THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	Civil Case No. 1183/05
In the matter between	
SWAZILAND ELECTRICITY BOARD	1st Applicant
THE MINISTER FOR NATURAL RESOURCES AND ENERGY	2nd Applicant
And	
MALESELA TECHNICAL SERVICES (PROPRIETARY) LIMITED	1ST RESPONDENT
THEMBA TSELA	2nd Respondent
ADVOCATE D A KUNY SC	3rd Respondent
Coram	Banda, CJ
For the Applicants	Z.F. Joubert SC
For the 1st Respondent	A.J. Horwitz SC C.L. Robertson

JUDGMENT

22/01/2008

[1] This is an application in which the Applicants are seeking orders in the following terms:-

1) Declaring that the Electrical Systems Losses Reduction Agreement concluded at Mbabane between the first Applicant and the first Respondent during July 2003 is null and void and of no force and effect;

2) Alternatively to prayer 1 above setting aside the said Agreement;

3) Setting aside the submission to arbitration the said Agreement;

4) Ordering the first Respondent to pay the costs of the application;

5) Granting to the Applicant further and/or alternative relief.

[2] The first Applicant is the Swaziland Electricity Board, a body corporate having perpetual succession which

may, in its corporate name, sue and be sued. It was established under the provisions of Section 1 of the Electricity Act (Act No. 10 of 1963) and carries on business at Mhlambanyatsi Road in Mbabane. The second Applicant is the Minister responsible for Natural Resources and Energy and, in the latter capacity, carries responsibility for the business operations of the first Applicant. His offices are located at Income Tax Building, Usuthu Link Road in Mbabane.

[3] The first Respondent is Malisela Technical Services (Proprietary) Limited, a company duly incorporated and registered in accordance with the Company laws of the Republic of South Africa and has its principal place of business at 301 Brander Street, Jan Niemand Park, Pretoria and in Swaziland at Lot 609, Mganu Road, Checkers, Mbabane. The second Respondent is Themba Tsela who resided, at the material time, at House 7, Bishop Watson Crescent, Kent Rock, Mbabane. He was, at the relevant time, the Managing Director of the first Applicant. The third Respondent is Advocate D.A. Kunny, SC. NO, an advocate in private practice at the Johannesburg Bar, who is cited in these proceedings in his nominated capacity as arbitrator in terms of the arbitration agreement mentioned in the Electrical

Systems Losses Reduction Agreement referred to in the Notice of Motion. The papers filed in this application are voluminous but I believe the main issues which are raised for determination are easily identifiable. There are no material disputes of facts in regard to the main issues to be determined.

[4] It would appear that the first Applicants were experiencing electrical supply losses in their operations and were desirous of reducing such losses. Accordingly they entered into a written agreement with the first Respondent by whose terms the respondent was appointed to identify the causes of electrical system supply losses and to institute and implement such technical methods and administrative measures as may be required to reduce the Electrical System Supply losses to 10% or less.

[5] A dispute has arisen between the first Applicants and second respondent on the nature and status of the Agreement. The first Respondent has referred the dispute to arbitration in terms of the Arbitration clause as stipulated in the said Agreement. The first Respondent has also instituted civil proceedings in this court under Civil Case No. 1579/04 against the first

Applicants for the payment of a sum of E1.638.290.96 with interest thereon at 9% per annum and costs. The first Applicants oppose the claim and have filed a plea against it.

[6] There were preliminary issues which were raised by Mr. Howitz for instance whether it was necessary to join the second Applicant and whether it was also necessary to join parties against whom no relief is sought. He also questioned the relevance of introducing a judgment of a case in which the second Respondent was involved. Mr. Howitz submitted that the only relevancy would be to show the second Respondent's character. Mr. Howitz did not, however, wish to raise those issues as matters of substance in the application. I understand that he only raised them for purposes of the record. He was quite happy to let the application proceed on the basis of the parties as presently cited. Mr. Joubert drew the attention of the court to a case of ***North Western Provincial Government & Another v Tswana Consulting and others*** 2007 4 SAR 452 where serious allegations of corrupt conduct were made similar to the allegations made against the second Respondent and it was held in that case that the party against whom such allegations were made was a

necessary party and was accordingly joined**.** Mr. Joubert further contended that the introduction of the judgment of the case involving the second Respondent was relevant to this application if only to show that the second Respondent's attempts to sue the first Applicants were unsuccessful.

