Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A 280/2017

Before: The Hon. Ms Justice Allie
The Hon. Mr Justice Binns-Ward
The Hon. Ms Justice Mantame

Hearing: 29 January 2018
Judgment: 1 February 2018

In the matter between:

**ABET INSPECTION ENGINEERING (PTY) LTD** Appellant

and

**THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA** First Respondent

**VUMELA INDUSTRIAL CONSULTANCY (PTY) LTD** Second Respondent

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**JUDGMENT**

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**BINNS-WARD J (ALLIE and MANTAME JJ concurring):**

[1] The appellant has come on appeal from the judgment of Holderness AJ dismissing its application for the review and setting aside of the decision by PetroSA (the first respondent) to accept the tender of Vumela (the second respondent) for the provision of quality control and approved inspection authority services at certain of

PetroSA's installations with effect from the end of August 2016.[1] The appeal to the full court was brought with the leave of the judge at first instance.

[2] Several tenders were received in response to the invitation to tender, but after an initial vetting process, only those of the appellant and Vumela were found to have been responsive. Vumela was awarded the tender contract because its tender achieved the highest score in the tender evaluation process. Its tender price was just over R4,6 million lower than that in the competing tender submitted by the appellant. No issue was taken with the scoring of the tenders. The appellant's complaint was that Vumela's tender had actually been non-responsive, in that it had not been accompanied by a certificate of accreditation by SANAS (the South African National Accreditation System, an institution established in terms of s 3 of the 'Accreditation Act'[2]) issued in Vumela's name, or a certificate by the Department of Labour, in terms of the Occupational Health and Safety Act 85 of 1993, certifying Vumela as an approved authority for the inspection of pressure equipment.[3] The appellant contends that Vumela's tender should consequently have been disqualified from consideration.

[3] PetroSA is an organ of state. It is trite that only an '*acceptable tender*' within the meaning of the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA') – an enactment contemplated by s 217(3) of the Constitution – can lawfully be accepted by an organ of state. Moreover, if it awards a contract pursuant to a tender process, an organ of state is obliged, in terms of s 2(1)(f) of the PPPFA, to conclude the agreement with the tenderer who scored the highest points, unless objective criteria justify the award to another tenderer. It has not been suggested that the contract in the current matter should have been awarded to anyone but the highest scoring tenderer.

[4] An '*acceptable tender*' is by definition one '*which, in all respects, complies*

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[1] The judgment of the court a quo is reported on SAFLII: *Abet Inspection Engineering (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd and Another* [2017] ZAWCHC 39 (8 March 2017); http://www1.saflii.org/za/cases/ZAWCHC/2017/39.pdf .

[2] The full title of the Accreditation Act is the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006.

[3] In terms of section 4(1)(c) of Act 19 of 2006, SANAS is recognised as the '*only national body responsible for carrying out ... accreditation of inspection bodies*'. It is responsible for maintaining an '*internationally recognised accreditation system*' and for promoting '*the competence and equivalence of accredited bodies*'. (See the Preamble, and s 5 of the Act.)

*with the specifications and conditions of tender as set out in the tender document*'.[4] In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*, it was held that '[t]*he acceptance by an organ of state of a tender which is not 'acceptable' within the meaning of the* [PPPFA] *is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement.*'[5] Judicial review is a discretionary remedy, however, and therefore it does not necessarily follow that an invalid act will in fact be set aside.[6]

[5] It was stressed in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [7] that the fairness and lawfulness of a state procurement process must be assessed independently of its outcome. No discretion is involved in that assessment; the answer is determined by law. A finding of unlawfulness must follow if the evidence establishes a ground of review in terms of s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[6] The Constitutional Court explained that '[t]*he proper approach* [in matters of this nature] *is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established*'.[8]

[7] It is clear that in its treatment of 'materiality' the Constitutional Court endorsed the principle that substance should prevail over form. Thus, if the

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[4] Section 1 of the Preferential Procurement Policy Framework Act 5 of 2000.

[5] [2005] ZASCA 90; [2005] 4 All SA 487 (SCA); 2008 (2) SA 638, at para. 11.

[6] Cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222, at para. 36: *'…a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide*'. (Footnote omitted.) The courts' discretionary power in this respect in reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 is now regulated by s 172(1) of the Constitution read with s 8 of the Act.

