THE PUZZLE OF PUBLIC CONTRACTS: TO WHAT EXTENT ARE THEY GOVERNED BY PUBLIC AND PRIVATE LAW

Submitted by

RAMAROBELE JOSEPH LEGODI

(216091596)

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ABSTRACT

The objective of this study was to observe the inconsistencies that are brought about in the application of both public and private law principles to a dispute emanating from a public contract. There are two arguments considered by courts which are, the “purely contractual approach” being an approach that only applies contract law principles to the exclusion of public law and, “public law approach” being an approach that only applies public and administrative law principles to the exclusion of private law. To date, these two approaches contrast one another in application and have left the question unsatisfactorily answered whether public or private law regulates the contractual relationship between the parties to the contract.

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1. INTRODUCTION

In fulfilling their constitutional obligations of service delivery, organs of state[1] often contract-in certain goods and services from the private sector. This outsourcing involves concluding a public contract between the relevant organ of state and a private party.[2]

A question that has not been adequately answered in respect of these public contracts is whether public or private law regulates the contractual relationship between the parties to the contract. The courts have acknowledged that the conclusion of a public contract is influenced both by public and private law principles,[3] but the extent to which either is applicable following the conclusion of the public contract is not clear. What this means is that the courts accept the approach that a tender procurement process, namely the process leading up to the entering into of a public contract, is informed by both public and private law. However, there is less certainty in the court decisions as to which of the two areas of law regulate the contractual relationship after the conclusion of the public contract.[4]

Hoexter and Ferreira[5] categorise the two approaches to the regulation of public contracts as being the "purely contractual approach" in which contract law principles only apply to the exclusion of public law principles and the "public law approach" in

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1 For purposes of this dissertation, the term "organ of state" has the same meaning as "government" which in turn means one of the following: a national or provincial department; municipal entity; or provincial legislature as set out in section 239 of the Constitution of the Republic of South Africa.

2 For the purposes of this dissertation, the term "private party" means a natural persons and/ or juristic entity incorporated in terms of applicable law and accordingly, "private entity" and "juristic entity" bear the same corresponding meaning.

3 Bolton, *The Law of Government Procurement in South Africa* (2007) 21.

4 Bolton (n 3) above 16 - 17.

5 Hoexter "Contracts in Administrative Law: Life After Formalism?" 2004 *South African Law Journal* 595 – 618 and Ferreira "The Quest for Clarity: An Examination of the Law Governing Public Contracts" 2011 *South African Law Journal* 172 - 200.

which public and administrative law principles apply to the exclusion of contract law principles. These two approaches contrast one another.

In practice, the courts have been confronted with the question, particularly when there is a dispute involving the termination of service delivery due to a breach of a public contract, as to whether the purely contractual or public law approach should be followed in an attempt to resolve the dispute. In some cases, the courts have relied on the purely contractual approach and justified it by asserting that the exercise of power by an organ of state to terminate a public contract is not prescribed by statute, but rather that it is a termination supported by the provisions of the public contract agreed to by both parties.[6] Conversely in other judgments, the courts have followed the public law approach and argued that one cannot divorce a public contract from public law rules, predominantly the administrative law principles which govern the decisions of the organs of state as party to such public contracts.[7]

To date, these two approaches contrast one another in application and have left the question unsatisfactorily answered whether public or private law regulates the contractual relationship between the parties to the contract.

2. RESEARCH PROBLEM

In South Africa, precedent indicates that the tender procurement process is informed by both public and private law.[8] The issue that is not clear is which area of law between public and private law, regulates the contractual relationship between the parties following the conclusion of the contract.

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6 *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2008 SA 112 (SCA).
7 *Logbro Properties CC v Bedderson NO and Others* 2003 1 SA 424 (SCA).
8 Bolton (n 3) above 32.

The courts have considered two arguments with the first in favour of purely the contractual law principles leaving out public law and the second one being an argument in favour of the public and administrative law principles leaving out private law.[9] These two arguments have been applied inconsistently by courts. The inconsistencies are observed where the court has been required to rule on whether the purely contractual or public law principles should be followed when an organ of state for instance, terminates a public contract.

In this regard the court has ruled in favour of the purely contractual approach and/or argument on the basis that although the powers of an organ of state to enter into contracts derive from an enabling statute, its right to terminate the public contract does not derive from statute but from the public contract itself.[10] It has also rejected the reliance of the purely contractual approach and/or argument, ruling that the terms and conditions which appear in the tender procurement documentation and the principles of administrative justice outline the contractual relationship. It ruled further that, the attempt to separate public contracts from the principles of administrative justice is not sound.[11]

In light of these issues, uncertainties arise, mainly with regard to whether public or private law regulate the contractual relationship between the parties. However, it is imperative that clarity and guidance is provided in order to safeguard the overall interests of the public at large to whom these public contracts are beneficial. It is also imperative for citizens to trust that the government will utilise public funds properly and one way to ensure that this is achieved, is by warranting that such public contracts are precisely and adequately regulated. Additionally, it may be within this context that one

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9 *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n 6) above, *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 3 SA 1013 (SCA), *City of Cape Town v Khaya Projects (Pty) Ltd* 2016 SA 107 (SCA) and *Logbro Properties CC v Bedderson NO and Others* (n 7) above.

10 *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others* (n 9) above par 18.

could possibly pose the following questions in an attempt to assist solve the legal problem at hand:

Is it time for South Africa to develop a new special dispensation for public contracts to regulate them?[12] Or perhaps, subject the regulation of public contracts to separate rules apart from those applicable to ordinary contracts?[13] Alternatively, since the courts are wrestling with this legal question on regulation of public contracts, would it be befitting for South Africa to fast-track the enacting of the anticipated Public Procurement Management Bill aimed at revising, harmonising and consolidating the current fragmented public procurement legislation? Or considerably, would it not be beneficial for judiciary and legislature(s) to observe similar jurisdictions over how their respective public contracts are administered and regulated?[14]

3. RESEARCH METHODOLOGY

The main objective of this study was to observe the arguments that are brought about in the application of both the public and private law principles to a dispute emanating from a public contract. Accordingly, a desk-top study was undertaken in the preparation of this dissertation.