[7] The Applicants have submitted that the Electrical System Supply Losses Reduction Agreement, entered into between the first Applicant and the first Respondent, is void and unenforceable for a number of reasons. They contend that the Agreement falls foul of the provisions of the Public Enterprises (Control and Monitoring) Act and the Electricity Act and that it is accordingly illegal and unenforceable. They contend that in terms of Section 10(1) of the Public Enterprises (Control and Monitoring) Act, the approval of the Minister, in writing, had to be obtained before the Applicants could enter into the said agreement with the first Respondent. The relevant parts of Section 10(1) of the Public Enterprises (Control and Monitoring) Act provide as follows:-

> *"No category A public enterprises shall do any of the*

following without the approval in writing of the Minister responsible in consultation with the Standing Committee

(a)

b) *undertake any major investments*

c) *……*

d) *close, sell, liquidate or divest any major part;*

(2) For the purposes of Sub-Section (1) the Standing Committee shall, in consultation with the Public Enterprises Unit, determine what is major in relation to each category of public enterprises".

The Public Enterprises Unit is created by Section 3 of the Act. It is a unit within the Ministry of Finance and it is responsible for the control and monitoring of public enterprises in the country.

[8] It is not disputed that the first Applicants are a category A public enterprise. The section makes it clear that the approval in writing is required and that the Minister has to act in consultation with the Cabinet's standing Committee. The Applicants have contended that if there had been any decision by the Standing Committee, it would have been routed through the Public Enterprises Unit. The Director of the Unit has

stated in his affidavit before court that there had been no request and no consultations had taken place between the Standing Committee, the responsible Minister and the Public Enterprises Unit.

[9] The Applicants have submitted that in terms of the Electrical Systems Reduction of Losses Agreement, the Applicants are obliged to make such investment as is envisaged under Section 10(1) of the Public Enterprises Act and that it was necessary that the Cabinet Standing Committee should have been consulted by the responsible Minister and that such consultation would have involved the Public Enterprises Unit.

[10] The Applicants have submitted that any investment in the region of E300 Million, which was contemplated under the contract with first Respondent, would require the approval in writing of the Minister responsible acting in consultation with the Public Enterprises Unit. It is also the contention of the Applicants that such approval would be necessary if the Applicant were to divest itself of any major part of its business. They contend that no such request was processed by the Unit and, therefore, there was no such approval granted. The Applicants have submitted that the E300

Million required to be invested far exceeded the definition of a major investment. The Applicants have dismissed, as absurd, the suggestion that the responsible Minister could have delegated his power to the second Respondent.

[11] The Applicants have further contended that it is clear on reading the provisions of the agreement that a substantial outlay on capital account would be necessary. The Applicants have referred to what the Respondent states would appear in its final report and which states that "the technical losses have been calculated to be 9.94%. Of this percentage approximately and according to the first respondent, is attributable to reactive currents in the distribution network which it is stated can be avoided by the careful introduction of power factor connection equipment at large customers". The Applicants contend that to introduce measures to avoid the problem would cost them in the region of E15 million. In the first Respondent's reply to a letter from the first Applicants dated 5th February 2004 the Respondent stated as follows:-

"TECHNICAL LOSSES

"It is a known fact that technical losses can only be *reduced by the implementation of technical Correction Measures, i.e. Reducing Systems Current by increasing the transmission voltage, large conductors increase in the average power factor etc. all of which require investment".*

The Applicants contend that on the first Respondent's own version there is need for capital investment and the Applicants submit that the capital investment required to do what Mr. Steenkamp recommends in order to reduce the technical losses would be in excess of E300 Million. The Applicants contend that to increase operating voltage would require changes in the Applicants' 66/11K transformers and reconstruction of the entire distribution network to accommodate the insulation levels of the new operating voltage. The Applicants contend that the costs of doing this would be approximately E207 Million. The Applicants further contend that introduction of large conductors as recommended by the first Respondent would require a huge capital outlay as the cost of upgrading the network would be approximately in the region of E64 Million. The power factor improvements would also require capital expenditure. Estimated costs for this would be in the region of E15 Million.

