Termination of Contracts by Organs of State

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Abstract

Organs of state shall terminate the procurement contracts if it is found that there were irregularities and concluded in contravention of the applicable legislation.[1] The general rule is that a contract which has been concluded in violation of legislation is void.[2]

Section 2 of the Constitution of the Republic of South Africa, 1996 states that law or conduct inconsistent with the Constitution is invalid. When organs of state procure goods or services they are exercising public power of which they are subject to the provisions of the Constitution which is the supreme law.

Organs of state which fail to heed the provisions of the procurement laws and or a policy will be acting unlawfully and their decisions will be attack[3] as they will be in conflict with the rule of law and the principle of legality.[4]

[1] *Qaukeni Local Municipality and Others v FV General Trading* (324/08) [2009] ZASCA 66 at para [26], the Court stated that "*. . . if the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it . . .*".

[2] Section 2 of the Constitution.

[3] *Batho Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* (CCT27/03) [2004] ZACC 15 at para [103].

[4] *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39 at para [81], Jafta J stated that ". . . These principles require the admimistrative functionanrie to exercise only public power conferred on them and nothing more. . .".

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CHAPTER 1

1.1 Definition of key terms

The definitions of the terms and acronyms:

"Accounting Officer"	means a head of an organ of state;
"BBEEA"	Broad-Based Economic Empowerment Act, 2003 (Act No. 53 of 2003);
"Constitution"	means the Constitution of the Republic of South Africa, 1996;
"Organ of state"	means an organ of state as defined in section 239 of the Constitution;
"Procurement contract"	means a contract for procuring goods and services through a tendering (bidding) process by an organ of state;
"PFMA"	Public Finance Management Act, 1999 (Act No. 1 of 1999);
"PAJA"	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
"PSA"	Public Service Act, 1994 (Proclamation 103 of 1994);
"PPPFA"	Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
"Preferential Procurement Regulations"	means the PPPFA: Preferential Procurement Regulations, 2017;
"Termination"	includes cancellation or repudiation;

“Treasury Regulations” means the Treasury Regulations, 2005, published in Government Notice No. R225 of 15 March 2005, as amended.

1.2 Introduction

The definition of an "organ of state"[5] is a relatively broad definition which includes, amongst other things, an entity that performs a public function in terms of national legislation. This renders the legality principle and the Bill of Rights applicable to it.[6]

Section 217(1) of the Constitution provides that "when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competiveness and cost-effectiveness.

Organs of state procure goods and services either by way of quotations or through a tendering process which must be within the threshold values as determined by the National Treasury from time to time.[7] A contract concluded by an organ of state is also subject to the common principles and or any other law which regulate contractual relationship by the organ of state. All law, including the common law of

[5] Section 239 of the Constitution provides that "in the Constitution, unless the context indicates otherwise–
"organ of state" means–
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution–
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.".

[6] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* [2006] ZACC 9 para [41].

[7] Framework for Supply Chain Management as published in *Government Gazette* No. 25767 of 5 December 2003; Tasima at para [99], Jafta J stated that "the general principle is that the State procures goods and services through a tender process." *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hirdro-Tech System (Pty) Ltd and Others* [2010] ZACC 21 at para [26].

contract, derives its force from the Constitution and is subject to constitutional control.[8]

Organs of state are entitle to negotiate the terms of the procurement contract with the parties who they have awarded the contracts, provided that such negotiation does not allow any preferred party a second or unfair opportunity, and is not to the detriment of any other party, and does not lead to a higher price than the tender as submitted.[9] As a contract is bilateral juristic act (there must, at the very least, be a meeting of two minds, even if one and the same acts in different capacities), no contract can ever come into being solely as a result of the efforts of one person, except if that person is acting in different capacities.[10] The decision to award a procurement contract by an organ of state is a matter of public law which is governed by the Constitution of the Republic of South Africa, 1996, and procurement legislative prescripts.[11] This is so because it is a fundament tenet of our constitutional jurisprudence that all law, whether legislation, common law, customary law must be read in a manner that is consistent with the Constitution.[12]

Legal agreements have the effect of law upon the parties and bind them in order to be held to a full performance of the obligations flowing therefrom. It si a common cause that freedom of contract signifies that parties to an agreement have the right and power to construct their own bargains; In a free enterprise system, parties are

[8] *Botha and Another v Rich No and Others* [2014] ZACC 11 at para [24].
[9] *Arecon South Africa (Pty) Ltd v City of Cape Town* (20384/2014) [2015] ZASCA 209 (29 December 2015) at para [27].
[10] *X-Procure Software (Pty) Ltd v Sutherland* (882/13) [2014] ZASCA 196 (28 November 2014) at para [7].
[11] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another* {2015] ZACC 22 at para [75].
[12] *AAA Investments (Proprietary) Limited* at para [72].

free to contract except for those instances where the government places restrictions for reasons of public policy.[13]

D Donnelly, "*A new approach to the interpretation of contracts and the management of strategic corporate relationship,"* Journal of Contemporary Management, Vol. 11 (2014) 20 has stated that "a contract is almost always signed, although co-operation can be achieved without an 'ex-ante' attempt to frame the relationship in terms of a formal contract. Formal contracts are intended to discourage opportunistic behaviour between contracting parties and build trust . . . In fact "formal contracting increases the probability of ex-post cooperation between the contracting parties when hazards become severe" and when the relationship is a strategic one. In such circumstances, the parties would be encouraged to seek relational solutions, overcoming the adaptive limits of the formal contract.".

Organs of state are entitled to terminate any procurement contract and such termination may be based on any form of a contractual breach or if a contract has been concluded in contravention with an applicable legislation or against public policy.[14]

[13] Patrick S. Ottinger, "*Principles of Contractual Interpretation,*" Louisiana Law Review, Vol. 60 (2000) 766.
[14] *Barkhuizen v Napier* (CCT 72/05) [2007] ZACC 5 paras [28-30]; *Botha* at para [23], the Court stated that ". . . public policy requires that parties should in general comply with contractual obligations that have been freely and voluntarily undertaken.".

1.3 Research problem

Currently, South Africa has experienced an increase where organs state are terminating most of the procurement contracts as a result of a failure to comply with the legislative procurement framework which regulates the procurement by the organs of state and the conducts by its officials or any other person such a tenderer.

The main challenge which organs of state face regarding the invalid procurement contracts are that they have been acted upon by the time the review applications are brought to the courts, and these have an impact on the implementation of these procurement contracts on the rights on the innocent parties.[15] Thus that the government resource is being wasted as the result of this termination, including the failure to recover such wasted resources after a successful termination of a procurement contract.

Our courts have also raised a number of the concerns with regard to the conclusions or terminations of the procurement contracts by organs of state because of the failure to adhere legislation and their own internal policies which regulates the conclusion of such procurement contracts i.e. the Constitution, PFMA, etc.[16]

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[15] *Millennium Waste Management v Chairperson Tender Board* [2007] SCA 165 (RSA) at para [23], the Court explained that:

> "A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.".

[16] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42 at para [72] (No.1), Froneman J stated that:

> "Given the central and fundamental importance of substantive empowerment under the Constitution and the Procurement and Empowerment Acts, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed was fatally defective. It is difficult to think of a more fundamentally mandatory and material condition prescribed by the constitutional and legislative procurement

1.4 Rationale or purpose of research

The purpose of this research paper is to establish and or identify the problems which cause organs state to terminate the procurement contracts and implications of such terminations.

1.5 Research questions

The questions which are to be answered in this research paper are:

1.4.1 What should be regarded as an irregularity which results to a termination of a procurement contract by the organs of state?

1.4.2 What should be regarded as an improper conduct by an official of an organ of state and or a person?

1.4.3 Which laws have the impact to the organs of state's procurement contracts which may result to a termination of those procurement contracts if there have not been complied with?

1.4.4 The impact and or the role of the PAJA with regard to the termination of a procurement contract by organs of state.

1.4.5 Whether organs of state should terminate the procurement contracts which were concluded in breach of legislative requirements?

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framework than objectively determined empowerment credentials. The failure to make that objective determination fell afoul of section 6(2)(b) of PAJA (non-compliance with a mandatory and material condition) and section 6(2)(e)(iii) (failure to consider a relevant consideration).".

CHAPTER 2

2.1 Conclusion of the procurement contracts

David P. Weber, "*Restricting the Freedom of Contract: A Fundamental Prohibition*" Yale Human Rights and Development Journal: Vol. 16, Article 2 (2013): 56, has stated that "the right to contract which is essential to the ability to gain and dispose of possessions and services, alter legal relationships, and act with some guaranty as to future obligations and rights. The general right of an individual to contractually obligate himself and receive corresponding obligations in return is so pervasive and necessary for our society as to make it a fundamental right, and as such, to be entitled to a significantly high level of protection.".

The general rule is that procurement contracts contain technical specifications, which in their turn are just complex to the types of goods or services which are intended to be procured, and these specifications must be strictly complied,[17] in order for the procurement contracts to valid.[18] The specifications are generally be from statutes such as PPPFA. F. Troubridge vom Baur "Small business and the law," American Bar Association Journal. Vol. 43 July (1957) 607, has stated that a procurement contract should contain provisions that define the rights and obligations of the parties with respect to the matters as contract changes, payments, termination of the contract for default of the contractor and for the convenience of the government.".

[17] Regulations 3, 4, 5 of the Preferential Procurement Regulations.
[18] *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* (037/2012) [2013] ZASCA 186 (29 November 2013) at para [10].

If one take note what has been stated by Weber[19] and Baur,[20] it should be applied in relation to the conclusion of procurement contracts in South Africa. The conclusion of procurement contracts by organs of state is subjected to many limitations which is generally imposed by legislation which includes the Bill of Rights which guards against a paryt with greater bargaining powers by not allowing them to extort additional power without any statutory checks. Weber[21] has stated that "the restriction/protection of the individual party is framed not only under the guise of freedom of contract, but also an impingement of the rights of the *protected* party to enter into contracts that legislatures might perceive as disadvantageous or unsafe for that party.".

In South Africa, the procurement process by organs of state is done through a process of a tender,[22] or by obtaining at least three verbal or written quotations from a list of prospective suppliers, and an acceptance of these (the tender) creates a procurement contract; the tender process is strictly regulated by the Constitution and legislative procurement framework.[23] Thus that the procurement of goods and services by the organs of state is the exercise of public power and is always subject to constitutional control and the rule of law.[24] In *Tasima,*[25] Jafta J stated that ". . . It is suffice to say that in our, the rule of law as a founding value of our democratic State, does not serve the purpose of preserving individual right only. It also prohibits the exercise of power that is not validity conferred.".

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[19] Weber at 56.
[20] F. Troubridge vom Baur "Small business and the law," American Bar Association Journal. Vol. 43 July (1957) 607
[21] Weber at 59.
[22] *Tasima* at para [99]; *Viking Pony Africa Pumps (Pty) Ltd*.
[23] *Nexus Forensic Services (Pty) Ltd v The Chief Executive Officer of SASSA and Others* (14708/15) [2016] ZAGPPHC 579 (21 June 2016) at para [7].
[24] *AAA Investments (Proprietary) Limited* at para [29].
[25] Para [86].

Our courts have expressed themselves that the procurement contracts should be concluded within the confines of the statutory powers in order to be valid. In *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation* (Case No. 36811/2014) [2016] ZAGPPHC 1027 (13 December 2016) at para [30], Ranchod J explained that:

> "Where a contract is concluded as a result of an exercise of an organ of state's constitutional or statutory powers, this must be done within the confines of such powers. In other words, the conclusion of a contract must be a valid exercise of power; if not, it will be ultra vires and invalid (The Law of Government Procurement in South Africa – Bolton, 2007, 74). Unlike private parties who generally have freedom of contract, organs of state do not have such freedom. A number of limitations are placed on the power of organs of state to enter into contract."

