REPORTABLE

/BB

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE: 24 November 2005
CASE NO: 19747/2003

IN THE MATTER BETWEEN:

RPM BRICKS (PROPRIETARY) LIMITED PLAINTIFF

AND

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY DEFENDANT

JUDGMENT

PATEL, J

[1] In this action the plaintiff, RPM Bricks (Pty) Ltd claims payment from the defendant, the City of Tshwane Metropolitan Municipality the sum of R2 646 134.40 together with interest thereon at the rate of 15,5% per annum *a tempore morae* from 1 March 2003 to date of payment and costs of suit.

[2] The plaintiff's main claim arises from a contract founded on a

tender awarded by the defendant to the plaintiff. The latter's alternative claim is a claim for enrichment.

[3] It is common cause from the pleadings, read with the pre-trial questions and answers, that on or about 7 June 2001 the defendant awarded to the plaintiff a tender for the supply and delivery of coal to the Pretoria West and Rooiwal Power Stations for a period of three years. The supply contract comprised of the defendant's "General Conditions of Contract Governing Tenders", the "Specification and Additional Conditions of Tender", the defendant's written notification of award of tender C/T28/2000 dated 7 June 2001 and an annexure "A" to the written notification of award of tender.

[4] It is also common cause that the terms of the supply contract were that the prices initially payable by the defendant to the plaintiff for the supply and delivery of coal were the prices reflected in annexure "POC3". The supply contract would commence on 1 April 2001 or nearest date and endure for a period of three years. The mass of the coal for which payment was to be made by the defendant to the plaintiff was to be ascertained by an assized

weighbridge at the colliery from which the coal was supplied or some other assized weighbridge on route to the Pretoria West or Rooiwal Power Stations. The total price of all coal delivered by the plaintiff to the defendant in any calendar month would be paid by the defendant within 30 days after receipt by the defendant's City Electrical Engineer of a fully specified account.

[5] The supply contract provided for the delivery of coal to two of the defendant's power stations. The present claim pertains only to coal supplied by the plaintiff to the Rooiwal Power Station ("Rooiwal"). The plaintiff supplied and delivered coal to the defendant at Rooiwal during December 2002 (in the total volume set out in annexures "POC6", "POC7" and "POC8) and in January 2003 (in the total volume set out in annexures "POC10", "POC11", "POC12" and "POC13").

[6] The agreed calorific value adjustment in respect of the coal delivered in respect of which the plaintiff claims payment is R417 069.16. This value was agreed at to the pre-trial conference. At the outset of the trial, the plaintiff amended its particulars of claim to incorporate the agreed amount. The defendant did not

react to the amendment. On the latter's version it had not paid to the plaintiff the difference between the agreed calorific value in the amount of R417 069.16, and the amount it had contracted for, being common cause *quantum* of R2 646 134.40. The defendant is indebted to the plaintiff in at least the amount of R2 646 134.40.

[7] The dispute is the price payable by the defendant to the plaintiff for the agreed volumes of coal that were delivered at Rooiwal during December 2002 and January 2003. In essence, the plaintiff contends for an increased and amended price whilst the defendant contends that the plaintiff is only entitled to the original contract price. Thus, the nub of the dispute is whether the price increase requested by the plaintiff was validly granted by the defendant. If it was then the defendant is indebted to the plaintiff in the sum of R2 646 134.40 (after bringing to account the calorific value adjustment alluded to above). 0n the other hand if the price increase was not validly granted then what needs to be determined is, whether the defendant is estopped from denying that the price increase was in fact granted or whether the defendant has been enriched at the expense of the plaintiff in respect of the coal delivered during December 2002 and January 2003, and if so, to

what extent the defendant has been enriched.

[8] The first consideration is the agreed price adjustment that is the prices initially payable by the defendant to the plaintiff for coal supplied to Rooiwal. These are set out in annexure "POC3". These prices comprised of two components, the FOR (free on rail) price per ton which varied according to the calorific value of the coal plus the railage cost per ton delivered to Rooiwal.

[9] The supply contract provided that the price is fixed for the first year of the contract. Thereafter it is adjusted annually in accordance with the producer price index ("PPI") (all commodities for South African consumption) for the previous year (April to April). Such price increase is applicable to both components of the total price that is the commodity price as well as the railage cost. It is common cause that the contract price was adjusted with effect from 1 April 2002 in accordance with the increase in the PPI. The extent of the adjustment in respect of Rooiwal was recorded in a letter of 15 May 2002 addressed by the plaintiff to the defendant. It was subsequently confirmed by the defendant in a letter of 3 July 2002 to the plaintiff. The effect of PPI adjustment was to increase

the contract price in respect of the grades of coal as follows:

Grade (MJ/kg)	**Existing Price**	**New Price**
>27.50	R100.00	R113.08
26.50 – 27.49	R95.00	R107.49
25.20 – 26.49	R90.00	R101.90
24.50 – 25.49	R85.00	R96.31

[10] On 13 June 2002, and at the request of M Speek, the Chief Engineer Mechanical Maintenance at Rooiwal, the plaintiff addressed a letter to the defendant in which, *inter alia*, it indicated that Transnet was unable to provide rail trucks and set out details of the price increases that would ensue from the use of road transport. This letter was marked for the attention of Speek.

