SUPREME COURT OF SWAZILAND

APPEAL CASE NO.5/2008

In the matter between:

MALESELA TECHNICAL SERVICES (PTY) LTD — **APPELLANT**

AND

SWAZILAND ELECTRICITY BOARD — **1st RESPONDENT**

THE MINISTER OF NATURAL RESOURCES AND ENERGY — **2nd RESPONDENT**

CORAM	**ZIETSMAN JA** **RAMODIBEDI JA** **MAGID AJA**
FOR THE APPELLANT	**A.J. HORWITZ SC** **C.L. ROBERTSON**
FOR THE RESPONDENTS	**Z.F. JOUBERT SC**

JUDGMENT

Zietsman JA

This appeal requires a determination of the question whether a contract entered into between the appellant and the first respondent was correctly declared to be null and void by the *court a quo.*

The contract, referred to as the Electrical Systems Losses Reduction Agreement, was signed by Themba Tsela on behalf of the first respondent and by P.J. Steenkamp on behalf of the appellant, on 25 June 2003.

The first respondent was experiencing electrical supply losses in its electricity network supply system which losses far exceeded 10%. It wished to reduce such losses to 10% or less. The first respondent then called for tenders "to identify the causes of the Electrical System Supply Losses, to address the causes thereof and to institute such technical methods and administrative measures that may be required to reduce the Electrical System Supply Losses to 10% or less". Various tenders were submitted and after they had been considered and evaluated the first respondent accepted the tender submitted by the appellant. The contract or agreement referred to above was then concluded and signed.

Clause 1 of the agreement defines certain words and expressions contained in the agreement. The first respondent is referred to as the "Buyer" and the appellant is referred to as the "Supplier". The "supplies" are defined as "the administrative procedures designed to reduce and decrease the Electrical System Supply Losses in the electrical network of the Buyer to 10% or less".

The agreement makes provision for the conclusion of a further

separate agreement to be known as "The Materials and Equipment Supply Agreement" to be entered into "if and when the Supplier is requested by the Buyer to supply, install and commission materials and equipment for the purposes of reducing electrical systems losses". Provision is also made for a Project Manager to be appointed by the Buyer (the first respondent) and for a Project Consultant to be appointed by the Supplier (the appellant).

The "Project" is defined to mean "the examination of the electricity supply network of the Buyer with a view to identifying what causes the Buyer to experience Electrical System Supply Losses and the means and procedures to be implemented by the Supplier in order to reduce the Electrical System Supply Losses to 10% or less". It is further provided that "The implementation of the Project shall be carried out in two phases i.e. the identification phase and the phase of the technical loss study".

Clause 5(1) of the agreement deals with the "Phases of the Execution of the Project". This clause reads as follows:

> "*5.1 The Supplier shall conduct and execute the Project in the following two phases;*
>
> *5.1.1 An identification phase during which the Supplier shall embark on a technical loss study to:*
>
> (1) *identify the causes of the technical losses suffered by the Buyer; and*
>
> (2) *investigate and examine the administrative procedures of the billing cycle of the Buyer with a view to identifying the likely causes of the under determination of energy sold by the Buyer to its customers;*

5.1.2 An implementation phase during which the Supplier shall design and implement improvement plans to reduce the technical and non-technical system losses suffered by the Buyer.

5.2 The identification and implementation phases for each of the loss components of the Project can be done concurrently during the execution of the agreement".

The losses sustained by the first respondent consisted of the difference between the amount of energy produced by and purchased by the first respondent, and the energy sold by the first respondent. A certain percentage of loss is inevitable but the losses sustained by the first respondent, being in excess of 10%, were considered to be excessive. The causes of such losses are both technical and non-technical. The agreement makes provision for the payment to the appellant from time to time as the losses are reduced, and it is accordingly provided in the agreement that the losses experienced by the first respondent for the period 1 April 2002 to 31 March 2003 would be calculated and agreed upon, and this would be used as the baseline or starting point for the purpose of then calculating the savings in the losses resulting from time to time as a result of the implementation of the appellant's recommendations.

In terms of the agreement the appellant guaranteed to the first respondent that it would be able to reduce the losses to at least 10% provided that the technical component of the current losses was in excess of 9% and that the non-technical losses were in excess of 5%. It is clear from the papers that this provision was met.