[7] [2013] ZACC 42; 2014 (1) BCLR 1 (CC); 2014 (1) SA 604, at para. 22-30.

[8] *Allpay* supra, at para. 28.

irregularity or apparent deviation from the legal requirements has not substantively detracted from or undermined the purpose or object of the relevant governing provision, a court might conclude upon contextual evaluation that it does not make out a cogent basis for judicial review.[9] That entails a legal determination. If it is made adversely to an applicant's case, that is the end of the matter.

[8] Assuming a finding of unlawfulness is made, the court must acknowledge that by making an appropriate declaratory order. The outcome or result of the unlawful administrative action then falls to be considered in the context of determining an appropriate remedy. That is where s 8 of PAJA comes to the fore. It might be that in the peculiar context of the given case that it would nevertheless not be in the public interest to set the process aside. It is in respect of this aspect of the judicial review process that the court exercises its discretionary jurisdiction.

[9] In the current matter the appellant's counsel has argued (with a focus that was absent in the founding papers) that the review was founded on s 6(2)(b) of PAJA: namely, that '*a mandatory and material procedure or condition prescribed by an empowering provision was not complied with*': an unacceptable tender was scored, notwithstanding that it had failed to satisfy the threshold requirement.[10] Accordingly, the questions that fell to be determined by the court a quo were (i) was Vumela's tender an 'acceptable tender' and (ii) if it was not, should the award of the contract to Vumela be set aside.

[10] Having summarised the legal principles applicable to the adjudication of the appellant's review challenge, it is time now to examine the factual context in which the court a quo had to bring those principles to bear. The appellant has not attacked the description of the salient facts in the judgment a quo, which is reported on

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[9] Cf. *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; [2016] 1 All SA 313 (SCA); 2016 (2) SA 199, at para. 43 (quoted at para. 66 of the judgment a quo), and *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982, at para. 2 (quoted at para. 93 of the judgment a quo).

[10] In its founding papers the appellant expressly relied on several other provisions of s 6(2) of PAJA. The relevant averments in this respect were quoted *in extenso* in the judgment of the court a quo at para. 72. Section 6(2)(b) was not invoked at all by the deponent to the founding affidavit. Whilst it is desirable in review proceedings in terms of PAJA for the applicant to identify the grounds of review on which it relies with reference to the provisions of the Act, I nevertheless do not think that an inappropriate or incorrect identification precludes a litigant from relying on the appropriate provision at the hearing if the papers afford an evidential basis for such reliance and no incurable prejudice is occasioned in the circumstances to the other parties to the litigation.

SAFLII.[11] The detail of the matter can be found there. An abbreviated recitation of the factual background will therefore do for the purposes of this judgment.

[11] The invitation to tender was issued on 4 March 2016. Tenders had to be submitted on or before 31 March 2016, and be 'in accordance with', amongst other things, the 'Draft Consultancy Agreement' that had been incorporated by reference in the tender notice. A 'special condition of contract' in the draft consultancy agreement indicated that the successful tenderer would be required to '*ensure it maintains its SANAS accreditation to SANS 10227*[12] *and ISO 17020*[13] *through out the duration of the contract*'. The draft agreement also provided that '*Suspension of the Consultant's SANAS accreditation shall result in immediate cancellation of this contract …*'.

[12] The tenders had to be submitted electronically via a portal on PetroSA's procurement website. The tender notice advised that tenders had to be submitted in accordance with the online terms and conditions. The online requirements included the completion by tenderers of a technical questionnaire which included a section that read as follows:

> **SCOPE OF WORK REQUIREMENTS**
> **ELIMINATION PHASE – TENDERERS WILL BE ELIMINATED FROM FURTHER EVAULATION FOR FAILURE TO COMPLY WITH ANY OF THE FOLLOWING**
> *Tenderer to provide a copy of its SANAS accreditation certificate. Is certificate attached?*
>
> - *No*
> - *Yes*
>
> *Tenderer to provide a copy of its Department of Labour (DOL) and/or Department of Mineral Resources (DMR) certificate proving tenderer to be an Approved Inspection Authority. Is the certificate/s attached?*
>
> - *No*
> - *Yes*

[13] The aforementioned requirements clearly signalled that the stipulated accreditation and certification were absolutely essential qualifications for any contractor to be able to undertake the quality control work that had been put out to tender; hence the intimation that if the accreditation were suspended the contract

[11] See note 1 above.