In light of the desk-top study, it must be noted that there is a scarcity of material in South African legal literature on the subject matter of public contracts and how the contractual relationship of parties is regulated and governed. There are notable exceptions to the dearth of material in South Africa and a number of authors have contributed significantly to the research that has informed this study.

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11 *Logbro Properties CC v Bedderson NO and Others* (n 7) above par 7 - 13.

12 Millard D, *Does South Africa need a special dispensation for contracts with government and state-owned enterprisesand: Slovenian and South African Legal Orders: Convergence and Divergence* (7-03-2019).

13 Mashaba M, *Public Procurement and subsequent contracts in the wake of Black Sash v Minister of Social Development* (2018) 11.

14 Bezuidenhoudt, *"SA Public Procurement" (https://iclg.com/practice-areas/public-procurement-laws-and-regulations/south-africa)* (10-04-2019).

Firstly, Bolton[15] provides guidance on the South African legislative framework on which public contracts are initiated and in particular, the tender procurement process leading up to the conclusion of the public contract. He covers all aspects regarding the tender procurement process but regrettably supplies limited data on the regulation of public contracts post regulation effect.

Secondly, Burns[16] opines on the public and private law discussion of public contracts. She recommends the adoption of a separate statute that would seek to regulate public contracts and provide legal remedies to disputes of that nature.

Thirdly, Ferreira and mostly Hoexter[17] clarify the distinctions between the two approaches namely, the purely contractual and public law approaches. Hoexter observes that the rules governing public contracts are fragmented, inadequate and in other instances, unsatisfactory. Her approach to finding a meeting ground between the two divergent approaches is supported in this study.

Fourthly, an interesting argument is made by Cachalia[18] which seems to introduce a distinct recommendation regarding the debate between the regulation of public contracts by either public and/ or private law. She recommends that instead of the courts placing so much emphasis on the distinctiveness of public contracts as a way of determining the relevant area of law between public and private law, it is imperative that the attention be shifted to the distinctiveness of organs of state as parties to such public contracts. She opines that once this step is achieved, it will be understood why the principles of public law overlap with the contractual relationship and visa versa.[19]

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15 Bolton (n 3) above 13 - 32.
16 Burns "Government contracts and the public/private law divide" 1998 SA Public Law 234 - 255.
17 Ferreira (n 5) above 184 and Hoexter (n 5) above 599 -613.
18 Cachalia "Government Contracts in South Africa: Constructing the Framework" *2016 Stellenbosch Law Review Volume 27* 88 – 111.
19 Cachalia (n 18) above par 8.

Insofar as case law is concerned, this study did not examine cases that ask the question whether a private party assumes the role of the organ of state or is accountable in terms of law. This study focused on cases which were resolved after the enactment of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), as it introduced certain public law remedies. Accordingly, the case law is discussed under two categories with the first category in favour of the purely contractual and the second category in favour of the public law approach. The case law ranges from 2001 to 2018 and is discussed in chronological order with the objective to observe the courts' reasoning in the application of both approaches.

4. STRUCTURE AND APPROACH

The sections below discuss what a public contract is and what makes it distinctive from other types of contracts. Following the discussion on the nature of a public contract, an overview of the legislative framework which is applicable to public contracts is provided and discussed with emphasis on regulation and governance, including the shortcomings of the legislative framework. The legislative overview is followed by an analysis of key case law dealing with public contracts. This analysis considers how the courts have applied the purely contractual and public law approaches and examines the inconsistencies which have resulted from these approaches.

5. THE NATURE OF PUBLIC CONTRACTS

A definition of what a public contract has not been legislated but judges have attempted to define it in case law. As such, Allison[20] defines it as an agreement between an organ of state and a private party concluded post a tender procurement process for the

[20] Allison "The Use of E-Procurement in South Africa Public Procurement Law: Challenges and Prospects" (2018) *Law, Democracy & Development* 39 - 41.

delivery of certain goods and services. Millard[21] observes that indeed South African legislation does not provide an explicit definition of a public contract and she recommends that Parliament develops a new dispensation for such public contracts.[22]

Ferreira[23] and Burns,[24] define a public contract similarly to Allison, as an "administrative contract" or "public contract" entered into between an organ of state and a private party for the provision of goods and services. A practical example of a public contract would be a service level agreement that is entered into between a municipality and a service provider for the provision of either a health, public transport or water and sanitation services on the municipality's behalf.[25]

A question which arises from the definition provided above, is whether public contracts are distinct in nature from other contracts and if they are, how are they distinct and how they should be regulated. Ferreira argues that public contracts are distinct in nature from ordinary contracts which are entered into between private parties. He argues this on the basis of how public contracts are formalised.[26] For instance, there are fewer limitations imposed on private parties regarding their respective capacity and authority to conclude a valid contract. Conversely, in the case of an organ of state, its capacity and authority to conclude a contract is prescribed by the enabling constitutional and legislative framework which we discuss later in this study. In addition, , there are no public funds involved which would generally attract public regulatory rules aimed at monitoring and managing the use of public monies. Lastly, the contract will not factor in any public interest nor, generally, will its conclusion be to the benefit of the public at large.[27] The implication here is that private parties are under no obligation to put work

21 Millard (n 12) above.
22 Millard (n 12) above.
23 Ferreira (n 5) above 172.
24 Burns (n 16) above 263.
25 Bolton (n 3) above 1 -5.
26 Ferreira (n 5) above 173 - 183.
27 Ferreira (n 5) above 173 - 183.

out for tender and their contractual relationship as a result is limited to the private contractual law domain.

Public contracts on the other hand, are subject to a public procurement tender process which is informed by both public and private law rules.[28] Bolton argues that, generally, the entire tender procurement process is subject to both the public and, to a limited extent, private law principles, particularly contract law would apply. He breaks the procurement tender process down into three stages which stage one, is the pre-award phase; stage two, the award phase and stage three, the conclusion of the public contract stage. In his view all three stages are subject to public law regulation.[29] He argues that at stage three, over and above the application of public law, private law principles feature and frame the contractual conclusion of the public contract. For instance, the requirements of concluding a valid and enforceable contract come into play. Again, the implication here is that organs of state as parties to the public contract are restricted and confined to act within the limits of the powers prescribed by the enabling constitutional and legislative framework. Their contractual powers are more restricted in comparison to the rights of private parties to a contract.