The Constitution, PFMA, PSA, PPPFA, BBEEA, Preferential Procurement Regulations, Treasury Regulations, the internal policies of the organs of state, etc., regulate the procurement contracts for goods and services by the organs of state.[26] The starting point of the legislative procurement framework regarding the procurement of goods and services by organs of state in South Africa is the Constitution,[27] as the supreme law of the Republic, including that law or conduct inconsistent with it is invalid, and the obligations imposed by it must fulfilled in terms

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[26] *Batho Star Fishing (Pty) Ltd* at para [72]*; AAA Investments (Proprietary) Limited* at para [36]; *Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality* (623/13) [2014] ZASCA 154 (29 September 2014) at para [28], the Court stated that "an invitation of procurement of goods and services from an organ of state and the processing is governed by the Promotion of Administrative Justice Act 3 of 2000, the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA), the Preferential Procurement Policy Framework Act 5 of 2000, Local Government: Municipal Finance Management Act No. 56 of 2003, Municipal Supply Chain Management Regulation, 2005, and the preferential procurement policy by the organ of state, in which this system is intended to provide for a fair, equitable, transparent, competitive and cost effective process as contemplated in section 217(1) of the Constitution.".

[27] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* (No. 1) at para [32]; *Chairperson: Standing Tender Committee and Others v JFE Sapelo Electronics (Pty) Ltd and Others* (511/2005) [2005] ZASCA 90 at para [11]; *Batho Star Fishing (Pty) Ltd* at para [72]; *AAA Investment (Proprietary) Limited* at para [36]; *Lepogo Construction (Pty) Ltd*.

of section 2.[28] In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hirdro-Tech System (Pty) Ltd and Others* [2010] ZACC 21 at para [23], the Court stated that "section 217 of the Constitution set out the basis on which organs of state may enter into contracts for the procurement of goods and services.". And the following was also said in *Millennium Waste Management v Chairperson Tender Board* [2007] SCA 165 (RSA) at para [4]:

> "The final Constitution lays down minimum requirements for a valid tender process and contract entered into following an award of tender to a successful tenderer (s217).[29] The section requires that the tender process preceding the conclusion of contracts for the supply of goods and services must be 'fair, equitable, transparent, competitive and cost-effective'. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of PAJA apply to the process . . ."

A decision to award a procurement contract by an organ of state is a matter of public law and it is governed by the Constitution,[30] and the power to award such procurement contract is constrained by the principle that the organ of state must execise no power and perform no function beyond that conferred on it by law.[31] In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* (347/2004) [2005] ZASCA 43 at para [20], the Court stated that:

> "The Constitution is the repository of all state power. That power is distributed by the Constitution – directly and indirectly – amongst the various institutions of state and other

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[28] *AAA Investments (Proprietary) Limited* para [40], Yacoob J mentioned that:

> "Section 8(1) of the Constitution renders the Bill of Rights applicable to the judiciary, the executive, the legislature and organs of state. An organ of state is, amongst other things, an entity that performs a public function in terms of national legislation. The applicability of the Bill of Rights to the legislature and to the executive is unconditional as to function; the Bill of Rights is applicable to it regardless of the function it performs. Our Constitution ensures, as in Canada and the United States, that government cannot be released from it human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.*"*.

[29] *Esofranki Pipelines (Pty) Ltd and Another* v Mopani District Municipality and Others (13480/2011, 17852/2011) [2012] ZAGPPHC 194 (29 August 2012) at para [32].

[30] *Trencon Construction (Pty) Limited* at para [75].

[31] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 at para [58].

public bodies and functionaries and its exercise is subject to inherent constitutional constraint – if only for legality – the extent of which varies according to the nature of the power that is being exercised."

Section 217(1) of the Constitution provides that:

"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation,[32] contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competiveness and cost-effectiveness.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation[33] must prescribe a framework within which the policy referred to in subsection (2) must be implemented.".

These constitutional requirements, in section 217(1) of the Constitution, of fair, equitable, transparent, competitive and cost-effective are reinforced by, for example, in sections 38(a)(iii) and 51(1)(iii) of the PFMA, Regulation 16A3.1 and 16A3.2(a) of the Treasury Regulations, 2005, section 65(2) of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003),[34] etc. *Minister of Social Development v Phoenix Cash & Carry* [2007] SCA 26 (RSA) at para [1], Heher JA stated that:

[32] PFMA.
[33] PPPFA.
[34] Sections 38*(a)*(iii) and 51(1)(iii) of the PFMA provides the accounting officer for a department, trading entity or constitutional institution must ensure that that department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Regulation 16A3.1 and 16A3.2 (a) of the Treasury Regulations require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that must be fair, equitable, transparent, competitive and cost-effective.

> ". . . Section 217(1) of the Constitution requires an organ of state to contract for goods and services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.[35] These principles must inspire all aspects of the process which makes provision for the conclusion of such a contract.".

Organs of state are entitle to negotiate the final terms of the procurement contract with their preferred party.[36] As a contract is a bilateral juristic act (there must, at the very least, be a meeting of two minds, even if one and the same acts in different capacities), no contract can ever come into being solely as a result of the efforts of one person, except if that person is acting in different capacities.[37]

Organs of state have public power and perform public functions in the public interest[38] and are bound by the provisions of the Bills of Rights in terms of section 8(1), read with section 239, of the Constitution,[39] with regard to the procurement of goods and services The procurement processes by the organs of state is subject to the Bill of Rights; this so as section 8(1) and (2) of the Constitution expressly provides that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state", and that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable,

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[35] *Vox Orion (Pty) Ltd v State Information Technology Agency (SOC) Ltd* (Case No. 49425/2013) [2013] ZAGPPHC 444 (6 December 2013) at para [52], the court stated that:

> "Section 217 of the Constitution of the Republic of South Africa, 1996 provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.".

[36] *Arecon* at para [27].
[37] *X-Procure Software (Pty) Ltd* above n 10 at para [7].
[38] *AAA Investment (Pty) Ltd* at paras [68], [119] – [120].
[39] *Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17 at para [23].

taking into account the nature of the right and the nature of any duty imposed by the right.".[40]

Five requirements in section 217(1) of the Constitution are briefly discussed, below:

2.2.1 *Equitability*

Equitability should be interpreted in line with section 9 of the Constitution.[41] Phoebe Bolton, "*Government Procurement as a Policy Tool in South Africa,*" Journal of Public Procurement, Vol. 6 (2006), 197 has stated that "in South Africa context, the equality debate has surfaced particularly in view of the fact that the Constitution guarantees the right to equal treatment, as it may be argued that using procurement as a policy tool i.e. affording preferential treatment to certain sections of the South African community when awarding government contracts, is unconstitutional based on sections 9(1) and 9(3) of the Constitution.".

[40] *AAA Investments (Proprietary) Limited* at para [29].
[41] Section 9 provides that:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedom. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disadvantaged by unfair discrimination may be taken.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.".

J.C. Pauw and J.S. Wolvaardt, *Multi-Crieria Decision Analysis in Public Procurement- a Plan from South Africa,"* Politiea Vol. 28 No. 1 (2009) Unisa Press 73 have stated that "in many contexts, 'equitable' simple means 'fair' and 'equity' or 'equitableness' therefore means 'fairness'. Equitableness is applied when equal shares (equal treatment on a numerical basis) are not fair. It is about allocation.".

2.2.2 *Fairness*

Pauw and Wolvaardt have stated that "*fairness* is a very basic concept in public administration and the law, in that it has a larger scope of application than all the others, not only public procurement, but all government action must comply with it. That the question regarding the meaning of the term 'fairness' in section 217 may also be addressed by looking at the occurrence of the term or concept in the Constitution as a whole, searching the Constitution one finds occurrences of 'fair', 'unfair', and 'fairness' in sections 9, 33, 190, 195, 197, and 217. And that 'fairness' is related to the fundamental right to administrative justice provided for in section 33.".[42] In *Tetra Mobile Radio v MEC, Department of Works* [2007] SCA 128 (RSA) at para [9], the Court stated that:

> ". . . fairness is inherent in the tender procedure. Its very essence is to ensure that before Government, National or Provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effective and competitiveness. Fairness, transparency and the other facts mentioned in section 217 permeate the procedure for awarding or refusing tenders . . .".

[42] Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedural fair.

Pauw & Wolvaardt have also explained that "*fairness* relates to getting what you deserve: procedural justice and just allocation. As it refers to individuals in relation to the processes to which they are subject, for example, the just and unbiased treatment, free of corruption, of a potential supplier in a tender process. It also refers to the benefits that individuals gain or duties required from them in comparison to their fellows, for example, the way benefits of procurement processes as distributed in society and the distribution of the tax burden between suppliers. And that the procedural justice itself also has two parts, namely the fairness of the steps in the procedure and secondly the absence of partiality, bias or prejudice.".

Organs of state are required to always act fairly when they procure goods or services, as the duty to act fairly requires that in the circumstances of a particular case that an administrator bring to a person's attention the critical issue on which the decision is likely to turn so that the person may have an opportunity to deal with it.[43]

2.2.3 *Transparency*

Pauw and Wolvaardt[44] have stated that "this concept 'transparency' relates to information, accountability and prevention of corruption, as they intertwine. And that reliable and open information about government procurement in general and tenders in particular contributes to better service delivery and firms that are more viable. In economics, it can be argued that a market is transparent if as many people as possible know about what products and or services are available and where.

[43] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (7447/2012) [2012] ZAGPPHC 185 (28 August 2012) at para [57].
[44] Pauw and Wolvaardt at 74–75.

Therefore, a higher degree of market transparency can result in disintermediation[45] due to the buyer's increased knowledge of supply pricing. Reliable and open information about government gives the public a better idea of how government has used their tax revenues, and is a corruption disincentive-these are the political and moral aspects of the concept. Transparency is also a necessary condition for competitiveness.".

Section 195(1)(g) of the Constitution requires that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles the transparency must be fostered by providing the public with timely, accessible and accurate information. The following has been said in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No. 2) [2014] ZACC 12 at paras [49] – [50], Froneman J stated that "organs of state have the obligations that extend beyond the merely contractual. In terms of section 8 of the Constitution, the Bill of Rights binds all organs of state. Organs of state, even if not state departments or part of the administration of the national, provincial or local spheres of government, must thus "respect, protect, promote and fulfil the rights in the Bill of Rights. The founding values of our Constitution include a democratic government based on the principles of accountability, responsiveness and openness. The public administration, which includes organs of state, "must be accountable", and "transparency must be fostered by providing the public with timely, accessible and accurate information.".

[45] "Disintermediation" is the removal of intermediaries in the supply chain.

2.2.4 *Competitiveness*

Pauw and Wolvaardt have explained what the term "competitiveness" entails by stating that "this criterion (competitiveness) also contains various elements: in this case the *procedural* meaning and the *economic* meaning. When the government puts out a tender, competitiveness requires that a sufficient number of suppliers should be afforded the opportunity to make bids. And that procedurally, competitiveness means that contracts are awarded on merit on level playing fields. Further, that in economics, competitiveness refers to a complex composition of factors. This includes the number of viable firms active in a given market and their ability to offer goods and services of a high quality at economic prices at the right time and that bids may be rejected if certain basic quality conditions are not met. It is better for the state to deal with many competitive suppliers that with monopolies or oligopolies, and completion between suppliers results in better efficiency within competing firms and better prices for the buyer – in our case, the state.".[46]

Moreover, the constitutional requirement of "competiveness" may not be served by only one or some of the tenderers knowing what are the true subject of the tender because this will deprive the public of the benefit of an open competitive process.[47]

2.2.5 *Cost-effectiveness*

[46] University of Pennsylvania Law Review, "*Requests for Proposals in State Government Procurement.*"Vol. 130: 179 (1981): 187, scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4726&context=penn_law_review. It was stated that "it is a postulate of economics that competition minimizes the cost of goods to consumers. Competition also tends to improve the quality of goods purchased, to encourage innovation among suppliers, and to increase the buyer's choice. Competitive bidding assures competition by definition because it typically results in the lowest price to the purchaser.".

[47] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6 at para [30].

The General Procurement Guidelines, which were issued by the National Treasury, provides that “a department must justify a procurement outcome, and price alone is often not a reliable indicator and departments will not necessarily obtain the best value for money by accepting the lowest price offer that meets mandatory requirements. Best value for money means the best available outcome when all relevant costs and benefits over the procurement cycle are considered. Therefore procurement function must be carried out in a cost-effective way.”.