[12] The Respondent have conceded, at the outset, in their

Heads that in terms of the agreement concluded between the parties, the first Respondent undertook to investigate the causes of losses and to recommend to the first Applicants the implementation of measures aimed at securing a reduction of losses. The Respondents contend that aside from being compensated for certain expenses, the only income that the first Respondent was to earn was a proportion of any loss reduction that it might have secured for the first Applicants. If it secured no loss reduction it would earn nothing. The Respondent further conceded that the parties contemplated that, for the purpose of reducing losses, the first Applicants would have to undertake some capital investment. They contend, however, that the first Applicants were not obliged to do so, and that whether to do so and to what extent they would do so, was a matter within the first Applicants' discretion.

[13] The Respondents have submitted that since the loss reduction Agreement between the parties has now been cancelled they have instituted proceedings against the first Applicant to recover, from them, damages the first Respondent alleges it has suffered.

[14] The Respondent concede that if the Agreement between the parties is void ab initio that would strike at the heart of the entire Agreement including the provision that requires reference of a dispute to arbitration and that it would mean that there would be no submission to arbitration. The first Respondent also concedes that it is for the court, and not the arbitrator, to determine whether or not the loss reduction Agreement was void ab initio. The Respondent submit that the concession they are prepared to make is that the court is the appropriate forum to determine the intrinsic validity of the arbitration Agreement.

[15] The first Respondent has submitted that the loss reduction Agreement was most certainly not void ab initio. He has submitted that none of the statutory prerequisites, on which the first Applicants rely, are applicable. In so far as the impossibility of performance of contract is concerned the first Respondent has submitted that the purported impossibility of performance, on which the first applicants rely, was not of the nature which would have the effect of rendering the Agreement void ab initio. The Respondents have contended that the nature of the impossibility of performance on which the first

Applicants rely was not of the nature that would give a right to cancel the agreement. The first Respondent has, therefore, submitted that the Agreement is valid and that such validity attaches to the entire Agreement including the arbitration provision. The Respondent have contended that a court will not lightly or capriciously accept a request by a party to be relieved of the consequences of its having agreed to submit to arbitration unless a party can show good and compelling circumstances why a court should accept such a request; vide ***Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*** 1994(1) SA 162 at 169. The Respondent submitted that a party can only avoid arbitration if he can show that arbitration proceedings are intrinsically inappropriate for determining such a dispute.

[16] On the issue of whether Ministerial approval or consent was necessary before the first Applicants could conclude the Agreement the first respondent has contended that as a matter of law, no Ministerial consent was necessary to lend efficacy to the Agreement. They contend that in respect of both statutory provisions and in particular in respect of Section 12 of the Electricity Act the need for

compliance was merely an administrative issue which would not have impacted one iota on the validity of any agreement that the first Applicants might have concluded with another party. As regards the provisions of Section 10 of the Public Enterprises (Control Authority) Act the Respondent submits that there is nothing in the Agreement which obliges the first applicant to make "any major investment". It should be noted, however, that the first Respondent concedes in the introduction to their Heads that

"The parties contemplate that for the purpose of reducing losses, the first applicant would have to undertake some capital investment".

The Respondent contends that the purpose of the provisions of Section 12 of the Electricity Act should be construed as a general directive for the purpose of good governance and does not oblige the Minister or the first Applicants under pain of some or other sanction, to perform a particular act or acts prior to the first Applicants being able to legally enter into binding contracts with other parties. They submit that the provisions of Section 12 are only directory and not peremptory and that non-compliance with them would not impinge upon the Agreement which the first

Applicants concluded with the first Respondent. The Respondent further submitted that the Loss Reduction Agreement between the two parties did not per se, involve any outlay on capital account, notwithstanding that the first Applicants, in order to achieve any benefit from the agreement, would in its own discretion have had to undertake some capital outlay. The Respondent contend that the consent which is postulated in section 12 relates to a general programme to be settled from time to time in consultation with the Minister and that it does not relate to specific agreements like the present agreement between the first Applicants and the first Respondent. The Respondent dismisses the contentions of the first Applicants that the Agreement would involve the first Applicants in considerable amounts of money and that they would incur substantial outlay on capital account.