In light of the distinctions made between an ordinary contract concluded between private parties and a public contract, it is observed that both contracts are formalised differently and for various distinct purposes. Although there may seem to be an overlap between public and private law principles as observed under the three stages of the procurement tender process, it is still unclear as to which applicable area of law regulates the contractual relationship of the parties following its conclusion.

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[28] Bolton (n 3) above 17.
[29] Bolton (n 3) above 9-10.

In a contrary view, Cachalia disagrees with the observation provided above.[30] She argues that the enquiry should not be on the distinctiveness of public contracts but on the distinguishing factors regarding the authority and capacity in which organs of state conclude such contracts. She justifies her argument by saying that once the distinctive authority and capacity in which organs of state enter into such contracts has been appreciated, it is only at that level that the study as to which area of law between public and private law apply respectively, should be undertaken. She reiterates the position that organs of state's capacity and authority can never be equated to private parties' when entering into public contracts and it is on that basis that she recommends the development of a separate legislative body to regulate them.[31]

6. LEGISLATIVE AND REGULATORY FRAMEWORK

The Constitution of the Republic of South Africa, 1996 (Constitution)

Section 217 of the Constitution establishes the government's procurement regulatory framework.[32] It provides that all public contracts procured for the delivery of goods or provision of services on behalf of organs of state must be undertaken within the confines of five constitutional principles namely, fairness, equitability, transparency, competitiveness and cost-effectiveness.[33] This means that, public contracts must be procured and delivered fairly, equitably, transparently, competitively and cost effectively.[34]

In the furtherance of these constitutional principles, section 217(2) provides that, should an organ of state wish to implement a procurement policy in favour of a certain group which has been unfairly discriminated against on the basis of race, gender or disability,

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30 Cachalia (n 18) above par 5.
31 Cachalia (n 18) above par 4 - 5.
32 Section 217 of Constitution.
33 Section 217(1) of the Constitution.
34 (n 33) above.

it may do so, but such a procurement policy, must be applied within set parameters. Section 217(3) of the Constitution then makes provision for a framework in which national legislation must set out the parameters within which the section 217(2) procurement policy can be effected. An example of such legislation is the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), which is discussed below.[35]

Whilst the Constitution seeks to protect contracting parties in so far as the principles of fairness, equity, transparency, competitiveness and cost-effectiveness are concerned in relation to the tender procurement processes, it does not regulate public contracts subsequent to the conclusion of those contracts. In other words, the Constitution limits its application to the regulation of tender procurement processes because firstly, it requires that organs of state must make use of competition when concluding public contracts. Secondly, they must ensure that the interests of private parties seeking to participate in the tender procurement process are treated fairly and without bias. Thirdly, they must ensure that the tender procurement process to be undertaken is conducted in a transparent manner and lastly, the tender procurement process must be cost-effective.[36]

Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA)

The PPPFA[37] was enacted in response to the constitutional imperative to regulate preferential procurement in public contracts. It provides that organs of state in the national, provincial and local sphere of government may implement their own respective procurement policies in an effort to, amongst other things, extend the preferential procurement of public contracts to certain groups or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and

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35 5 of 2000.
36 Bolton "Grounds for dispensing with public tender procedures in government contracting" 2006 *Potchefstroom Electronic Law Journal* 2.
37 PPPFA (n 35) above.

disability.[38] The PPPFA in turn regulates the procurement of public contracts from the inception phase where the tender requirements are drawn leading up to the award stage. However, similarly to the Constitution, the provisions of this piece of legislation is limited to the tender procurement process and silent on the post regulation and/or governance of public contracts.

Public Finance Management Act 1 of 1999 (PFMA)

The PFMA seeks to regulate the administration of the finances of organs of state in national and provincial government. It outlines the processes to be employed for the efficient and effective management of all income, expenditure, assets and liabilities of organs of state in these national and provincial spheres of government.[39] Due to the financial implications that arise prior and subsequent to the conclusion of a public contract, the provisions of the PFMA apply accordingly.

Section 66 provides that an organ of state can only enter into any transaction that binds it to any future financial commitment if the transaction is authorised in terms of the PFMA. Section 68 provides that an organ of state cannot be bound by a transaction if that transaction does not comply with the authorisation requirements of section 66. Considering section 66 and 68, it is clear that public contracts do fall within the ambit of these sections as they do impose future financial commitments on the state. However, taking into consideration the lengthy procedures involved with procuring public contracts, would it still be necessary to subject them again to undergo section 66 and 68 approval and/or authorisation processes? The answer to this question is not clear.

In the case of *South African National Roads Agency Ltd v City of Cape Town*[40] neither the *court a quo* nor the Supreme Court of Appeal (SCA) provided the clarity required as

[38] PPPFA (n 35) above.
[39] National Treasury, *(http://mfma.treasury.gov.za/Pages/Default.aspx)* (10-03-2019).
[40] 2016 SA 122 (SCA).

to whether a public contract should undergo the section 66 and 68 authorisation processes. However, the issues before the SCA were: (i) whether the City's delay in bringing the review application against the decisions of SANRAL and the Minister was correctly condoned by the *court a quo*; (ii) whether the decisions by the Minister and the SANRAL board relating to the declaration of a number of toll roads were lawful; and (iii) whether SANRAL should be interdicted from entering into a proposed concession contract relating to the contemplated toll roads.[41] Disregarding the issues brought before the SCA and for the purposes of this study, this dissertation only considered the City's argument in the c*ourt a quo* on the implications of the phrases "transaction" or "future financial commitment" as provided for under section 66 and 68.[42]

According to the City, the meaning in section 66 of the words "any future financial commitment" is not easy to determine. The City argued that Parliament did not intend it to mean every transaction that commits the entity to make payment in the future.[43] The City gave examples of transactions which do not require a section 66 and 68 authorisation such as "travel and accommodation bookings, salary contracts and hiring of premises". The City argued that "there must be something fiscally exceptional about the financial commitment in order to bring it within the operation of the provisions requiring approval by the relevant Ministers".[44] It argued that only serious transactions need to undergo section 66 and 68 approvals and/or authorisation processes. However, since both the *court a quo* and SCA did not address the issue of whether public contracts are required to undergo a section 66 and 68 approval and/or authorisation process, it then leaves this question unanswered.