The agreement provided that in consideration of the services provided by the appellant, the first respondent would make the following payments to the appellant

(3) A fixed monthly fee of E30 000.00;

(4) 50% of the savings effected in respect of the technical losses; and

(5) 50% of the savings in respect of non-technical losses. This would be 50% of the calculated monetary value of the increased billing effected to the first respondent's customers.

The agreement provided that the expenditure in respect of the technical losses study, and the capital expenditure in respect of the improvement and rectification measures to address the technical losses, would be borne by the first respondent. The limit of expenditure for the technical loss study would be E550 000.00.

The possibility of the first respondent deciding not to implement any of the recommendations made by the appellant was foreseen, and the agreement provided that in such a case the first respondent would be liable to pay to the appellant the aforementioned sum of E550 000.00.

The position, then, is that if the first respondent decided not to implement the appellant's recommendations the first respondent would have to pay the appellant

(6) E30 000.00 per month (the agreement did not provide for the length of period this would have to be paid. In terms of the agreement it would seem that such payments would stop when the appellant had completed its study and had submitted its recommendations to the first respondent which, according to the agreement, it had to complete within a period of 12 months. There is however

an allegation in the papers that it had to be paid for 36 months); and

(7) The sum of E550 000.00.

If the recommendations by the appellant were accepted and implemented by the first respondent, the first respondent would be obliged to pay the appellant

(8) for the items supplied and installed by the appellant;

(9) 50% of the savings resulting from a decrease in the aforementioned losses for a period of 3 years, and thereafter 25% of the savings for a further 2 years .

The agreement provided further that until the technical loss percentage was established the first respondent would be obliged to make interim payments to the appellant based on a value of E266 000.00 for each 1% or part thereof improvement in energy losses saved, or increases in energy billed.

The capital expenditure required to implement the improvement and rectification measures to address the technical losses had, in terms of the agreement, to be borne by the first respondent. It was also provided that the capital expenditure to replace the existing maximum demand meters to the top 50 maximum demand customers of the first respondent with other maximum demand meters, the refurbishment of existing maximum demand meters and the re-introduction thereof into the first respondent's systems would be done at the first respondent's cost. This capital investment would be limited to a maximum of E400 000.00.

The agreement also provided that the appellant would provide the first respondent with a performance guarantee in the sum of El 000 000.00 within 30 days of the date of the agreement.

An arbitration clause in the agreement provided that in the event of a dispute between the parties regarding, *inter alia,* the interpretation of the agreement, the rights and obligations of the parties or the termination of the agreement, such dispute would have to be submitted to, and decided by, an arbitrator and there would be no right of appeal against his award.

Apparently the appellant failed to provide the first respondent with the El 000 000.00 performance guarantee and it does not appear from the papers before us that the appellant at any stage presented the first respondent with a final document reflecting the studies done by it and its recommendations of what steps were needed to be taken to achieve the guaranteed reduction in the electrical system losses. However, it does appear as though some recommendations made by the appellant were implemented and certain reductions in the losses are alleged. Accounts were sent by the appellant to the first respondent demanding certain payments, and when these were not forthcoming the appellant in June 2004 instituted an action in the High Court against the first respondent in which it claimed a total sum of El 638 290.00. The appellant also instituted a claim against the first respondent to be determined by the arbitrator and it was agreed that the two actions would be consolidated and would be dealt with by the arbitrator.

On 31 March 2005 the first respondent brought an application in the High Court on Notice of Motion against the appellant for an order declaring the agreement to be null and void and of no force or effect. The application was opposed by the appellant but was granted by the Chief Justice on 21 January 2008. This had the effect of nullifying the arbitration clause in the agreement and of bringing the arbitration proceedings to a close. It is against this

order that the appellant has appealed to the Court.

The Chief Justice found the agreement to be null and void on five separate grounds, namely:

(10) He found that the agreement was contradictory and void for vagueness;

(11) He found that there was a lack of consensus ad idem between the parties at the time when the agreement was signed;

(12) He found that at the time of the conclusion of the contract the achievement of the object sought to be achieved was, unbeknown to the parties, not possible of achievement;

(13) He found that the agreement was tainted with fraud and that it was also for that reason void; and

(14) He found that there was non-compliance with section 10(1) of the Public Enterprises (Control and Monitoring) Act, No.8 of 1989, and that this rendered the agreement void.

