



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: NO /YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
05/07/2022	[REDACTED]
DATE	SIGNATURE

Case No:103 /2022

KGAUGELO TRADING ENTERPRISE CC

FIRST APPLICANT

NOEL AND MARJORIE BUSINESS ENTERPRISECC SECOND APPLICANT

And

CAPRICORN TVET COLLEGE

FIRST RESPONDENT

GREAT LINKING MANAGEMENT SERVICE

(PTY) LIMITED

SECOND RESPONDENT

MS2J HOLDINGS CC

THIRD RESPONNDENT

SOMANDLA TRADING 14 CC

FOURTH RESPODENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication and released to SAFLII. The date and time for hand-down are deemed to be 10H00 05 JULY 2022.

JUDGMENT

MG PHATUDI J

BACKGROUND:

[1] Section 237 of the Constitution¹ enjoins functionaries within organs of state to “perform diligently and without delay all constitutional obligations” assigned to them². Its true objectives are aptly laid down by the Constitution/Court in that:

“Section 237 acknowledges the significance of timeous compliance with Constitutional prescripts. It elevates expeditious and diligent compliance within itself. This principle is thus a requirement of legality....In addition, it is important to understand that the passage of considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers memories are bound to decline with time..... Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired”

It is against this background that I have with deference endeavored to be responsive to the aforementioned passage.

¹ The Constitution of the RSA, Act 108 of 1996, as amended.

² Khumalo and Another v MEC for Education, Kwazulu Natal 2014 (5) SA 579 (CC) para: [46] [48]

THE FACTS:

- [2] In or about September/ October 2021, Capricorn TVET College ("the college"), the first respondent, invited tenderers to submit their bids in response to bid number: CCTVET/2021/09/02/01- 03 ("the bid") for the college to appoint an experienced service provider to provide catering services at its Seshego, Senwabarwana and Polokwane cumpuses student hostels. The duration of the contract is three years from 01 November 2021(the effective date). The applicants were among the tenderers that submitted their bids in response to the invitation.

2.1 It is important to mention this early in the judgment that Section 2 (3) of the General Conditions of Bid" in particular, the bid validity period which is stipulated as 120 days from the bid closing date, states that "if you do not find a response or any correspondence from the college within 120 days, please consider your bid unsuccessful." The closing date of the bid was 01 November 2021.

- [3] On 05 January 2022, the applicants, heard on the grapevine that the college had since awarded the tender to the second, third, and fourth respondents respectively. I shall, for considerations of convenience, hitherto refer to the three respondents jointly as the "the respondents" unless the contrary otherwise indicates.

On 06 January 2022, the applicant's attorneys issued a letter to the College dated 06 January 2022 seeking all necessary documentation and reasons relating to the award of the bid, not to them, but to the respondent. The request for information was sought on an urgent basis no later than 10 January 2022. In response thereto, the college furnished only the record, except the reasons for its decision to award the tender to the respondents.

- 3.1 In the letter requesting the relevant information and the information sought, the applicants indicated that they harboured the belief that the said award was not only irregular, but also unlawful. The purpose of the information sought was to enable the applicants to institute judicial review proceedings in order to vindicate their rights from an administrative viewpoint in relation to the award. I consider it apposite to mention at this stage, for the sake of completeness, that the documentation required was, among others, the record pertaining to the decision to award the bid to the respondents, tender specifications, the minutes of the Bid Evaluation and Adjudication Committees respectively, ("BEC and BAC ") the recommendation/s made by either of the said Committees, and letters of award issued to the respondents.
- 3.2 The College, through the medium of their attorneys of record, penned a response in a letter dated 10 January 2022 purporting to furnish the reasons proffered by the College's attorney's briefly as follows: -
- 3.2.1 The bidder (the 01st applicant) was evaluated and adjudicated and was found to have quoted above 20% of estimated budget, therefore, rendering its price "un affordable and most expensive" as opposed to other successful bidders, considered by the BAC, applying a "due process". Similarly, the second applicant scored 55% points far less than 70% of the threshold criteria set for adjudication requirements and, in addition, failed to meet the experience requirement to illustrate its competence in the industry, and was, therefore, deemed non-responsive by the BAC requirements.

