IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 59309/2008

DATE: 27/5/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

19/5/2010

DATE

IN THE MATTER BETWEEN

AUROBINDO PHARMA (PTY) LTD	APPLICANT
AND	
THE CHAIRPERSON, STATE TENDER BOARD	1ST RESPONDENT
STATE TENDER BOARD	2ND RESPONDENT
THE CHIEF DIRECTOR, CONTRACT MANAGEMENT, NATIONAL TREASURY	3RD RESPONDENT
MINISTER OF FINANCE	4TH RESPONDENT
MSD (PTY) LTD	5TH RESPONDENT
ADCOCK INGRAM HEALTHCARE (PTY) LTD	6TH RESPONDENT
PHARMACARE LIMITED t/a ASPEN PHARMACARE	7TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This was an application to review and set aside the awarding of a certain tender no RT71/2008MF by the 2nd respondent to the 5th, 6th and 7th respondents.

[2] The applicant was an unsuccessful tenderer. There were also other unsuccessful tenderers.

[3] The tender involved the supply of various antiretroviral drugs for end-use by the Department of Health.

[4] The users of these antiretroviral drugs would be the Minister of Defence, the Minister of Correctional Services and the Members of the Executive Council: Health Services of all the Provincial Governments ("the participating Departments").

[5] At the commencement of the proceedings before me, Mr Reyneke SC, who appeared for the applicant, informed me that the applicant was no longer proceeding with the review application, but was only asking for a costs order against the 3rd and 4th respondents on the basis that the challenge against the award was good in law in the first place. I shall revert to the arguments as to costs in greater detail hereunder.

The reason for the applicant's decision not to proceed with the application

[6] The tenders were awarded on the basis that the successful tenderers would supply various antiretroviral drugs, as illustrated, for the period 1 June 2008 to 31 May 2010.

[7] The application came before me on 28 April 2010 after the Deputy Judge-President, some time ago, had allocated 28 and 29 April for the hearing of the matter as a special motion application. This meant that, on the date of the hearing, there was only approximately one month left for the tender period to run its course. In that sense, the application had, for practical purposes, become moot. Although the application did not come before me in the form of an appeal, so that section 21A of the Supreme Court Act 59 of 1959 does not apply, it is useful, in this regard, to have regard to the recent, as yet unreported, Supreme Court of Appeal judgment of *R M R Commodity Enterprise CC t/a Krass Blankets v The Chairman of the Bid Adjudication Committee and Five 0thers* (092/08) [2009] ZASCA 2 (20 February 2009).

[8] Moreover, if the tender awards were to be set aside, with the full period not yet having run its course, such an order could have serious and prejudicial results, not only for the successful tenderers, but also for the public, and, more particularly, the antiretroviral drug consuming patients of the participating Departments.

[9] In this regard, it is useful to quote an extract from the opposing affidavit filed on behalf of the 6th respondent in August 2009:

> "21. Second, a decision to review and set aside the tender award would have disastrous consequences for the members of the public who depend on state institutions for their antiretroviral treatment.
>
> 21.1 It would mean that there is no supply in place to the state for the various antiretroviral medicines concerned.
>
> 21.2 ... I point out that while Aspen (my note: the 7th respondent) speaks of providing antiretroviral treatment to approximately 500 000 to 650 000 people pursuant to this tender, Adcock Ingram (my note: the 6th respondent) is providing antiretroviral treatment to approximately 280 000 to 300 000 people.
>
> 22. Third, it should be noted that pursuant to having been awarded the tender, Adcock Ingram has invested enormous sums of money in both equipment and personnel in order to fulfill its obligations and consistently supply this product to Government, to ensure patient compliance and to avoid compromising patient health.
>
> 22.1 For example, Adcock Ingram has embarked on an enormous capital investment program in its factories that manufacture antiretrovirals. In this regard it has been awarded a Government tax incentive grant of R458 million to upgrade its factory under the Department of Trade and

Industry's Strategic Industrial Projects and has currently spent approximately R611 million in this regard.