I shall deal separately with these findings of the court *a quo.*

AGREEMENT CONTRADICTORY AND VOID FOR VAGUENESS The alleged contradictions in the agreement deal with the implementation of the recommendations made by the appellant in the event of the first respondent deciding that the recommendations should be implemented, and in particular whose obligation it was to enforce such implementation.

Clause 2.1 of the agreement provides that the appellant is employed to study the electricity supply network, to identify the sources of the losses and to address the causes of the losses. Clause 2.1.2 provides for the appellant to then

"*design and implement such technical methods and*

administrative measures in order to reduce the Electrical System Supply Losses to 10% or less".

Clause 5.1.2 of the agreement refers to -

> "*An implementation phase during which the Supplier (the appellant) shall design and implement plans to reduce the technical and non-technical system losses suffered by the Buyer (first respondent)*".

Clause 10.3 of the agreement provides:

> "*The Buyer (first respondent) shall have a duty to implement and maintain efficiently all the agreed upon corrective administrative measures and procedures proposed by the Supplier (appellant)*".

In his judgment the Chief Justice states that as far as the implementation of the appellant's recommendations is concerned the parties have interpreted the above quoted provisions differently and that this goes to show that the parties were not *ad idem* and the agreement lacked consensus.

At first sight it may appear that there is uncertainty as to which party is obliged, in terms of the agreement, to undertake the implementation of the recommendations, and that clauses 2.1.2 and 5.1.2 are in conflict with clause 10.3. But in interpreting a contract the courts should seek to uphold the contract rather than to destroy it. See e.g. ANNAMMA v MOODLEY 1943 A.D. 531 and GANDHI v S M P PROPERTIES (PTY) LTD 1983 (1) SA 1154 (D & CLD) at 1156 E-F.

In the present case it would seem to me that the intention of the parties was that the first respondent, if it decided to implement the appellant's recommendations, would be obliged to maintain

the implementation thereof at least for the period during which the appellant was entitled to share of the savings resulting from the reduction in the losses. The appellant would, however, also be involved in the implementing of its recommendations. This, in my opinion, is at least a possible interpretation of the clauses in question. It is therefore possible that an interpretation can be given which will uphold the contract. This being the case it cannot be said that the contract is void for vagueness.

CONSENSUS AD IDEM

The finding of the Chief Justice that there was a lack of consensus ad idem between the parties is based upon the finding that the clauses in the contract mentioned above are conflicting and irreconcilable.

It is not clearly stated in the papers before us that there was a lack of understanding between the parties concerning the interpretation of these clauses and, as indicated, it is my conclusion that the clauses mentioned above are not irreconcilable. In my opinion it has not been shown that there was a lack of consensus between the parties.

IMPOSSIBILITY OF PERFORMANCE

It is clear that it was the intention of the parties to conclude a contract which would result in a reduction of the losses sustained by the first respondent to 10% or less. The conclusion reached by the Chief Justice was that this object was, at the time the contract was concluded, and unbeknown to the parties, impossible of achievement.

For a party to be relieved of his obligations in terms of a contract on the basis of impossibility of performance it must be shown that

the impossibility is absolute. See e.g. YODAIKEN v ANGEHRN AND PIEL 1914 T.P.D. 254, at 261; HAYNES v KING WILLIAMSTOWN MUNICIPALITY 1950 (3) S.A. 841 (E.D.L.D.) at 847H. The mere fact that performance will involve great difficulty and great expense does not constitute impossibility. See ORDA AG v NUCLEAR FUELS CORPORATION OF SOUTH AFRICA (PTY) LTD 1994 (4) S.A. 26 (W).

If the realization that performance might not be possible was within the contemplation of the parties at the time the contract was concluded they are generally bound by the contract. See BISCHOFBERGER v VAN ECK 1981 (2) S.A. 607 (W). Also, if the parties agree that the risk of impossibility of performance is to fall upon the debtor, he cannot rely on impossibility of performance to avoid the contract. See OERLIKEN S.A. (PTY) v JOHANNESBURG CITY COUNCIL 1970 (3) S.A. 579 (A) at 585B.