3.2.2 Furthermore, it was stated that as for the record sought the applicants are enjoined to apply in terms of rule 53 (unspecified) and not through a letter. The applicants should have, in addition, familiarized themselves with the college's Supply Chain Management Policy ("SCM"), in particular, Clause 10.11 thereof which provides for any aggrieved bidder to lodge either an internal appeal or objection to the college, as a way, so the response went, to exhaust internal remedies at the aggrieved bidder's disposal.

3.3.3 The response in conclusion intimated their client's view that "due process" was followed in terms of the SCM policy, and that the college would, proceed with the award to successful bidders" seeing that neither an objection nor appeal has been lodged as envisaged in clause 10.11 of the policy.

- [4] Displeased with the college's response, the applicants on 10 January 2022, launched an urgent mandatory interdict (Part A) in terms of which they sought an order compelling the college to provide to them the documentation and record sought described in paragraph 3.1 above, and furthermore, an injunction restraining the college from implementation of the tender pending the outcome of the review application in part B of the application, and the costs attendant thereto. Part A of the application was heard and disposed of by Mangena AJ on 18 January 2022, in terms of which the learned Acting Judge granted the relief sought in Part A of the application proceedings. Full reasons appear in the judgment he delivered in writing in terms of Rule 49 (1) (b) of the Uniform Rules of Court ("the rules"). Accordingly, I

take the view, therefore that, the proceedings in Part A, became deminished. The applicants persists in Part B, the review application.

- [5] Subsequent to finalization of the said urgent interim interdict against the respondents, the applicants on 28 January 2022 delivered an amended notice of motion Part B, to be heard on an urgent basis, and, furthermore seeking an order reviewing, declaring unlawful and setting aside the college's decision to award the bid to the respondents, and additionally, nullifying any contract concluded by and between the college and the respondents pursuant to the impugned award void *ab initio*. The applicant also sought an order directing the latter to award the bid to it, (substitution order) alternatively, that it be ordered to re-evaluate and re-adjudicate all bids received by it *de novo* and make the award (s) in line with recognized prescripts governing procurements and in accordance with its SCM Policy. Costs were also sought against the College and against any party in the event of opposition.
- [6] Only the college filed papers to oppose the application. The Second to Fourth respondents did not participate in the proceedings.

THE PARTIE'S SUBMISSIONS:

- [7] Counsel for the applicant, Mr Mthombeni, submitted, on the one hand that the urgency in the present application (part B) is underscored by the existing interim interdict obtained in Part A since 18 January 2022, and the fact that it remains effective as against the respondents, until Part B is disposed of. A speedy resolution of part B would therefore ensure that the learners in the affected campuses are not inconvenienced nor continue to suffer any prejudice. Moreover, it would also save the college and the fiscus funds to be expended as a result of procurement of

services, unlawfully sourced to entities contrary to procurement prescripts. This is where, so the submission went, the provisions of section 237 of the Constitution squarely fits in.

Further delay in the determination of the underlying dispute, would defeat adequate substantial redress at a hearing in due course that might be available within the meaning of rule 6 (12) (b) of the rules.

7.2 He also argued against the preliminary issues raised by Mr Buthelezi on behalf of the college for, inter alia, alleged failure by the applicants to exhaust internal remedies. Similarly, Mr Mthombeni vehemently submitted that the issue of mootness of the application was wrongly relied on by college's counsel.

7.3 It was also submitted that the tender was not awarded in compliance with the spirit of Section 217 of the Constitution.

[8] Mr Buthelezi submitted, on the other hand, among others, that the review application is moot on account of the agreement allegedly reached by the parties to the dispute for the college to re-evaluate and re-adjudicate the tender award process. This would, according to him, be a tedious exercise.

8.1 It was submitted further that applicants failure to exhaust internal remedies had virtually ousted the court's jurisdiction to entertain the main application. He placed reliance on the provisions of Section 7 (2) of the Promotion of Administrative Justice Act, 2000³ ('PAJA') and failure to seek the leave of court to be exempted from compliance with the relevant Section of PAJA.

8.2 Furthermore, the existence of urgency in the matter was called into question.

³ Act 3 of 2000.

I shall now proceed to examine the submissions made on behalf of the parties.