Pauw and Wolvaardt[48] have defined “cost-effectiveness” as a basic principle of economic life as fairness is of moral and political life. That cost-effectiveness increases the public benefits derived from the spending of public money. And that cost-effectiveness should be used as a management tool in comparing the outputs and inputs of two or more processes, and then making a pronouncement on which process has the highest output relative to its cost. They further stated that we accept that the five criteria (fair, equitable, transparent, competitive and cost-effective) are set for the system as a whole as well as for each individual procurement decision.”.

A policy or a tender which clashes with these five constitutional requirements would be unconstitutional, and therefore legally invalid. The following was said in *Trencon,*[49] by the Court stated that “it is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process is shown not to be so, courts have the power to intervene.”.

[48] Pauw and Wolvaardt at 76.
[49] *Trencon* at para [1].

It is important to emphasise that the Government's procurement officials have dual responsibilities: they make sure that operational agencies comply with procurement regulations; and that they are directly involved in procuring goods, services and capital assets as authorised and funded.[50] As the Government's procurement officials are required to ensure the compliance with procurement legislation and that they are not allowed to act beyond the provisions of the procurement legislation. In *Provincial Government North West and Another v Tsoga Developers cc and others* [2016] ZACC 9, at para [29], the Court stated that "the exercise of all public power – which the issuing of a writ is – must be in accordance with the law. As Chaskalson P, Goldstone J and O'Regan J held in *Fedsure Life Assurance*, organs of state "may exercise no power and perform no function beyond that conferred upon them by law.". And the following was also said in *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20 at para [173], Ngcobo J stated that:

> "Another source of constraint on the exercise of public power is the rule of law which is one of the foundational values of our constitutional democracy. The rule of law principle requires that the actions of all those who exercise public power must comply with the law, including the Constitution. It is central to the conception of our constitutional order that those who exercise public power including the President, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law. Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law. The common law principle of ultra vires is now underpinned by the constitutional doctrine of legality which is an aspect of the rule of law. Thus what would have been ultra vires under the common law by reason of a public official exceeding a statutory power is now invalid according to the doctrine of legality.".

[50] Khi V Thai, *"Public Procurement Re-Examined,"* Journal of Public Procurement, Vol. 1 (2001) Issue 1: 16–17.

If an organ of state fails to heed the provisions of the procurement laws and or a policy, it would be acting unlawfully and any of its decision, as a result thereof, would be open to an attack.[51] As an administrative authority, therefore its action will be in conflict with the rule of law and the principle of legality, which requires that the organ of state to exercise only public power conferred on them and nothing more.[52] Where there is a procurement policy an organ of state must give effect of it.[53] Section 2(1) of the PPPFA provides that an organ of state must determine its preferential procurement policy and implement it within the following (the prescribed) framework.

The National Treasury Practice Note No. 6 of 2007/2008 of 18 April 2007 outlines the procure goods and services by organs of state. Clause 2 of the Practices Note No.6 of 2007/2008 provides that:

> "2.1 Section 217 of the Constitution of the Republic of South Africa, 1996, prescribes that goods and services must be contracted through a system that is **fair**, **equitable**, **transparent**, **competitive** and **cost-effective**. This prescript stipulates how Government's supply chain management (SCM) system should be managed and it also confers a constitutional right on every potential supplier to offer goods and services to the public sector when needed.
>
> 2.2 The SCM process of procuring goods and services by means of public advertisement, including its publication in the Government Tender Bulletin, gives effect to the Constitution's prescripts that all potential suppliers should be afforded the right to compete for public sector business through competitive bidding.
>
> 2.3 It is, however, recognised that there will be instances when it would be impractical to invite competitive bids. In this regard, Treasury Regulation 16A6.4 provides for such instances where accounting officers or authorities are allowed to dispense with competitive bidding processes to procure goods and services by other means. This

[51] *Batho Star Fishing (Pty) Ltd* at para [103].
[52] *Tasima* at para [81].
[53] *Batho Star Fishing (Pty) Ltd* at para [100].

provision is intended for cases of emergency where immediate actions is necessary or if the goods and services required are produced or available form sole service providers. The reasons for such action must be recorded and approved by the accounting officer or accounting authority.

2.4 . . .".

It is important to note that the conclusion of the procurement contract by the organ of state, the organ of state does not divest itself of its constitutional responsibilities and public accountability for rendering the public services, as it still remained accountable to the people of South Africa for the performance of those functions by the tenderers.[54] And that when the tenderer concludes the procurement contract with the organ of state for rendering public services, it too become accountable to the public of South Africa in relation to the public power it acquired and the public function it performs, therefore commercial part dependent on, or derived from, the performance of the public functions is subject to public scrutiny both in its operational and financial aspects.[55]

Khi V. Thai, "*Public Procurement Re-Examined,*"Journal of Public Procurement Vol. 1 (2001) Issue 1, 24 has stated that "the public procurement is an important function of government for several reasons. First, the sheer magnitude of procurement outlays has a greater impact on the economy and needs to be well managed. Second, public procurement has been utilised as an important tool for achieving economic, social and other objectives. Thus it is essential to establish a procurement system with clearly stated goal and policies. Due to its different economic, social and political environment, each country and even each governmental entity within a

[54] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others (No. 2)* at para [58].
[55] Ibid at para [59].

country has a different procurement goal or policy. In a government entity, be it a national, state or local entity, where corruption is widespread, its procurement system may focus more on procurement integrity or transparency. In a government entity that has under-privileged ethnic groups, its procurement policies may focus on procurement equity. A government entity that deals with ailing economy shall use its procurements as a tool for economic development or stabilisation. In addition to procurement goals, procurement regulations specify, among other things, such as the procurement organisational structure, roles and responsibilities, or procurement phases and process, and standards of conduct. In that, as public procurement is very complicated system within which there are many conflicting interests, sound procurement regulations are needed in order to increase public confidence in the procedures followed in public procurement, and to ensure fair and equitable treatment of all persons who deal the procurement systems.”.

Chapter 3

3.1 The impact of PAJA

An invitation, a conclusion, or termination of the procurement contracts is subject to the PAJA, as the decision relates to a matter of procurement which has an administrative character,[56] except to the disputes which arises after the contracts have been awarded.[57] The consideration and award of a tender by the organ of state is regarded as an administration therefore a tenderer is entitled to a lawful and procedurally fair and transparent process.[58] In *Millennium Waste Management*[59], the Court stated that:

> "Since the adjudication of tenders constitutes administrative action, of necessity the process must be conducted in a manner that promotes the administrative justice rights while satisfying the requirements of PAJA (Du Toit v Minister of Transport 2006(1) SA 297 (CC). Conditions such as the one relied on by the tender committee should not be mechanically applied without consideration of and the constitutional rights of a tenderer.".

Thus, when the organ states are procuring goods and services they do so through the empowering legislation, the process constitutes an administrative action and it should be lawful and procedurally fair all the time.[60] In *Transnet Ltd v Goodman Brothers (Pty) Ltd* (373/98) [2000] ZASCA 62 at paras [7] and [9], Schutz JA agreed with Howie JA that:

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[56] *City of Tshwane v Nambiti Technologies (Pty) Ltd* (20580/2014) [2015 ZASCA 167 (26 November 2015) at paras [22] – [25].
[57] *Lesedi News CC v Rustenburg Local Municipality* (4/14) [2014] ZANHWC 35 (6 November 2014) at para [14].
[58] *AllPay Consolidated Investment Holdings (Pty) Ltd* (No. 1) at para [43].
[59] Para [21].
[60] *Member of the Executive Council, Department of Education, North v KC Productions CC* (CA14/207) [2009] ZANWHC 10 (5 March 2009) at para [15].

> ". . . The steps that had preceded the conclusion of a contract were purely administrative actions and decisions by officials, whilst in addition public money was being spent by a public body in the public interest. Naturally, in such a case the subject is entitled to a just and reasonable procedure. . ., and that the actions of Transnet in calling for and adjudicating tenders constituted administrative action, whatever contractual arrangements may have been attendant upon it.".[61]

PAJA shall be used when a procurement contract is reviewed, as the decision to award or refuse the tenders is regarded as administration actions.[62] Organs of state shall ensure that the constitutional requirements of fairness, equitability, transparency, competitiveness and cost-effectiveness is observed and adhered to all the time during the procurement processes.[63] In *Tetra*[64], the Court stated that:

> ". . . Indeed the stated purpose of the Procurement Act as it appears in the long title is to give effect to s 217 of the Constitution and to provide for matters connected therewith. Section 217 guarantees fair, equitable, transparent, competitive and cost-effective procurement processes. In addition, the decision awarding or refusing a tender constitutes administrative action and therefore engages the right to just administrative action. This requires that in considering a tender, the decision-maker must conduct itself in a procedurally fair manner . . „ . .[65]

As a decision to award a procurement contract is an administrative action, an organ of state shall approach a court of law for review of its decision if there is evidence which suggest that such decision is defective.[66] In *Member of the Executive Council*

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[61] *Greys Marine* at paras [22] and [24].
[62] *City of Tshwane* at para [22]; *AllPay Consolidated Investment Holdings (Pty) Ltd* (No. 1) at para [41]; *MEC for Health, Eastern Cape and Another v Kirland Investements (Pty) Ltd* [2014] ZACC 6 at paras [93] – [95] .
[63] *AllPay Consolidated Investment Holdings (Pty) Ltd* (No. 1) at para [43].
[64] Para [8].
[65] *Vox Orion (Pty) Ltd* at para [51]; *Trencon* at para [31].
[66] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* (No. 2) at paras [29] –[30].

for Health, Eastern Cape Province v kirland Investments (473/12) [2013] ZASCA 58 (16 May 2013) (herein refers as *"Kirland"*)[67] case, Cameron J stated that:

> "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 it effects on those subject to it.".

As illustrated in aforesaid paragraphs, the tender invitations, conclusions or terminations of the procurement contracts are subject to PAJA, therefore organs of state are not allowed to just terminate the procurement contracts if there are flawed in the processes for awarding or refusing to award such procurement contracts without approaching the court first for an appropriate remedy, in terms of the principle of *functus officio*.[68] The following was said in *Kirland*[69] by the Court that:

> ". . . It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid, whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that would be caused to the person in whose favour the initial decision had been granted is obvious.".

3.2 Termination of procurement contract

It is a fundamental principle of the rule of law that the exercise of public power is only legitimate where is lawful, and that organs of state only act within the powers lawfully

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[67] *Kirland* at para [64].
[68] Ibid at para [15], the Court stated that "the fact that the decisions were not communicated or otherwise made known has an important effect: because they were not final, they were subject to change without offending the *functus offio* principle . . . In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.".
[69] Ibid at para [21].

conferred upon them.[70] Section 1(c) of the Constitution provides that "the Republic of South Africa is one, sovereign, democratic state founded on the following values . . . supremacy of the Constitution and the rule of law".[71]

The general rule is that a contract which has expired (when its term clearly state so), it came to an end therefore there is no need of any party to the contract to give a notice of termination, as all rights terminate immediately in term of doctrine of *ex lege*. If the contract does not have an express term providing for termination by notice, or the period of the contract is left undetermined, the contract is also terminable by either party after the initial period on reasonable notice to the other.[72] In *Moloi v Medi-Clinic (Pty) Limited* (A38/2014) [2014] ZAFSHC 153 (11 September 2014) at para [21], Pohl, AJ stated that:

> "The basis of the appellant's defence in his answering affidavit was that the respondent cancelled the lease agreement and that it was not entitled to do so. The appellant relied on clause 21 of the lease agreement, being a clause dealing with cancellation. But in this case the respondent did not cancel the lease agreement. The lease agreement expired and terminated *ex lege* due to effluxion of time. A lease that has a fixed period terminates automatically, as a matter of law, upon the expiry of the time period. When a lease terminates due to the expiry of its fixed period, all rights terminate immediately and no rights to occupation remain. The tenant is obliged to vacate immediately upon such termination. It is not necessary for any notice of termination to be given as the lease terminates *ex lege*.".

