

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

- (1) REPORTABLE: Electronic Reporting.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes

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Case No. 16813/2012

In the matter between:

RED ANT (PTY) LTD

Applicant

and

MOGALE CITY MUNICIPALITY
MAFOKO SECURITY SERVICES (PTY) LTD
BOSASA SECURITY SERVICES (PTY) LTD
FIDELITY SECURITY SERVICES (PTY) LTD
NATIONWIDE SECURITY CC
CHANGING TIDES 208 (PTY) LTD

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

JUDGMENT

MEYER, J

[1] Fidelity Security Services (Pty) Ltd ('Fidelity') seeks the review and setting aside of a decision of Mogale City Local Municipality ('Mogale City') taken on 19 March 2012 to award a tender to Mafoko Security Patrols (Pty) Ltd ('Mafoko') for the provision of

armed and unarmed security services to Mogale City for a period of three years commencing on 1 April 2012 and of the contract that was concluded between Mogale City and Mafoko on 29 March 2012 pursuant to such award. Red Ant Security Services Pty Ltd ('Red Ant') and Fidelity submitted bids for the same contract, but both companies were disqualified. The tender is worth approximately R2.5 million per month and its estimated total value is R86,4 million. It is said to be the biggest tender awarded in Mogale's history.

[2] This matter began with a review application brought by Red Ant on 11 May 2012, wherein it sought the setting aside of the award of the tender to Mafoko and an order substituting Red Ant for Mafoko as the successful tenderer or, alternatively, an order remitting the decision to Mogale City for reconsideration on the basis that thirteen employees of Mogale City might then not be involved in the reconsideration of the tender award ('Red Ant's application'). Mogale City, as the first respondent, opposed Red Ant's application. It delivered the record in terms of Rule 53 of the Uniform Rules. Red Ant supplemented its founding papers and amended its notice of motion in terms of Rule 53(4) on 27 July 2012. Mogale City filed its answering affidavit on 10 September 2012. Fidelity, as the fourth respondent, also filed an answering affidavit on 14 September 2012, wherein it supported the relief claimed by Red Ant, except for the relief relating to the substitution of Red Ant for Mafoko, which it opposed. Red Ant filed its replying affidavit on 12 October 2012, wherein it abandoned its prayer for substitution and it accepted the stance of Fidelity that the appropriate order would be one of remittal for a fresh decision.

[3] On 6 December 2012, Red Ant's attorneys of record filed a notice of withdrawal of Red Ant's application. The notice of withdrawal did not tender costs. On 10 December 2012, Fidelity's attorney received a letter from Red Ant's attorneys informing him that Red Ant and Mafoko had negotiated a deal in terms of which Mafoko had agreed to cede 35% of its contract with Mogale City to Red Ant. Such deal was negotiated despite Fidelity's interest in the review application and Red Ant's own allegation that Mogale City's disqualification of Fidelity from the tender process was procedurally unfair and rendered unlawful the award of the tender and the conclusion of the contract with Mafoko.

[4] On 13 December 2012, Fidelity brought a so-called counter-application ('Fidelity's counter-application') in which it seeks the following relief:

1. It is declared that this application is one of urgency and the applicant's failure to comply with the Rules of this Court is condoned.
2. The fourth respondent is given leave to bring this counter-application.
3. The decision(s) of the first respondent of 19 March 2012 and/or thereafter to award tender No: SS (T&S) 01/2012 to the second respondent is reviewed and set aside.
4. The contract between the first respondent and the second respondent pursuant to tender No: SS (T&S) 01/2012 is set aside and declared void *ab initio*.
5. The decision of the first respondent, taken on or about 10 December 2012, to allow the second respondent to cede 35% of its contract to the applicant pursuant to tender No: SS (T&S) 01/2012 is reviewed and set aside.
6. The contract of cession between the second respondent and the applicant is set aside and declared void *ab initio*.
7. Directing that the first respondent re-evaluate the bids submitted for tender No: SS (T&S) 01/2012 and re-award the contract within 4 weeks of the date of this order or any other period that the court may determine.
8. The first respondent, applicant and any other respondent that oppose this application are ordered to pay the fourth respondent's costs in the application and counter application, including the costs of two counsel.
9. The applicant is granted further or alternative relief.