EVALUATION:

- [9] The need to an expeditious resolution of disputes involving tender awards was recognized in **Millenium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others**⁴

In the present case, the urgency of the relief sought and the reasons thereof is now settled by the judgment of Mangena AJ. (Part A)

- 9.1 The urgency of the matter in Part B, which the college attacked in its opposing affidavit, is underpinned by the fact that the impugned tender is currently interdicted and the injunction subsists pending the determination of the present review proceedings.
- 9.2 One, therefore, has to examine nonetheless the reasons for the urgency application, and why applicant avers that substantial redress could not be achieved at a hearing in due course⁵. It is also the reasons and circumstances set fourth explicitly which would ordinarily determine if the matter is sufficiently urgent to justify the granting of the relief sought in Part B.
- 9.3 In this instance, the reasons for urgency as contended by the applicants are that the implementation or execution of the tender under consideration has effectively been interdicted and restrained by the interim court order. What exacerbates the matter even further is that the learners resident in the affected campuses under the college's governance, continue to suffer inconvenience or untold prejudice for not receiving catering services due to

⁴ 2008 (2) SA 481 (SCA)

⁵ Provisions of rule 6 (12) (b), Uniform Rules of Court paraphrased.

the interdict obtained against the college and the “successful” tenders. This alone, in my view is sufficient reason to treat the matter as sufficiently urgent

Accordingly, I find no merit in the college’s attack on the urgency of the main review application. This finding is reinforced by the imperative language in Section 237 of the Constitution which impels organs of state and its functionaries to “perform all constitutional” obligations “diligently and without delay”. To delay this matter further than what it has been would have catastrophic consequences for the innocent learners in those campuses. To that end, the cautionary warning sounded in the Millenium case⁶ above, that “to set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset...” with respect is, what in the instant case, is required to be examined. I am persuaded, therefore, that the present review application retains its urgency, and it is accordingly treated as such.

MOOTNESS:

[10] I turn now to consider the Mootness of the application. Counsel for the college contended that the review application in Part B has become moot. This submission, it appears, found reliance from a letter addressed to the applicant’s attorneys on behalf of the college dated 03 February 2022, stated in part that:

“2

10.1 upon consultation with our client at 17h00 on 2nd February 2022, we

⁶ Ibid para: [23] of the Judgment

hold instructions to accede to your request/prayer that our client re-evaluate and re-adjudicate the tender under bid number CCTVET/2021/09/02/01-03.⁷"

"If your client is amenable, we propose that the application be withdrawn and by agreement between the parties..... the tender under bid number CCTVET/2021/09/02/01-03 will be re-evaluated and re-adjudicated," (underlying added)

10.2 In response to the said letter, the applicant's attorneys on 03 February 2022, indicated they are amenable that the relevant bid be re-evaluated and re-adjudicated "subject to the condition that same shall be done within a period of 3 calendar days from 16 February 2022, owing to the urgency of the review."

10.3 The issue that the costs be reserved was, however, not acceptable, it being contended that the costs of Part "A" and Part "B" up to the hearing of "B" of the review application, (15.02.2022) be tendered by the college. Additionally, that the main application would not be "withdrawn", but instead "removed" from the roll.

10.4 A reading of the proposal made by the college and the response thereto, do not constitute, in my view, a definitive "agreement" which can reasonably be construed to create unanimity of the parties, meeting of the minds. To that end, it cannot be said that upon non-fulfilment of the counter-proposals set out in the applicant's terms and conditions in their letter, render the prayers sought in Part B, superfluous or moot. Two main disputes had placed the parties at variance, to each other to wit, (1) the costs being paid by the college,

⁷ Annexure "S1" Answering Affidavit to Part B,

and (2) whether or not the review application be withdrawn, with the applicants having resorted to a "removal" thereof instead. Quiet understandably, the withdrawal by the applicants of the application would have impelled them to simultaneously tender the costs in accordance with rule 41 (1) of the rules, a step that would be self-defeating to their rights they sought to protect and vindicate themselves of.

- [11] It is trite principle of our law that the doctrine of mootness requires, among others that courts must adjudicate upon existing "flesh and blood" disputes that are not abstract or purely academic.
- [12] The above mentioned observation is reinforced by the dictum laid down in **National Coalition for Gay and Lesbian Equality and Others V Minister of Home Affairs**⁸ where the court stated that:-

"

[21]

A case is moot and, therefore, not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on absent propositions of law, such was the case of *J. T. Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) S.A 514 (CC) ..., where Didcott J said the following at para [17]:

.... (T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest, but an historical one, than those on which our ruling is wanted have now become."

⁸ 2000 (2) SA.1 (CC) para: [21]

- [12] Applying the aforementioned principles to the facts in the instant case, I am fortified, in my view, that the argument on the mootness of the present application, is devoid of merit and, therefore ,falls to fail.