[17] The Respondent has submitted that the knowledge or absence of it by the Minister responsible that the Agreement had been concluded was irrelevant because in the Respondent's view, Ministerial consent was not required for the conclusion of the Agreement.

[18] The Respondent has dismissed the allegations on the

impropriety regarding the tender process as purely a red herring. The Respondents contend that the minute of the Board which instructed the second Respondent to prepare

"a draft contract with escape clauses should MTS fail

to deliver desired results"

as vague. Although the Respondent describe the above minute as vague and yet he also describes it as clear in that it gave the second Respondent a discretion as to how to achieve that objective. If the minute was indeed vague it should be vague for all purposes. It cannot be vague for one purpose and clear for another. You cannot approbate and reprobate. The first Respondent further contends that if the first Respondent did not deliver and achieve loss reductions as contemplated in the Agreement it would earn no income and then there was nothing for the first Applicants to pay in that event. This surely is not correct. What the first Applicants would pay is that in the event of the first Respondent failing to achieve the principal object of the contract, the first Applicants would continue to suffer losses and would have to take measures financial or otherwise to cover that loss.

[19] The first Respondent does not agree that there was lack of consensus between the parties and is not able to understand the submission made by the first Applicants on how clauses 2.1.2 and 5.12 of the Agreement are said to clash with clause 10.3. They contend that there is no basis for the contention that the minds of the parties did not meet. The minutes prepared by the first Respondent's attorney are described merely as "nothing more than cryptic jottings by the writer thereof" and that it does not remotely purport to contain an accurate record in comprehensive form of agreement and contention. However no accurate record of the minute has been suggested by the first Respondent.

[20] The first Respondent has submitted that none of the requirements of impossibility of performance has been proved. The first Respondent contend that given the terms of the contract and the relative obligations of the parties it cannot be said, on the papers, that it was impossible for either or both parties to have performed some or other act which would have resulted in their achieving a loss saving as contemplated in the Agreement. That the allegation by the first Applicants

that “unbeknown to the parties it was impossible to reduce losses to 10%” is nothing more than conjecture. But the first Respondents have not shown how they would have performed “some or other acts which would have resulted in their achieving a loss saving as contemplated”. The Respondent have submitted that the application be dismissed with costs including costs occasioned by the employment of two counsel.

[21] There can be no doubt, in my judgment, that these huge capital expenditures, to which the first Applicants have referred far exceed what is called a major investment and this required the approval in writing of the Minister responsible before the first Applicants could enter into the Agreement with the first Respondent. The Applicants have submitted that the peremptory provisions of the Public Enterprises (Control and Monitoring) Act were not followed and that, on that basis alone, the agreement which the first Applicants and the first Respondent concluded must be null and void. The first Applicants have submitted that the provisions of Section 10 of the PEU is couched in peremptory terms and that any agreement or contract which contravenes it, is void. The first Applicants have drawn a distinction between the effect of provisions

which are peremptory in purport and those which are merely directory. They have submitted that where the provision is merely directory a contract which it contravenes is unaffected. In the case of ***Sutter vs Scheepers*** (1932) AD 165, 173 – 174 Wessels JA stated as follows:-

"Now it is admittedly a difficult matter to lay down any conclusive test as to when a provision is directory and when it is peremptory. A long series of cases both here and in England evolved certain guiding principles. Without pretending to make an exhaustive list I would suggest the following tests not as comprehensive but as useful guides. The word "shall" when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negate this construction.

If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate.

If a provision is couched in a positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

If, when we consider the scope and object of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the contract to be

void if the conditions are not complied with, or if no sanction is added then the presumption is rather in favour of the proposition being directory.

The history of the legislation will also afford a clue in some cases."

[22] In the case of ***Schierhout v Minister of Justice*** 1926 AD 99 at 109 Innes CJ stated as follows:-

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition to the law is void and of no effect……."