[70] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/1998) [1998] ZACC 17 at para [56].
[71] *Tasima* at para [86].
[72] *Maphango v Aengus Lifestyle Properties* (611/2010) [2010] ZASCA 100 (1 June 2010) at paras [7] and [28]; *Moloi v Medi-Clinic (Pty) Limited* (A38/2014) [2014] ZAFSHC 153 (11 September 2014) at para [19].

The National Treasury has issued the 'General Conditions of Contract July 2010' (GCC).[73] The GCC empowers the organs of state to terminate the procurement contracts on certain grounds. Clause 23 provides for a termination for default:

> "23.1 The purchaser, without prejudice to any other remedy for breach of contract, by written notice of default sent to the supplier, may terminate this contract in whole or in part:
>
> (a) if the supplier fail to deliver any or all of the goods within the period(s) specified in the contract, or within any extension thereof granted by the purchaser pursuant to GCC clause 21.2;
>
> (b) if the supplier fails to perform any other obligation(s) under the contract; or
>
> (c) if the supplier, in the judgement of the purchaser, has engaged in corrupt or fraudulent practices in competing for or in executing the contract.
>
> 23.2 In the event the purchaser terminates the contract in whole or in part, the purchaser may procure, upon such terms and in such manner as it deems appropriate, goods, works or services similar to those undelivered, and the suppliers shall be liable to the purchaser for any excess costs for such similar good, works services. However, the supplier shall continue performance of the contract to the extent not terminated.
>
> 23.3 . . .".

Baur[74] has said that "before bidding on a government's procurement contracts one should know the circumstances under which the government may cancel or terminate the contract and the consequences of such termination may be. As if the government's need for the procurement of goods or services diminishes, the government's procurement officials may exercise their power to cancel or terminate the contracts rather than let the government take and pay for goods or services it no longer needs. The consequence of such cancellation or termination the contractor will be reimbursed for his or her costs of performance and will be paid a reasonable

[73] *Sakhiwo Health Solutions* at para [26'.
[74] Baur at 607.

profit on work done. And that anticipatory profit may not be recovered, and the recovery of costs and profits may not exceed the contract price of the cancellation or termination.".

Any person who enters into a procurement contract with an organ of state should be aware and or informed about the GCC and its implication with regard to the right of termination of the contract by the organ of state. The GCC is applicable or implied in all procurement contracts, unless it is specifically excluded by the parties in their contract.[75]

Organs of state are entitled to terminate the procurement contracts if the other parties failed to perform any obligations under the contracts,[76] including if the organs of state have no enough budget to comply with its performance obligations. In *Van Streepen & Germs (Proprietary) Limited v The Transvaal Provincial Administration* (71/87) [1987] ZASCA69 (21 August 1987), the Court dealt with matter that involved the cancellation of a contract where the respondent wrote a letter to appellant informing it that owing to a shortage of funds respondent was compelled to cancel the contract with immediate effect. The appellant disputed the right of the respondent to cancel the contract on grounds alleged and that it regard the respondent's action as a wrongful repudiation[77] of the contract and a material breach thereof, and that in consequence therefore it had elected to cancel the contract and claimed damages as a result of the breach. Corbett JA held that in the law of contract "cancellation" is a well-known terms which covers both cancellation by agreement between the

[75] *Swart v Mutual Federal Insurance Co. Ltd* (1035/2004) [2009] ZAWCGC 107 (4 August 2009) at para [22].
[76] Clause 23 of GCC.
[77] *South African Forestry Company Limited v York Timbers Limited* (Case No.656/02) [2004] ZASCA 72 at para [38], the Court explained how repudiation accours, by stating that "repudiation occurs where on party, without lawful grounds, indicates to other party, by word or conduct, a deliberate and unequivocal intention that all or some of the obligations arising from the contract will not be performed in accordance with its true tenor.".

parties (or consensual cancellation, to use the phrase adopted by counsel in argument) and cancellation by one party on the ground that the other party has wrongful repudiation or breached a material term of the contract . . . These two forms of cancellation denote every different juristic concepts. The first-mentioned form, consensual cancellation, is a contract whereby another contract is terminated. The second-mentioned form, cancellation on repudiation or breach, involves the unilateral exercise by one party of the right to rescind the contract, this right having accrued to him by reason of the other party's repudiation or material breach. This form of cancellation is often termed "rescission". The order was given in favour of the appellant as clause 3(6) conferred upon appellant rights additional to its common law rights with regard to the cancellation of the contract.

Organs of state may be terminated the procurement contracts which the courts have found to be contrary with the public policies,[78] or if the provisions of the contracts are found to be that of unconscionable, immoral or illegal conduct will result from their implementation. The following was said in *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd* (448/2003) [2004] ZASCA 64 at paras [23] – [24], by the Court that:

> "At common law agreements that are contrary to public policy are void and not enforceable. While public policy generally favours the utmost freedom of contract it does take into account the necessity for doing 'simple justice between man and man'. Therefore, when a court finds that an agreement is contrary to public policy it should not hesitate to say so and refuse to enforce it. However, the court should exercise this power only in cases where the impropriety of the transaction and the element of public harm are manifest. It is an important consideration that there be certainty about the validity of agreements and that this certainty could be undermined by an arbitrary and indiscriminate use of the power to declare

[78] *Botha* at para [23].

> agreements contrary to public policy (see *Sasfin (Pty) Ltd v Beukes* 1989(1) SA 1 (A) at 7I-J and 9A-C; *Botha (now Griessel) and another v Finanscredit (Pty) Ltd* 1989(3) SA 773 (A) at 782J-783B; *Brisley v Drotsky* 2002(4) SA 1 (SCA) para 94; *Afox Healthcare Bpk v Strydom* 2002(6) SA 21 (SCA para 8).".[79]

Weber[80] has stated that "historically, contracts void for violating public policy have included protective types such as unconscionable agreements or overreaching restraints on trade or alienability, as well as more general public policy grounds such as contract with business not registered in the state, contracts with an illegal purpose or subject matter.".

A court may declare a procurement contract invalid if the conditions in the tender invitations of the procurement contracts are viewed to be immaterial, unreasonable or unconstitutional.[81] In *Dr JS Moroko Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* (037/2012) [2013] ZASCA 186 (29 November 2013) at para [10], Leach JA held that:

> ". . . Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an 'acceptable tender' under the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.".

[79] *Jordan and Another v Farder* (1352/09) [2009] ZANCHC 81 (15 December 2009) at para [12], the court stated that:

> ". . . It is trite that our court will invalidate and refuse to enforce agreements which are contrary to public policy. As to what public policy entails, the Constitutional Court in *Barkhuizen v Napier* 2007(5) SA 323 (CC) at 334 par 28 recognised that the Bill of Rights represents a reliable statement of public policy. Thus, what public policy is and whether a term in a contract is contrary to public policy needs to be determined by having regard to the Bill of Rights and the values that underlie our constitutional democracy (as expressed in the Constitution).".

[80] Weber at 65.

[81] *Millennium Waste Management* at para [18].

Thus that an organ of state is entitled to terminate a procurement contract if it realises that the prerequisite conditions for a valid tender were immaterial, unreasonable or unconstitutional, but it can only do so by approaching a court.[82] Because the organ of state is estopped by the *functus officio* principle to terminate the procurement contract without a court order, and it may resist the enforcement of the procurement contract which it deems to be invalid.[83] In *Vos Orion (Pty) Ltd v State Information Technology Agency (SOC) Ltd* (Case No. 49425/2013) at para [92], Nkosi AJ stated that:

> "After notifying the applicant of the award of the tender as aforesaid, the respondent become "*functus officio*" and was not competent to revoke the award of the tender without a court order. For this reason, the respondent was not empowered to revoke the award and its decision to do so stands to be reviewed and set aside. However, if the decision to award the tender to the applicant is reviewed and set aside, the revocation of that decision by the respondent itself will become academic.".

Regulation 8.6 of the Treasury Regulations provides for the cancellation and variation of contracts. It provides that "*no contract (excluding personnel contracts) may be cancelled or changed to the detriment of the state without the prior approval of the relevant treasury*". This confirms the right of termination of the procurement contracts by the organs of state, subject to the relevant treasury's approval before exercising such right of termination.[84]

There is a duty on an organ of state to investigate any abuse of procurement processes by its officials or the tenderer, so that the right of termination may be

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[82] *Kirland Investments (Pty) Ltd* at paras [64] – [65].
[83] *Sanyathi Civil Engineering & Construction (Pty) Ltd and Another v eThekwini Municipality and Others, Group Five Construction (Pty) Ltd v eThekwini Municipality and Others (KZP)* [2011] ZAKZPHC 45 at para [13].
[84] Regulation 15 of the Preferential Procurement Regulations.

exercised if the evidence clearly shows such abuse.[85] Paragraphs 4 and 5 of National Treasury Instruction SCM Instruction Note No. 3 of 2016/17 (Instruction Note No. 3 of 2016/17) empowers the Accounting Officer/Accounting Authority to investigate a complaint and or an allegation of abuse of the Supply Chain Management System, and to initiate the implementation of the recommended remedial actions after the receipt of the investigation report, such as the rejection of the bid, cancellation of the contract, restricting the supplier from doing business with the state and or claiming damages (if any).

As it is trite that administrative action that does not satisfy the requirements of section 33[86] of the Constitution or PAJA is unlawful and an organ of state shall approach a court for an order declaring such administrative action invalid.[87] Our courts generally consider the parol evidence rule in relation to the review applications of the procurement contracts.[88] The following was said in *Premier of the Free State and Others v Firechem Free State (Pty) Ltd* (548/98) [2000] ZASCA 28 at para [29] by Schutz JA that:

> "But I do not think that the case is to be decided upon the basis of Mr Pillay's views. To do so would be to ignore the parol evidence rule in a fundamental way. It is not for him to tell us

[85] *Nortwest Provincial Government v Tswaing Consulting CC* [2006] SCA 138 (RSA) at paras [11] – [13].
[86] Section 33 provides that:

> "*(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
> *(2) Everyone whose rights have been adversely affected by administrative has the right to be given written reasons.*
> *(3) National legislation must be enacted to give effect to these rights, and must–*
> *(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
> *(b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and*
> *(c) promote an efficient administration.*".

[87] *Passenger Rail Agency of South Africa v Swifambo Rail Agency* (2015/42219) [2017] ZAGPJHC 177 (3 July 2017) at para [82]; *Kwafel CC v Kwa Dukuza Municipality and Others* (9959/2016) [2017] ZAKZDHC 1 (5 January 2017) at para [18].
[88] *Sakhiwo Health Solutions v MEC of Health, Limpopo* (908/2013) [2014] ZASCA 206 (28 November 2014) at para [32].

what the Board intended, when the Board has expressed its intentions in words that are capable of ready interpretation.".

3.3 Termination of a procurement contract as a result of irregularities

Organs of state are only empowered to act to the extent that their powers are defined and conferred by the Constitution and the law, as any conduct by the organs of state beyond their constitutional or statutory powers violates the principle of legality.[89] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 at para [58], the Court stated that "it seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.".[90]

Organs of state are entitled to terminate the procurement contracts if they found that there were or are irregularities during the procurement processes and or the procurement contracts have been concluded in contravention of the applicable legislation.[91] The general rule is that the procurement contracts which were concluded in violation of legislation are void contracts,[92] or to enforce the contract which have been concluded in breach of an applicable legislation.[93] In *Firechem,*[94] the Court stated that ". . . the delivery contract has to be ignored because to give

[89] *Minister of Finance and Others v Oakbay Investments (Pty) Ltd* (80978/2016) [2017] ZAGPPHC 576 at para [54].
[90] *Pepcor Retirement Fund and Another v Financial Services Board and Another* (198/2002) [2003] ZASCA 56 at para [47'.
[91] *Qaukeni* above n 1.
[92] Section 2 of the Constitution.
[93] *Tasima* at para [98.
[94] Para [36].

effect to it would be to countenance unlawfulness. The Province was under a duty not to submit itself to an unlawful contract and entitled, indeed obliged, to ignore the delivery contract and to resist Firechem's attempts at enforcement. Its acts in doing so amount to unlawful repudiation . . ." This rule articulate the principles that "freedom of contract" is limited only by the parameters which the legislature imposes in order to promote public policy.[95] In *Sanyathi Civil Engineering & Construction (Pty) Ltd and Another v eThekwini Municipality and Others, Group Five Construction (Pty) Ltd v eThekwini Municipality and Others (KZP)* [2011] ZAKZPHC 45 at para [13], Pillay D, J stated that:

> "Starting with the Constitution, all the authorities state unambiguously that an illegal act is invalid. No one can be in any doubt that this is the position in our law. A public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act, because a public authority has an interest and duty to act on behalf of the public. It is also under duty not to submit itself to unlawful contracts but to resist attempts to enforce such contracts.".