In the present case, although there are statements from both parties suggesting that it would not be possible for the appellant to reduce the losses to 10% or less, it does not seem to me that an absolute impossibility of performance has been established. What has been shown is that it would be difficult, and perhaps exorbitantly expensive, to implement steps capable of the required reduction in the losses, but this does not, in my opinion, go far enough to justify a finding of absolute impossibility of performance.

The appellant, in the contract, guaranteed that it would be able to reduce the losses to 10% or less. It must be accepted, therefore, that it considered whether performance would be possible and it chose to guarantee that it would be able to attain the required result. This being the case the contract could not be avoided on the basis of impossibility of performance.

FRAUD AND COLLUSION

The first respondent contends that the agreement is void or voidable on the ground that it is tainted with fraud. The contract was signed on behalf of the first respondent by Themba Tsela who was at the time the first respondent's managing director. The first respondent alleges that Tsela fraudulently took steps to ensure that the contract would be awarded to the appellant and that he misrepresented the terms of the contract to the first respondent's board of directors. The first respondent alleges further that this was all done in collusion with the appellant.

Although this was denied, the Chief Justice in the court *a quo* found that the allegations made by the first respondent had been proved.

At one stage the first respondent alleged that it had cancelled the agreement. It is not clear whether the Chief Justice regarded the contract void because of the alleged fraud, or whether he considered that it was voidable and had lawfully been cancelled.

There are many facts and allegations in the papers that point to irregularities committed by Tsela.

When tenders were called for, prior to the conclusion of the agreement, eight tenders were received. They were eventually whittled down to four. These four tenders were evaluated by an evaluation team and the score or rating given to the appellant was well below the score given to the other tenderers. The negotiations leading up to the conclusion of the agreement were handled by Tsela, on behalf of the first respondent, and by Petrus Johannes Steenkamp on behalf of the appellant. The first respondent alleges that Tsela was dissatisfied with the low scores

given by the evaluation team to the appellant and he summoned Walter Nxumalo, and Meshack Kunene, two members of the evaluation team, to his office and asked them why they had allotted such low scores to the appellant. It was explained to him that the appellant had failed to provide vital information in relation to its tender. Tsela then gave the appellant the opportunity to provide additional information, and instructed Nxumalo and Kunene to change the scores they had allotted to the appellant. The chairman of the tender board who opposed what Tsela was doing was dismissed from his job by Tsela.

Tsela thereafter tried to persuade the first respondent's board of directors to accept the final tender submitted by the appellant. As can be seen from the minutes of meetings held by the board members there were misgivings concerning the appellant's tender. Queries were raised and instructions were given to Tsela to ensure that certain clauses and safeguards would be included in any final agreement entered into with the appellant. After several meetings the board, on 6 February 2003, passed a resolution that the matter would from then onwards be handled by the main board, but that Tsela should make a presentation to the board. Despite this resolution Tsela continued to negotiate directly with Steenkamp and the contract was finalized and was signed by Tsela in his capacity as managing director of the first respondent.

It was submitted by Mr. Horwitz, who acts an behalf of the appellant, that the Chief Justice erred in concluding that the contract was void (or voidable) as a result of the alleged fraudulent conduct of Tsela. In his submission he relied largely upon the resolution passed by the first respondent's board of directors on 6 February 2003 to the effect that the further

negotiations in respect of the appellant's tender would be dealt with by the "main board". As pointed out above, however, it appears that Tsela continued to handle all of the further negotiations himself, and the agreement was finalized and signed by him after he had undertaken to include in the agreement the terms stipulated by the board. It seems from the papers that Tsela did not fulfil his undertakings to the board.

Whether or not the Chief Justice was correct in finding that the alleged fraud and collusion rendered the contract void or voidable need not be determined in view of our finding in respect of the applicability of section 10(1) of the Public Enterprises (Central and Monitoring) Act of 1989.

PUBLIC ENTERPRISES (CONTROL AND MONITORING) ACT NO.8 OF 1989

This Act will be referred to simply as the Act. The relevant parts of section 10(1) of the Act read as follows:

> *"10(1) No category A public enterprise shall do any of the following without the approval in writing of the Minister responsible acting in consultation with the Standing Committee:*
>
> *(a)*
>
> *(b) undertake any major investment;*
>
> *(c)*
>
> *(d) close, sell, liquidate or divest any major part of its business;*
>
> *(e)".*

The agreement provides that the contract may be carried out in different phases. Clause 5.1 refers to two phases, namely an identification phase during which the appellant will identify the

causes of the technical losses suffered, and identify also the causes of the non-technical losses, and a second phase, referred to as the implementation phase, during which the appellant will design and implement plans to reduce the said losses.