[12] SANS is the acronym for 'South African National Standard'.

[13] ISO is the acronym for International Organization for Standardization, and the nomenclator, ISO 17020, identifies a particular International Standard issued by the Organisation.

would be cancelled immediately. It was also common ground that it was not possible to obtain certification as an approved inspection authority in the relevant respect unless one had first been afforded the stipulated accreditation. The importance in the tender process of the tenderer's presentation of the accreditation and certification documents quite obviously lay not in the documents as of themselves, but in the assurance they provided that the tenderer's organisation or facility had been determined by the relevant statutory authorities to be qualified to do the work.

[14] Vumela had purchased as a going concern the business through which it sought to obtain the tender only a few days before the tender notice was published. The going concern was a business that performed the examination of processes and plant to determine their conformity with specific requirements, or on the basis of professional judgment, general requirements: '*quality control*' in everyday parlance;[14] the business of an '*inspection body*' in the language of the Accreditation Act.[15] Indeed, it was only by reason of this acquisition that Vumela possessed the capacity to take on the contract work that PetroSA had put out to tender.

[15] It had bought the business from a company that was referred to in the judgment at first instance by the acronym 'PBA'. The terms of acquisition gave Vumela the right to use the PBA trademark and effectively to trade in the business as PBA for six months after the sale. The business was accredited by SANAS to the specified standards and it was an approved inspection authority. The official documentation in this regard had, of course, been issued in the name of the seller, PBA.

[16] It bears mention in this regard that in terms of the Accreditation Act the issue of an accreditation certificate results in the organisation or facility to which it relates becoming an '*accredited body*' as defined in s 1 of the Act. The term denotes '*an organisation or facility that has been accredited by SANAS …*'. On the facts it is evident that it was the division in PBA's enterprise that had been accredited that was

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[14] '*Quality control*' is defined in the *Oxford Dictionary of English* (Version 2.2.2 (203 © 2005–2017 Apple Inc.) as '*a system of maintaining standards in manufactured products by testing a sample of the output against the specification*'.

[15] '*Inspection body*' is defined in s 1 of the Accreditation Act as '*an organization that performs examination of a product design, product service, process or plant, and determination of their conformity with specific requirements or, on the basis of professional judgment, general requirements*'.

sold to Vumela (i.e. the business that would fall within the classification of an '*inspection body*' in the language of the Accreditation Act). In other words, the *res vendita* was a part of PBA's enterprise that had been found by SANAS, in terms of s 22(2)(b) of the Accreditation Act, to have met the required criteria.[16]

[17] Section 23(4) of the Act provides that an accreditation certificate is the property of SANAS, *not* of the accredited body. A certificate is therefore not proprietary to the person who applied for it, but rather a document that affords objective proof that a particular body, be it a testing or verification laboratory or an inspection body as the case might be, has been found by SANAS to meet the required criteria for accreditation. Accreditation attaches to the organisation or facility, not its owner.

[18] It is convenient at this point to refer to the appellant's reliance on a SANAS document, described in its the founding papers as 'SANAS regulation R01/05'. It is not clear to me that the document is in fact a set of regulations; no particulars were furnished concerning its making or promulgation. But nothing turns on that. Paragraph 1 thereof identifies its purpose as follows:

> The purpose of this document is to define the requirements concerning the transfer of South African National Accreditation System (SANAS) accreditation/compliance status. This document is applicable to all divisions of SANAS and accredited laboratories / GLP compliant facilities / bodies.

Paragraph 3 of the document bears the subheading 'Regulations'. The appellant relied in particular on para. 3.2, which provides:

> SANAS shall not transfer accreditation / compliance status from one accredited / compliant body to another or from an accredited / compliant body to a non-accredited body.