[5] Only Mogale City opposed Fidelity's counter-application. Its answering affidavit was filed on 10 January 2013. Fidelity's replying affidavit was filed on 11 January 2013. Fidelity's heads of argument were filed on 8 February 2013, and those of Mogale City on 14 February 2013. The date specially allocated for the commencement of the hearing of Fidelity's counter-application was Monday, 4 March 2013. The hearing of the matter was concluded during the afternoon of Wednesday, 6 March 2013.

[6] A judgment in this matter is urgently required. See: *Millenium Waste Management (Pty)Ltd v Chairperson Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA), para [34]. The contract in issue has a duration of three years. It has now run for almost one year. This judgment will accordingly be relatively brief and the focus will be on aspects that I consider decisive of the matter.

[7] Fidelity seeks leave 'to bring this counter-application' in prayer 2 of its notice motion. Such leave it seeks in terms of Rule 24(2). Rule 6(7) permits a party in any application proceedings to bring a counter-application. Rule 24 deals with counterclaims in action proceedings. Fidelity's contention is that although Rule 24 is not listed in Rule 6(14) as one of the rules that are applicable to applications it should nevertheless govern the procedural aspects relating to counter-applications, because: Rule 6 is silent on that; Rule 24 provides a 'convenient and sensible' procedure also for counter-applications; no party will be prejudiced through the application of such procedure; and there is case law authority - such as *Academy of Learning (Pty) Ltd v Hancock and Others* 2001 (1) SA 941 (CPD), at 950G, and *Reymond v Abdulnabi and Others* 1985 (3) SA 348 (WLD), at 349E – F - supporting the contention that it falls

within the inherent jurisdiction of a superior court to adopt rules applicable to actions in applications.

[8] The competency of the counter-application was not challenged in Mogale City's heads of argument. Its counsel, Adv Mansingh who appeared with Adv Mofokeng, informed me at the commencement of the hearing that Mogale City accepts that the counter-application was properly before this court. The competency of the counter-application was only challenged on the second day of the hearing by way of retraction by counsel for Mogale City of the concession that had been made at the commencement of the hearing. It was then submitted on behalf of Mogale City that Fidelity ought to have enforced its claim against Mogale City by way of a third party notice in accordance with the provisions of Rule 13.

[9] I am of the view that the attorney for Fidelity erred in bringing Fidelity's counter-application after Red Ant's application had been withdrawn in terms of Rule 41. Insofar as Red Ant's notice of withdrawal does not embody a consent to pay costs, Fidelity may, in terms of Rule 41(c), '...apply to court on notice for an order for costs.' It was no longer open for Fidelity to bring a counter-application under Rule 6(7) in proceedings that had been withdrawn. I accordingly need not decide whether the provisions of Rule 24 are applicable to applications or whether Fidelity ought to have issued and served on Mogale City a third party notice in accordance with the provisions of Rule 13. Fidelity ought to have enforced its claim against Mogale City by way of a separate application.

[10] Fidelity's counter-application, however, is in substance a fresh application. It was served on all the parties. It comprises a founding, answering and replying affidavit. In

paragraph 14 of its answering affidavit Mogale City specifically incorporated its answering affidavit and annexures thereto filed in Red Ant's application as part of its opposition to Fidelity's counter-application. The record that was delivered in terms of Rule 53 in Red Ant's application has been relied upon by Mogale City and Fidelity. Neither party was alive to the issue that Fidelity ought to have enforced its claim against Mogale City by way of a separate application until I raised it with counsel during the course of the hearing. The entire matter was argued over three court days. There is no prejudice to Mogale City if heed is not taken of the procedural irregularity in this matter. Doing so will interfere with the expeditious and more inexpensive present decision of this matter on its real merits. Any further delay in the finalisation of this matter may drastically reduce or even defeat the granting of effective relief. See: *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A), at 278F – G; *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A), at 654D – E. I am in all the circumstances of the view that the interests of justice require me to exercise my inherent jurisdiction by overlooking the procedural irregularity in order to avoid injustice. See: *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA), para 19; *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and others* 2007 (2) BCLR 167 (CC), paras 35 – 36; *PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC), paras 30 – 33.

[11] I now turn to the merits of this matter. In its answering affidavit, Mogale City confirms that it was Mafoko's intention to attempt to cede 35% of the contract to Red Ant, but it says that no agreement of cession was indeed concluded between them. Mafoko's attorneys advised it on 11 December 2012, which date was after the launch of

the counter-application, to suspend the execution of the cession. Fidelity's counsel, Adv C Steinberg who appeared with Adv N Ferreira, on behalf of Fidelity accordingly abandoned the relief prayed for in prayers 5 and 6 of Fidelity's counter-application.