[11] On 22 August 2002 the defendant addressed a letter to the plaintiff signed by D Strydom for an on behalf of G Gumbo the Acting Functional Co-ordinator: Procurement. It reads as follows:

"With reference to your fax dated 18 June 2002, I have to

inform you that your application for an increase in the price of coal to the Pretoria West and/or Rooiwal Power stations, being in accordance with your tender qualification has been approved.

The increase has been verified and found in order. The new prices shall therefore with effect from 1 July 2002 be as per the attached annexure A.

No price increase older than three (3) months will be considered.

PLEASE ACKNOWLEDE RECEIPT OF THIS LETTER to the Strategic Executive: Corporate Services (Procurement) PO BOX 48, Pretoria, 0001."

[12] The letter refers to the plaintiff's letter of 18 June 2002, being the request for a price increase in respect of Pretoria West Power Station, but the letter as well as the schedule to it included separate tables of the price increase applicable for both Pretoria West and Rooiwal. It is the increased prices listed in this table which the

plaintiff claims it is entitled to be paid, but which the defendant denies being liable to pay. W A Lindecke, the manager at Rooiwal, indicated that "procedurally" the letter was "issued correctly". In this regard, however, it is significant that the defendant raises no defence. Thus, there was no reason why plaintiff should have known anything to the contrary in the absence of the defendant's defence.

[13] The defendant, however, endeavoured to avoid payment by raising several defences. These are *first*, although the defendant admits that the letter confirming the price increase requested by the plaintiff was addressed to the plaintiff but alleges that it was drafted by C H Arlow and signed by D Strydom. Both of them were defendant's employees, but neither of whom were authorised to draft or to agree to the contents of the letter, or to confirm the contents of such letter to the plaintiff, or to address such a letter to the plaintiff. It was alleged that when Strydom signed the letter confirming the price increase, he *bona fide* and reasonably believed that the price increase as set out in the annexure to the letter was that provided for in paragraph 3 of the tender award, that is the annual PPI increases. It was also alleged that he never intended to

sign the letter to which the annexures were attached containing the price increase in excess of the price increase provided for in the tender award, or price increase calculated on a different basis than provided for in the tender award. *Secondly*, that at no stage did the defendant resolve to vary the supply contract or the terms and conditions set out in annexure "POC4" as required by section 38(1) of the Rationalisation of Local Government Affairs Act 10 of 1998 ("the Rationalisation Act"). Nor did it comply with the formalities prescribed in section 38(3) of the Rationalisation Act. *Thirdly*, that the purported variation of the supply contract in terms of annexure "POC4" would have increased the tender value of the supply contract by more than 20% and consequently would in terms of section 38(2)(c) of the Rationalisation Act have been void. *Fourthly*, that in terms of section 10G(5)(a) of the Local Government Transition Act, Act 209 of 1993 ("the Transition Act") and the regulations thereto the defendant was not empowered to vary the supply contract on the terms and conditions set out in annexure "POC4", but had to call for tenders with a view to entering into a new supply contract, which it failed to do. *Fifthly*, annexure "POC4" to the particulars of claim constitutes a purported variation or addition to the supply contract which was

not signed by both parties and it is invalid because of non-compliance with the non-variation provisions of the supply contract. *Last*, the defendant was not enriched at the expense of the plaintiff.

[14] The plaintiff filed a replication in which, *inter alia*: it denies that Arlow and Strydom were not authorised to draft or to agree to the contents of annexure "POC4", or to confirm the contents thereof to the plaintiff, or to address such a letter to the plaintiff. In the alternative, the plaintiff avers that the defendant is estopped from denying the authority of its officials. The plaintiff also avers that the defendant is estopped from denying that it resolved, as required by section 38(1) of the Rationalisation Act, to vary the supply contract by increasing the contract price.

[15] It is common cause that the volumes of coal in respect of which the plaintiff claims payment were supplied and delivered to Rooiwal. It follows that unless one or more of the defences pleaded by the defendant is or are upheld, the plaintiff is entitled to judgment in the amount claimed.

[16] On 22 August 2002 the Rooiwal Power Station addressed the letter (A81A – B) to defendant's Corporate Services Division. On the same day Arlow (then employed in defendant's Corporate Services Division) received the letter (A81A-81B). In this letter the new coal prices, effective from 1 April 2002, were set out. These new prices represent prices that were increased on the basis as set out in clause 3 (at A56). Arlow was requested to confirm the validity in terms of the tender and to inform the plaintiff accordingly and a copy of plaintiff's letter of 13 June 2002 was also attached to this letter (81C). On receiving this letter Arlow, instead of drafting a new letter, amended the letter addressed to the plaintiff on 3 July 2002 (A77). The amendments he made to this letter appear at A81E-81H. These amendments were made on the basis of the prices appearing in the first paragraph of the letters of 13 June 2002 (A70) and 18 June 2002 (A71) addressed by the plaintiff to the defendant and had no regard to the tariffs as set out in paragraph 1 of 81A.