[19] It will be apparent from the description of the working of the Accreditation Act in paragraphs [16] - [17] above that the transfer of PBA's accredited 'Quality Services' business to Vumela did not entail any transfer of accreditation; it involved, rather, a change of ownership of the '*accredited body*'. Indeed, it is clear from para. 3.4 read with para. 3.3 and 3.5 of document R01-05 that PBA and/or Vumela

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[16] Section 22(2)(b) provides insofar as relevant:
'*SANAS must* –
*issue a certificate of accreditation … to applicants that meet required criteria, specifying any conditions applicable to the accreditation …*'.

were obliged to advise SANAS of the change of ownership and that SANAS' right to carry out a reassessment as a consequence of the change was reserved. Para. 3.4 provides that the accreditation of an accredited body might be suspended should it fail to inform SANAS of any relevant change in its organisational status or management.[17] As it was, it was evident from Vumela's tender that SANAS had been informed of the change of ownership of the business. (Whilst not relevant to the acceptability of the tender, it nevertheless bears mention anecdotally that the evidence established that there was no resultant change in the nature of the accreditation, save that a certificate of accreditation was issued in Vumela's name.)

[20] The window period during which tenders might be submitted in response to PetroSA's tender notice gave insufficient time for Vumela to have the necessary accreditation and certification documents for the business that it had acquired re-issued in its own name. That happened later when, in or about early July 2016, SANAS issued a document certifying that Vumela's business (or 'facility' to use the language employed in the certificate) had been accredited with effect from 17 March 2016. (SANAS had, however, previously confirmed in April 2016, that its Approval Committee had granted 'unconditional accreditation' in accordance with ISO/IEC 17020:2012 and SANS 10227:2012 to PBA '*now Vumela Industrial Consultancy (Pty) Ltd*'. It cited the existing Facility Accreditation Number - that is the same number as that reflected on the certificate of accreditation that had been issued to PBA.) The Department of Labour informed Vumela of its certification as an approved inspection authority with effect from 17 June 2016 by letter dated 7 July

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[17] Para. 3.3 to 3.5 of SANAS document R01-05 provide:

*3.3 SANAS may perform, or have performed on its behalf, accreditation assessments or compliance inspections if there are any changes in a Laboratory's / Facility's / Body's:*
*(a) legal, commercial or organisational status;*
*(b) organisation and management, i.e. key managerial staff;*
*(c) policies and procedures (where appropriate);*
*(d) premises;*
*(e) personnel, equipment, facilities, working environment or other significant resources;*
*(f) such other matters that may affect the accredited / compliant body's capability or any other relevant criteria specified by SANAS.*
*3.4 All bodies accredited or deemed compliant by SANAS are responsible for infoirming SANAS immediately should any of the changes specified in paragraph 5.3 [this should obviously read '3.3'] occur. Failure to notify SANAS of any such changes may result in the accredited / compliant facility being suspended.*
*3.5 SANAS reserves the right to decide on the scope of the assessment / inspection as a result of any changes as described in 3.3 (a) to (f).*

2016. The letter recorded that the certification was 'aligned' to the accreditation of Vumela's facilty under the Accreditation Act.

[21] Accordingly, when Vumela submitted its tender, it put in the documents evidencing the accreditation and certification that had been issued in respect of the business when it had been owned by PBA. It also included an explanatory letter that PBA had addressed to the existing clients of the business under the subject heading '*Re: SANAS Accreditation of Vumela Industrial Consultancy*'. The part of the letter that was most material for present purposes was a paragraph reading as follows:

> As part of the transition process, Vumela has engaged with SANAS and the Department of Labour (DoL) regarding their application for accreditation as per SANS 17020 and SANS 10227. Further to this, the PBA accreditation is valid until the 31st of July 2019.

The functionaries at PetroSA who were responsible for the initial assessment of the responsiveness of the tenders that had been submitted (the 'evaluation team') were accordingly informed by the letter that Vumela had acquired the Quality Services business of PBA, that the business was currently accredited, and that Vumela was in the process of engagement with SANAS to obtain the certificate of accreditation re-issued in its name and, similarly, with the Department of Labour in respect of its required certification as a government approved inspection authority in terms of the Pressure Equipment Regulations.