On 6 March 2018, the SCA was provided another opportunity to provided clarity on whether public contracts should undergo a section 66 and 68 approval and/or

[41] *South African National Roads Agency Ltd v City of Cape Town* (n 40) above par 1.
[42] *Cape Town City v South African National Roads Agency Ltd and Others* 2015 6 SA 535 (WCC).
[43] *Cape Town City v South African National Roads Agency Ltd and Others* (n 42) above par 269.
[44] *Cape Town City v South African National Roads Agency Ltd and Others* (n 42) above par 269.

authorisation process in the case of *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation.*[45] This case was brought on appeal against an order of the Gauteng Division of the High Court (Pretoria) that a contract intended for the provision of professional services was invalid for the reason that it contravened the provisions of section 66 and 68.

Lewis JA ruled that: "*As I see it, Ranchod J in the court a quo did not need to read section 66 to mean an undertaking to commit expenditure in the future for which a budget has not yet been approved. Nor is there any need to read section 66 to exclude those transactions that are not fiscally exceptional, as Waymark has suggested. The sections require no embroidery or unpicking. If one looks to their design and purpose, as we must, it is plain that section 66 does not apply to procurement contracts that follow upon a proper process, and that do not embody loans, guarantees or the giving of security, even though they extend beyond one fiscal year. The contract in question did not amount to 'any transaction that binds or may bind that institution . . . to a future financial commitment': it was a present commitment to pay for professional services as they were rendered, albeit over a three-year period*".[46]

Therefore, learning from this judgment an answer has been provided as to whether a public contract should undergo a section 66 and 68 approval and/or authorisation process. It is said that section 66 does not apply to public contracts that follow upon a proper process. However, Lewis JA was silent on what a "proper process" is. Therefore, in an attempt to get clarity, an inference can be drawn from Lewis JA's judgment that when he referred to a "proper process" he actually intended to refer to a procurement tender process. However, this then still begs the question on whether the PFMA regulates public contracts once they have been concluded.

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[45] 2018 SA 11 (SCA).
[46] *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation* (n 45) above par 17.

Section 51 of the PFMA sets out the duties of accounting officers which such duties include amongst others, the overseeing and management of treasury matters and ensuring that there are an effective, efficient and transparent systems that manage financial risks exposed to the relevant organ of state. In light of this section 51, it is not clear whether public contracts fall within the ambit of the duties of accounting officers or if the PFMA does regulate public contracts post conclusion of the tender procurement process.

Municipal Finance Management Act 56 of 2003 (MFMA)

Similar to the provisions of the PFMA, the MFMA seeks to implement a system that administers the finances and ensures the sound and sustainable management of the financial affairs of organs of state at municipal government level. According to the national treasury, the aim of the MFMA is to modernise budget, accounting and financial management practices in order to maximise the capacity of municipalities to deliver services to communities.[47] In light of the objectives of the MFMA, direction on the regulation of public contracts is sought after from section 120 and 33 of the MFMA.

Section 120(4) stipulates that prior to the conclusion of a public contract, the organ of state must undertake a feasibility study on the required provision of the municipal service which will be performed or delivered by the private party once the public contract is finalised.

Section 120(6) and (7) read with section 33 of the MFMA provides that once the feasibility study has been completed in terms of section 120(4) above, a municipality must undertake a section 33 of process, if the feasibility results reveal that the proposed contract to be concluded with the private party, will impose financial obligations exceeding three years on the state. For ease of reference, the section 33

[47] National Treasury (n 39) above.

process includes the following requirements but is not limited to: (i) the circulation of the draft contract to national and provincial treasuries for approvals, and (ii) the local community and other interested persons to solicit reviews and comments on the draft contract.

In light of these requirements as set out in section 120 and 33 above, particularly on the requirements where the views and comments of the local community and other interested persons are sought, it can be argued that it will be difficult to divorce the public law rules which are aimed at protecting the interest of the public at large from the public contract. This argument is considered later through case law.

Promotion of Administrative Justice Act 3 of 2000 (PAJA)

In giving effect to section 217 of the Constitution, organs of state are required to adhere to the principle of fairness when concluding public contracts. In turn, PAJA was enacted to enforce the principle of fairness and ensure that the "rights to just administrative action" as contemplated in the Bill of Rights are upheld accordingly.[48] It provides that any decisions by an organ of state or failure to take a decision is considered to fall under the ambit of administrative action.[49] It further offers remedies to affected parties prior to an organ of state taking an administrative decision or conversely, once the administrative decision is taken.[50]

Bolton argues that the tender procurement process is of an administrative law nature and the word "fair" as contemplated by section 217(1) of the Constitution can be said to refer to procedural fairness.[51] He explains that, procedural fairness according to him means the right to a fair hearing and right to actions or decisions that are not taken

[48] The Department of Justice and Constitutional Development, *"Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)"* (*http://www.justice.gov.za/paja/faq.htm*) (07-04-2019).
[49] The Department of Justice and Constitutional Development (n 48) above.
[50] The Department of Justice and Constitutional Development (n 48) above.
[51] Bolton (n 3) above 47.

from a biased perspective.[52] In light of this, it then can be considered from a private law view that should the termination of a public contract be due to action by the organ of state, it is considered to be of an administrative of nature and as a result it will be regulated by a public law. This view is discussed later in this study through the relevant analysis of case law.

Public Procurement Management Bill

Government has proposed the development of a Public Procurement Management Bill which will revise, harmonise and consolidate the currently fragmented procurement legislation and policy framework.[53] However, not much can be discussed about the Bill as it has not yet been made a public document. In anticipation of this Bill, it seems likely that it will provide an opportunity for addressing the gaps in the existing legislation.[54]

7. GAPS AND UNCERTAINTIES IN LAW

As observed above, the various pieces of legislation constituting the legislative framework for public contracts are rather vague, if not silent, on the regulation of public contracts subsequent to the tender procurement process. Most of them, for instance, the PPPFA limits its application to the tender procurement process and is silent on the post regulation and governance of public contracts. The PFMA and MFMA similarly do not expressly make provision for the regulation of public contracts instead, they make reference to the duties of accounting officers to include contract management of contracts as one of the general duties. In this regard, do public contracts fall within this ambit, it is not clear. PAJA on the other hand, has left questions open as to whether certain actions taken by organs of state under public contracts, can be considered to be

[52] Bolton (n 3) above 47.
[53] Bezuidenhoudt (n 14) above.

administrative in nature, for instance, when an organ of state terminates a public contract, does it attract administrative rules under PAJA? This is not clear.