Section 5.2, however, provides that the identification and implementation phases can be done concurrently during the execution of the agreement.

Section 7 provides that the appellant shall, within 12 months from the date of the agreement, compile and submit to the first respondent a report in respect of its studies of the technical losses. The first respondent is then given the option, after considering the report and the appellant's recommendations, of deciding whether it will be prepared to incur the capital expenditure required to implement the appellant's recommendations.

As stated above the agreement provides that the first respondent is obliged to pay to the appellant a monthly fee of E30 000.00. If the first respondent decides not to implement the appellant's recommendations the first respondent is obliged to pay to the appellant a further sum of E550 000.00.

If the first respondent decides to implement the appellant's recommendations the first respondent is to pay to the appellant 50% of the calculated monetary value of the savings effected in respect of technical losses, and 50% of the calculated monetary value of the increased billing effected to the first respondent's customers. In addition to the said payments to the appellant the first respondent will be liable for the capital outlay required to implement the recommendations.

It is common cause that the first respondent is a category A public enterprise to which section 10(1) of the Act applies. Section 10(1) (d) provides that ministerial approval is required if a category A public enterprise divests itself of any major part of its business. It was submitted on behalf of the first respondent that the agreement which requires the first respondent to pay to the appellant 50% of the monetary savings resulting from the reduction of its losses constitutes a divesting of a major part of its business. In my opinion this submission cannot be correct. The fact that the first respondent would be obliged to surrender to the appellant a portion of the money it saves does not constitute a disposal or divestment of part of its business.

The main issue between the parties concerns the interpretation of section 10(1) (b) of the Act. This provides that ministerial approval is required if a category A public enterprise undertakes any major investment. Section 10(2) of the Act provides that a determination of what is major will be determined by the Standing Committee in consultation with the Public Enterprises Unit. For the year in question "major" was determined as being 6.5% of the enterprise's working capital.

It has not been established on the papers that the money required to be paid by the first respondent if it should decide not to implement the appellant's recommendations would constitute a major investment by the first respondent. On the other hand, it seems not to be disputed that the capital outlay required to implement measures in order to reduce the first respondent's losses to 10% or less would run into millions of Emalangeni. Such a capital outlay would constitute a major investment by the first respondent and this would require ministerial approval.

It was part of the submissions by Mr. Horwitz, that if ministerial approval was required it was in fact obtained. For this submission he relies upon the affidavit submitted by Magwagwa Mdluli who alleges that he was the Minister for Natural Resources for three years up to and until March 2003. He alleges that Tsela briefed him continuously regarding the negotiations and the drafting of the agreement. He alleges further that he delegated to Tsela the power to give his approval to the conclusion of the agreement, and that by signing the agreement Tsela added the necessary ministerial written approval to the agreement. This submission clearly cannot stand. There is nothing in the Act which allows the Minister to delegate his powers in terms of section 10(1) and in any case the Minister is required to act "in consultation with the Standing Committee". There is no suggestion that the Standing Committee was consulted in the matter. It is clear also that at the time when the agreement was signed Mdluli was no longer the relevant Minister.

Mr. Horwitz's main submission was that Ministerial approval was not required at all at the time when the agreement was signed. Mr. Horwitz's submission is based upon the fact that in terms of the agreement the first respondent, after receiving the report and recommendations of the appellant, could then decided whether it wished to implement the said recommendations. He submitted that if the first respondent took the decision to implement the recommendations only then would the question of a major investment arise and only then would ministerial approval be required.

The agreement provides, in clause 7, that the appellant would, within 12 months from the effective date of the agreement,

compile and submit a report and recommendations to the first respondent in respect of its studies of the technical losses. The first respondent would then have the opportunity to decide whether it was prepared to incur the capital expenditure required to implement the appellant's recommendations. The report and recommendations were apparently not submitted by the appellant. The agreement, in clause 5.2, provides that the identification and implementation phases for each of the loss components of the project could be done concurrently during the execution of the agreement. This is apparently what was done. Clause 3.6 of the agreement provides that until such time as the technical loss percentage is established the first respondent is obliged to pay to the appellant interim payments based on the value of E266 000.00 for each 1% or part thereof improvement in energy losses saved, or increases in energy billed.