22.2 Adcock has adopted strategies, at great cost to it, to ensure that appropriate inventory levels of the antiretrovirals are available ...

22.3 If the tender award is reviewed and set aside, substantial portions of this expenditure would be unrecoverable. Moreover, the equipment purchased in the factory for antiretroviral manufacture at a cost of R25 million will be left idle and it is probable that retrenchments will follow."

[10] The 6th respondent also make the point, in paragraph 20 of its answering affidavit, that setting aside of the awards would have a very limited benefit for the applicant because of the approaching termination date of the tender period.

[11] The 7th respondent, in its answering affidavit, echoes most of these sentiments, but also makes telling submissions about the interests of the drug consuming patients themselves:

"18.5 I respectfully submit, therefore, that providing life saving treatments, such as antiretrovirals is always preferable to delaying it. This will not be the case should the applicant be awarded the relief that it seeks.

18.6 I also point out that one of the risks associated with the interruption of an HIV/AIDS antiretroviral program is the spectre of virus mutation, resistance, and viral immunity to the drugs. In the context of the HIV pandemic, this is a risk that can never be tolerated. In the greater context of HIV, there are very few drugs available as treatment options and resistance/treatment immunity poses a highly significant threat to the effectivity of these drugs. Interruption of treatment leads directly to resistance and treatment immunity. Given the potential spread of HIV, this is a problem that has implications not only in South Africa but worldwide ..."

[12] The 7th respondent makes other compelling submissions about health issues flowing from the interruption of the treatment which I deem unnecessary to repeat for purposes of this judgment.

[13] The Supreme Court of Appeal has now repeatedly held that, in appropriate circumstances, a court has a discretion to decline to set aside an administrative act even if it was invalid.

In *Chairperson, Standing Tender Committee and 0thers v J F E Sapela Electronics (Pty) Ltd and 0thers* 2008 2 SA 638 (SCA) the learned Judge of Appeal says the following at 649J paragraph [28]:

"In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paragraph [36] at 246D:

'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensible moderating tool for avoiding or minimising injustice when legality and certainty collide.'

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time ... In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its *raison d'être* was said by BRANDT, JA in *Associated Institutions Pension Fund & Others v Van Zyl & Others* 2005 2 SA 302 (SCA) in paragraph [46] to be twofold:

'First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.'

Under the rubric of the second I would add considerations of pragmatism and practicality."

See also *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others* 2008 2 SA 481 (SCA) at paragraph [23].

See also the, as yet unreported, judgment of the Supreme Court of Appeal in *Moseme Road Construction CC v King Civil Engineering CC* (385/2009) [2010] ZASCA 13 (15 March 2010) paragraphs [19], [20] and [21].

[14] For all these reasons, the present case, given the particular circumstances as illustrated, is one which, in my view, would have attracted the result of the court exercising its discretion not to set aside the administrative action, even if it was found to have been invalid.

If I understood Mr Reyneke correctly, it is for this reason that the decision was taken to abandon the application.

[15] In order to meaningfully consider the arguments as to costs, *supra*, it is incumbent upon me to pronounce upon the validity of the administrative act of disqualifying the applicant from the tender process.

Was the tender process flawed and invalid?

[16] In terms of the conditions of the invitation to tender all tenders were to be evaluated with reference to a preference points system as contained in the "Preferential Procurement Regulations 2001".

[17] The Special Conditions applicable to the tender process provides that "the bidder obtaining the highest number of points will be awarded the contract".

[18] In terms of these regulations and the "Special Requirements and Conditions of Contract", both of which were referred to and contained in the tender documents, points were to be scored on a 100 points system, with 90 points allocated to price, 1 point being scored if the tenderer qualifies as "historically disadvantaged individuals" or "HID" and 9 points for local manufacturing.

[19] The founding affidavit contains a comparison between the points that should have been scored by the applicant and the comparative points that should have been allocated to the successful tenderers.