In addition to the gaps identified in legislation, there are also inconsistencies observed in case law where courts have considered both the purely contractual and public law approaches. These two approaches introduce uncertainty in their respective applications and courts have not provided an adequate answer to the question of which area of law between the public or private regulates the contractual relationship between the organ of state and private party following the tender procurement process.

Purely Contractual Approach

As mentioned above, the purely contractual approach is defined as an approach in which only contract law principles apply, to the exclusion of public law rules.[55] It disregards any application of public law rules that may have been part of the tender procurement process.[56] The contractual relationship between the parties is considered to be governed by the expressed and/or implied terms of the public contract itself and there is no reliance on any enabling legislation.

An example of this application of the purely contractual approach is found in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others (*Cape Metropolitan v MIS).[57] On 30 March 2001, the SCA had the opportunity to rule in favour of the purely contractual approach. However, a brief background on this case is that in the *court a quo*, the Cape Provincial Division set aside a decision by the Cape Metropolitan to terminate the contract with MIS. MIS in the *court a quo* argued that the action by Cape Metropolitan to terminate the contract amounted to an administrative action in terms of PAJA. It argued further that the Cape Metropolitan should have

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[54] Bezuidenhoudt (n 14) above.
[55] Hoexter (n 5) above 599 and Ferreira (n 5) above 184.
[56] Hoexter (n 5) above 599 and Ferreira (n 5) above 184.
[57] 2001 3 SA 1013 (SCA).

disclosed its intention to terminate the contract prior to taking its decision. Cape Metropolitan argued still in the *court a quo* that its decision to terminate the contract did not constitute an administrative action in terms of PAJA, solely for the reason that it relied on the termination provisions of the contract itself to terminate.

On review of this case in the SCA, Streicher JA ruled against the *court a quo's* judgement that the termination of the public contract was an administrative action. He reasoned that Cape Metropolitan is a public authority and that although it derives its powers to enter in contract from a statute, in this case, its decision to terminate did not derive from a statute but the public contract itself.[58]

Streicher JA further ruled that:

"*The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking*. *The appellant, when it concluded the contract, was, therefore, not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power*."[59]

[58] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (n 9) above par 18.

[59] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (n 9) above.

As observed, this judgment was founded on the "purely contractual approach" and the reasoning of the SCA was that a public contract is regulated by the expressed and/or implied terms of the contract and the contractual relationship is regarded to be contractual in nature. Streicher JA outlined it clearly in his judgment that the exercise of power by Cape Metropolitan to terminate the contract was not regulated by any statute.

On 25 September 2008, the SCA had another opportunity to consider the purely contractual approach in the case of *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (Government v Thabiso).[60] This case involved an action for damages arising out of an appointment letter following the successful award of the tender, by the State Tender Board on behalf of the Government. Shortly after the appointment letter was issued to Thabiso, it became apparent to the State Tender Board that Thabiso in his submission for the tender, omitted to submit a specific documentation which was required. The State Tender Board regarded the non-submission as sufficient ground to terminate its contractual relationship with Thabiso.[61]

Thabiso, in the *court a quo*, contested the termination and argued unfairness on the part of the State Tender Board. On the other hand, the State Tender Board argued that the exercise of its right to terminate the contract was on the strength of the expressed provisions of the tender documentation which formed part of the contractual relationship between the parties.[62] Brand JA ruled against Thabiso's argument and reasoned that after a tender has been awarded to a private party, the contractual relationship between the private party and organ of state is then governed by the principles of contract law.[63] He ruled that: "*I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by*

[60] *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n 6) above.
[61] *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n (n 6) above par 7.
[62] *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n (n 6) above par 8-9.
[63] *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n (n 6) above par 17 – 18.

the principles of contract". Brand JA applied the ruling of this court from the case of Cape Metropolitan v MIS.[64]

Interestingly enough, Brand JA made an exception to the application of public law rules under this purely contractual approach. He reasoned that, should there be any public regulation that was part of the tender, such a public regulation can be incorporated by reference into the public contract.[65] Considering this exception, it then means that should there be any public law regulation and/or provision that formed part of the tender initially and which the parties wish the agreement to be regulated by, the parties must make express reference to them in the public contract.

On 26 July 2016, the SCA again had an opportunity to consider the purely contractual approach in the case of *City of Cape Town v Khaya Projects (Pty) Ltd* (City v Khaya).[66] This recent case involved a contract for the development of low-cost housing funded by the City. Khaya sub-contracted the services from a third-party to assist it with the execution of the building works. Shortly after a certain number of units were built, the City was not satisfied with the delivery of the units as they were perceived to be defective. The City then sought relief from the courts to hold both Kaya and its sub-contractor accountable under the Constitution on the basis that they failed to comply with the Constitutional obligation to construct adequate housing in terms of section 26 of the Constitution.[67]

Victor AJA in his ruling, relied on the judgment in the case of *Mazibuko & Others v City of Johannesburg & Others.*[68] This case of *Mazibuko and City of Johannesburg* involved a leave for appeal against the SCA judgement and interpretation of section 27(1)(b) of the Constitution, which provides that everyone has the right to have access to sufficient

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[64] *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n (n 6) above par 17 – 18.
[65] *Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (n (n 6) above par 17 – 18.
[66] *City of Cape Town v Khaya Projects (Pty) Ltd* (n 9) above.
[67] *City of Cape Town v Khaya Projects (Pty) Ltd* (n 9) above par 1.

water. The Constitutional Court held that, where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution, instead of relying on the Constitution as the main cause of action.[69]

In light of the Constitutional judgment in *Mazibuko v City of Johannesburg*, Victor AJA ruled that the City should have exhausted the remedies already available to it and should not have by-passed the statutory and contractual processes. He reasoned that the City had failed to act against Khaya and its subcontractor as it should have in terms of the contractual provisions of the contract itself.[70]

In light of the case law discussed above, it is observed that the purely contractual approach disregards the application of public law rules and/or principles. As seen in the first judgment which it is discussed, *Cape Metropolitan,* the court held that a public contract is regulated by the expressed and/or implied terms of the contract. The court further held that the contractual relationship between the organ of state and private party is regarded contractual in nature.[71] The second case which also applied the purely contractual approach is *Thabiso*. In Thabiso, the court applied the reasoning in the Cape Metropolitan that a public contract is regulated by the expressed and/or implied terms of the contract. However, Thabiso the court introduced an exception to the application of public law rules under this purely contractual approach. The court held that the only way in which public law rules can find application under the purely contractual approach, is on the exception that the parties to the public contract agree to expressly incorporate the public law rules and/or principles in the public contract itself.