"So that what is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done – and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the Act. The maxim 'quod contra legen fit pro infecto habetur' is also recognised in English Law. And the disregard of peremptory provisions in a statute is fatal to the validity of the proceedings affected."

[23] And the case of ***York Estates Ltd v Waveham*** (1950) 1 SA 125 affirmed the above principle when it stated that:-

"As a general rule a contract or agreement which

is

expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by statute".

[24] And also in the case of ***Makwetlane v Road Accident Fund*** (2003) SA 439 at 455 Horwitz AJ stated that a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, any purported compliance falling short of that is a nullity. It is to be noted that this case cited the passages in the case of ***Sutter v Scheepers*** already referred to in this judgment.

[25] The Applicants have submitted that when these principles are applied to the facts in the case and to the provisions of the statute in question, it is clear that the intention of the legislature was to prohibit activities in contravention of the provisions of Section 10 of the Public Enterprises Act and that any acts in contravention of the provisions must be found to be unenforceable and that accordingly the Agreement is therefore void for illegality and accordingly unenforceable.

[26] The Applicants have further submitted that the

agreement was, in any event, incapable of performance at the time when the agreement was concluded as unbeknown to the parties it was simply impossible to reduce the first Applicants' electricity losses. The Applicants also contended that the agreement lacked consensus between the parties and that they were, therefore, not *id idem* . It would appear from a minute prepared by Mr. Rothbart, the first Respondent's attorney, confirmed the first Applicants' contention. In para 7 of this minute it is recorded,

"…major problems and on implementation (sic) contract unworkable; number of grey areas; no meeting of minds… no consensus ad idem (SMR will understand) .

"No clear consensus …glaring contradictions. Manner of implementation as well".

[27] It is clear, in my view, that quite early in the matter, the first respondent's attorney took the view that the Agreement was unworkable because of major problems and that there was no meeting of the minds by the parties. There was also difficulty on the manner of implementing the agreement. There were glaring contradictions according to Mr. Rothbart.

[28] The Applicants have submitted that the first Respondent, in terms of the provisions of the Agreement between the parties, had guaranteed to the first Applicants that he would reduce the electricity system supply losses by at least 10%. It is important, therefore, to refer to clause 10.4 of the Agreement. It provides as follows:

> *"The supplier guarantees to the Buyer that it shall be*
>
> *able to reduce the Electrical Systems Supply Losses experienced by the Buyer to at least 10% provided that the technical component of the current losses is in excess of 9% and that the current non-technical losses are in excess of 5%."*

The Applicants have stated that the technical component had, at all material times, been more than 9% and that the non-technical component had, at all times, been more than 5%. The Applicants have argued that the rationale of the agreement was to have the Electrical System Supply Loss reduced to at least 10%. And in terms of Clause 17 of the Agreement the first respondent was obliged to provide to the first applicants a performance guarantee in the sum of E1 000,000.00. This guarantee was to be provided within thirty days from the effective date of the Agreement.

The guarantee was never provided by the first Respondent!

[29] The Applicants contend that, having regard to the first respondent's own preliminary report and as is confirmed in their own answering affidavit, it would not be possible for them to satisfy the guarantee because it will not be possible to reduce the losses in accordance with the guarantee given. The object of the Agreement was to reduce the first Applicants' electricity losses to at least 10%. The first Applicants have contended that the papers before the court have demonstrated beyond doubt that the Agreement was incapable of performance at the time when it was entered into and unbeknown to the parties it was simply impossible to reduce the first Applicants' electricity losses to 10%. The Applicants have submitted that it has been shown beyond doubt that it is impossible to achieve the core object of the Agreement which was to reduce the first Applicants' losses to 10%. The Applicants have, therefore, submitted that the Agreement was void *ab initio.*

[30] The first Applicants were established in terms of Section 3 of the Electricity Act. The Applicants' Managing

Director and its Chairman are appointed by the Minister responsible in accordance with the provisions of Section 4 of the Act. Under section 12 of the Act the Minister responsible may, after consultation with the first Applicants, give it such directions of a general character as to the exercise and performance by it of its functions as appears to the second Applicant to be requisite and in the public interest and the first Applicants shall give effect to such directions. The first Applicants submit that such directions are important in respect of matters involving substantial outlay on capital account and that in this respect the first Applicants would be obliged to follow such directions with regard to a general programme settled from time to time. Section 12 of Electricity Act is in the following terms –