[22] On the basis of what I have set out in paragraphs [16]-[17] above concerning the operation of the Accreditation Act, it is clear that in the circumstances the evaluation team would have been entitled to accept – assuming that the accredited organisation or facility[18] that had belonged to PBA now belonged to Vumela – that the tenderer's business was an '*accredited body*' within the meaning of the Act. The evaluation team would also understand why the attached certificates were in the name of PBA rather than Vumela. Were the team to have rejected the tender as non-responsive in these circumstances they would, in my view, have acted wrongly. As explained earlier, the subject of accreditation was the organisation or facility that would perform the inspection functions, not the people or entities who owned it. As

[18] The *Oxford Dictionary of English* op. cit. supra, gives 'a business' as an example in its definition of the word '*organization*': '*an organized group of people with a particular purpose, such as a business or government department: a research organization*'. A '*facility*' is defined in the relevant sense as '*an amenity for a particular purpose*'.

also mentioned, the Act expressly provides that a certificate of accreditation is not proprietary. I am not surprised in the circumstances by the evidence that some officials at SANAS were of the view that it was unnecessary to change the existing Facility Accreditation Number (LVUP017) and sufficient merely to note a change of owner.

[23] There was no challenge to PetroSA's evidence that an appropriately accredited body would be given the required authorisation as an inspection body by the Department of Labour as a matter of course. Indeed, the content of regulation 7 of the Pressure Equipment Regulations, quoted at para. 104 of the first respondent's answering affidavit, bears that out. The evidence adduced by PetroSA was that '[t]*he Evaluation Team's understanding … was not only informed by the wording of the regulation, but also by its experience and its understanding of the prevailing industry norms in the Approved Inspection Authority industry*.'

[24] It would have frustrated, rather than promoted, the objects of s 217(1) of the Constitution were the evaluation team to have disqualified the tender as non-responsive in the circumstances when, on the face of matters, it was only the name on the certificates that required changing, there having been no change in the character of the body which had been accredited and certified. There was nothing unfair, inequitable or opaque about treating the tender as an acceptable tender in the circumstances. On the contrary, it would most obviously have prejudiced competitiveness and cost-effectiveness not to do so. I am not persuaded that the appellant established any irregularity or deviation from the legal requirements. But if I were wrong, its nature was so entirely formalistic that to hold that it gave rise to a review ground would be to unjustifiably elevate form above substance. The irregularity, if there was one, was incontestably immaterial.

[25] The indicated precautionary enquiry by PetroSA in the circumstances was to assure itself that the business that had been acquired by Vumela was indeed in substance that which was the organisation or facility in respect of which PBA had applied for and obtained accreditation. This was done in the technical evaluation phase of the consideration of the responsive tenders. The assurance was provided in the April 2016 letter from SANAS referred to earlier in which it was advised that unconditional approval had been given for the accreditation of the facility in Vumela's name.

[26] It is unnecessary in the circumstances to say anything about the fall-back basis upon which the court a quo held that it would in any event have dismissed the review; namely, that had it been wrong in not declaring the acceptance of the tender to have been unlawful, it would nevertheless have exercised its discretion to decline to set aside the award of the tender contract to Vumela.

[27] The only remaining issue arises out of the order made by the court a quo when granting leave to appeal. It awarded the costs of the application for leave to appeal to the appellant. The appellant's counsel, Mr *Engela*, very fairly and correctly agreed that that costs order had been a patent error on which the appellant would not seek to rely. He also agreed that this court might record in the order to be given on appeal that the costs in the appeal should include the costs of the application for leave to appeal. PetroSA was represented by two counsel at the hearing of the appeal, having up till that stage been represented only by Mr *Borgström*. Mr *Maenetje* SC advisedly did not ask for an order allowing the costs of two counsel.

[28] The appeal is dismissed with costs, which shall include the costs of the application for leave to appeal.

**A.G. BINNS-WARD**
**Judge of the High Court**

**R. ALLIE**
**Judge of the High Court**

**B.P. MANTAME**

**Judge of the High Court**

**APPEARANCES**

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|---|---|
| **Appellant's counsel:** | **R.B. Engela** |
| **Appellant's attorneys:** | **Lombard Kotze Inc.**<br>**George**<br><br>**Davidson England Attorneys**<br>**Cape Town** |
| **First Respondent's counsel:** | **N.H. Maenetje SC**<br>**D.P. Borgström** |
| **First Respondent's attorneys:** | **Cliffe Dekker Hofmeyr**<br>**Cape Town** |

**No appearance for the Second Respondent**