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[68] 2010 4 SA 1 (CC).
[69] *Mazibuko & Others v City of Johannesburg & Others* (n 68) above par 18.
[70] *City of Cape Town v Khaya Projects (Pty) Ltd* (n 9) above 17 - 19.
[71] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (n 9) above par 19 – 19.

Therefore, considering the two aforementioned judgments and in particular the exception expressed in *Thabiso*, the implication is that the only way in which public law rules and/or principles can be applicable under the purely contractual approach is when the parties make express provisions to include same in the public contract accordingly.

Public Law Approach

According to Hoexter, the public law approach is regarded as the second distinct approach in terms of which contractual relationships can be regulated after the tender procurement process.[72] This public law approach applies administrative law principles to the exclusion of contractual law. It gives due regard to the enabling statute from which the organ of state derives its powers and capacity to enter into contract.[73] This public law approach contrasts markedly with the judgments discussed in the previous section where the consensus was that the tender procurement process is regulated by both public and private law and once the tender is awarded, the contractual relationship is then regulated by contract law.

An example of this application of the public law approach is found in *Logbro Properties CC v Bedderson NO and Others* (Logbro v Bedderson)[74] which accordingly distinguished the purely contractual approach found in Cape Metropolitan discussed in the previous section. This Logbro case involved two sets of disputes. In the first, Logbro successfully challenged the award of a tender to buy certain property on the basis that the successful tenderer did not comply with the tender condition. Consequently, the Kwa-Zulu Natal Government tender committee (tender committee) was then accordingly ordered to reconsider the compliant tenders. When it did so, rather than awarding the tender to any one of the existing tenderers, it called for fresh tenders because of the substantial increase in the value of property. In the second dispute, Logbro challenged the calling for fresh tenders because of the substantial

[72] Hoexter (n 5) above 605.
[73] Hoexter (n 5) above 605.

increase in the value of property and argued that it should have been afforded an opportunity to present its case in light of the valuations done, prior to re-issue of the tender.[75] The tender committee argued that, in light of its contractual rights to exercise its discretion to issue a new tender, its rights stemmed from the contract contained in the tender documents and relied on the reasoning provided in the judgment found in Cape Metropolitan.[76] Cameron JA rejected the tender committee's argument, particularly on its reliance to the judgment of Streicher JA in the case of Cape Metropolitan.[77] He ruled that:

"*Counsel's invocation of the Cape Metropolitan case as authority to the contrary is mistaken……Although the public authority derived its power to conclude the contract from statute, it was held that the same could not necessarily be said about its power to cancel. But the Cape Metropolitan case turned on its own facts, and this Court was careful to delineate them. In the first place, the tender cases were expressly distinguished. Second, the employment cases where a public authority's express statutory power to dismiss public sector workers was held bound by public duties of fairness notwithstanding that a corresponding right existed at common law or that such a right might also have been contained in a contract were also distinguished. Third and most importantly, the Court in Cape Metropolitan did not purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly. That question was left open. Instead, the Court's judgment makes it plain that the answer depends on all the circumstances*".

Cameron JA's ruling advocated for the public law approach and moved away from the purely contractual approach as observed in Cape Metropolitan that administrative law

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[74] *Logbro Properties CC v Bedderson NO and Others* (n 7) above.
[75] *Logbro Properties CC v Bedderson NO and Others* (n 7) above par 6-7.
[76] *Logbro Properties CC v Bedderson NO and Others* (n 7) above par 9.
[77] *Logbro Properties CC v Bedderson NO and Others* (n 7) above par 10 - 11.

principles have no role to play where an organ of state exercises its private law rights in terms of contract. Cameron JA reasoned that the principles of administrative justice seek to frame the contractual relationship of the parties and on that basis, the exclusion of administrative law is not sound.[78]

On 17 May 2018, the SCA again had an opportunity to consider the legal question as to whether public or private law regulates the contractual relationship between the parties to the contract in this case of *South African National Parks v MTO Forestry (Pty) Ltd* (SANParks case*).*[79] Interestingly enough, in this case, the SCA introduced a new line of reasoning which sought to depart from the formalistic approaches adopted previously as witnessed in the above case law discussion. This new line of reasoning was observed in both the majority and minority judgments which are discussed later.

In this SANParks case, the issue was whether SANParks exercised a public power when it considered MTO's request for expedited clear-felling.[80] The enquiry was whether the exercise of such public power, once established, was lawful in the instant case. SANParks, argued that it only exercised its private law contractual rights when it considered the request for expedited clear-felling. It contended that there was no exercise of public power against which any review could lie. Parkscape on the other hand, argued that the exercise by SANParks to permit MTO to undertake the clear-felling constituted a variation of the lease agreement and, as a consequence, it constituted an exercise of public power necessitating public participation. It argued further that SANParks was an organ of state which was generally required to exercise public powers and functions in terms of the enabling statute.

The *court a quo* held that the plantation fell within the boundaries of the Park and the plantation was therefore part of a national protected area. It ruled that SANParks

[78] *Logbro Properties CC v Bedderson NO and Others* (n 7) above par 9.
[79] 2018 SA 59 (SCA).

exercised statutory powers and discharged obligations in relation to the plantation under the National Parks Act 57 of 1976 (enabling statute) and when it did so, it took those steps under public power conferred on it under that statute amongst others.

The SCA enquired whether the variation of the lease agreement constituted an exercise of public power by SANParks and whether it should have held public consultation prior to permitting MTO to vary the lease agreement by expediting the clear-felling. It was held by the SCA that indeed SANParks' exercise of power to vary the lease agreement was well-framed around enabling statute and as a result, constituted an exercise of public power.