[20] Based on this comparison, it appears to be probable that, if the point scoring system had been correctly applied, the applicant could have been awarded the tenders in respect of each of the products tendered for, in that its tendered prices were significantly lower than the prices of its competitors. Had this happened, the tax payer may also have been saved a considerable amount of money.

[21] It appears that the Bid Adjudication Committee evaluated the bids on 6 May 2008. According to the 3rd and 4th respondents' answering affidavit the applicant's bid was regarded as "unresponsive" and non-compliant with the provisions of clause 7(a) of the Special Conditions. In the result, the applicant was disqualified.

[22] The applicant was only informed on 25 June 2008 that its tender was not successful.

[23] On or about 9 July 2008 representatives of the applicant met with, amongst others, the Director, Contract Management of National Treasury to discuss the unsuccessful bid. According to an allegation in the founding affidavit, no "cogent reason" was furnished by the authorities as to the reason for the disqualification of the bid.

[24] In terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") the applicant requested reasons for the decision to award the tender to the 5th, 6th and 7th respondents and not to the applicant. The reasons were requested within ninety days after the applicant became aware of the decision, and the time within which a response was to be supplied in terms of PAJA expired on 20 November 2008.

[25] No formal response was received. In terms of section 5(3) of PAJA there is a presumption, subject to certain other conditions as set out in section 5(4), that if an administrator fails to furnish adequate reasons for an administrative action it is presumed that the action was taken without good reason.

[27] These proceedings were instituted on or about 22 December 2008, and within the period of 180 days prescribed in terms of section 7(1) of PAJA.

[27] On a general reading of all the papers, including the opposing affidavits, I find no basis for concluding that there was an undue delay on the part of the applicant in launching this application.

[28] It is also common cause that there was no question of misconduct or, for example, fraudulent behaviour on the part of the applicant when presenting its tender.

[29] With reference to my earlier remark that the Special Conditions provide that the bidder obtaining the highest number of points will be awarded the contract, it should be added, in fairness and for the sake of detail, that section 2.1(b) of the Special Conditions records that-

> "A contract may, on reasonable and justifiable grounds, be awarded to a bid that did not score the highest number of points."

In my view, this particular provision does not come into play for present purposes.

[30] I now turn to the reason offered by the authorities (in this case the 1st, 2nd and 3rd respondents) for disqualifying the applicant's tender bid. It is contained in a letter written to the applicant's attorney by the State Attorney, dated 19 November 2008 in response to an earlier letter written by the applicant's attorney. Technically, this letter would have served as an answer to the request for reasons in terms of

PAJA, *supra*, and would also, in my view, nullify any presumption which may have arisen in terms of section 5(3) of PAJA, *supra*. Nothing turns on this.

[3] It is convenient to quote the contents of the letter:

> "1. The bid that was submitted by your client Aurobindo Pharma (Pty) Ltd was received and evaluated by the Evaluation Committee. Although your client offered the lowest price in some products, as stated in your letter under reply, it, however, failed to submit a letter from the manufacturer confirming a firm supply of the items offered by your client.
>
> 2. Clause 7(a) of the Special Conditions provides that
>
> 'In the event of the bidder not being the actual manufacturer and will be sourcing the product(s) from another company, a letter from that company(ies)/supplier(s) confirming firm supply arrangements, including lead times in this regard, must accompany your bid at the closing date and time.'
>
> 3. Clause 7(j) provides that,
>
> 'Non-compliance with the abovementioned Special Conditions will invalidate the bid for such products offered.'
>
> 4. Upon perusal of documents submitted by your client nowhere in the bid documents did your client indicate that it is a manufacturer of the products in question. Instead when it completed the bid forms it claimed no preference points for the local manufactured

products. Furthermore when responding to the question of whether it is an actual manufacturer or authorised importer? your client simply answered 'yes'. This answer does not indicate whether your client is a manufacturer or an authorised importer. Therefore the insertion of 'yes' was meaningless. This alone does not indicate whether your client is an authorised importer or manufacturer.