[17] Gumbo was absent from office on that day. Arlow did not have the authority to sign the letter that he amended on the basis of A77 and submitted it for signature to his immediate superior Strydom.

He too had no authority to amend the tender conditions. His duties in the Corporate Services Division entailed, *inter alia,* to control the validity of increased prices in terms of the tender. The increased prices set out in the letter prepared by Arlow did not represent prices increased in terms of the tender agreement, but were based on the prices for road transport as set out in the first paragraphs of plaintiff's letters of 13 June 2002 (A70) and 18 June 2002 (A71). When Strydom noticed this, he instructed Arlow to redraft annexure "A" to the letter on the basis as set out in paragraph 1 of A81A since the price increase set out therein was in accordance with the tender agreement. Arlow redrafted the letter. When Strydom checked it, he noticed that A83 was correctly amended and that the prices on A84 in respect of Bankfontein/Graspan were correctly amended. He did not check the prices in respect of Leeuwfontein/Delmas and Lakeside/Meyerton as set out in A84 and simply signed the letter.

[18] There is a dispute between the evidence of Fourie and Arlow as to whether this letter was collected by Fourie or whether it was posted to the plaintiff. Fourie testified that he collected the letter while Arlow testified that it was posted to him. A copy of A82-85 was

forwarded to the Finance Section of the defendant's electricity division. Ms Van Rensburg was employed in this division and she was responsible for payment of the accounts submitted by coal suppliers. She proceeded to make payments to the plaintiff in terms of A82 – 85. The letter (at A86-87) of 26 August 2002 was received by the Corporate Services Division on 27 August 2002 (see A88). On receiving this letter Strydom drew the relevant file to ascertain whether this letter contained any new prices. He noticed that an error had been made in respect of this prices payable for deliveries from Leeuwfontein/Delmas and Lakeside/Meyerton. He instructed Arlow to make the necessary corrections. The corrections made by Arlow appear from A87D.

[19] Arlow also testified that he telephoned Fourie and informed him of the error. The following day Fourie called on him and he handed to Fourie a copy of the letter containing the correct prices. His evidence was that he informed Fourie that prices based on road transport could only be paid if such prices had been approved by the defendant's full council and that such approval had not been obtained. Fourie denied Arlow's evidence. Lindecke, later established towards the end of November 2002 that the plaintiff

was not paid in accordance with the prices as set out in A81A. Steps were then taken to reconcile the plaintiff's account and Speek was instructed to inform the plaintiff that this was being done. The reconciliation resulted in the letter of 4 March 2003 (at A123) which was addressed to the plaintiff.

[20] With that backdrop an appropriate starting point is to consider the relevant statutory provisions. The first and foremost is section 217 of the Constitution which provides for procurement in the following terms:

> "(1) Where an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of State or institutions referred to in that subsection from implementing a procurement policy providing for -

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

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

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

The preferences referred to in section 217(2) are dealt with in the Preferential Procurement Policy Framework Act 50 of 2000.

[21] The defendant in its plea relies on section 10G(5) of the Local Government Transition Act 209 of 1993 (the "Transition Act") and the regulations made in terms thereof. Section 10G(5) of the Transition Act provides that:

"(a) A municipality shall award contracts for goods

and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(b) Notwithstanding paragraph (a), a municipality may, in accordance with a framework prescribed by national legislation, in awarding contracts give preference to the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, and shall make the granting of such preferences public in the manner determined by the council.

(c) A municipality may dispense with the calling of tenders in the case of an emergency or of a sole supplier or within such limits as may be prescribed by a national law."

[22] In terms of item 26(1) of Schedule 6 to the Constitution, the provisions of the Transition Act remained in force in respect of a municipal council until a municipal council replacing that council

had been declared elected as a result of the first general election of municipal councils after the commencement of the new Constitution. However, after the general elections, section 93 of the Local Government: Municipal Structures Act 117 of 1998 provided that section 10G of the Transition Act would remain in force. The defendant further relies on sections 35 to 38 of the Rationalisation of Local Government Affairs Act, Act 10 of 1998. This Act came into operation on 19 March 1999.

Section 35 provides for the procedure for procuring goods and services in the following terms:

> "(1) The MEC must prescribe the tender value of the services or goods in respect of which the procurement procedure as contemplated in section 36 applies.
>
> (2) Despite the provisions of subsection (1), the procedure provided for in section 36 may be dispensed with in respect of prescribed goods or services -

(a) In the case where the required goods or services have to be procured -

i) as a matter of emergency;

ii) as a matter of necessity; or

(iii) from a sole supplier and

(b) If the procedure as contemplated in section 37 has been complied with."

Section 37(1) permits a municipal council to dispense with the tender procedures specified in section 36 if, *inter alia*, it is satisfied that the circumstances as contemplated in section 35(2)(a) prevail.