Organs of state shall terminate the procurement contracts if there is evidence that the BBEEA have been contravened during the procurement processes. Section 13A of the BBEEA provides that *"any contract or authorisation awarded on account of false information knowingly furnished by or on behalf of an enterprise in respect of its broad-based black economic empowerment status, may be cancelled by the organ of state or public entity without prejudice to any other remedies that the organ of state or public entity may have".*

[95] Ottinger at 769.

Section 1 of the PPPFA defines "acceptable tender"[96] as any tender which, in all respects, complies with the specifications and conditions of tender as set out in tender document. The definition prescribes the exercise of any discretion thus that an organ of state which wishes to exercise such discretion it must reserve such discretion for itselves in the tender documents in the interests of fairness, transparency and competitiveness,[97] including discretion to amend the tender documents. In *Liesching and Others v The State and Another* [2016] ZACC 41 at para [33], Musi AJ stated that:

> "Where a word is defined in a statute, the meaning ascribed to it by the Legislature must prevail over its ordinary meaning. . . If, however, there are compelling reasons, based on the context, to disregard the ascribed meaning then the ordinary meaning of the word must be used.".

Any amendments to the tender documents will be regarded as irregular if there was no such discretion reserved in the documents themselves for such amendments.[98] This is so as the tender documents themselves become the sole memorial of the terms of the transaction which it was intended to the records thus that in absence of a claim for rectification extrinsic evidence as to the terms of the tender or the intention of parties.[99] In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (7447/2012) [2012] ZAGPPHC 185 (28 August 2012) at paras [66], the court stated that:

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[96] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* (No. 1) at para [34].
[97] *Sanyathi Civil Engineering & Construction (Pty) Ltd* at para [34].
[98] *Swifambo* at para [54].
[99] *Gushman No and Another v Traunt No and Others* (3981/2012) [2012] ZAFSHC 217 (20 November 2012) at para [27].

> "In term of the RFP, each bidder had to submit a separate bid in respect of each of the Provinces in respect of which it intended to bid. CPS submitted one technical proposal and one preferential proposal in respect of the nine Provinces. The CPS's technical and preferential proposal was the same for every Province. SASSA made it clear at a briefing session that it was a formal requirement of the bid that each bidder must submit a separate bid for each Province. By failing to submit the bids by Province, CPS prevented the BEC from performing the comparative analysis of proposals per Province. CPS has accordingly failed to comply with a mandatory requirement of the RFP. An administrative body has no inherent power to condone non-compliance with a peremptory requirement unless it has been afforded discretion to do so. See *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd* 2004(1) SA 308 SCA at para 31.".

Lantera Nadew, "*Void agreements and voidable contracts: The need to Elucidate Ambiguities of Their Effects.*" Misan Law Review Vol. 2 No. 1 , Jan (2008):92 has stated that "a void contract is an act that the law holds to be no contract at all – a nullity from the very beginning: conclusion of void contract does not change the position of 'contractants'. They can assume as if contract was never formed . . . it is logically fallacious to view a void act as a contract: because if an agreement is truly void, it is not a contract. Strictly speaking a void contract produces no legal effect. Neither party, therefore, can sue the other for enforcement of the same. The defect causing a contract void is incurable and has no binding effect and hence, unless a new and independent contract is re-entered, there will be no contract relationship.".

An organ of state shall terminate a procurement contract if it realised the procurement contracts were concluded without the proper delegation by the officials who should signed the contract, or without adherence with legislative procurement

frameworks.[100] If it is clear that the official involved has no authority to conclude the procurement contract and that the authority is vested in someone else in terms of the law and that that person has not assigned such authority the contract is generally void as the power exercised without authority cannot be ratified after the fact.[101] In *Mathipa v Vista University and Others* [2000] JOL 5999 (T), De Villiers J stated that:

> "Put another way, the legislature simply did not intend that the council would be entitled to ratify the appointment of a staff member made by someone else. The Act clearly intended that the council would itself make the appointment unless it had assigned its power of appointment to a committee of the council was bound to make the appointment itself.".

An organ of state is required, on opening of the tenders and before the detailed evaluation of the tenders, to satisfy themselves that the tenders met all the requirements of the tender documents read with the conditions of the tender, were properly and fully completed and signed and were responsive to all the requirements of the tender conditions.[102] If the evidence shows from the invitation to the tender terms relied on by the organ of state are not the one of the tender specifications therefore it has failed to comply with its own tender invitation and is regarded as irregular, and the award of the tender would be void and invalid *ab intio*.[103] The failure to comply with the procurement specifications in the tender documents and processes outlined in the tender invitations will be subjected to judicial review.[104] In *Esofranki Pipelines (Pty) Ltd* at para [29], Matojane J stated that "in our, all administrative acts are presumed to have been done rightly until such time that the decision is set aside by a court of law . . .".

The organ of state shall immediately disqualifies the tenderer who failed to comply with the tender invitation if there is no discretion to condone in the tender documents,

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[100] *Firechem* at para [31].
[101] *AAA Investments (Proprietary) Limited* at para [91].
[102] *Esofranki Pipelines (Pty) Ltd* at para [69].
[103] *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality and Others* (641/2012) [2013] ZAECGHC 76 at para [94]; *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (7447/2012) [2012] ZAGPPHC 185 (28 August 2012) at paras [66].
[104] *Goodman Brothers* supra.

and that the tenderer should not be allowed to take part in the tender and warded the award.[105] In *KwaZulu-Natal Joint Liaison Committee v MEC of Education and Others* 2013 (6) BCLR 615 (CC) at para [102], the Court has said that "it is an adjunct of the rule of law, or legality, that the State cannot act outside its constitutional or legislative power.".

Organs of state are not entitled to import additional criteria or factors not stipulated for in the tender invitations, or to have regard to their own perception of the nature of the contract, or of what is necessary in terms of the tender invitation outside of what is specifically stated in it, or to interpret the tender invitations to suit such perceptions,[106] unless they have clearly reserved such powers on itself in the tender invitations. This is so as the reservation should relate directly to the subject-matter of the procurement contracts as they have an impact on the process of performance under the contracts. It would, however, still be important to inform the tenderers beforehand that the conditions related to performance may or will be incorporated into the procurement contracts concluded with the successful tenderer(s). In *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd and Another* (47/2015) [2015] ZASCA 208 at paras [48] and [50], the Court stated that:

> "The very fact that the BTC resorted to strategic considerations without making these known to either Westinghouse or Areva, and without making them part of the bid evaluation criteria, appears to me to be fundamentally unfair. And the fact that Eskom added to these in its answering affidavit by stating that the BTC had also had regard to the float added injury to insult. No mention was made of this consideration in the letter to the Minister and of course Westinghouse was not given the opportunity to point out where, in its schedule, it had built in buffer periods to avoid delay in the completion of the work . . . If any of the considerations that

[105] *Passenger Rail Agency of South Africa* at para [60].
[106] *BKS Consortium* at para [48].

> caused the BTC to award the tender to Areva is outside the parameters of the bid criteria the decision is bad in law. In considering each of the strategic considerations and the float, it must be borne in mind, as Schutz JA aid in *Firechem* above, that the tender must speak for itself."

This also applies to the procurement contract which is concluded after the contract is awarded and accepted, as the following was said in *Firechem*[107] by Schutz JA that ". . . one must ask oneself what was expressed to be intended when the acceptance referred to "a contract . . . signed by the Province and Firechem." This expression must be read together with the statement that "This letter of acceptance constitutes a binding contract . . ." if the contract brought into being by this acceptance was to bind, then the further contract envisaged could not be the one which contradicted it."

As an administrative authority, an organ of state is burdened with its public duties of fairness in exercising the powers it derives from the terms of a contract, and its officials have to remind themselves that it is a public authority and as such it could not conduct its affairs as a private enterprise as it is accountable to the public.[108] The general public interest requires that the procurement of goods and services be operated fairly and properly and, in addition, the interests of very persons affected by the procurement decision to seek judicial review on their own if the organs of state have not done so.[109].

A tender invitation should clearly states all the specifications that are applicable to the tender (the GCC should form part of the invitation always), it may also include a clause such as that the "non-fulfilment of any of the prescribed conditions may lead

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[107] *Firechem* at para [29].
[108] *Sanyathi Civil Engineering & Construction (Pty) Ltd* at paras [45] – [46].
[109] *Pepcor Retirement Fund and Another v Financial Services Board and Another* (198/2002) [2003] ZASCA 56 at paras [14] and [31].

to disqualification of the proposal".[110] This is so because it ensures that the tender documents clearly inform the tenderers about all what they are required to do in order to response to the tenders.[111] And that the tender should speak for itself and its real import may not be tucked away, apart from its terms and that tenderers should be treated equally in the sense that they should all entitled to tender for the same thing.[112] More importantly, the tender invitations must be drafted in line with the constitutional imperatives of fairness and transparency as envisaged in section 217 of the Constitution.[113] In *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others* (21158/2012) [2013] ZAWCHC 3 (6 February 2013) at paras [72] – [73], Davis J stated that:

> " . . . In my view the imperatives fairness and transparency, laid down in section 217(1) of the Constitution, dictate that prospective tenders should be properly informed of the tender evaluation criteria to be applied. This information is obviously necessary to enable would-be bidders to decide whether or not to spend time and money on preparing a tender. Furthermore, I consider that it offends against the notion of transparency where a tender adjudicator is left to choose from a smorgasbord of tender evaluation methods. To my mind transparency and fairness requires that tender evaluation methods should be clearly defined, certain and published in advance in the tender documentation.".[114]

The tender conditions have a statutory provenance[115] thus that proper compliance with the tender process is necessary for the process to be lawful. For example, regulations 3, 4 and 5 of the Preferential Procurement Regulations require that an organ of state to determine and stipulate in the tender documents the preference

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[110] *BKS Consortium* at para [89].
[111] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others* (21158/2012) [2013] ZAWCHC 3 (6 February 2013) at paras [72] – [73].
[112] *Firechem* at para [30].
[113] In *TED Properties CC v The MEC, Department of Health and Social Development, North West* [2011] ZASCA 243 at para [20].
[114] BKS Consortuim at para [115].
[115] *City of Tshwane* at para [30]; *Dr JS Moroka Municipality* at para [10].

point system, designated sector, pre-qualification criteria to advance certain designated group, objective, subcontracting and the evaluation criteria for measuring functionality. Thus, that the tender invitations shall incorporate the legislative requirements such as those contemplated in the Preferential Procurement Regulations. This is so not only because the organ state is administrative authority, but it is to ensure the compliance with the procurement legislative prescripts. The Constitution, the PPPFA, Preferential Procurement Regulations, etc., clearly set out the legal position in respect of the obligations of the organs of state have on the drafting of the tender invitations and the conclusion of the tenders. If a tenderer submitted a tender which it is clear that the tender did not comply with the requisite of legislative prescripts that was specified in the tender document at the time of submitting it's tender have to be disqualified, as the tenderer tender cannot be regarded as "acceptable" in that it does not comply with the specifications and conditions of the organ of state's own tender document.[116]

A response to a tender invitation does not create a relationship between an organ of state and a tenderer.[117] Even though, the organ of state is duty bound by the terms of the tender invitation[118] and or the fact that the consideration of a tender could only fall within the terms of the tender invitation and not go beyond that.[119]

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[116] *Esofranki Pipelines (Pty) Ltd* at para [71].
[117] *Telkom v Mzanzi & Others* (383/12) [2013] ZASCA 14 (18 March 2013) at para [8].
[118] Regulation 3 of the Preferential Procurement Regulations, 2017 provides that "an organ of state must–
(a) Determine and stipulate in the tender document–
(i) The preference point system applicable to the tender as envisaged in regulation 6 or 7; or
(ii) If it is under which preference point system will be applicable, that either the 80/20 or 90/10 preference point system will apply and that the lowest acceptable tender will be used to determine the applicable preference point system;
(b) Determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4;
(c) Determine whether the goods or services for which a tender is to be invited, are in a designated sector for local production and content as envisaged in regulation 8; determine whether compulsory subcontracting is applicable to the tender as envisaged in regulation 9; and
(d) Determine whether objective criteria are applicable to the tender as envisaged in regulation 11."
[119] *BKS Consortium* at paras [48], [50] and [54].