It is clear from the papers that the appellant from time to time submitted accounts to the first respondent claiming its share of the savings allegedly brought about by the implementation of its recommendations. These claims were disputed, but at one stage payment of E500 000.00 to the appellant was authorized by Tsela. Other payments were also made by the first respondent to the appellant. According to the papers the total amount paid to the appellant was E905 754.17.

On 8 June 2004 the appellant issued summons in the High Court against the first respondent in which it claimed at total sum of El,638 290.96. This included claims for its monetary share of the decreases in losses allegedly experienced by the first respondent. In its plea to the applicant's claims the first respondent referred firstly to the arbitration clause in the agreement and alleged that the appellant had to bring his claims before the arbitrator. In a plea over, the first respondent alleged that the appellant's

particulars of claim were excipiable as it had failed to allege that the savings were brought about by the implementation of its recommendations.

The appellant also instituted claims against the first respondent in arbitration proceeding in which it claims damages in the amount of E26 million resulting from the first respondent's alleged wrongful repudiation and cancellation of the agreement, and a further sum of El5 000.00. It was agreed by the parties that the action instituted in the High Court would be consolidated with the claims brought before the arbitrator.

What is clear from the abovementioned facts is that the appellant, on its own allegations, was not merely making recommendations to the first respondent, but was busy implementing what it thought were the remedies needed to reduce the losses. In other words it was embarking upon the second phase of the agreement. It also ordered and delivered to the first respondent 25 maximum demand meters and installed 15 of them at the premises of first respondent's customers.

The carrying out by the appellant of the necessary remedies to reduce the losses would indisputably involve major capital expenditure and would require a major capital investment by the first respondent.

What was done, namely the implementation of the two phases of the project concurrently, was something envisaged and provided for in the agreement and this, in terms of section 10(1) of the Act, required the approval of the Minister acting in consultation with the Standing Committee. My conclusion, therefore, is that the Minister's approval was required at the time of the signing of the

contract.

The provisions of section 10(1) are clearly peremptory, and the fact that it was the first respondent that should have obtainec the Minister's approval does not prevent the first responden from setting up, and relying upon, the illegality. See YORE ESTATES LTD v WAREHAM 1950 (1) SA 125 (S.R.).

In the result it is my conclusion that the Chief Justice was correct in concluding that a failure to comply with sectior 10(1) of the Act rendered the agreement void. This being the case the appeal must fail.

The appeal is dismissed with costs, such costs to include the costs of counsel.

N.W ZIETSMAN
judge of Appeal

I agree

M. RAMODIBEDI
judge of Appeal

I agree

PAM MAGID
judge of Appeal

Delivered in open court on this Acting Judge of Appeal

.......day of November 2008.

[1] I have read the judgment of my Brother Zietsman and agree with his conclusion and the order which he proposes. Since, I am of the firm view that section 10 (1) (b) and (d) of the public Enterprises (Control and Monitoring) Act ("the Act") disposes of the matter, I think it is necessary for me to state my own reasons.

[2] The appeal originated by way of a notice of motion filed in the High Court by the first respondent as applicant. The first respondent sought an order against the appellant and one Themba Tsela ("Tsela") declaring that the agreement ("the Agreement") between it and the appellant was null and void and of no force or effect. One of the grounds on which the first respondent relied for this contention was that the Agreement was in contravention of the section in question in as much as the approval of the Minister For Natural Resources and Energy ("the Minister") had not been sought and obtained.

MI. After hearing submissions in the matter the learned Chief Justice, sitting in the High Court, granted the application with costs. Hence the present appeal.

MII. In order to interpret section 10 meaningfully and contextually, it is critically important to quote it in the forefront of such an exercise. It provides as follows

“{1} 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 of its business;

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

MIII. It is an established principle in the interpretation of statutes that if a provision is couched in a negative form, like the one under consideration, it is to be regarded as peremptory rather than as a directory mandate. See **Sutter v Scheepers 1923 AD at 173.**

MIV. At the outset, it is important to recognise that by enacting section 10, the Legislature conferred oversight functions on the Minister in order to protect public funds from misuse. His consent is necessary as a mechanism to provide the requisite checks and balances. Construed in this way, it will be seen that the section was enacted to serve the public interests and not private ones. It is significant in this regard to note that the first respondent is a category A Public Enterprise within the meaning of the Act. It is wholly owned by the Government of Swaziland. It follows, in my view, that section 10 must be interpreted strictly in order to achieve the purpose for which it was designed as fully set out in the preceding paragraph. The fact that the section is couched in mandatory or peremptory terms is the clearest indication of this proposition.