[12] Fidelity was the successful bidder in respect of Mogale City's tender (No. SS (P&S) 06/2011) for the rendering of security services to all sites situated within the jurisdiction of Mogale City Local Municipality for a period of six months. As a result thereof Fidelity rendered security services to Mogale City. The contract duration was extended until the end of January 2012.

[13] Mogale City issued an invitation to bid (No. SS (T&S) 01/2012) during July 2011 for the rendering of such security services for a period of three years. The invitation to bid provides that tenders would be evaluated '... in terms of the 90/10 points system which awards points on the basis of 90 points for price and 10 points for contract participation goals. Preference points are offered to tenderers for HDI [historically disadvantaged individuals] (6 points) and for Promotion of Mogale City-based Enterprises (4 points).' Tenders would first be assessed for functionality. Only those bids that met the minimum functionality requirement, which was 48 out of 70 points, would proceed for assessment in terms of the 90/10 point system. The closing date for the submission of bids was 1 August 2011.

[14] The inclusion of these provisions in the invitation to bid was in line with Mogale's City's own Supply Chain Management Policy ('the SCM Policy'), which governed the tender process. The SCM Policy, in turn, is informed by legislation, such as the Local Government: Municipal Finance Management Act 56 of 2003 and its regulations, the

Preferential Procurement Policy Framework Act 5 of 2000 and its regulations, and s 217 of the Constitution of the Republic of South Africa, 1996, which provides that when an organ of state contracts for goods and services ‘...it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.’ This is the golden thread that runs through the applicable legislation.

[15] Messrs Nchefu and Korff of Mogale City’s Department of Security and Social Services (‘the department’) were assigned to assess the functionality and financial proposals of the bidders. The department is the entity responsible for providing security services to Mogale City. Nchefu and Korff each separately evaluated the bids during the functionality evaluation stage, which was conducted between 11 October 2012 and 26 October 2012. The final score each bidder received represented the average of the individual scoring by Nchefu and Korff. Their functionality score sheets reflect a functionality score of 36 points given by Nchefu to Mafoko and 43 points given by Korff. The functionality score sheets reflect an average score of 39.5 that was given to Mafoko for functionality, which was below the minimum required score of 48 points. Red Ant’s average score for functionality is reflected as 65.5 points and that of Fidelity as 66.5 points.

[16] The scores were captured in the department’s report to the Bid Evaluation Committee (‘BEC’), which committee in terms of the SCM policy evaluates bids in the first instance and submits its report and recommendations regarding the award of bids to the Bid Adjudication Committee (‘BAC’). The BAC considers the report of the BEC and either endorses the BEC recommendations for the accounting officer’s approval or it makes another recommendation to the accounting officer.

[17] Mafoko, however, was recorded as having obtained 48.5 points for functionality in the department's report to the BEC. Fidelity was recorded as having obtained 66.5 points and Red Ant 65.5 points. The BEC accepted all three as eligible to move on to the next stage of the assessment. The scoring obtained by the front runners at the next stage of the assessment – the 90/10 system prescribed by the Preferential Procurement Regulations of the Preferential Procurement Policy Framework Act 5 of 2000 - were 93.72 points by Red Ant, 92.24 points by Fidelity and 91.63 points by Mafoko.

[18] Regulation 38(1)(c) of the Municipal Supply Chain Management Regulations provides that

'[a] supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer –
to check the national treasury's database prior to awarding any contract to ensure that no recommended bidder, Or any of its directors, is listed as a person prohibited from doing business with the public sector.'

[19] The requirement is reflected in paragraph 38(1)(c) of the SCM Policy, which provide that

'[t]he accounting officer must –
check the National Treasury's database prior to awarding any contract to ensure that no recommended bidder, or any of its directors, is listed as a person prohibited from doing business with the public sector.'

[20] One of Fidelity's directors, Mr. Godfrey Jack ('Jack'), was so listed on National Treasury's database. National Treasury 'blacklisted' him from doing business with any organ of state for a period of 10 years as from 20 November 2003 until 19 November 2013. It is undisputed that Fidelity only became aware of Jack's blacklisting by National Treasury on 4 September 2011. Jack, on 6 September 2011, amicably resigned as a

director of Fidelity's board of directors and Mr Simon Mahlangu was on the same day appointed in his stead. Jack's blacklisting only came to the attention of Mogale City on 8 November 2011.