Further, section 38 provides as follows:

"38 Extending or varying a tender agreement

(1) Subject to subsection (2), a municipal council

on its own initiative or upon receipt of an application from the person, body, organisation or corporation supplying goods or services to the municipal council in terms of this Chapter, may resolve to extend or vary a tender agreement if-

(a) the circumstances as contemplated in section 35(2)(a) prevail; or

(b) with due regard to administrative efficiency and effectiveness, the council deems it appropriate.

(2) A municipal council may not extend or vary a tender agreement-

(a) more tan once;

(b) for a period exceeding the duration of the contract;

(c) for an amount exceeding twenty (20) percent of the original value.

(3) Within one month of the resolution referred to in subsection (1)m the matters specified in subsection (4) must be-

(a) published in the municipal council at least in an appropriate newspaper circulating within the boundaries of the municipality; and

(b) displayed at a prominent place that is designed for that purpose by a municipal council.

(4) The matters to be published or displayed are –

a) the reasons for dispensing with the

procedure specified in section 36;

b) a summary of the requirements of the goods or services; and

c) the details of the person, body, organisation or corporation supplying the goods or services.

(5) The functions of a municipal council in terms of this section may not be assigned nor delegated."

This section of the Rationalisation Act does not prohibit the variation of a tender *per se.* What is prohibited in terms of subsection (2) is the extension or variation of a tender agreement by a municipal council more than once, for a period exceeding the duration of the original agreement, or for an amount exceeding twenty (20) percent of the original tender value.

[23] It is trite law that a provincial legislature is not competent to amend a national statute such as the Transition Act. However, this Act allows a municipal council to dispense with the calling of tenders in the case of an emergency or of a sole supplier or within such

limits as may be prescribed by a national law. Necessity is not a ground of exemption for the calling of tenders in terms of the Transition Act. But, section 35 of the Rationalisation Act 10 of 1988 provides for circumstance which entitles a municipal council to dispense with the calling of tenders as a matter of necessity.

[24] The lack of authority defence, the section 38 defence and the excessive increase defence are pleaded as separate defences by the defendant. However, these defences overlap in certain important respects and in view of the importance of the doctrine of estoppel to each of these defences, it is necessary to consider them together.

[25] The scope of authority of Arlow and Strydom and any limitations applicable to their authority need to be objectively assessed, since these matters were within the knowledge of the defendant and surely were not known to the plaintiff or its representatives Dan Fourie and/or André Boje. What is of critical importance is to determine whether Arlow or Strydom were authorised to draft the letter confirming the price increase and/or to agree to its contents and/or to confirm its contents and/or to address such letter to the plaintiff. These are factual issues. What needs to be determined is

whether the defendant is estopped from relying on the lack of authority of its officials to avoid liability for payment of the increased tender value.

[26] It is trite that to hold a principal liable on the basis of ostensible authority of its agent since a representation, by words or conduct, by the principal and not merely by the agent that the latter had the authority to act as he or she did. Such a representation is that the principal should reasonably have expected that outsiders would act on the strength of it. Any reliance by the third party on such a representation would and consequently be to the third party's prejudice. [*NBS Bank Limited v Cape Produce Co (Pty) Ltd and Others* 2002 1 SA 396 (SCA) at 412C-E; *Glofinco v Absa Bank Limited t/a United Bank* 2002 6 SA (SCA) at 479H-J.] Within this context, however, there are certain limitations on the operation of estoppel. The principle is aptly stated in *Lawsa*, vol 9, para 470, that:

> "Estoppel is not allowed to operate in circumstances where it would have a result which is not permitted by law. A defence of estoppel will therefore not be upheld if its

effect would be to render enforceable what the law, be it the common law or statute law, has in the public interest declared to be illegal or invalid."

[27] The application of this principle has the effect, *inter alia*, that a statutory body has such powers and duties that are entrusted to or imposed upon it by statute, and it cannot be bound by estoppel to do something beyond its powers, or to refrain from doing something which it is its duty to do. [*Lawsa* (*supra*) para 472; *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 A at 411H-412B; (p32) *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) 148E-G.] What is important in the present action regarding the application of the doctrine of estoppel is that a distinction must be drawn between acts which are *ultra vires* of a statutory body as opposed to those acts which are within the statutory body's powers if done after certain internal formalities have been complied with. In the latter type of case persons dealing with the statutory body may, in the absence of knowledge to the contrary, assume that all the necessary formalities have been complied with, and may plead an estoppel if the defence is raised by the statutory body, (as the defendant has

done so in the instant matter) that the necessary formalities were not complied with. [*Hoisain v Town Clerk Wynberg* 1916 AD 236 at 240; *Roodepoort Settlement Committee v Retief* 1951 1 SA 73 (O) 79-81; *Khani v Premier, Vrystaat en Andere* 1999 2 SA 863 (OPD) at 868B-869C. See also: Baxter, *Administrative Law,* pp402-403.]