MV. The conclusion that section 10 requires a strict interpretation renders it necessary to attach, at the outset, meaning to the word "undertake" appearing in subsection 10 (1) (b). The ordinary and natural meaning of the word according to the Concise Oxford Dictionary is "<u>commit</u> oneself to and begin.

Take on." I am satisfied, therefore, that before the first respondent could "commit" itself by entering into the Agreement in the circumstances fully highlighted below, it was obliged to seek and obtain the Minister's consent. This is a statutory duty. It is trite that the parties cannot contract out of the statutory provisions. See for example **Administrator, Transvaal and Others v Zenile And Others 1991 (11 SA 21 (A)** at 34. Similarly, the court cannot compel a body to do that which the statute does not permit. See for example **Hoisain v Town Clerk,Wynberg 1916 AD 236.** Indeed **I** am mainly attracted by the following apposite remarks of Innes CJ in **Schierhout v Minister of Justice 1926 AD 99** at 109:-

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: "Ea quae lege fieri prohibentur, si fuerint facta, non soluminutilia, sed pro infectis habeantur; licet legislator fieri prohibuerit tantum, nec specialiter dixerit inutile esse debere quod factum est. " (Code 1.14.5). 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. (See also Brunneman ad Codicem 1.14.5). The maxim, "Quod contra legem fit pro infector habetur", is also recognised in English in English law. And the

disregard of peremptory provisions of a statute is fatal to the validity of the proceeding affected. "

MVI. On 25 June 2003, and notwithstanding the provisions of section 10, the parties signed the disputed Agreement. The appellant was represented by one Petrus Johannes Steenkamp ("Steenkamp") who was its Managing Director. The first respondent on the other hand was represented by Tsela who was its Managing Director at the time.

MVII. The relevant provisions of the Agreement in so far as this dispute is concerned were the following:-

(1) Clause 2 provided for the appellant's employment by the

first respondent for the purpose of:-

(i) *identifying the sources of the Electrical System Supply Losses suffered by the first respondent;*

(ii) *addressing the causes of the Electrical System Supply Losses and*

(iii) *designing and implementing such technical methods and administrative measures in order to reduce the Electrical System Supply Losses to 10% or less.*

(2) *Clause 6.4 committed the first respondent to a minimum of E550,000.00 in lieu of expenditure in respect of the technical loss study, including capital expenditure for the improvement and rectification measures to address the technical losses.*

(3) *Clause 9 committed the first respondent to further capital expenditure which is significantly termed "this capital investment", a clear demonstration that the Agreement fell under section 10 (1) (b). The clause reads as follows:-*

"9.1 The capital expenditure incurred by the Supplier to replace the existing maximum demand meters to top fifty maximum

demand customers of the Buyer with full four quadrant electronic maximum demand meters, the

refurbishment of existing maximum demand meters and re-introduction thereof into the systems of the Buyer will be done at the cost of the Buyer. This capital investment shall be restricted to a maximum of E400,000.00 which shall be undertaken during the 2003/2004 financial year.

9.2 The Buyer shall revise its standard conditions of supply to large commercial and industrial customers in order to force such maximum demand customers to have static power factor correction equipment installed at their electrical installations to maintain a power factor of 0.96 lagging at the metering position of the Buyer.