> *"12(1) The Minister may, after consultation with the Board, give such directions of a general character as to the exercise and performance by it of its functions as appear to the Minister to be requisite in the public interest, and it shall give effect to any such directions.*
>
> (2) In carrying out such measures of the organisation, or such works of development, as involve substantial outlay on capital account and

> in exercise and performance of its functions as to training, education and research, the Board shall act in accordance with a general programme settled from time to time in consultation with the Minister.

[31] The first Applicants have contended, as indicated earlier in this judgment, that the implementation of the contract with the first Respondent would involve a huge outlay on capital account running into hundreds of millions of Emalangeni. The first Applicants have submitted that it is clear on the papers filed in this matter that Mr. Mdluli the responsible Minister, at the time, and the second Respondent, who was acting on behalf of the first Applicants at the time, must have been aware of the peremptory requirements laid down in the relevant legislation and that the two individuals must have deliberately ignored the statutory prohibitions of the Acts. The Applicants contend that failure to comply with the provisions of the Electricity Act provides another reason why the Agreement should be declared null and void. For my part I agree with the interpretation placed on the provisions of Section 12 of the Electricity Act by the first Respondent. I accept the Respondent's contentions with regard to the import of the provisions of Section 12 of the Electricity Act. That provision only gives a general directive to

the purpose of good governance and does not, unlike Section 10 of the PE Act, oblige the first Applicants to seek Ministerial approval before it can legally enter into binding contracts with other parties.

[32] The Applicants have also contended that the Agreement is void on the ground that it is tainted with fraud perpetrated on the first Applicants' Board. The Applicants contend that the second Respondent acted in collusion with the first Respondent in having the contract awarded to the first Respondent. It is submitted by the first Applicants that the second Respondent misled the first Applicants Board and made misrepresentations not only with regard to the tender process but also with regard to the contents of the Agreement. The first Applicants have submitted that the second Respondent disregarded the tender procedure and abused his authority by instructing the evaluators to change their scores in order to increase the points awarded to the first Respondent and that he applied pressure on the evaluators to recommend the first Respondent to get the contract.

[33] The papers filed in this matter demonstrate the extent to which the second Respondent went to ensure that

the contract was awarded to the first respondent. The Chairman of the Tender Committee who opposed what the second Respondent was doing was dismissed from his job. The first Applicants have submitted that the second Respondent misled the Board into believing that the first Applicant's would not make payments to the first Respondent and that the amounts to be paid would come from the savings that would result from the implementation of the Agreement. The first Applicants contend that the second Respondent manipulated the tender process. They submit that the tender evaluation of the four tenderers which included the first Respondent established that the first Respondent's average score of 54% was approximately 30% lower than the evaluation of the other three tenderers. It is contended that the second Respondent put pressure on Mr. Nxumalo and Mr. Kunene to change the evaluations which they had made on the first Respondent. Through the pressure exerted by the second Respondent, the first Respondent was given the opportunity to amend and supplement its tender by providing further information without extending similar opportunity to the other tenderers. The second Respondent later altered the scores on the evaluations which had earlier been made by Mr. Nxumalo and Mr.

Kunene.

[34] It is further contended that the second Respondent misled the Board of the first Applicants into believing that the first Applicants would not have to effect payment to the first Respondent and that the amounts to be paid to the first Respondent, in terms of the agreement, would come from monies that would be generated as a consequence of the implementation of the Agreement. In the paper the second Respondent submitted to the Board he stated the following:-

> *"SEB is taking zero financial risk by engaging Malesela – the money we will pay them will cancel the savings they make for SEB. They will have to make the savings and only once we have realised them will we pay them".*

And again,

> *"The project has been structured such that we do not require funding from the Board as Malesela will fund the project and only get paid a percentage of the savings SEB realises."*

[35] The Applicants contend that these were misrepresentations clearly made with a view to

persuading the Board to approve the appointment of the first Respondent. The applicants have submitted that the Special Tender Committee did not want the first Respondent to be appointed. The minutes of their meeting convened on 4th December 2002 record as follows:-

"The first respondent should not be accepted as is;

The second respondent was authorised to enquire from the first respondent whether it would be feasible to carry out the mandate to "identify" without the first applicant "paying out money upfront for phase 1 for identification".