[28] Now, in the instant case, the increase in the tender price is not affected by the provisions of section 38(2) of the Rationalisation Act. In this regard, *first*, there is no suggestion of any previous increase in the tender price. The only adjustment to the tender price was the annual PPI adjustment which was stipulated in the supply contract. The PPI adjustment is common cause and it is recorded in the plaintiff's letter of 15 May 2002 and in the defendant's reply dated 3 July 2002. It was also confirmed by the testimonies of Fourie, Boje and Lindecke. The PPI adjustment did not constitute a variation of the supply contract. Therefore, section 38(2)(a) is not applicable. *Secondly*, there is no suggestion of the price increase granted by the defendant, exceeding the duration of the original supply contract. Therefore, section 38(2)(b) is not applicable. *Thirdly*, the increase requested by the plaintiff, and

which the plaintiff contends was approved by the defendant, does not exceed 20% of the original tender value. As appears form Exhibit "C", the increase approved by the defendant in respect of each calorific value are in each instance less than 20% of the original tender value as adjusted in accordance with the PPI adjustment. Lindecke accepted the figures reflected in Exhibit "C" are arithmetically correct. Hence, section 38(2)(c) not applicable.

[29] In terms of section 38(1) of the Rationalisation Act the variation of a tender by a municipal council is expressly permitted if the circumstances contemplated in section 35(2)(a) prevail, or with due regard to administrative efficiency and effectiveness the council deems it appropriate. The significance of this, in the present case, is that the approval of an increase in the tender price payable by the defendant under the supply contract is not *ultra vires* and the defendant can, therefore, be estopped from relying on the alleged non-compliance with the formalities on which it seeks to rely to avoid liability. Further, the terms "*emergency*" and "*necessity*" are not defined in the Act. The meaning of these terms must be sought by applying the primary rule in the construction of statutes, that is that the language of the Legislature should be read in its ordinary

sense. This principle was stated in *Pick 'n Pay v Minister of Mineral and Energy Affairs* 1987 2 SA 865 (AD) at 876C-D in the following terms:

> "As stated in *Union Government (Minister of Finance) v Mack* 1917 AD 731 at 739, and stressed in subsequent decisions,
>
> > 'The primary rule in the construction of statutes is that the language of the Legislature should be read in its ordinary sense.'"

The principle of interpretation was stated in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 3 SA 300 at 804A-D as follows:

> "The plain meaning of the language in a statute is the safest guide to follow in construing the state. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to

> their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. See *Venter v Rex* 1907 TS 910 at 913-14, *Johannesburg Municipality v Cohen's Trustees* 1909 AD 136 at 142; *Ebrahim v Minister of the Interior* 1977 1 SA 665 (A) 678A-G."

[30] "*Emergency*" is defined in the *Concise Oxford Dictionary* as:

> "1. a sudden state of danger, conflict, etc., requiring immediate action. 2a a medical condition requiring immediate treatment. b a patient with such a condition. 3 (*attrib.) Austral.* Sport a reserve player. State of emergency a condition of danger or disaster affecting a country, esp. with normal constitutional procedures suspended."

"*Necessity*" is defined in the *Concise Oxford Dictionary* to mean:

> "1a an indispensable thing; a necessary (*central heating is a necessity) b* (usu. Foll. By of) indispensability (the necessity of a warm overcoat). 2 a state of things or circumstances enforcing a certain course (there was a necessity to hurry). 3 imperative need (necessity is the mother of invention). 4 want; poverty; hardship (stole because of necessity). 5 constraint or compulsion regarded as a natural law governing all human action. Of necessity unavoidably."

[31] Applying the ordinary meaning of the words "*emergency*" and "*necessity*" in the context of section 38(1) of the Rationalisation Act, it is apparent that the meaning and effect of this section is clear, since the Legislature expressly recognised the need for a municipal council to extend or vary a tender agreement in certain circumstances. The circumstances under which a municipal council is authorised to extent or vary a tender agreement are those described in section 38(1), subject to the limitations imposed in terms of section 38(2). "*Emergency*" in the context of section 38(1) includes a situation requiring immediate action by the municipal council so as to avoid a situation arising which poses a

threat to the efficient and effective management and administration of the municipal council and the services provided by it. Any disruption in the supply of power to consumers in a municipal area and the potentially dire consequences resulting from such disruption to industry, essential services and society in general, is *a fortiori* a situation requiring immediate action and the "*necessity*" in the context of section 38(1) includes any indispensable thing or need. Power supply is clearly an indispensable need of the residents, industry and other consumers of electricity in the municipal area of the defendant.

[32] It was argued on behalf of the plaintiff by Mr Robinson SC appearing with Mr Rood that there is also a statutory duty on the defendant to provide electricity. [See: section 10C(2) of the Local Government Transition Act, 1993 read with Schedule 2 thereto. Sections 10, 11 and 12 of the Electricity Act, 1987 Act 41 of 1987.] There is clearly an indispensable need, and as such it is a matter of "*necessity*", that the defendant should comply with its statutory obligations. The defendant's failure to comply with its obligations to supply electricity exposes it to both criminal and civil sanction. It is evident from the defendant's own conduct that

it considers the procurement of coal supplies to its power stations at acceptable prices to be a matter of "*necessity*" within the meaning of section 35 of the Rationalisation Act. *A fortiori* the procurement of coal as a strategic commodity necessary to enable the defendant to sustain the generation of sufficient electricity to meet its demand is certainly a matter of "*necessity*".