[21] I interpolate to mention that in application proceeding between Jack and Fidelity as the applicants and the Chairperson: Bid Adjudication Committee National Treasury, the Director-General of the National Treasury and the Minister of Finance as the respondents, the North Gauteng High Court, on 10 May 2012, set aside the decision to place Jack's name on the National Treasury's database of restricted suppliers and an order was granted to remove his name within 5 days of the order. The other relief claimed by Jack and Fidelity in those proceedings was postponed *sine die* to the opposed motion court roll. On 16 August 2012, the North Gauteng High Court issued a further order in those proceedings, which is that Jack's name '... is deemed for all purposes never to have been included on the National Treasury's database of restricted suppliers.'

[22] The issue of the blacklisting of a director of Fidelity was discussed at BEC meetings. The minutes of the BEC meeting of 9 January reflect that Nhefu advised the BEC that Mogale City and the department would be privileged 'in terms of service delivery' if the tender is awarded to Fidelity due to its track record and the 'very high' score it had achieved during the bid evaluation process. The minutes of the BEC meeting on 11 January 2012 reflect that the BEC at that stage recommended that the tender be split between Fidelity and Red Ant due to the 'small margin and difference' between the two. Fidelity had scored 92.24% and Red Ant 93.72% According to this

recommendation it was only in the event that Fidelity refused the offer of a split that Mafoko would enter the picture.

[23] On 13 January 2012, the BEC received a report and obtained legal advice regarding Fidelity. It decided to disqualify Fidelity from the tender. The minutes reflect that the chairperson requested advice from Mogale City's legal adviser regarding Fidelity's position as a bidder. His advice was that Fidelity had had the opportunity to respond to Mogale City regarding its shareholders, but that '... there was no proof of such information received.' For this reason he was of the view that it was not advisable to consider Fidelity's bid. On 16 January 2012, the BEC signed its recommended proposal, which would serve before the BAC. It *inter alia* recommended that Red Ant be awarded 60% and Mafoko 40% of the contract.

[24] The BAC, at its meeting on 20 January 2012, approved the recommendation of the BEC. The BAC submitted its recommendation to Mr Mashitisho, the municipal manager and accounting officer. Mashitisho referred the recommendations back to the BEC and BAC to investigate possible impropriety by Red Ant. Information had been brought to his attention that Red Ant had hosted a party and offered gifts to the department and senior members of the department. Regulation 29(6) of the Municipal Supply Chain Management Regulations provides that '[t]he accounting officer may at any stage of a bidding process refer any recommendation made by the evaluation committee or the adjudication committee back to that committee for reconsideration of the recommendation.'

[25] The final BEC recommendations dated March 2012 *inter alia* include a recommendation that Fidelity was disqualified for the following reasons: Fidelity had not officially responded to allegations that one of its shareholders was on the Treasury blacklist; the information obtained about Fidelity's directors was not obtained in connection with this bidding process and may accordingly not be taken into account; and Fidelity's tender had to be evaluated according to the information it contained when submitted, which was that Jack was listed as a shareholder. It was recommended that Red Ant be disqualified because of the gifts and donations it had bestowed on the department and officials of the department. Bosasa was the fourth highest scorer at 81.91 points. The recommendation was that '... Mafoko be awarded 70% and Bosasa 30% of the total value of the contract, subject to negotiation of the rates of Bosasa in order to align them with the rates as tendered by Mafoko.' Mashitisho, however, awarded the whole tender to Mafoko after Bosasa had declined the award of 30% of the contract.

[26] One of Fidelity's grounds for review is that its disqualification was unlawful. A stated reason for disqualifying Fidelity was that it had not responded to queries from Mogale City officials regarding the blacklisting of Jack. The evidence, however, reveals that during November 2011, and before the decision to disqualify Fidelity had been taken, it appraised Mogale City of the facts that it only became aware of the blacklisting of Jack on 4 September 2011; that he amicably resigned on 6 November 2011; and that Mahlangu was appointed as a new director of Fidelity in his stead. Fidelity also furnished Mogale City with supporting documentation, including a formal announcement that Mahlangu had replaced Jack on Fidelity's board of directors; the resolution of the

board of directors appointing Mahlangu as a director; a certificate of good standing from the Private Security Industry Regulatory Authority issued on 14 October 2011, confirming that Jack was no longer a director of Fidelity; and documents from the Companies and Intellectual Property Commission confirming Jack's resignation. The inescapable conclusion on all the evidence presented in this application is that members of the BEC received Fidelity's response and the documents which Fidelity furnished to Mogale City and that such information and documents served before and were considered by the BEC and the BAC in connection with the bidding process in question. The fact that Mogale City initially requested the information and that it was furnished by Fidelity in connection with the contract concluded between them pursuant to another tender (No SS(P&S) 06/2011) do not advance the case of Mogale City.