Dambuza JA held that Parkscape had a legitimate expectation to be consulted before the decision to vary the lease agreement was made. She reasoned that the lease agreement was concluded in terms of an enabling statute and that it necessitated public consultation to be conducted.[81] She relied on the ruling found in Logbro's case and reasoned that the lease agreement concluded, recognises public interest. Dambuza JA clarified that an obligation to consult the public existed in the lease agreement and as a result, public participation was unavoidable.[82] In light of Dambuza JA's ruling, Navsa JA and Davis AJA constituting the majority judgment, concurred with her judgment to the exclusion of Rogers AJA as minority.

Firstly, in support of the majority ruling, Navsa JA and Davis AJA supported Dambuza JA's ruling and they reasoned that Parkscape indeed had a legitimate expectation to be consulted before the decision to vary the lease was made. They passed a recommendation that courts should apply the constitutional principal of proportionality

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[80] *Parkscape v MTO Forestry (Pty) Ltd & another* 2018 JOL 39678 (WCC).
[81] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 22.
[82] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 22.

in adjudicating whether to import administrative law principles into cases involving an organ of state and a private party.[83] Navsa JA and Davis AJA recommended that:

"*Proportionality is a constitutional watchword, the exercise of which, can be employed in adjudicating whether to import administrative law principles into cases involving an organ of state and a private party. In the present case, as demonstrated by our colleague, those indicators compel the conclusion reached by her, namely, that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the lease was made. The application of the administrative law principle that parties affected by a decision of an organ of state in this case can hardly be said to place a disproportionate burden on SANParks".*[84] This recommendation was found in this dissertation to be thought-provoking as it could be considered as one of the proposed solutions to the research problem observed in this study.

Secondly, in supplementing Dambuza JA's ruling, Navsa JA and Davis AJA went ahead and distinguished the two distinct judgments found in *Cape Metropolitan* which ruled in favour of the purely contractual approach and the other being *Logbro* which ruled in favour of the public law approach.[85] Navsa JA and Davis AJA distinguished the two judgments as follows:

"The ambit of Cape Metro, confirmed in Logbro, was as follows: The Metropolitan Council cancelled a contract with a private contractor. The main issue was whether the cancellation in terms prescribed by the contract involved administrative law principles. On the facts of that case, this court held that the cancellation did not constitute administrative action. It was this distinction that Logbro sought to make.

[83] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 39.
[84] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 39.
[85] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 36.

There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party. However, there are indicators".[86]

Apart from the distinctions made by Navsa JA and Davis AJA between the above discussed *Cape Metropolitan* and *Logbro* rulings, Navsa JA and Davis AJA proposed indicators which courts can apply when confronted with the legal question as to whether administrative law principles encroach into public contracts.[87] What can be learned, however, from the proposed indicators which are discussed below, are the distinguishing factors that are introduced to assist in determining scenarios on which the administrative law principles are applicable.

The first proposed indicator is a determination which is made in order to ascertain two things, (i) whether a private party can bear the organ of state's upper contractual power and (ii) whether an exercise of a contractual right by either party warrants an attraction of public law principles.[88] This indicator requires a comparison exercise to be carried out in order to gauge the fairness and equality of each of the parties' respective bargaining contractual powers and thereafter, interrogate if any action exercised by either party would warrant an application of administrative law principles.

The second proposed indicator is a question as to whether the contractual terms of the public contract itself envisage a dispute between the parties.[89] This second indicator can be argued to be in favour of the purely contractual approach and justification can be relied on the ruling found in Cape Metropolitan. Streicher JA in Cape Metropolitan held that when an organ of state purports to terminate a public contract, its action and powers do not derive from an enabling statute but from the expressed provisions of the

[86] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 37.
[87] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 37- 38.
[88] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 37- 38
[89] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 37- 38

public contract itself."[90] Therefore in support of this second indicator, it can be concluded that public contracts should envisage disputes and make provision for dispute resolution mechanisms which the parties can rely on. Conversely, a counter argument can be made that the actions and/or powers of the organs of state in a public contract cannot be divorced from public law rules, predominantly the administrative law principles which govern the actions and decisions of organs of state as parties to such public contracts.[91]

The third proposed indicator in *SANParks* is also a question. It involves making an enquiry to determine two things, (i) whether an organ of state can be regarded to be acting fairly within the confines of the public contract itself to the exclusion of the application of public law rules and (ii) whether a private party can rely on the public law principles even if the public contract itself does not require public participation and/or involve public interest.[92] This third indicator requires a break-away by the courts from their respective traditional and conventional ways of handling and ruling cases. This approach is similar to Hoexter's recommendation that courts should shy away from relying on the formalistic method of passing judgments and should take each case on its own merits.[93]

In light of the majority judgment and recommendations discussed above, Rogers AJA constituting the minority provided a different view on this case.[94] He ruled that SANParks' decision to vary the lease agreement did not constitute an 'administrative action' as defined in PAJA. He reasoned that the decision to vary the lease agreement was not taken in terms of any enabling statute and as a result, did not constitute an exercise of public power or function. He clarified that the lease agreement between

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[90] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (n 9) above par 18.
[91] *Logbro Properties CC v Bedderson NO and Others* (n 7) above par 9 - 10.
[92] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 37- 38.
[93] Hoexter (n 5) above 609 – 610.
[94] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 40.

SANParks and MTO fits Cameron JA's description in the Cape Metropolitan case. He reasoned that the purely contractual approach favoured in the Cape Metropolitan case, was then successfully applied by this court in the case of Thabiso's case where Brand JA also held that once the tender was awarded, the relationship between the parties was governed by the principles of contract law. He explained that the fact that the tender committee board in Thabiso's case, relied on authority derived from a statutory provision to cancel the contract, did not detract from the principle. The grounds of cancellation in Thabiso's case were reflected in regulations which were referred and incorporated as contractual terms in the contract rather than as legislative provisions.

In light of this, it then takes us back to the exceptions provided in Thabiso's case that, public law rules can only find application or regulate the contractual relationship of the parties if such legislative provisions are referred in the public contract itself. Does this mean that the public law approach is only regarded to be applicable to regulate the parties' contractual relationship once the parties agree to incorporate them into the public contract? The answer to this question is still not clear. But it can be assumed that Rogers AJA's in this SANParks case, would be amenable to apply public law principles only if the Parties agree to incorporate them into the public contract accordingly.