[33] What is further evident from the undisputed evidence of Peter Swanepoel, who was employed by Spoornet as Executive Manager Transport: Lime, Coal and Cement, is that during 2002 Spoornet did not have the capacity in terms of railway trucks to ensure a reliable supply of coal by the plaintiff from the mines to Rooiwal by rail. The evidence established that Spoornet was in the process of "*rightsizing*" and that it was unable to sustain delivery of trucks to its existing customers, besides new customers such as the plaintiff. This was also confirmed by Boje who testified that rail deliveries ceased in mid-2001 due to service delivery being terrible and in some cases non-existent. The evidence of neither Swanepoel nor Boje was disputed by the defendant. Nor was Spoornet's inability to provide a reliable supply of coal by rail during 2002 disputed. The potential of dire consequences are also

evident from the minutes of the defendant's council meeting held on 27 June 2002. What emerges from the minutes is that, *one,* problems were experienced with Spoornet regarding deliveries of coal to Rooiwal and Pretoria West Power Stations. *Two*, the power stations and coal suppliers expressed concern that Spoornet was not making rolling stock available in line with orders placed. *Three*, Spoornet stated that they would not be able to meet transport requirements for any additional demand for coal, since the demand was already problematic for their existing capacity. *Four*, the representatives of the Electricity Divisions of the power stations pointed out that the power stations were running at minimum output and that any reduction in coal supply would force them to shut down. If the defendant were to shut down the power stations, Escom would terminate the Dynamic Surplus Pricing Agreement and the Escom surplus energy and power station energy would have to be purchased at the Negaflex tariff. This would result in an increase of R54 million on the Escom account based on figures for the 2000/01 financial year.

[34] Lindecke confirmed most of these facts on behalf of the defendant but he attempted to suggest that Rooiwal could have survived

without the road deliveries from plaintiff. It was is submitted on behalf of the plaintiff that the objective facts are destructive of his protestations and that the probabilities favour the plaintiff since the latter was the largest single supplier of coal during the relevant period because it having supplied almost 40% of the coal to Rooiwal. Lindecke also testified that the strategic stockpile of coal at Rooiwal reduced by approximately 50,000 tons during the two-month period of July 2002 and August 2002. In this regard, the strategic stockpile was reduced from approximately 120,000 tons at the beginning of July 2002 to approximately 70,000 tons at the end of August 2002. It is significant that during this period the reduction in the stockpile occurred notwithstanding the continued supply of coal to Rooiwal. According to Lindecke the consumption of coal during this period was approximately 60,000 tons per month (i.e. an average of 2,000 tons per day). The stockpile at the beginning of July 2002 (i.e. approximately 120,000 tons) would therefore have been exhausted by the end of August 2002 in the absence of the supply of coal to Rooiwal. The necessity of ensuring coal supplies to Rooiwal, objectively assessed, is clearly evident. That the defendant, from its subjective assessment, also considered the procurement of coal from the

plaintiff to be a matter of necessity is indeed evident. Thus, Mr Robinson submitted that coal supplies had to be procured for Rooiwal as a matter of "*emergency*", or as a matter of "*necessity*", or that with regard to administrative efficiency and effectiveness it was appropriate for the price increase to be granted. Thus, the requirements of publication and display in terms of section 38(3) and (4) are clearly internal formalities which a party in the position of the plaintiff was entitled to accept would have been complied with by the defendant and consequently it does not preclude the plaintiff from raising an estoppel.

[35] Under the circumstances, it is clear that the requirements of estoppel are satisfied because *first,* a representation was made by the defendant that the price increase had been approved. Such representation was made, *inter alia*, by the defendant's letter of 22 August 2002, by the defendant's acceptance of road deliveries, by payment by the defendant of the plaintiff's invoices at the increased rates and by the defendant's written confirmation on 8 January 2003 that the plaintiff's final account for December 2002 to the amount of R1 755 485.80 had been settled without any alterations. *Secondly*, the representations were made by various

officials of the defendant and not merely by the officials who addressed the letter to the plaintiff confirming that the price increase requested by the plaintiff had been approved. *Thirdly*, the representations were in a form that the defendant should reasonable have expected that outsiders, like the plaintiff would act on the strength of such representation. This is evident from the fact that the plaintiff undertook delivery by road which it would not have done in the absence of the price increase because to have done so would have resulted in the plaintiff incurring losses. *Fourthly*, the plaintiff relied on the representations to it that the price increase requested was granted. This is evident from the deliveries of coal to Rooiwal until February 2003, when deliveries were stopped pursuant to the defendant's failure to effect payment at the end of December 2002 and January 2003. *Fifthly*, the plaintiff's reliance on the defendant's approval was indeed reasonable given that notice of the price increase was issued by the defendant's officials, who had ostensible authority to approve such increase, who were from the defendant's department to which the plaintiff's representatives had been informed by Speek that they should address their request for a price increase, and who gave notice of the approval of the price increase on an official letterhead of the