Despite the fact that the organs of state are entitled to determine the tender specifications and conditions, those specifications and conditions cannot vitiate any applicable legislative framework within which the procurement process operates.[120] It is important to take into account that an organ of state cannot be estopped to refuse an attempt to enforce a procurement contract which has been entered into in contrary to what is required by law such that the procurement contract be entered into pursuant to a tender process which is 'fair, equitable, transparent, competitive and cost-effective.[121] If the tender processes have not been complied with the organs of state are duty bound to apply to a court for order to set aside any resulting procurement contracts as it is unlawful and not to submit to an enforcement of such contracts.[122]

When a tender invitation stipulates validity period for the tender proposal, as soon as that validity period had expired without the an organ of state awarding a tender the tender process was complete and albeit unsuccessfully, the organ of state was no longer free to negotiate with any tenderer as if they were attempting to enter into a procurement contract, as the process will be no longer transparent, equitable or competitive.[123] The same applies to a procurement contract which contains a clause for 'the renewal of the contract' or 'any tender will not necessary be accepted and the organ of state may cancel the tender process and reject all tender offers at any time before the formation of a contract'.[124] As the wording in regulation 3 of the Preferential Procurement Regulations implies that the organs of state may determine

[120] *Nexus Forensic Services (Pty) Ltd* at para [16].
[121] *Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others* (27974/2010, 25954/2010) [2011] ZAGPPHC 1 (7 January 2011) at para [18].
[122] *Telkom SA Limited* at para [22].
[123] *Telkom SA Limited* at para [14].
[124] *City of Tshwane* at para [25].

the terms in the tender documents thus that the determined terms have to be straightaway. In *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* (199/10) [2010] ZASCA 156 (1 December 2010) at para [25], the Court stated that:

> ". . . It is clear that the renewal of the service agreement did not give rise to a new service agreement; it simply extended the duration of the service agreement for a period of three years. Properly interpreted, clause 2.3 of the agreement provides for a renewal for a period of two years on the same terms as before subject only to such amendments as may be negotiated and agreed between the parties.".

And in *Sakhiwo Health Solutions v MEC of Health, Limpopo* (908/2013) [2014] ZASCA 206 (28 November 2014) at para [26], Lewis JA stated that ". . . All the contractual documents had to be read together. A request for proposals binds the body making it and the successful bidder once the bid is accepted. It could not be altered other than with the clear agreement of the parties.".

It is also possible that the express reservations such as that 'the organ of state may cancel the tender process and reject all tender offers at any time before the formation of a contract' merely made explicit what would in any event have been the position, as it is always open to a public authority as it would be to a private person to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender.[125]

Generally, the same terms and conditions which appeared in the tender invitation form the basis of the procurement contract between the organ of state and another

[125] *City of Tshwane* at para [26].

party,[126] and that the language and context of the legislation prevail over the preference terms of the organ of state and the tenderer.[127] Thus that the organ of state shall terminate the procurement contracts if there evidence of breach such terms and conditions. In *Member of the Executive Council of the Department of Education, North West v KC Productions CC* (CA14/2007) [2009] ZANWHC 10 (5 March 2009) at paras [18] – [19] Matlapeng AJ stated that:

> " . . . There is a seamless transition from a tender to a contract without there being a separate written contract based on the terms and conditions laid in the tender. The relationship of the parties may be said to be that of ordinary contracting parties but tender conditions, which form the basis of the contract were dictated by the appellant, the province exercising public power or performing public function . . . the attempt by the appellant to separate the agreement from the statute that gave rise to the agreement is not a sound one. Furthermore, the fact that the agreement came into being as a result of a statute, renders its termination a public exercise of power . . .".

Organs of state shall always be cautious of the tender invitations, their acceptance by the successful tenderers which contains the "entire agreement" clauses such as 'this agreement contains all the express provisions agreed upon by the Parties with regard to the subject-matter of the Agreement and the parties waive the right to rely upon any alleged express provision not contained in the Agreement'. As the consideration of external information to that tender invitation in awarding the tender renders the tender unlawful and procedurally unfair and that the arbitrary use of measure to determine the success or failure of a tender is inconsistent with the functions required of the organ of state.[128]

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[126] *BKS Consortium* at para [57].
[127] *Sakhiwo Health Solutions* at para [33].
[128] *Nexus Forensic Services (Pty) Ltd* at para [11].

The period for which a party approved the procurement contract depends on what the written contract says, and by application of the parole evidence rule in respect to its conclusion, thus, any extrinsic evidence on the meaning of the relevant clause of the contract would be precluded.[129] In *Sakhiwo Health Solutions*[130] , Lewis JA stated that:

> ". . . There are two aspects to the parol rule: First, that a court cannot entertain evidence of extrinsic matter that adds to or alters a written contract. And second, the extent to which extrinsic evidence may be allowed in the process of construction of a written contract. (See *KPMG*, above, para 39, and *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013(3) SA 426 (SCA) paras 20 and 21). In so far as the second aspect is concerned, it is clear that a court may have regard to any matter that forms part of the factual matrix. That is what this court has decided in the cases referred to above. In so far as the first aspect is concerned, the parol evidence rule does not prevent this court from considering the RFP (Request for Proposal) and its terms since it is the contract itself. It is not extrinsic to the SDA (Service Delivery Agreement). As we have seen, the SDA is auxiliary to the RFP, which is the foundation of the contract. The purpose of looking at the provisions of the RFP is to understand what the parties intended to achieve when concluding the contract. The RFP, the award and the SDA tell us that.".

Generally, there is no procurement contract if the conditions imposed for the conclusion of the procurement contract have not been complied with, and the evidence can clearly established that no contract was ever concluded between the parties, as one of the primary requirements of any contract is that there must be a meeting of the minds regarding the essentials of the contract that the parties intend concluding. This is so as an organ of state should reject a tender that did not comply

[129] *Gauteng MEC for Health* at para [20]; *Jordan* at para [31].
[130] *Sakhiwo Health Solutions* at paras [32] – [33].

with the tender specifications. In *Kwafel CC v Kwa Dukuza Municipality and Others* (9959/2016) [2017] ZAKZDHC 1 (5 January 2017) at para [17] the Court stated that:

> "In this case it is common cause that the singular reason for rejecting the applicant's bid was that his waste management plan did not comply with the tender specifications. On the evidence before me I must find in favour of the first respondent. Manifestly, the applicant's plan does not meet the minimum requirements to even qualify as a valid tender.".

Organs of state may terminate the procurement contracts if the evidence clearly shows that the misrepresentations by the tenderers or their representatives, as the misrepresentation generally render a contract voidable. In *Sim Road Investments CC v Morgan Air Cargo (Pty) Ltd* (024/10) [2010] ZASCA 081 (27 May 2011) at paras [22] – [24], the Court stated that:

> "It has been settled law for many decades that a material representation renders a contract voidable at the instance of the misrepresentee. Absent the voetstoots and exclusion clauses cited above, Morgan Air would have been entitled to ask for rescission and restitution even if the misrepresentation had been innocent. But liability for a misrepresentation made innocently and even negligently may be excluded by parties to a contract – hence the conjecture that Murphy J found that the misrepresentation had been made negligently and that it had resulted in iustus error that rendered the contract, including the exclusion clauses, void. As stated, however, a misrepresentation generally renders a contract voidable. The innocent party may elect to abide by it even where the other has been fraudulent. The difference that fraud makes is that one cannot contract out of liability for fraudulent conduct. And even where a mirespresentee has been foolish or negligent in relying on the fraudulent misrepresentation, which does not in any way affect the liability of the misrepresentor . . .".[131]

Our courts have for long time settled the principles governing the interpretation of a contract, such as that of ascertaining the meaning of the contract a court must

[131] *African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province* (134/2014) [2015] ZASCA 104 (2 July 2015) at paras [19] and [21].

establish what the parties intended and what the purpose of the contract was, by considering all of the contract provisions and may not isolate any of them and consider them in a vacuum.[132]

A conclusion of a procurement contract even the tender documents submitted by a tenderer are viewed as unresponsive is unlawful, therefore the organ of state shall not enforce such contract, especially if there is no discretion to condone such failure to comply with the tender documents. In *Dr JS Moroka Municipality*[133], Leach JA stated that:

> ". . . A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid 'validly submitted'. Moreover, the tender process consists of various stages: first, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid; second, the evaluation of all bids 'validly submitted' as prescribed in clause 3; and third, a decision on which of the validly submitted bids should be accepted . . . In these circumstances it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an 'acceptable tender' as envisaged by the Procurement Act and did not pass the so-called 'threshold requirement' to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside – as was held by this court in Sapela Electronics."

The organ of state can also terminate the procurement contract which it has clearly mistaken with regard to the entity (party) with whom it thought that it was contracting, and the actions of that party were deliberately taken to mislead, as in such situation,

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[132] *Sakhiwo Health Solutions* at para [25]; *Sun Packaging (Pty) Ltd v Vreulink* (665/94) ZASCA 73; Ottinger at 790 has said that "the most fundamental tenet regulating the interpretation of contracts is that the "interpretation of a contract is the determination of the common intent of the parties." As a corollary, "[w]hen the word of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.".

[133] Paras [15] – [16].

thus, there is no contract *ab initio*.[134] The parties of the procurement contract should, as far as possible clearly, be identified in the procurement contract so that that procurement contract reflect the parties consensus.[135] This helps to identify whether there is a proper representation if a person who acts on behalf of another has authority to do so.[136] In addition, it prevents a tenderer to make a false representation in submitting the tender.[137] In *Esofranki Pipelines (Pty) Ltd and Another* v Mopani District Municipality and Others (13480/2011, 17852/2011) [2012] ZAGPPHC 194 (29 August 2012) at paras [76] – [79], Matojane J stated that:

> "The municipality will have noted that the Tlong did not conduct any business at the time the tender was submitted. It did not exist at the given address. I agree with counsel for Cycad that the representation that the Joint venture carries on business at given address is a fraud on the Municipality and they should not have been allocated a point in respect of locality. The given address is a residential house with only few furniture. Had proper investigation have been done, the Municipality would have found the Ms Malebate is employed at an unrelated company, MM Paving and it is part of Selby Construction, she and the owner are brother and sister. There are in fact neither offices nor an operating business address. Ms Malebate made a false representation that the total number her firm has been in business was three years. Tenderers were required to list all shareholders by name, position, identity numbers and citizenship, HDI etc. It is falsely represented that Mr Jim Lu a Chinese national obtained South African citizenship on the date of his birth. The representation is made that the contract is going to be managed and executed in equal portions by Tlong and Base Major when it is obvious that Tlong has no experience in construction work at all . . . I agree with Cycad's contention that the decision to award the tender to the joint venture falls to be reviewed set aside . . .".

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[134] *African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province* (134/2014) [2015] ZASCA 104 (2 July 2015) at paras [33 – 35].
[135] Ibid.
[136] *Minister of Transport v Prodiba (Pty) Ltd* (20028/2014) [2015] ZASCA 38 (25 March 2015) at para [31].
[137] *African Information Technology Bridge 1* at paras [19] and [21].

