argue that MSW should have known that it could not render services lawfully in terms of the renovation agreement. As far as the assessment agreement is concerned, applicants deny that the reports have any value. They deny that the assessments fulfil the requirements of the Government Immovable Asset Management Act, 2007, and therefore they say, the reports are of no use to DCS. Applicants also accuse MSW of making misrepresentations regarding the validity of the assessment agreement. The latter contention is slightly hypocritical given the DCS' own involvement in the unlawful scheme.

[50] In my view the DCS should not benefit from work properly done by MSW, which is useful to it, without paying for the services. On the other hand, MSW should not benefit from a contract which was unlawfully entered into, although it should be fairly compensated for work done to DCS' benefit.

[51] It must be clear from the above that there is a substantial factual dispute which cannot be resolved on the papers. I cannot assess what amount should be repaid to DCS, if anything. What order is just and equitable in these circumstances would have to be considered once evidence is presented on this issue by both parties. It follows therefore that I should postpone the relief sought for a just and equitable remedy, and refer that aspect to trial.

COSTS

[52] Applicants have had substantial success in having the decision to participate in the DHET contract declared to be inconsistent with the Constitution. In these circumstances applicants are entitled to their costs.

[53] I make the following order:

[53.1] The decision taken by officials of the Department of Correctional Services, to participate in and agreement between respondent and the Department of Higher Education and Training with contract no. DHET 026 is declared to be inconsistent with the Constitution and unlawful.

[53.2] The agreement concluded between the Department of Correctional Services and respondent for the project management and design of renovations to the Durban Westville, Johannesburg and St Albans correctional facilities, and the replacement of the Brandvlei and Zeerust correctional facilities is declared to be inconsistent with the Constitution and unlawful.

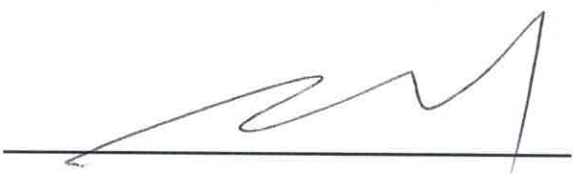
[53.3] The agreement concluded between the Department of Correctional Services and respondent for the conditional assessment of 221 correctional facilities is declared to be inconsistent with the Constitution and unlawful.

[53.4] The consideration of the appropriate just and equitable relief to be granted in terms of section 172 (1) (b) of the Constitution is referred to trial.

[53.5] The notice of motion shall stand as a simple summons and the answering affidavit as a notice of intention to defend.

[53.6] Applicant shall deliver a declaration within 15 (fifteen) days of this order, whereafter the rules relating to further pleadings, discovery and the conduct of trials shall apply.

[53.] Respondent shall pay the costs of the application thus far, including the cost of two counsel where so employed.



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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	Adv. Radekgala
ATTORNEYS FOR RESPONDENT:	**Manala & Co. Inc.**
DATE HEARD:	**31 July 2023**
DATE OF JUDGMENT:	**23 August 2023**