DID THE APPLICANT FAIL TO EXHAUST INTERNAL REMEDIES?

- [13] This question was also raised by Counsel for the college in resistance to the main application. Relying on section 7 (2) of PAJA, he contended that they should have first exhausted internal remedies available prior to approaching this court with the review application. The relevant part of section 7 (2) (a) of PAJA provides that: -

SECTION 7 (2):

- “(a) subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act, unless any internal remedy provided for in any other law has first been exhausted.
- (b)
- (c) “The court or tribunal may, in exceptional circumstances; and on application by a person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice”

- [14] It is common cause, or at least not disputed by the applicants that they did not comply with Section 7 (2) of PAJA, in line with Clause 10.11 of the college's SCM Policy in order to exhaust internal remedies. The relevant copy the SCM Policy is for conveniences sake attached to this judgment for easy reference.⁹

⁹ Copy of Supply Chain Management Policy marked Annexure “A”



SUPPLY CHAIN MANAGEMENT POLICY

CAMPUSES:
POLOKWANE
SESHEGO
SENWABARWANA
RAMOKGOPA

Policy Revised: 30/07/2021

Approved by
Management: 30/07/2021

Approved by
Council: 08/09/2021

Next revision date:
August 2024

15/9/2021

business entity, official or other role player, and inform the relevant Treasury of such measures.

- Must consult the National Treasury's Register for Bid Defaulters before awarding of contracts. Refer to Circular dated 19/02/2008.

10.11 OBJECTION / APPEAL PROCESS

The Accounting Officer may formulate an Objection Committee that will be responsible to manage any inquiries received or objections raised by unsuccessful bidders.

This Committee should consist of a minimum of 2 members and may comprise members of the Bid Evaluation Committee (BEC). The following should be noted by the Objection Committee:

Confidentiality:

- Bids are not available for perusal by the public;
- The Colleges should, only when requested in writing by the bidders, provide them with the reasons why his/her own bid was not successful;
- The reasons why another bidder's bid was unsuccessful should not be supplied, as this may contain privileged information (e.g. a negative banking report);
- No itemized prices other than the formal contract prices of the successful bidder(s) should be supplied to competitors;
- According to the prescripts of section 36 of the Promotion of Access to Information Act, No. 2 of 2000, no information may be revealed that will prejudice a third party in commercial competition. Revealing itemized prices of unsuccessful bidders may reveal their trade secrets, strategies and no such information should be revealed without the written consent of the relevant bidder(s).

10.12 RETENTION FEES

To strive towards uniformity, all contracts must be based on the General Conditions of Contracts (GCC) issued by National Treasury. Any aspect not covered can be dealt with in the special conditions of contract. These conditions should form an integral part of the bidding documents.

The Special Conditions of Contract applicable to each bid must be approved by the Accounting Officer or his/her delegate (Bid Adjudication Committee) before included in the bidding documents.

As a special condition to the contract, a maximum retention fee of 10% may be approved by the Accounting Authority for each individual contract.

10.13 INDUCEMENTS, REWARDS, GIFTS AND FAVOURS TO COLLEGES, OFFICIALS AND OTHER ROLE PLAYERS

As per the College Code of Conduct, SCM officials must not:

- Seek or accept a bribe or other improper inducement;
- Seek gifts or benefits of any kind;
- Accept any gift or benefit that may create a sense of obligation or may be perceived to be intended or likely to influence the officials during the execution of public duty;
- Accept any gift or benefit of more than R350;
- Accept an offer of money, regardless of the amount.

All gifts or benefits should be recorded in the gifts register. Any gifts or benefits received of more than R350 that cannot be reasonably refused or returned, must be disclosed to the head of the SCM Unit.