[36] The Applicants further contend that the extent to which the second Respondent went in order to have the contract awarded to the first Respondent emerges from the minutes of a meeting which was convened on 17th December 2002. The second Respondent informed the Board as follows:-

"That Malesela has already been awarded the contract".

The contract, at that time, had not been awarded to the first Respondent. Once again the second Respondent

is deliberately misleading the Board.

[37] That meeting had resolved that the contract should not be drawn up until the Tender Committee's conditions were met by Malesela despite the urgency of the matter.

[38] It is interesting to note that after the second Respondent had been dismissed from the first Applicants' employment, documents were found in his office computer which indicated that Mr. Steenkamp of the first Respondent had sent a revised draft agreement between the first Applicants and the first Respondent and a progress report for January 2003. The documents show that the draft agreement was emailed to the second Respondent on 15th December 2002. Interestingly Mr. Steenkamp indicated his doubts on what would be the reaction of the first Applicant's Tender Committee. All this correspondence was not disclosed to the Board. This clearly shows the extent of the collusion between the second and first Respondents. The second Respondent did not include escape clauses in the contract as directed by the Board. The Board specifically and expressly gave him these instructions to do so. He completely disregarded those

instructions.

[39] The Applicants have submitted that prior to the contract being signed Mr. Hlanze had discussions with the second Respondent relating to the clauses in the contract which did not comply with the Board's conditions and he was advised by the second Respondent that he would resolve those issues with the attorneys. On 6th March 2003 the second Respondent had forwarded a letter to the Board in which he stated, *inter alia*, the following:-

> *"The contract allows for the Board to stop any investments required from the Board (for reducing technical losses) if it feels that they will not materially benefit the Board overall. MTS would present its technical losses report to the Board for evaluation and deliberation …"*

[40] The Agreement does not provide for this and the second Respondent, once again, tried to mislead the Board of the first Applicants. It is the Applicants' submission that it is clear that the second Respondent manipulated the bidding process, misled the Board and colluded with the first Respondent to ensure that the first Respondent was appointed. There can be no doubt, in my judgment, that the conduct of the second

Respondent constituted a fraud on the first Applicants. It is clear, in my view, that the first Respondent should not be allowed to benefit from this fraudulent conduct. It is a fundamental principle of law that no one should be allowed to improve his own position from his own wrongdoing. In the case of ***Wimbledon Lodge (Pty) Ltd v Gore NO. & others*** (2003) 5 SA 315 at 321G, Schutz JA stated as follows:-

"Can this situation be countenanced? I think not. I *am content to start with Roman Law. In D50.17.134.1 Upian tell us* "nemo ex suo delictor meliorem suam conditionem facere potest" *rendered in Watson translation as: No one is allowed to improve his own condition by his own wrongdoing."*

This fundamental principle has been applied expressly in the case of ***North West Provincial Government and Another v Tswana Consulting CC and others*** *(supra)*. The Applicants have submitted accordingly that they are entitled to the relief sought.

[41] I have carefully reviewed the material facts as disclosed on the papers filed in the case. I have also carefully considered the oral submissions which both learned counsel have made to me together with the decided authorities which they have cited to me and I have reached the following conclusions.

[42] I am satisfied and find that it has been demonstrated

on the papers and on the documents annexed to the application that it was impossible to achieve the object of the Agreement. The fundamental object of the Agreement was the guarantee which the first Respondent had given that they would reduce the Applicants losses to 10% or less. It is very clear to me and, indeed, on the Respondent's own admission in their preliminary report it was, at all time and unbeknown to the parties, impossible to achieve this fundamental object of the Agreement and the Agreement therefore must be held to be void *ab initio.* The first Respondent's preliminary report is also supported by the report commissioned by the first Applicants and is part of the evidence before this court. However, Mr. Howitz objected to that report being received in evidence ostensibly on two grounds; that the report was not properly before the court and that it was inadmissible as hearsay evidence. After hearing both counsel on the matter I took the view that the report was very critical and relevant to the main issue I had to determine in this case. I have considered the case cited by Mr. Howitz namely, ***Mauerberger v Mauerberger*** (1948) 35 AR 737 at 732 where the Court held as follows:-