The organ of state may further terminate a procurement contract if the conditions (suspensive conditions) or terms of the written contract are not met[138] after the conclusion or after the acceptance letter, with conditions, has been communicated with the successful tenderer. In *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province* (20800/2014) ZASCA 61 (14 April 2016) at paras [25] – [26], Mdha JA stated that:

> "Once one accepts, as we must, that where the tender document explicitly imposed a duty on a tenderer to disclose that it had the necessary financial resources to execute a project of this magnitude when it submitted its bid, it can hardly be contended that this duty did not endure thereafter, during the adjudication process. In my view it did. Once Tau Pele's financial position had changed materially after it had submitted its bid it bore the duty to disclose that material fact. The adjudication process would be seriously undermined and the department prejudiced if the public procurement process did not recognise such a duty. This is underpinned by the fact that a tendering process, involving huge amounts of public money, is clearly a matter in which the public has an interest. For these reasons, the learned judge in the court a quo was correct to set aside the contract awarding the tender to Tau Pele.".

As the organs of state are not be expected to conclude the procurement contracts which are inconsistent with the applicable legislation they are also not expected to enforce such procurement contracts which have been concluded in breach of an applicable legislation.[139] In *Kirland Investments (Pty) Ltd,*[140] the Court stated that ". . . the delivery contract has to be ignored because to give effect to it would be to countenance unlawfulness. The Province was under a duty not to submit itself to an unlawful contract and entitled, indeed obliged, to ignore the delivery contract and to

[138] *De Villiers NO and Another v BOE Bank Limited* (477/2002) [2003] ZASCA 101 at para [76].
[139] *Trencon Construction (Pty) Limited* at para [75].
[140] Para [36].

resist Firechem's attempts at enforcement. Its acts in doing so did not amount to an unlawful repudiation . . .".

Organs of state should not take the attitude for just withdrawing or ignoring the procurement contracts for the simple basis that the defective decision did not exist, as the procurement contracts remain in existence until, in due process, it is properly considered and set aside by the court.[141] Even if a decision for the conclusion of the procurement contract was not taken in terms of any statute or regulation, an organ of state is not entitled to ignore it.[142] Even though the procurement contract has been concluded without the procedures not being followed when an organ of state exercises its public power, the organ of state is not entitled to terminate such procurement contract on its own, but it has to approach a court to set it aside. In *Kirland Investments (Pty) Ltd*[143], the court stated that:

> "The fundamental notion is that official conduct that is vulnerable to be challenge may have legal consequences and may not be ignored until properly set aside it springs deeply from the rule of law. The courts alone and not public officials are the arbiters of legality. As Khampepe J stated in *Welkom*, "(t)he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means". On the contrary, the rule of law obliges an organ of state to use the correct legal process. For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortes of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid. The approval communicated to Kirland was therefore, despite its vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set

[141] Ibid at 67.

[142] Ibid at [88] – [89]; Qaukeni at para [23], the court stated that "*. . . this court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not be entitled but also duty bound to approach a court to set aside its own irregular administrative act . . .*".

[143] Paras [103] and [105].

> aside. It could not be ignored or withdrawn by internal administrative fiat. This approach does not insulate unconstitutional administrative action from scrutiny. It merely requires government to set about undoing it in the proper way. That is still open to government.".

An organ of state is entitled to approach a court the just and equitable remedy under section 172(1)(b)(ii) of the Constitution in relation to the contract that entailed constitutional obligations, as soon as it becomes aware that compliance with its constitutional obligations is impossible. This may include in case where the procurement contract entered into has been declared invalid because it done outside the fair and equitable legislative procurement framework such as the one put in place under the authority of section 217 of the Constitution. In *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8 at paras [40], [44], [46] – [47] and [76], the Court held that:

> "The constitutional obligations of both SASSA and CPS as organs of state preforming a constitutional function for a considerable period do not end on 31 March 2017. . . This court has extensive powers to grant a just and equitable order also permit it to extend the contract that would otherwise expire on 31 March 2017. Since the contract was declared invalid in *AllPay* 1, if we extend the contract, it will be necessary to also extend the declaration of invalidity and the suspension of that declaration for the period of extension of the contract. In *AllPay* 2 we tied up the suspension of the declaration of invalidity to the period of the invalid contract. That was done, in order "to allow the competent authority to correct the defect" and to avoid disrupting the provision of crucial services that it was constitutional obliged to render. . . CPS is correct in submitting that its continued constitutional obligation to provide service for payment after 31 March 2017 exists only if there is no-one else to provide those services . . . So it must be accepted that CPS is , at present, the only entity capable of making payment of the social grants after 31 March 2017. It is declared that SASSA and CPS are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe

upon grant beneficiaries rights of access to social assistance under section 27(1)(c) of the Constitution, and the declaration of invalidity of the contract is further suspended for the 12-months period from 1 April 2017 on the same terms and conditions as those in the current contract. . .".

3.4 Termination of a procurement contract as a result that it is unfair, inequitable, not transparent and uncompetitive

In terms of the General Procurement Guidelines, which is issued by the National Treasury, organs of state shall promote openness in the procurement process for encouragement of effective competition through procurement methods suited to market circumstances and observance of the provisions of the PPPFA. As this ensures that the potential tenderers have reasonable access to procurement opportunities and have adequate and timely information is available to them and that bias and favouritism are limited. Organs of state are allowed to deviate from a constitutional and legislative procurement framework if this deviation is procedural fair and reasons for such deviation is justifiable. Regulation 61A6.4 of the Treasury Regulations provides that "if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.". But the deviation shall not be done willy-nilly in order to disregard the Constitutional and legislative procurement framework. In *Allpay Consolidated Investment Holding (Pty) Ltd* (No. 1)[144], Froneman J explained that:

[144] *AllPay Consolidated Investment Holdings (Pty) Ltd* (No.1) at para [40].

> "Compliance with the requirements for a valid tender process, issued in accordance with the Constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.".

Organs of state could terminate the procurement contracts if there were no compliance with requirements for a valid tender process as a result of failure to act openly and in accordance with the principles of fairness, equitable, transparency, competitiveness and cost-effectiveness. Generally, fairness and transparency and other facts mentioned in section 217 of the Constitution permeate the procedure for awarding and refusing a tender.[145] As the consideration and award of a tender by the organ of state is regarded as an administration action therefore a tenderer is entitled to a lawful and procedurally fair and transparent process. Thus, when the organ state is procuring goods and services it does so through the empowering legislation, the process constitutes an administrative action and it should be lawful and procedurally fair all the time.[146]

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[145] *Tetra* at para [9]; *Phoenix Cash & Carry* at para [1]; *Millennium Waste Management* at para [4].

[146] *KC Productions CC* at para [15]; *Vox Orion (Pty) Ltd* at paras [53] – [54], [77] – [78], [80] and [82]; *AllPay Consolidated Investment Holdings (Pty) Ltd* (No. 1) at para [88], the court mentioned that ". . . after all, an element of procedural fairness– which applies to the decision-making process– is that persons are entitled to know the case they must meet".

Moreover, the organ of state shall approach a court to set aside a procurement contract which was awarded and the evidence shows that the officials have withhold information which was relevant to the procurement contract from other tenderers with the intention to conclude a secret agreement with one of them, as it is subversive of a credible tender procedure and that the requirements of the tender procedure is that the body adjudging the tenders be presented with comparable offers in order that its members should be able to compare, that the tender should speak for itself and that competitors should be treated equally.[147]

Thus that organs of state should resist any attempts for the enforcement of the contracts if the evidences show the tender processes which resulted to the awarding the tenders are procedural unfair, inequitable, not transparent and uncompetitive, for example if the tenders which have been received were not assessed and tender has then awarded to a tenderer whose tender was not assessed in respect of all the aspects on which all the other tenders were assessed.[148]

3.5 Termination of a procurement contract as a result of an improper conduct by officials of organs of state or any person

The starting point is that the officials of the organs of state cannot bind the organs of state contractually except within the scope of their actual authority[149] and, in addition,

[147] *Kirland Investments (Pty) Ltd* above n 77 at para [30].
[148] *Vox Orion (Pty) Ltd* at para [78]; *Sanyathi Civil Engineering & Construction (Pty) Ltd* at para [13]; *Telkom SA Limited* at para [18].
[149] J.W. Whelan and J.T. Phillips, "*Government Contracts: Emphasis on Government,*" Law and Contemporary Problems. 317.

certain public officials have statutory functions which relate to the procurement contracts, such as the heads of the organs of states.[150]

Organs of state are bound to the basic values and principles government public administration set out in section 195[151] of the Constitution,[152] thus that the procurement officials are required or expected to ensure that their conducts are proper, or maintained a high standard of their professional ethic during the performance of their duties.[153] The organ of state shall avoid to carry its procurement obligations in contrary with section 195 of the Constitution, or to provide crucial information to the tenderers regarding the tender or the implementation of the tender, or failure to investigate irregularities in the tender and decision-making processes.[154] Chapter 2 of the Public Service Regulations, 2016, deals with the code of conduct of employees, such as:

> "Regulations 11 requires an employee to be faithful to the Republic and honour and abide by the Constitution and all other law in the execution of his or her official duties, put the public interest first in the execution of his or her official duties, loyally execute the lawful policies of the Government of the day in the performance of his or her official duties, abide by and strive to be familiar with all legislation and other lawful instructions applicable to his or her conduct

[150] Section 38(1) of the PFMA.

[151] Section 195(1) of the Constitution provides that "public administration must be governed by the democratic values and principles enshrine in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public Administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personal management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broader representation."

[152] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* (No. 2) at para [73].

[153] Section 195(1) of the Constitution.

[154] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* (No. 2) at para [75].

and official duties, and co-operate with public institutions established under the Constitution and legislation in promoting the interest of the public.[155]

Regulation 14 of the Public Service Regulations, 2016 provides, amongst others, that an employee shall strive to achieve the objectives of his or her institution cost-effectively and in the interest of the public, promote sound, efficient, effective, transparent and accountable administration, give honest and impartial advice, based on all available relevant information, in execution of his or her official duties, etc.".[156]

The General Procurement Guidelines states that:

"(a) In procurement, it all parties comply with ethical standards they can deal with each other on a basis of mutual trust and respect, and conduct their business in a fair and reasonable manner and with integrity.

(b) All government staff associated with procurement, particularly those dealing direct with suppliers or potential suppliers, are required to recognise and deal with conflicts of interest or the potential therefor, deal with suppliers even-handedly, ensure they do not compromise the standing of the state through acceptance of gifts or hospitality, be scrupulous in their use of public property, and provide all assistance in the elimination of fraud and corruption.".

It is the duties of the officials of the organs of state to ensure that the tender processes are fair and transparent all the times, and guard against the conflicts of interest and assist in the elimination of fraud and corruption.[157] Thus that if an official discover or become suspicions that there is a misrepresentation by a tenderer which

[155] Regulation 13 of the Public Service Regulations, 2016.

[156] Paragraph 10 of the Instruction Note No. 3 of 2016/17; Paragraph 1 of the Practice Note No. 4 of 2003.

[157] *Pepcor Retirement Fund* at para [47]

amounts to fraud of which may result to an award of a procurement contract unlawfully, the official must investigate.[158] In *Viking Pony*[159], the Court stated that:

> "It is satisfied that '*defect*' general means no more that discovering, getting to know, coming to the realisation, being informed, having reason to believe, entertaining a reasonable suspicion, that allegations, of a fraudulent misrepresentation by the successful tenderer, so as to profit from preference points, are plausible. In other words it is not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of state. It is the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme.".

Therefore, the organ of state is entitled to investigate any allegation, if there is a reasonable suspicion of a fraudulent misrepresentation or improper conduct by its officials or members of a Bid Committee on a procurement processes which resulted to a the conclusion of the procurement contract. And that the organ of state must also act against such officials, member of the Bid Committee, or a supplier by imposing suctions, including approaching a court of law for appropriate relief (which includes an order to set aside the procurement contract), and if there is a criminal elements established after the investigation it must report it to an appropriate authority.