defendant. Lindecke confirmed in his evidence that the Corporate Services (Procurement) was the defendant's department responsible for advising suppliers of the acceptance of price adjustments by the defendant. Lindecke also confirmed that the letter issued by the defendant to the plaintiff in which the price increase was approved was "procedurally" and correctly issued. *Last*, the prejudice to the plaintiff is self-evident. Suffice to indicate that TROLLIP AJ (as he then was) in *Peri-Urban Areas Health Board v Breet and Another* 1958 3 783 (T) 790E-F, stated:

> "[T]he very act of the one contracting party in entering into the contract in reliance on the other's conduct will be regarded in most bilateral contracts as a sufficient alteration of his position to his detriment to meet the requirement of prejudice."

[36] There is another reason why, even assuming that Arlow and Strydom were not authorised to act as they did, the defendant are estopped from invoking the defences under consideration. In this regard, to allow the defendant to render itself immune from its obligations to pay for the coal which it received and which it has

consumed would be inconsistent with the culture of justification of which the right to reasonable administrative action is an important component. In *Eastern Metropolitan Structure v Peter Klein Investments (Pty) Ltd* 2001 4 SA 661 (W) BORUCHOWITZ, J at 684F-685B, said:

> "Regardless of its technical ambit in terms of s 33 of the Constitution, reasonable administrative action is a value to which expression must be given when developing the common law in terms of s 39(2) of the Constitution. A rule of law which permits an organ of State, through its own carelessness or neglect, to deprive the Defendant of a statutory right of recourse and then to render itself immune from a defence to that deprivation, which estoppel would offer the Defendant is, in my view, inconsistent with the culture of justification of which the right to reasonable administrative action is an important part. To permit the Plaintiff to take advantage of the established rule against the raising of an estoppel where there is no alleged or minimal countervailing benefit to the Plaintiff would, to my mind, be inconsistent with the entrenched constitutional value of

reasonable public administration. I assume for present purpose that the Defendant cannot establish or easily prove damages against the Plaintiff.

To allow the plea of estoppel in the limited and peculiar circumstances of the present case would, to my mind, prevent hardship and injustice and give content to the object of the Constitution and basic values underlying it."

[See also *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 3 SA 210 (WLD) 234G-238A; *Choice Decisions v MEC, Department of Development (No 1)* 2003 (6) 280 (WLD) 288C-F; *Choice Decisions v MEC, Department of Simon's Town Maintenance Court* 2004 2 SA 56 (C) 61/65.]

[37] The application of the doctrine of estoppel against a public authority is also recognised in English law. Lord DENNING MR in *Lever Finance Limited v Westminster (City) London Borough Council* [1971] 1 QB 223 held:

> "If the planning officer tells the developer that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it. I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty: see, for instance, the recent decision of the Divisional Court in *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be."

[38] In the *Eastern Metropolitan Substructure* case (Supra), BORUCHOWITZ J found that a rule of law which permitted an organ of state, through its own carelessness or neglect, to deprive the defendant of a statutory right of recourse and then to render itself immune from a defence to that deprivation which estoppel

would offer the defendant, was inconsistent with the culture of justification of which the right to reasonable administrative action was an important part (para [37] at 684). The learned Judge emphasised the equitable nature of estoppel and found that a court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case.

[39] Mr Delport SC for the defendant argued that the public interests at stake in the present case is a pertinent consideration since the wrong tariffs, set out in the annexures to "POC4". resulted from *bona fide* errors made by Strydom and Arlow which resulted in public money being paid out to the plaintiff to which it was not contractually entitled. The defendant obtained the public money and paid to the plaintiff from revenue. A local authority's revenue in the nature of trust money. [See: *Eastern Metropolitan Substructure* case(Supra) at p 679G-J]. Thus, in support of this argument counsel referred to the *dictum* of INNES CJ in the *Hoisain*, *supra*, that:

"This is not a mere transaction between private persons; it is

> a matter affecting the public interests; and the insertion of a wrong name in a certificate, or the affixing of a signature in error by the person charged with the duty of giving effect to the Council's decision, cannot deprive that body of its statutory authority ..."

[40] The defendant also pleaded that having regard to the provisions of section 10G(5) of the Transition Act and the regulations made thereto, it was not empowered to vary the supply contract by approving the price increased but had to call for tenders with a view to entering into a new supply contract but failed to do so such tenders. I am of the view that section 10G(5) does not find application in this case and the defendant's reliance on it is certainly misplaced. Suffice to say that section 10G(5) deals with the awarding of tenders but not with the variation of a tender contract that has already been awarded.