[27] Mogale City's counsel submitted that '[in] any event, the decision to disqualify Fidelity was not on the basis that it failed to respond to queries but rather that from the outset it was disqualified ...'. The submission is that Mogale City had no power to take Jack's resignation into account when it considered Fidelity's bid since his name was listed as a director of Fidelity at the time when Fidelity's bid was submitted. Mogale City's counsel submitted that 'Fidelity's submission of the bid was void *ab initio* by operation of law.' There is, in my view, no merit in these submissions.

[28] The clear and unambiguous language used in paragraph 38(1)(c) of the SCM Policy and in regulation 38(1)(c) of the Municipal Supply Chain Management Regulations to which I have referred earlier on in this judgment refutes the contention of Mogale City that a bidder is to be disqualified *ab initio* if it or any of its directors was listed on the National Treasury's database at the time of the submission of its bid. The

National Treasury's database must be checked 'prior to awarding any contract' and this must be done to ensure that no 'recommended bidder or any of its directors' is listed as a person prohibited from doing business with the public sector. The accounting officer is accordingly obliged to check the National Treasury's database at any stage prior to awarding the contract. A recommended bidder will not be disqualified if its name or that of its director has been removed from the National Treasury's database prior to the contract being awarded.

[29] Mogale's City's counsel submitted that for the decision makers to have considered Fidelity's bid in the light of Jack's resignation would have constituted a material amendment to the bid that would have amounted to unlawful administrative action. I disagree with this submission. It is not Mogale City's case that the directorship of Jack was in any way material in Fidelity having been chosen as one of the front runner bidders or that the appointment of Mahlangu as a director of Fidelity would have adversely affected Fidelity's position as such or that such circumstances would have had any impact on the points awarded to Fidelity in the assessment of its bid. I agree with the submission made by Fidelity's counsel that such information in the circumstances amounted to no more than an update regarding the personnel and directors of Fidelity. The 'ever-flexible duty to act fairly' entitled the BEC in the unusual circumstances of this matter to have requested Fidelity to clarify the position with regard to Jack's directorship and it enjoined the BEC to take the information it had obtained in consequence thereof into account in its deliberations. See: *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA), para 13.

[30] Fidelity, to the knowledge of the BEC and BAC, did not have a director whose name was listed on National Treasury's database at the time when the decision to disqualify Fidelity was taken. Jack resigned as a director of Fidelity on 6 September 2011. The BEC's final report in which it recommended the disqualification of Fidelity was dated March 2012.

[31] in *Oudekraal Estates (Pty Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), para [27], the Supreme Court of Appeal held that until invalid administrative action – and the consequences thereof – ‘... is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.’ *Per* Howie P et Nugent JA. The order of the North Gauteng High Court that set aside the decision to place Jack's name on the National Treasury's database of restricted suppliers and in terms whereof his name is for all purposes deemed never to have been included on the National Treasury's database of restricted suppliers, in my view, removes the decision to list his name and the legal consequences thereof from the range of the principle that invalid administrative action ‘exists in fact and has legal consequences that cannot simply be overlooked.’ The decision to disqualify Fidelity for the reason that Jack's name was listed on the National Treasury's database of restricted suppliers was accordingly premised on an error of fact even though the decision makers were ignorant of the true factual position.

[32] I am accordingly of the view that the decision to disqualify Fidelity was based on a failure to take relevant considerations into account and that it should be reviewed in terms of s 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’). Such decision was also based on material mistakes of fact and it falls to be reviewed for

that reason. See: *Pepcor Retirement Fund & Another v Financial Services Board & Another* 2003 (6) SA 38 (SCA), para 47.

[33] Another ground for review raised by Fidelity is that Mogale's award of the tender to Mafoko was unlawful and falls to be set aside since Mafoko's bid should have been eliminated at the functionality stage of the evaluation process.