MVIII. Crucially, Steenkamp himself concedes in paragraph 76.1 of his answering affidavit that clause 9 is an investment. He merely contests the proposition that it is a major one. On his own words he says the following:-

"*First Applicant contends that the sums of money which it is required to spend in terms of the agreement amounts to a major investment. The only capital expenditure which is*

referred to in the agreement is contained under such heading in clause 9. This can hardly be construed as a "major" investment but only as an investment which investment would benefit the First Applicant substantially. "

MIX. It is necessary to pause at this juncture and observe that the sums of money envisaged as expenditure in the clauses set out above are undoubtedly considerable for a poor country like Swaziland. Put differently, the Agreement has enormous cost implications which come into effect upon signing. I have not the slightest doubt that the Legislature intended the Minister's consent to be obtained before the first respondent could commit itself to such enormous expenditure. Indeed I accept that viewed in the context of the magnitude of the whole project envisaged by the Agreement, the first respondent was in fact undertaking a major investment within the meaning of section 10 (1) (b) of the Act. By the same token it was inevitable from the terms of the Agreement that the envisaged project could only succeed if substantial sums of money running into millions of

Emalangeni, were spent. In the process, the first respondent

would inevitably divest a major part of its business. This is especially the case when one has regard to the following clauses in the Agreement: -

"12.1 In consideration of the services that the Supplier shall provide the Buyer shall pay the Supplier in the following manner:

12.1.1 A fixed monthly fee of E30,000.00 (Thirty Thousand Emalangeni per month or part thereof, such payment to be paid monthly in arrears;

12.. 1.2 50% of the calculated monetary value of savings effected in respect of technical losses;

12.1.3 and 50% of the calculated monetary value of the increased billing effected to the customers of the Buyer, this being in respect of non — technical losses.

12.2 Until such time that the technical loss percentage is established which is anticipated shall be in March/April 2004 interim payment calculations to the Supplier shall be based on a value E266,000.00 for each one per cent or part thereof improvement in energy losses saved or increases in energy

billed. ”

12.5 *The 50% profit sharing by the Supplier shall endure for a period of three years from the Effective Date of this Agreement.*

12.6 *For a period of not less than two years after the expiry* ***of this Agreement the percentage profit sharing by the Supplier shall be reduced to 25%. ”***

MX. It has been submitted on the appellants’ behalf that the 50% profit-sharing arrangement did not involve the first respondent’s revenue. It was argued that it was a sharing of the savings of the losses. I am not impressed. The fact remains that clause 12.1.2 opened the door for the appellant to share half of the first respondent’s

profits arising from the savings. It is not difficult to conceive that ultimately such savings would be converted into money. This is the ordinary and natural meaning of the words “calculated monetary value of savings” appearing in clause 12.1.2. I should be astonished in these circumstances if the Minister’s consent was not obtained upfront in such a

situation.

MXI. The fact that the appellant subsequently claimed the sum of E26 Million from the first respondent arising out of the profit-sharing arrangement in question is a clear indication that the intention was to undertake a major investment which would in turn divest the major part of the first respondent's business.

MXII. Closely construed, the Agreement shows that it was intended to operate with immediate effect. I point to the following clauses:-

(i) Clause 3.6 provides that "[a]s soon as both parties have signed the Material and Equipment Supplies Agreement and this Agreement the Supplier shall commence to supply the Buyer with the Supplies".

This, in my view, is proof that the Agreement was implementable upon signing.

(2) Clause 7.3 indicates that once the Agreement was signed the

first respondent could not decline to implement it unless it paid the appellant the amount of E550,000.00, a huge sum of money in this country.

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(3) Clause 12.1.1 provides a fixed monthly payment of E30,000.00 by the first respondent in consideration of the services rendered by the letter.

(4) Clause 12.5 provides for a 50% profit-sharing by the appellant for a period of three years from the Effective Date of this Agreement.

MXIII. Although the implementation of the Agreement was disguised as being in two phases as clauses 1.2.8 and 5 suggest, in reality both phases were capable of being implemented at the same time. In point of fact this is exactly what happened.

MXIV. It is significant that an attempt was made to obtain the Minister's consent. Strangely enough, when the consent was

not forthcoming the appellant and Tsela simple went ahead and signed the Agreement in contravention of the Act. This, in circumstances where there is not a single minute of the Board to show that Tsela was authorised to sign the Agreement as opposed to merely preparing a "draft".

MXV. In the light of the foregoing considerations, I have come to the inescapable conclusion that failure to obtain the Minister's consent rendered the Agreement null and void and of no force or effect. The judgment of the learned Chief Justice on this aspect cannot be faulted. This conclusion renders it strictly unnecessary to consider the other points raised on the appellant's behalf.

MXVI. In the result, I agree with my brother Zietsman that the appeal should be dismissed with costs.

M.M. RAMODIBEDI
JUSTICE OF APPEAL