ATTACHMENT

- [15] Clause 10.11 relied upon entitled “**objection/Appeal Process**”, merely provides that the Accounting Officer may formulate an Objection Committee that will be responsible to manage any inquiries received or objections raised by unsuccessful bidders. Importantly, the clause provides that “the colleges should, only when requested in writing by the bidders, provide them with the reasons why his/her own bid was not successful.”
- [16] There is no evidence that the applicants upon a written request for the documentation sought in their letter dated 06 January 2022, were ever directed to lodge their “objection or appeal,” if any, to the so-called “Objection Committee”, if in fact such “objection or an appeal” were to be lodge with the college. Conversely, a closer reading of the said letter merely reveals applicant’s intention to institute review application upon receipt of the relevant documentation.
- It was only after receipt of the college’s response not through the “objection committee”, but through their attorneys, that Part A of the application was launched in order to pave way for Part B proceedings.
- [17] Furthermore, on a reading of the letter in question, nowhere is mention made that applicants sought to have reasons why they or the other successful bidders were awarded the bid or not, as the case may be. Crucially, clause 10.11 makes no reference to exhaustion of “**any**

remedy provided for in any other law” that has to first be exhausted, whatsoever.

The “objection committee” relied on by the college, does not meet, in my view, the threshold set out in Section 7 (2) (a) of PAJA.

Furthermore, it would be futile to determine even for a moment, whether or not subsection 7 (2) (c) of PAJA finds application in the instant case, if there is no room for invocation of subsection 2 (a) of Section 7 in the circumstances.

[18] The SCM Policy’s clause 10.11 which was apparently created as a mechanism to deal with the college’s internal objections or appeal, falls short of the “internal remedies” envisaged in Section 7 (2) (a).

[19] In the instant case, the issue is whether clause 10.11 constitute an internal remedy within the ambit of Section 7 (2).

The view I take of the issue is that the system the college created in Clause 10.11 lacks the hall-marks of a dispute resolution on mechanism that could resolve internal remedies and if invoked, would speedily and effectively resolve internal objections or appeals against the dispute bids before an aggrieved person can approach the courts for intervention.

[20] In **REED and Others v The Master of the High Court and Others**¹⁰ Plasket J, (as he then was) defined the term “internal remedy” when used in administrative law as follows:

“[T]he composite term ‘internal remedy’---- is used to connote an

¹⁰ [2005] 2 All S.A 429 €; Para [25]

administrative appeal- an appeal usually on the merits, to an official tribunal within the same administrative hierarchy as the initial decision- maker----“

In South Africa there is no system of administrative appeals. Instead, internal appeal tribunals are created by statute on an ad hoc basis”.

[21] Consequently, the college does not have, as already shown, an ‘internal appeal tribunal’ or let alone a body created by its SCM Policy akin to Section 7 (2) of PAJA.

[22] It is for that reason that the court in the case of **DPP v Valuers (Pty) Ltd v Madibeng Local Municipality & Another**¹¹ stated that “Generally, the duty to exhaust internal remedies is not in and of itself absolute, nor is it automatic.

That much is clear from the latitude given to courts in Section 7 (2) (c) of the PAJA, to exempt the applicants, in ‘exceptional circumstances’ and upon application by the person concerned, from exhausting internal remedies, if deemed by the court to be in the interest of justice....”

[23] In *casu*, I find that the reasons furnished as a basis to request for the bid documentation that directly affected the applicant’s in the outcome of the impugned tender were in my opinion, in the interest of justice to be provided upon request to the applicants.

23.1 To that end, it would not be a travesty of justice if the court had, in its judicial discretion, condoned failure to pursue an available remedy where it is illusory or incompetent, or where it is tainted with alleged illegality.

23.2 What is salutary principle at the end is that the requirement should not be rigidly imposed, nor should it be used by administrators to “frustrate the

¹¹ [2016] JOL 34189 (SCA), at Para : [14]

efforts of an aggrieved person” or to “shield an administrative process from judicial scrutiny.”¹²

- [24] As already shown above, the response given by the college upon a written request for documentation was aimed to frustrate the efforts of the aggrieved bidder by hiding behind “Rule 53 and not through a letter” to seek shielding information to which applicants were entitled. This is simply that the applicants could not have resorted to Rule 53 of the rules of the court without being furnished with the information sort (the record of bidding process).

24.1 Furthermore, the fact that “in our clients view due process was followed in terms of the SCM Policy and our client is to proceed with the award to successful bidders as neither objection nor appeals has been lodged.....” is a clear indication, in my understanding of the college’s response, that even the Rule 41A mediation route they proposed, but could not pursue, would not create room for exhaustion of internal remedies.

- [25] That said, for all the reasons aforementioned, I find no merit in the submission that the applicants failed to pursue internal remedies, as none was available to exhaust.