"It is quite clear that in Notice of Motion proceedings

an Applicant must in his or her supporting affidavit set out fully his or her cause of action. It is not for the Applicant to simply make general allegations, and when those allegations are dealt with in reply to come forward with replying affidavits giving details supporting the general allegations originally set out in the affidavit of the Notice of Motion."

That case can be distinguished from the present case. The first Applicants had given two (2) years Notice to the Respondent that they would produce the report. The report is specifically and expressly referred to in the supporting affidavit of the first Applicants. The report was commissioned only because the first Respondent refused to provide a final report to the first Applicants unless the latter had paid E500 000. It should be noted that the report is supported by an affidavit by the people who produced it.

[43] The material provisions in the Agreement and especially those providing for the implementation of the measures to be carried out by each contracting party are contradictory. Some clauses state that the obligations to implement the measures rest on the first Respondent while other clauses state that the

obligation rests on the first Applicants. Clauses 2.1.2 and 5.1.2 of the Agreement state that the first Respondent is obliged to design and implement the technical and administrative measures as well as the improvement plans to reduce the losses to 10% or less. Clause 10.3, on the other hand, puts the obligation on the first Applicants to implement and maintain efficiently all the agreed upon corrective administrative measures and procedures proposed by the first Respondent. The parties to the Agreement have interpreted these provisions differently and this differing interpretation only goes to show that the parties were not a*d idem* on those provisions when the Agreement was concluded. I find that the parties to the Agreement were not agreed on one of the essential parts of the Agreement and, therefore, there was no consensus between them and this was fatal to the existence of the Agreement as it would not be possible to enforce both interpretations of the Agreement.

[44] There can be no doubt on the materials before me that the second Respondent acted in collusion with the second Respondent to the detriment of the first Applicants in ensuring that the contract was awarded to the first Respondent. The evidence shows that the

second Respondent misled the Board of the first Applicants by making misrepresentations to it not only with regard to the tender process but also with regard to the provisions of the Agreement itself. The second Respondent disregarded the first Applicants tender procedures; he abused his position of authority as the Managing Director of the first Applicants by instructing the tender evaluators to change their scores in order to increase the points awarded to the first Respondent; In fact the second Respondent changed the ratings in his own handwriting. He applied pressure on the evaluators to recommend the first Respondent. Mr. Harry Nkambule who opposed him was dismissed from his job. The second Respondent misled the Board of the first Applicants into believing that the first Applicant would not have to effect payment to the first Respondent and that the amount paid to the first Respondent, in terms of the Agreement, would come from monies that would be generated as a result of the implementation of the Agreement; the second Respondent exceeded his clear mandate from the Board with regard to the clauses to be incorporated into the Agreement. This conduct of the second Respondent constituted, in my judgment, a fraud upon the first Applicants who were his employers and the

first Respondent cannot be allowed to benefit from a contract so tainted with fraud vide the case of ***North Western Provincial Government Supra.***

[45] I am further satisfied and find that the first Applicants have proved on the papers that to implement the recommended measures, technical and administrative, the Agreement would involve substantial capital outlay and it would be a major investment. And in view of the peremptory nature of the provisions of Section 10 of the PEU Act it was necessary to obtain Ministerial approval before the Agreement between the parties could be concluded. I am satisfied and find that such approval was neither sought nor granted. The PEA Act clearly states that a written authority of the Minister, acting in consultation with the Standing Committee, had to be obtained. This had not been done in this case. In terms of the authorities referred to earlier in this judgment, the Agreement is void and unenforceable. The first Respondent attempts to deal with the import of the provisions of Section 10 of the PEA are so unreasonable that I must reject them as without merit.

[46] In view of these findings the basis of the third Respondent's jurisdiction falls away. This application

must, therefore, succeed with costs.

R.A. BANDA

CHIEF JUSTICE