What is interesting about the minority judgment is the proposition introduced by Rogers AJA. He proposed that, in an attempt to assist court resolve whether to import administrative law principles into cases involving an organ of state and a private party, the following must be considered:

"*It may be that the 'final word has yet to be spoken' on the interplay between contract law and administrative law and that the decisions of this court are not entirely harmonious*. *What can, however, be deduced from this court's decisions, as a minimum proposition, is that the exercise of a contractual power by an organ of state does not*

constitute the exercise of a public power (a) where the contractual power does not mirror a statutory power and (b) where, additionally, the contract is of the kind explained by Cameron JA in para 10 of Logbro".[95]

He reasoned that with the enquiry of whether public or private law is applicable to a public contract, much emphasis should be placed on the element of the power which is exercised. He ruled that, the question whether the public impact of a decision is relevant in determining whether the decision involves the exercise of public power is unclear from this matter of SANParks case.[96] Accordingly, the minority ruled that SANParks' decision to vary the lease agreement lacked one or both of the requirements in PAJA and as a result, the decision should not be regarded as an exercise or performance of a public power or function that would warrant administrative action.[97]

8. CONCLUSION

To what extent are public contracts governed by public and private law? Can it be said that both public and private law govern the contractual relationship between the parties and if so, to what extent? As observed, Bolton provided guidance on the South African legislative framework which public contracts are initiated but regrettably supplies limited data on the regulation and governance of them post their conclusion.[98]

Ferreira on the other hand has also shared her views on the intercession between administrative and contractual law.[99] She argued that the interaction between these branches of laws vary greatly at each stage of the tender procurement process. She reasoned that, private law is modified to a greater or lesser extent by an operation of

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[95] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 65.
[96] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 85.
[97] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 85.
[98] Bolton (n 3) above 13 - 32.
[99] Ferreira (n 17) above 196 - 198.

the rules of administrative law. She explained that after a valid public contract has been concluded, the relationship between private and administrative law becomes more controversial and the resultant legal position is both uncertain and unsatisfactory.[100] She argued further that the only clear-cut application of the rules of administrative law is after a public contract has been concluded, for instance, where the government exercises the rights that are uniquely afforded to it in terms of legislation. Beyond this limited instance, the application of administrative law is unclear.

Cachalia[101] argues that South Africa is approaching this study on which area of law between public and contract law regulate public contracts wrongly. She opines that the actual test is with appreciating the distinctive nature of organs of state in which they enter into contracts. She argues that the once this step is realised, it will be understood why the principles of public and private law respectively overlap in public contracts. She further states that "*my argument is that the state's unique status as a contractor demands the creation of a special body of rules specific to it. The starting point is Logbro's "framing principle" and its recognition that administrative law provides the overarching context within which contractual undertakings operate. But to moderate the unqualified application of administrative principles, and to ensure the continued application of contractual terms, we must ask how different the state is from the ordinary contracting party, or conversely the extent to which that party requires protection – to ascertain what the relevant rules are, and the scope of their application in a particular case*."[102]

In light of these observations, what do courts give or take regarding these ambiguous issues? The SCA have considered two approaches thus far, the "purely contractual" and "public law" approaches. Interestingly enough, these two approaches contrast one another in application and the courts as a result have provided unsatisfactory insight on

[100] Ferreira (n 17) above 196 - 198.
[101] Cachalia (n 18) par 1.

whether private or public law regulates the contractual relationship between the parties to the contract. This as a result, has left the law unclear and the level of uncertainty regrettably undesirable.

Do we have a way forward on this matter? Remarkably, it can be argued that not all hope is lost, and this is reasoned in light of the judgment found in SANParks case which was discussed earlier. This case passed recommendations for courts in circumstances where they are faced with the legal question whether private or public law principles regulate the contractual relationship between an organ of state and a private party.

Firstly, considering the minority judgment in that case, it was suggested that as a minimum proposition, the exercise of a contractual power by an organ of state should not constitute an exercise of a public power in the following instances: (i) where the contractual power does not mirror a statutory power and (ii) where the contract is concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position.[103]

Secondly, considering the majority judgment, it was suggested that the courts should apply the constitutional principal of proportionality in adjudicating whether to import administrative law principles into cases involving an organ of state and a private party.[104] In addition, three indicators were recommended to be applied when interrogating the question as to whether public law rules should encroach a public contract.[105]

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[102] Cachalia (n 18) par 4.
[103] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 65.
[104] *South African National Parks v MTO Forestry (Pty) Ltd* (n 79) above par 39.
[105] *South African National Parks v MTO Forestry (Pty) Ltd (n 79) above par 37- 38.*

The first indicator seeks to interrogate the parties respective contractual bargaining powers in light of fairness and equality. The second indicator seeks to rely on the contractual provisions of the public contract to interrogate whether it foresees a dispute between the parties and possible remedies thereto. The third indicator is a proposal made to the courts that they should refrain from applying the formalistic approach in their respective judgments.[106] In support of this third indicator, Hoexter similarly expresses a parallel recommendation that the courts should do away with the formalistic method of passing judgments and should critic each case on its own merits.[107]

Ferreira on the other hand recommends that courts should evaluate the motivations as to why administrative law principles ought to be applicable after a valid contract has been concluded and only after that interrogation, should the courts decide and/or alternatively, use the interrogation as a guide.[108] To date, it can be argued that adequate and/or compelling motivations as to why administrative law principles ought to be applicable after a valid contract has been concluded, have not been sufficiently provided. However, these indicators and recommendations are thought provoking and one can only anticipate that the courts will truly apply or attempt to apply them at least.

In light of the recommendations proposed above, perhaps it is time for South Africa to develop a new legislative dispensation to regulate public contracts as recommended by Millard.[109] For instance, the proposed Procurement Management Bill could make specific provision for the resolution of disputes between organs of state and private parties emanating from such public contracts.

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[106] *South African National Parks v MTO Forestry (Pty) Ltd (n 79) above par 37- 38*

[107] Hoexter (n 5) above 609 – 610.

[108] Ferreira (n 5) above 198 - 199.

[109] Millard (n 12) above.

Alternatively, Burns' recommendations that perhaps South Africa's legal system should establish a specialised branch of administrative courts to adjudicate such disputes emanating from public contracts could be adopted. She believes that such disputes emanating from public contracts require detailed knowledge of, and insight into, complex and often highly specialised issues related to administrative law.[110]

[110] Burns (n 16) 254.

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