REVIEWABLE GROUNDS:

- [26] The applicants having been supplied with the record and reasons for decision submitted further that there are certain irregularities that are borne from the record which are at odds with the reasons for decision to award the tender to the respondents (excluding the principal)

¹² See, *Koyane v Minister of Home Affairs* (Lawyers for Human Rights as amicus curie [2009] ZACC 23, 2010 (4) SA 327 (CC))

The reasons furnished, appear in annexure "KIM,"³ ¹³ being a letter issued by the college's attorneys dated 10 January 2022 addressed to the applicants attorneys. I have briefly referred to the contents thereof elsewhere in this judgment. (Para: 3.2.1 to 3.2.3)

- [27] After re-stating by way of analysis of the SCM Policy under consideration, it was submitted further on behalf of the applicants that the score obtained by the latter at phase two of evaluation level, and functionality criteria, (100 points) had by far outplayed the second respondent, (Great linking Management Service) which had no points attained at all.

The same applies to the bidder's relevant industry experience, where the applicants scored out of 20 points, 18 points, whereas no point was obtained by the second respondents in this regard.

- [28] I Interpose to mention that, I consider it unnecessary to pin-point each and every irregularity alleged in relation to the evaluation process of each bidder, which appears from the record, save to say that, from the evidence which in any event is not countervailed, there is a similar pattern of grave irregularities which no reasonable decision –maker could countenance.

28.1 The minutes of the BEC shows an indication of disqualification of, for instance, the third respondent (MSJ Holdings CC) for lack of bank rating, and so was the second respondent, but for lack of public liability cover, and a letter of good standing from Pest Control Body.

¹³ Updated index, Part "B", PP 41-43

28.2 In addition, the record shows that all three respondents were disqualified for want of mandatory administrative imperatives required by the bid document.

DISCUSSION:

[29] The Constitution of the Republic of South Africa provides in Section 217 (1) that:-

"When an organ of state in the National, Provincial or Local sphere of government, or any other institution identified in the national legislation, contract for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective,"¹⁴

For purposes of procurement sought by any organ of state, such as the first respondent (the college) and the attendant decision it takes in that regard, PAJA in Section 6 (1) entitles any person or litigant to institute proceeding to judicially review an administrative action. An aggrieved person or litigant may institute review action if the administrator who took a decision repugnant to any of the conditions set forth in subsection 6 (2) (a) (i) (iii) and (b) to (e) (i) – (f), and (i) (g) – (i) of Section 6.

[30] In the present case, the record portrays infraction by the BAC of unfair process, (1) where it did not follow the SCM Policy that directs the BAC to follow the recommendations of the BEC, and absent any irregularities (2) to make a final decision without undue bias, bad faith, arbitrarily, (3) or generally for a reason/s not rationally connected to either the purpose for which it was taken, or (4) information before the administrator, or (5) the reasons given for it by the decision-maker, further that (6), the action is otherwise unconstitutional or unlawful. It is for the above

¹⁴ Act 108 of 1996, as amended.

mentioned considerations, in particular, the unlawful decision, that the applicants request an order to declare it unconstitutional and, therefore, invalid, unlawful, and to be set aside.

- [31] On a semblance of the foregoing considerations, I am persuaded that the decision to award the tender to the three respondents was not only flawed but tainted with illegality, therefore, invalid and reviewable to be set aside.

JUST AND EQUITABLE REMEDY:

- [32] Upon the declaration of invalidity, and the finding that the impugned decision is unconstitutional, this court is empowered in terms of the provisions of Section 172 (1) (a) of the Constitution, to select "any order that is "just and equitable". The decision is a discretionary matter to be made judicially after assessing all material facts in this case. Section 8 (1) of PAJA, reinforce the court's power in fulfillment of the constitutional imperative provided for in Section 172 (1) of the Constitution. The remedies available to an aggrieved person or litigant are encapsulated in Section 8 (1) (a) (a) – (c); (i) – (iii); (aa); (bb); (d) – (f) of PAJA.
- [33] In the present case, the relief sought by the applicant that upon the declaration of invalidity and the setting aside, it be granted a substitution order in terms of Section 8 (1) (c) (iii) (aa) is, in my view, not sufficiently supported by the hard facts to enable the court to lean in its favour. The court may only venture in that direction where sufficient material has been placed before it in order to be in as such as a position to step into the shoes of the administrator, and, importantly, to be careful not to encroach in the terrain of another arm of state.
- See: *Trencon Construction Pty Ltd v IDC* 2015 (5) SA 245 CC.