Organs of state are entitled to terminate the procurement contracts which were fraudulently concluded.[160] This is so as section 195(1) of the Constitution requires the officials in public administration to promote and maintained a high standard of professional ethics, and that services must be provided impartially, fairly, equitably

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[158] *De Sols Trading CC and Another v The Government of South Africa and Others* (Case No. 13762/10) [2010] ZAGPPHC 13 (5 October 2010) at paras [14] – [17].

[160] *De Sols Trading CC* at para [75]; *Esofranki* at para [66].

and without bias. In *Northwest Provincial Government v Tswaing Consulting CC* [2006] SCA 138 (RSA) at paras [11] – [13], the Court stated that:

> "First, Tswaing's fraud certainly rendered the contract voidable at the province's instance. The evidence established that Tswaing had no expertise in the flied, that the basis on which it elicited the contract was fabricated, and that the fees it secured were grossly inflated. In short, the fraudulent misrepresentations of Mangope and his accomplices were far-going and most material. The province was therefore entitled to elect either to rescind the contract or to enforce its terms. It chose to rescind. The judge's finding that the province failed effectually to rescind derived from a mis-appreciation of the facts. To establish forfeiture of the right to rescind, there had to be evidence that the province elected, with full knowledge of the deception, to affirm the contract. But Tswaing could point to no evidence that the province, with full knowledge of the relevant facts, including the extent and effect of deception, elected to affirm the contract.".

Nadew has further stated that the "voidable contract, on the other hand, is binding until is avoided (invalidated) by the option of the party whom the law protects. It is contract, . . . where one of the parties has power by manifestation of election to avoid the legal relations created by the contract . . . A voidable contract, thus, is a 'sick contract' that may be 'cured or killed' depending upon the option that may be exercised by the victim of the *defective agreement*. That is why it is said. "Annullable acts live in a way under menace of death." If the victim of the vice waives his right to avoid the contract and elects to ratify it, his power of avoidance extinguishes and the contract is deemed to have had no defect from the moment of election.".

As the Court has conceded in *North East Finance v Standard Bank (492/2012)* [2013] ZASCA 76 (20 May 2013) at para [14], that ". . . the effect of fraud that induces a contract is, in general, that contract is regarded as voidable: the aggrieved

party may elect whether to abide by the contract and claim damages (if it can prove loss) or to resile – to regard the contract as void from inception, and to demand restitution of any performance if may have made, tendering return of the fraudulent party's performance".[161] Therefore an organ of state should not wait for an unsuccessful tenderer to challenge a procurement contract which it concluded while there is an allegations of fraud, as such contract is regarded as void *ab intio*.

3.6 Termination of a procurement contract as a result of non-performance or defective performance

If performance on either party to the procurement contract becomes impossible after the conclusion of the contract owing to the fault of either party, the contract is not terminated, but the party who rendered performance impossible is guilty of a breach of contract.[162] This is so as a party who agrees, expressly or by implication, to be responsible for making a certain performance, irrespective of fault, is bound by that agreement, and the absence of fault is no excuse for malperformance is a party has guaranteed or warranted that his or her performance will be of a particult type or standard.[163] Therefore the innocent party to that procurement contract shall have decided on whether to enforce or terminate it depending on the nature and the

[161] *Firechem* above n 106 at para [36].

[162] *Datacolor International (Pty) Limited v Intamarket (Pty) Ltd* (2/99) [2000] ZASCA 81 at para [17], the court stated that:

> "As such a repudiator breach may be typified as intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or mal-performance."

[163] Dale Hutchison, Chris-James Pretorius, Jacques Du Plesis, and Others. "The Law of Contract in South Africa," Oxford University Press Southern Africa (Pty) Ltd (2012) Second Edition at 295.

degree of the non-performance.[164] In *Transnet Limited v Tatise Tebeka and Other* (35/12) [2012] ZASCA 197 (30 November 2012) at para [18], the court explained that:

> "How a creditor may cancel a contract on the basis of a debtor's non-performance will depend on the terms of the contract and, in some cases, the nature of the obligation involved. A contract may contain a forfeiture clause (or *lex commissoria*) – a clause to the effect that if a party fails to perform an obligation by a set date, the other party may cancel, or a provision that requires performance of an obligation by a set date coupled with a statement that time is of the essence. In either event, the contract may be cancelled forthwith when the date for performance has passed and performance has not occurred. If a contract contains no such provisions, it may be inferred from the nature of the transaction and the facts that time is of the essence, and cancellation may also be effected forthwith. This is, in truth, a tacit forfeiture clause. Finally, where no express or tacit forfeiture clause forms part of the contract and time is not of the essence, an innocent party may make time of the essence. This is done by giving the party in default a notice of rescission – a demand that if the non-performance is not remedied by a specified date, the contract will be cancelled.".

The "doctrine of prevention performance" says that a contracting party has an implied duty not to do anything that prevent the other party from performing it obligation, and a party who prevent performance of a contract may not complain of such non-performance as such party is guilty of a breach of contract, and under this doctrine, it is said that performance may be rendered impossible not only on or after the date of performance, but even long before such time, in which case the innocent party need not wait until the inevitable non-performance on the due date before invoking the appropriate remedies; he or she may take action immediately.[165] The remedies available to the innocent party follow the usual pattern for breach, except

[164] *Singh v McCarthy Retail Ltd (t/a McIntosh Motors)* (429/98) [2000] ZASCA 41 at paras [11] – [13] and [15.
[165] Dale Hutchison, Chris-James Pretorius, Jacques Du Plesis, and Others, "The Law of Contract in South Africa," at 303.

specific performance which may sometimes warrant a rescission of the procurement contract by an innocent party depending on the terms of the contract.[166] In *Datacolor International (Pty) Limited v Intamarket (Pty) Ltd* (2/99) [2000] ZASCA 81 at para [28], the Court stated that:

> "The innocent party to a breach of contract justifying cancellation exercises his right to cancel it a) by words or conduct manifesting a clear election to do so b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time . . .".

Organs of state are entitled to terminate the procurement contracts in terms of the clause 8 of the GCC. Clause 8 of GCC provides that:

> ". . .
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> 8.7 Any contract supplies may on or after delivery be inspected, tested or analysed and may be rejected if found not to comply with the requirements of the contract. Such rejected supplies shall be held at the cost and risk of the supplier who shall, when called upon, remove them immediately at his own cost and forthwith substitute them with 7 supplies which do comply with the requirements of the contract. Failing such removal the rejected supplies shall be returned at the suppliers cost and risk. Should the supplier fail to provide the substitute supplies forthwith, the purchaser may, without giving the supplier further opportunity to substitute the rejected supplies, purchase such supplies as may be necessary at the expense of the supplier.

[166] *South African Forestry Company Limited* above n 91 at para [30], the court stated that:

> ". . . the question is whether the parties have complied with their contractual obligations depends on the terms of the contract as determined by proper interpretation. The court has no power to deviate from the intention of the parties, as determined through the interpretation of the contract, because it may be regarded as unfair to one of them . . . Once it is established that a party has complied with his or her obligations as properly determined by the terms of the contract that is the end of inquiry."

8.8 The provisions of clauses 8.4 to 8.7 shall not prejudice the right of the purchaser to cancel the contract on account of a breach of the conditions thereof, or to act in terms of Clause 23 of GCC."[167].

An organ of state shall ensure that a penalty clause for non- or mal-performance is included in the tender invitation in order to rely to it with regard to the termination of the procurement contract. In *Powernet Services (1988) (Pty) Ltd v Government of the Republic of South Africa* (559/95) [1997] ZASCA 82 at page 36, the Court dealt with issues of whether the government's specification failed to state what it needed, or whether Powernet failed to supply a system which complied with a sufficient specification, and held that "as what was supplied failed to meet this standard and the contract contains a *lex commissoria*[168] the government was entitled to cancel it". And the following was said in *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* (34437/2013) [2014] ZAGPJHC 293 para [45], by the Court that:

> "Clause 11 of the contract contains a *lex commissoria*, which gives an innocent party, the right of cancellation for breach, on five days' notice to the defaulting party. Applicant (purchaser), duly exercised its right of cancellation, by giving first respondent (seller), notice to effect registration of transfer, within five days from the date of the notice, and that failure to perform within the five day period, will constitute breach leading to cancellation."

Before an organ of state may exercises its remedial action in terms of the procurement contract if there is non- or mal-performance it must notify the service providers or suppliers about the breach. Paragraph 2.1 of the Practice Note No. 5 of

[167] Paragraph 22.1 of GCC.
[168] "*Lex commissioria*" refers to a penalty clause for non-performance of a contract (See *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* (34437/2013) [2014] ZAGPJHC 293 at para [14].

2006 requires that “before action is taken in terms of regulation 15, the Accounting Officer/Authority must issue a final notification to the contractor by registered mail indicating the action to be taken in accordance with the contract conditions unless he/she complies with the contract conditions and delivers satisfactory supplies or services within a specified reasonable time. (Such time limit should not be less than seven (7) and not more than fourteen (14) calendar days). If the contract still does not perform satisfactorily despite this notification, the Accounting Officer/Authority may, in addition to any other remedy it may have against the supplier, opt to follow any or all of the actions stipulated in paragraph 15(2) of the Preferential Procurement Regulations, 2001.”.

No organs of state would be expected to render performance in terms of the procurement contracts which are void from the outset;[169] this is so because if a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses, fall with it.[170]

[169] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* (No. 2) at paras [40] – [50].
[170] *North East Finance v Standard Bank (492/2012)* [2013] ZASCA 76 (20 May 2013) at para [12].

CHAPTER 4

4.1 Conclusion

As discussed above, the Constitution and the legislation pertaining to procurement by organs of state are emphatically prescriptive, they inform on the procurement contracts prepared, evaluated and concluded (the issuing of the tender invitations and awarding or refusal of the tenders). Thus, the terms, specifications and conditions of the procurement contracts are informed by legislation and that the organ of state are the superior party in the drafting of those terms, specifications and conditions and cannot act like any other contracting party, but they are obliged to exercise their contractual rights with due regard to public duties of fairness, as their management of a contractual relationship, they must ensure that it satisfies the requirements of administrative justice and fairness; they cannot for unjustifiable reasons or improper motive decide to cancel the procurement contracts when such an act impacts on the rights of others.[171] Our courts construe a procurement contract by ascertain what the parties intended their contract to mean by considering the words used in the procurement contract as a whole, and the factual matrix (or context) in which the contract was concluded, including the tender processes. Moreover, the language and context of the legislation prevail over the preference of the terms, specifications and conditions which the organs of state and the tenderers.

An organ of state should terminate a procurement contract if it is found that there are irregularities and the procurement contract has been concluded in contravention of

[171] *KC Productions CC* at para [20].

the applicable legislation, as the procurement contract is invalid and the organ of state is not bound by it.[172] More importantly, the procurement contracts which were concluded in violation of legislation are void contracts,[173] and it is unlawful to enforce procurement contracts which have been concluded in breach of an applicable legislation.[174] This is also in accordance with the doctrine of legality that that a contract entered into without complying with the prescribed tender processes is invalid and the court has no discretion to enforce that contract or refuse to enforce it; it follows that, even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid (section 2 of the Constitution).[175]

Organs of state shall state clearly in the procurement contracts that any breach of legislative procurement framework should be dealt with seriously and have serious consequences. This may prevent and or safeguard against the contravention legislative procurement framework by the procurement officials of the organs of state, including deterring tenderers for not complying with the legislative procurement framework such as the Constitution. As most of the procurement contracts end in the courts as the result of failure to comply with the legislative procurement framework. Organs of state's right to terminate should be exercise if there are breaches of the Constitution or legislative procurement framework. The courts have emphasised that the PAJA is applicable if organs of state intend to terminate the procurement contracts. Every procurement officials or suppliers or service providers should be

[172] *Qaukeni* above n 1.
[173] Section 2 of the Constitution.
[174] *X-Procure Software (Pty) Ltd* at para [7]*; Firechem* at para [36].
[175] *Telkom SA Limited* at para [12].

aware of the legislative procurement framework and their implications when concluding the procurement contracts.

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