5. 0n further perusal of the documents, an impression was created that your client imports the items from a manufacturer in India.

6. Therefore your client did not comply with the requirements of the aforementioned special condition and as a result thereof your client's bid was disqualified."

[32] It is common cause that the applicant was not the manufacturer but the authorised importer of the drugs on behalf of a mother company in India which is the manufacturer.

[33] Counsel for the applicant submitted that the provisions of Special Condition 7(a), *supra*, should be considered in conjunction with the questions posed in respect of the relevant subject as also described in the letter from the State Attorney. The question is framed as follows:

"Are you the actual manufacturer or authorised importer? Yes [ ] No [ ]

If answered no, did you include a letter from the manufacturer or authorised importer?" (Emphasis added.) Yes [ ] No [ ]

[34] The applicant ticked the "yes" block in response to the first question because it is the authorised importer.

[35] Because the applicant did not answer "no", it did not answer the second question, neither was a letter supplied as intended by the provisions of clause 7(a).

[36] In the covering letter, enclosing the bid documents, the applicant also indicated in writing that deliveries will be executed within 42 days of receipt of the order – see the wording of Special Condition 7(a) with regard to "lead times".

[37] It was argued on behalf of the applicant that on a proper construction of the question a letter is only required if the bidder is neither the manufacturer nor the authorised importer. The applicant, correctly, responded to this question by ticking the "yes" block since it is the authorised importer and its response cannot be regarded as "meaningless" as suggested in the letter of the State Attorney. I agree that the questions, as posed in the documentation, are misleading. In my view, it would have been far more sensible to ask the tenderer to specify whether it is either the manufacturer or the importer and, secondly, if it had specified that it was not the manufacturer, to enquire whether the letter prescribed in terms of clause 7(a) had been included. Indeed, the question, as posed, namely "Did you include a letter from the manufacturer or authorised importer?" makes no sense

because clause 7(a) does not require a letter from the importer but only from the manufacturer.

[38] What adds to the confusion, is the fact that the two questions posed, as quoted and discussed, seem to appear in the invitation bid as a specimen "questionnaire per item" (record p65) whereas the actual form completed by the applicant and to which Mr Reyneke referred me (record p211) does not even contain the second question but only the first question "Are you the actual manufacturer or authorised importer?" and it was, as already stated, answered in the affirmative.

[39] I express no firm view as to whether the applicant should not in any event have attached a letter from the manufacturer in terms of clause 7(a). I do, however, agree with the submission on behalf of the applicant that, at worst for the applicant, the questions referred to, read with clause 7(a), are ambiguous and create confusion which, if not responded to in a satisfactory manner, should have prompted the Bid Adjudication Committee to seek clarification rather than to disqualify the bid as unresponsive.

[40] I consider this submission to be particularly valid in view of the fact that the 5th respondent, in its bid, also failed to comply with a condition that could invalidate its bid in terms of Special Condition 5, *infra*, but was afforded an opportunity to rectify the mistake before 6 May when the evaluation took place.

[41] The 5th respondent indicated that it was abiding by the decision in this matter and did not file an opposing affidavit. Nevertheless, the non-compliance by the 5th respondent is one of the main issues on which the applicant's attack on the validity of the process is based.

[42] I turn to the non-compliance by the 5th respondent and the manner in which it was allowed to rectify the mistake before the evaluation took place on 6 May 2008.

[43] Special Condition 5 of the contract reads as follows:

> "5. Response Fields
>
> It is imperative that bidders submit responsive bids by completing all the mandatory response fields and item questionnaires for the individual items. In this regard bidders' attention is drawn to the response field and price structure explanations and examples supplied in the bid document.
>
> Non-compliance with this condition will invalidate the bid for the item/s concerned."

[44] The "response fields" are listed in a specific document with space left for the particular item to be completed.