- [34] This court may adopt that approach only if “exceptional circumstances exist for the substitution order sought being a foregone conclusion that only applicants should have been awarded the bid.

I would, however, be pleased to grant an alternative relief as a ‘just and equitable’ remedy in the circumstances in order to redress the unfairness.

APPLICABLE LEGAL MATRIX:

- [35] This court in the case of **Ephraim Mogale Local Municipality v Inkokeli Projects (Pty) Ltd and Others**¹⁵ stated that “..... The correct approach on how to come to the aggrieved parties’ rescue has over the years received attention of our courts with apex jurisdiction. For instance, in *Steen Kamp N.O v Provincial Tender Board, Eastern Cape*¹⁶ the court stated that:-

“It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated Constitutional principles, if any, and the controlling law.... The purpose of a public law remedy is to pre-empt or correct or reserve an improper administrative function.....”

- [36] Furthermore, I think it is proper to sum up the position that ultimately, the object of a public remedy is to grant the aggrieved party administrative justice in order to promote efficient public administration based on constitutional precepts and the rule of law, it is for that reason that the rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether

¹⁵ (Case No:3298/2018) delivered 04.02.2019.

¹⁶ 2007 (3) SA 121 (CC) para [29]

factual certainty requires some amelioration, of legality and, if so, to what extent.¹⁷

In other words, in making the determination, much will depend on a repository of all the fact available in order to ameliorate legality and, if so, to what extent.

- [37] The unfairness or irregularity decried by the applicants is analogous to the principles enunciated in the case of **Premier, Free State v Firechem Free State (Pty) Ltd**¹⁸ held that:-

“One of the requirements is that the body adjudicating tenders be presented with comparable offers in order that its members should be able to compare.....yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by one or some of the tenders, knowing what is the true subject of the tender.... That would deprive the public of the benefit of an open competitive process?

- [38] Importantly, as I conclude, “it is common cause that this court is required in terms of Section 172 (1) (b) to find a ‘just and equitable’ remedy that is justifiable in the circumstances peculiar to the present case. The merits of each case will depend on a particular ‘just and equitable’ remedy which, of course, remain a discretionary matter.¹⁹

- [39] On a compendium of all the facts in this matter, the applicant I am satisfied has framed out a proper case to grant the relief sought in the notice of motion, as amended.

THE COSTS:

¹⁷ Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) para: [85] – on approach to determine a just and equitable remedy.

¹⁸ 2000 (4) sa 13 (SCA)

¹⁹ Greater Tzaneen Local Municipality v Tshiamiso Trading 135 (Pty) Ltd (Case No: 5267/2019) delivered on 28.01.2021) para [28] – This Judgment is a matter delivered in this Division.

[40] It is well settled principle that the costs follow the cause. The applicants had made reasonable efforts in order to resolve the dispute amicably. The impasse began when the college did not timeously furnish the record or information requested as evinced by the correspondence exchanged between the parties' respective attorneys. The college did not show any *bona fides* in that at some point it tactically delayed furnishing the record sought, by impermissibly relying on Rule 53 in circumstances where the review application was not yet set in motion. Furthermore, while the college correctly proposed the Rule 41A route (mediation) as an attempt to "settle" the matter, it had for some obscure reasons, unilaterally walked away from that process, in which event, the applicants had to persist in the main review application, and in the process incurred further legal expenses and costs.

In the circumstances, the following order will issue:

ORDER:

- [1] The applicant's non-compliance with the Uniform Rules of Court with regards to the usual forms, service and time periods is condoned, and the application in PART B is dealt with as a matter of urgency in terms of Rule 6 (12) of the Uniform Rules of Court;
- [2] The first respondent (the college) is forthwith ordered to re-evaluate and re-adjudicate all bids received in accordance with its applicable prescripts in procurement and make award (s) within 30 business days from date of the granting of this order;
- [3] The first respondent (College) is ordered to pay the costs of the application on attorney and client scale, such costs to include the costs occasioned by employment of counsel, where employed.



MG PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the Applicant : Adv P Mthombeni

Briefed by : Clearence Mangena Inc

Leswika House, Mare Str, Polokwane

Counsel for the First Respondent : Adv Buthelezi

Briefed by : Lucky Thekiso Inc Attorneys, Pretoria

No appearances for second, third, Fourth Respondents

Date Heard : 20 April 2022

Delivered : 05 July 2022