[41] The error on which the defendant seeks to rely to avoid the price increase is that when Strydom signed annexure "POC4", it was submitted by Mr Delport for the defendant that Strydom *bona fide* and reasonably believed that the price increase set out in the

annexures to the letter, was the price increase provided for in paragraph 3 of annexure "POC3". He never intended to sign a letter to which annexures were attached containing the price increase in excess of those provided for in annexure "POC3" or calculated on a basis different to that provided for in annexure "POC3" or calculated on a basis different to that provided for in annexure "POC3". Thus, the defendant seeks to rely on its own unilateral error to avoid the price increase. To escape contractual liability the defendant must prove not only that its mistake is material, but also that it is reasonable. [See: Van der Merwe Van Huyssteen Reinecke Lubbe, *Contract-General Principles* (2nd edition) at p39]

[42] A threefold enquiry is necessary to determine whether the party whose alleged actual intention did not conform to the common intention expressed, led the other party, as a reasonable person to believe that this declared intention represented his or her actual intention. F*irst*, was there a misrepresentation as to one party's intention. *Secondly*, who made that representation. *Thirdly*, was the other party misled thereby. [*Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (AD) at 239I-240B.] Applying this

test it is clear that there was a misrepresentation as to one party's intention, that is that defendant expressly approved the price increase which it claims was due to an error. The representation that the price increase had been approved was made by the defendant to the extent that the it was mistaken in approving the price increase and/or in conveying such approval to the plaintiff. Such mistake was not due to any misrepresentation by the plaintiff. It was in fact misled by the defendant's representation. The plaintiff's reliance on the defendant's representation that the price increase had been granted was also reasonable in the circumstances. The reasonableness of the error has been alluded above to in the context of the estoppel doctrine.

[43] The defendant also seeks to invoke the provisions of clause 20 of the "Specification and Addition Conditions of Tender" to avoid the price increase. In this regard, the defendant pleaded that the defendant's letter notifying the plaintiff of the price increase was not signed by both parties. There is no merit in this defence. Clause 20 of the supply contract provides as follows:

"20. No variation or addition to this agreement shall be of

> any force and effect unless done in writing and signed by both parties."

This clause does not require a variation to be recorded in a single document bearing the signature of both parties. All that is required is that the variation be "done in writing and signed by both parties". The formalities prescribed by the clause were duly complied with because the plaintiff's request for a price increase was in writing and signed by the plaintiff; and the defendant's approval of the price increase was also in writing and signed by the defendant. In *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA (AD) the issue before the Court was whether or not the parties had entered into a contract for the sale of certain land, and if so, whether such contract was valid and enforceable as complying with the formalities in respect of Contracts of Sale and Land Act 1969. TROLLIP AJA (as he was), at 18A-E, said:

> "The next question is whether or not all the requisite formalities were complied with so as to render the contract legally binding on the parties.

Section 1(1) of the Formalities Act 1969, in so far as it relates to the present case, reads:

> 'No contract of sale of land ... shall be of any force or effect ... unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.'

That does not mean that the writing and the parties' signatures must necessarily be embodied in one and the same document. Thus an offer in writing on one document signed by the seller can be accepted in writing in another document signed by the purchaser. The contract resulting from reading the two documents together will be regarded as having been 'reduced to writing and signed by the parties thereto'. For that would fully serve the purpose of the Act of having certainty as to the essential terms of the contract and the identities of the parties thereto. See *Jackson v Weilbach's Executrix* 1907 TS 212 at 216; *Malk v Pergiondakis* 1916 WLD 40; *Coronel v Kaufman* 1920 TPD

207 at 209. That requirement was therefore duly fulfilled by Friedhelm's signed written offer in the deed of sale and its signed acceptance by Trever in the letter of 16 March 1971."

[44] In the final analysis, this court finds that the price increase was validly granted by the defendant. In the circumstances, the plaintiff is entitled to judgment as claimed, and therefore it is not necessary for me to consider the argument pertaining to the alternative claim for enrichment. Suffice to say that the defendant failed to discharge the *onus* in establishing that it has not been enriched. [See: *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] 3 all SA 1 para [21] at 8e; *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 3 SA 699 (A) at 703G-H]

[45] Regarding costs Mr Robinson submitted that the issues raised in this matter are somewhat novel and complex and the issues regarding estoppel are important, therefore the engagement of two counsel was necessary. Given the complexity of the case and the legal issues raised and the volume of evidential material, I am amenable in granting costs for the employment of two counsel by

the plaintiff.

[46] In the result, the following order is made:

The defendant is to pay to the plaintiff the sum of R2 646 134.40 together with interests thereof at the rate of 15.5% per annum *a tempore morae* from 1 March 2003 to the date of payment and costs of suit, such costs to include the costs consequent upon employment of two counsel by the plaintiff.

E M PATEL
JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF: ADV P G ROBINSON SC & ADV P T ROOD
INSTRUCTED BY: SHAPIRO & SHAPIRO INC
FOR THE DEFENDANT: ADV P P DELPORT SC
INSTRUCTED BY: EBEN GRIFFITHS & PARTNERS
DATE OF JUDGMENT: 24 NOVEMBER 2005
HEARD ON: 21-26/10/2004, 27-29/07/2005