Included in the list one finds the following four items:

"Foreign currency [mandatory] American dollars.

Foreign exchange rate [mandatory] 1.

Import percentage [mandatory].

Minimum order quantity [mandatory]."

[45] It is common cause that the 5th respondent failed to provide the particulars relating to these four items or even to complete the form at all in so far as these items are concerned. This, as per Special Condition 5, would have led to the bid being invalidated.

However, on 21 April 2008, and well before 6 May, the Director, Contract Management, National Treasury, Ms Sizi Qolohle, wrote the following letter to the financial director of the 5th respondent:

"RT71 – 2008 MF: The supply of antiretroviral drugs for the period 1 June 2008 to 31 May 2010.

Sir it is mentioned in our Special Conditions document that the bidder is required to complete all the mandatory fields when submitting your bid, page 4 of paragraph 5.

The following mandatory information has not been complete:

- foreign currency
- foreign exchange rate
- import percentage

- minimum order quantity.

Contract management request that you indicate your response in writing.

Please respond before end of business today.

Yours sincerely

Sizi Qolohle

Director

Contract Management

National Treasury

Date: 21/04/2008."

0n the same date this letter was telefaxed to the 5th respondent and in a letter dated 22 April 2008 the financial director of the 5th respondent, Mr Chandler, wrote a letter to Ms Qolohle in the following terms and under the same heading:

"Sir/Madam

As requested attached please find the bid documents with all mandatory fields completed.

Yours sincerely

Mark Chandler

Finance Director

MSD (Pty) Ltd."

Attached to this letter one finds six printed forms duly completed with the required particulars that were omitted when the tender was lodged.

[46] In the event, of course, the 5th respondent was not disqualified but became one of the successful tenderers.

[47] In the supplementary affidavit filed by the applicant in terms of rule 53 after the record had been obtained and studied, reference is made to this favourable treatment meted out to the 5th respondent and it is submitted in the supplementary affidavit on behalf of the applicant that this conduct justifies the inference that the applicant was singled out and treated to different standards as other bidders and/or that the 5th respondent was singled out for special favourable treatment. It is submitted in this supplementary affidavit that this discrimination against the applicant and the favourable treatment of the 5th respondent contaminated the entire process. It is also submitted in the supplementary affidavit that if the applicant had been afforded the opportunity, it would allay any fears or uncertainty that could exist in regard to its ability to ensure a secure supply of all the products and it would have provided the authorities with the letter as intended by the requirements of Special Condition 7(a).

[48] In their answering affidavit, the 3rd and 4th respondents make the interesting revelation that, after the applicant had been disqualified, the 5th respondent was the only remaining tenderer offering this particular drug and it was necessary to

ensure that the award was made. The deponent on behalf of the 3rd and 4th respondents puts it as follows:

> "During the evaluation it was noted that the 5th respondent omitted to indicate the foreign currency that was going to be applied during contract price adjustment. Efivarenz is supplied in three different formulations being 50mg, 200mg and 600mg. It was also noted that the 5th respondent was the only bidder that had tendered for Efivarenz 200mg after the applicant was disqualified. As the 5th respondent was the only bidder that had tendered for Efivarenz 200mg it became necessary to ensure that this formulation is awarded. For this reason the bid document had to be scrutinised as to whether the missing information was material as to the price of the drug concerned."

The deponent also says the following in paragraph 17 of the answering affidavit:

> "Furthermore regard being had to the fact that the 5th respondent had no competitor in the formulation concerned (the applicant having been disqualified) it was in the public interest that that formulation should be awarded and accordingly government could not have afforded to postpone the award."

The deponent also offers another argument, which I find unconvincing, namely that the information omitted by the 5th respondent was not material to the evaluation of the bid nor was it material to the validity thereof as the price is the

determining factor as to whether or not the bid should be accepted. The deponent points out that the information could also have been requested after the award had been made. The deponent also appears to play down the omission by suggesting that it only involves one missing response field, whereas, indeed, there were four mandatory response fields missing, as illustrated. The argument adopted about materiality is also at odds with the clear provision in Special Condition 5 that non-compliance "will invalidate the bid for the item/s concerned".