[34] Regulation 8(1) of the Preferential Procurement Regulations provides that '[a]n organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price' and regulation 8(5) provides that '[t]he conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.'

[35] The Bid Specification Checklist stated that a minimum of 48 points for functionality was required to meet the requirements of the tender. The functionality score sheets of Nchefu and Korff reflect that they awarded an average score of 39.5 points to Mafoko for functionality. However, when Nchefu recorded the functionality results in the recommendations to the BEC and the BAC, Mafoko's score was recorded as 48.5 points. That score of 48.5 points was thereafter reflected in the BEC recommendations to the BAC and in the BAC's recommendations to the accounting officer.

[36] Mogale City's response is that if there had been any mistake in the recording of the scores of Mafoko and of the other bidders, such errors would have been rectified by Nchefu, who prepared the written recommendations that were ultimately acted upon. Mogale City's counsel submitted that 'Nchefu and Korff obviously re-evaluated the initial

functionality scoring based on the patent errors in the first round.’ Counsel also submitted that ‘[t]he revised scoring, from the documentation *per se*, is evidently correct.’ Mogale City’s response and the submissions of its counsel in this regard amount to mere speculation. Mogale City failed to put up affidavits from either Nchefu or Korff to explain whether Mafoko’s score captured on the functionality score sheets was in fact incorrect, whether they ‘revised’ it for that reason as was suggested in the heads of argument of Mogale City’s counsel, and whether they included its correct functionality score in the recommendations to the BEC.

[37] Mogale City accordingly did not refute the case put up by Fidelity that Mafoko’s bid failed to meet the minimum qualifying score for functionality. It must accordingly be accepted that the decision makers did not take the relevant consideration that Mafoko had not passed the functionality threshold requirement into account. The award was also unfair insofar as a different standard was applied to Mafoko. Tenderers should be treated fairly in relation to each other. An essential element of fairness is the ‘... equal treatment of tenders.’ *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA), para [14]. The decision to award the tender to Mafoko should accordingly be reviewed in terms of secs 6(2)(iii) and 6(2)(c) of PAJA. It also falls to be reviewed in terms of the principle of legality, because the decision makers’ decision was based on a material error of fact that Mafoko had fulfilled the threshold functionality requirement of the tender.

[38] I am in all the circumstances of the view that the decision to award the tender to Mafoko and the contract that was concluded between Mogale City and Fidelity pursuant to such decision should be reviewed and set aside and that an order in terms of s

8(1)(c)(i) of PAJA should be granted remitting the matter for reconsideration by Mogale City. It is not necessary for me to consider the applicant's other grounds for review.

[39] Fidelity, in terms of prayer 8 of its counter-application, seeks that Mogale City, Red Ant and any other respondent that opposes its counter-application be ordered to pay its costs of Red Ant's application and of its counter-application, including the costs of two counsel. Fidelity's counsel, however, submitted that Mogale City should pay Fidelity's costs of Red Ant's application and of Fidelity's counter-application. Red Ant's notice of withdrawal does not embody a consent to pay costs and I consider it more appropriate for Fidelity to follow the procedure prescribed by Rule 41(c) insofar as the costs of Red Ant's application are concerned. No reason exists why the costs of the counter-application should not follow the event. The employment of two counsel on behalf of each party cannot be said to have been extravagant or over-cautious and the costs of two counsel should in my view be authorised.

[40] In the result I make the following order:

1. The decision(s) of the first respondent of 19 March 2012 and/or thereafter to award tender No SS (T&S) 01/2012 to the second respondent is reviewed and set aside.
2. The contract between the first respondent and the second respondent pursuant to tender No SS (T&S) 01/2012 is set aside and declared void *ab initio*.
3. The first respondent is to re-evaluate the bids submitted for tender No SS (T&S) 01/2012 and re-award the contract within 4 weeks of the date of this order.

4. The first respondent is ordered to pay the fourth respondent's costs of the counter-application, including the costs of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

22 March 2013

Date of hearing: 4 – 6 March 2013

Date of judgment: 22 March 2013

Fourth respondent's counsel: Adv C Steinberg and Adv N Ferreira

Fourth respondent's attorneys: Blake Bester Inc

Ref: Mr P Bester

First respondent's counsel : Adv URD Mansingh and Adv T Mofokeng

First respondent's attorneys: Tshisevhe Gwina Ratshimbilani (TGR) Inc

Ref: Mr MT Matsau