[21] In the case of *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) it appears that one of the tenderers was also given an opportunity of augmenting its tender to improve its chances of acceptance.

In the judgment, at 21A-C, the learned Judge of Appeal points out that section 3(2)(a) of PAJA requires the process to be lawful, procedurally fair and justifiable. The learned judge refers to the case of *Logbro Properties CC v Bedderson NO & 0thers* 2003 2 SA 460 (SCA).

I find it convenient and informative to quote paragraphs [13] and [14] at 21C-G:

> "[13] In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H-467C, CAMERON JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an

ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.

[14] Was the tender process followed in the present case fair? A high-ranking municipal official purported to give the 9th respondent an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to everyone of the competing tenderers whether it stood a chance of winning the tender or not." (Emphasis added.)

[30] The present case may not involve "subterfuge and deceit" but it is common cause that the 5th respondent was afforded the opportunity to augment its tender after the closing date and before the evaluation date. This opportunity was also granted to the 5th respondent to overcome the problem caused by the disqualification of the

applicant. In my view there was no equal evaluation of tenders in this case so that the tender process was "stripped of an essential element of fairness" in the words of the learned Judge of Appeal. Given the stipulation in both Special Condition 5 and Special Condition 7 that non-compliance would lead to disqualification, I see no basis whatsoever for justifying the action of assisting the 5th respondent but not the applicant. Moreover, given the ambiguous nature of the questions posed to the applicant, *supra*, when the clause 7(a) subject had to be dealt with, this is clearly a case where it would be "fair to ask a tenderer to explain an ambiguity in its tender" and "fair to allow a tenderer to correct an obvious mistake" and "fair to ask for clarification or details required for the proper evaluation of the tender" – see *Metro Projects* at 21C-E.

[51] In all the circumstances I have come to the conclusion that there was a lack of procedural fairness in the process, and that the applicant was justified in attacking the decision, by way of this review application when it did so in the first place.

The costs

[52] I now turn to the question of costs.

[53] In *Sapela, supra,* it was also held that there was no undue delay in launching the review proceedings. Although the appeal was upheld, because of considerations of pragmatism and practicality and the effluxion of time, the appellants were nevertheless ordered to pay the costs of the respondent, which was the successful

applicant in the court below. The appellants were ordered to pay the costs flowing from the proceedings in both courts. The learned Judge of Appeal says the following at 650H-651A:

> "Had the matter been adjudicated when the review proceedings were launched it would in all probability still have been practicable to grant the respondents relief. Through no fault of their own this is now denied them. It is true that in the answering affidavit filed on behalf of the appellants the point was taken that the matter had become academic, but the main thrust of their resistance to the relief sought both in this court and in the court below was always that the respondents' complaints had no substance. In the special circumstances of the case it seems to me to be appropriate for the appellants to be ordered to pay the respondents' costs both in this court and in the court below."

[14] The case of *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council & Another* [2003] 2 All SA 340 (T) also involved a challenge of a tender award. The contract period provided for in the tender was only eight months. The plaintiff sought an urgent interim order restraining the first defendant from awarding the contract to the second defendant. At the hearing of the application the plaintiff accepted that the contract had already been awarded, and the parties signed a consent order in terms of which the matter would be referred to trial.

The court found that the award of the tender was irregular, *inter alia* because the plaintiff's right to procedurally fair administrative action had been breached. However, it was also held that the plaintiff had known, or ought reasonably to have known, that the contract period of eight months would expire (and that therefore the contract would be completed) before the matter could be adjudicated. This should have been clear to the plaintiff from the date that the application for urgent relief had failed, or at least from the date of the consent order referring the matter to trial.

The court concluded that the plaintiff was entitled to all costs (excluding specific exceptions) up to the date of the consent order referring the matter to trial, from which time the danger that the work would have been completed before the matter was adjudicated had become an obvious probability. The first defendant was entitled to all costs from that date until conclusion of the matter.

[55] In the present case, I have already found that there was no undue delay on the part of the applicant in launching the application. I have also found that the tender process was flawed for lack of procedural fairness. There was also no suggestion of improper conduct of any nature on the part of the applicant. Moreover, it was not argued on behalf of any of the respondents, during the proceedings before me, that the applicant should have protected its interests by seeking interim interdictory relief before launching the substantive application. It seems to me that, given the fact that the contracts had already been awarded by the time the

applicant became aware of the outcome of the tender process, and given the nature of the contracts awarded namely the supply of antiretroviral drugs, that it would have been difficult for the applicant to obtain such interim relief from the point of view of prejudice and the balance of convenience. I debated this issue with Mr Reyneke, who was in agreement with these sentiments.

Against this background, I am of the view that the applicant was justified in taking the decision to launch these proceedings in the form of a substantive application in the normal course.

[53] However, when the 3rd and the 4th, as well as the 6th and the 7th respondents filed their answering affidavits in late July and early August 2009, they all presented the argument that the application was likely to be heard only shortly before the two year period came to an end. In the event, these predictions turned out to be correct.

In addition, all these respondents offered the argument that this was a case where the court should exercise its discretion against setting aside the administrative action, even if it is found to have been unlawful, because of the practical considerations and the principles laid down in the judgments referred to earlier, including *Oudekrans, Sapela* and *Millennium Waste*. In their answering affidavits, the 6th and the 7th respondents also disclosed details of the relevant practical

considerations such as their investments in the project and the interests of the patients receiving the drug treatment.

All the respondents, in their affidavits, also challenged the applicant's argument dealing with the validity of the tender process.

[57] In my view, the applicant should, at this stage, have realised that the odds were heavily stacked against it and that the application may even be rendered moot through effluxion of time.

[58] I add that the 3rd and 4th respondents, in their answering affidavit filed on 20 July 2009, also raised a defence of non-joinder in the sense that the applicant had failed to join the participating departments as parties to the proceedings. This resulted in a further delay in the progress of the matter, through the oversight of the applicant, who only managed to join the participating departments by an order of this court dated 5 November 2009.

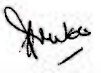
[59] The 3rd and the 4th respondents filed their answering affidavit on 20 July 2009 and the 7th respondent filed on 23 July 2009. It is not clear when the 6th respondent filed its affidavit, but it would have been shortly after 4 August 2009. However, it seems to me that by 23 July 2009, the applicant had enough information and sufficient warning about the likely outcome of the application, to reconsider its position. Taking one's cue from *Sebenza Kahle Trade CC, supra*, it seems that an

equitable approach would be for the 3rd and 4th respondents to pay the costs up to 23 July 2009 and for the applicant to pay the costs incurred thereafter.

The order

[60] I make the following order:

1. The application is dismissed.
2. The 3rd and the 4th respondents, jointly and severally, are ordered to pay the costs of the applicant and the costs of the 6th and the 7th respondents incurred up to and including 23 July 2009. In the case of the 3rd and the 4th respondents, and the 6th respondent, the costs will include the costs flowing from the employment of two counsel.
3. The applicant is ordered to pay the costs of the 3rd and the 4th respondents and the 6th and the 7th respondents incurred after 23 July 2009. In the case of the 3rd and the 4th respondents and the 6th respondent, the costs will include the costs flowing from the employment of two counsel.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

59309-2008

HEARD ON: 28 APRIL 2010
COUNSEL FOR THE APPLICANT: J J REYNEKE SC
INSTRUCTED BY: CLIFFE DECKER HOFMEYR INC
COUNSEL FOR THE 3RD AND 4TH RESPONDENTS: B R TOKOTA SC
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