REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 2350/2022

In the matter between:

MATHATA GENERAL TRADING CC	**First Applicant**
MABOTWANE SECURITY SERVICES CC	**Second Applicant (Applicant for Joinder)**
MAFOKO SECURITY PATROLS (PTY) LTD	**Third Applicant (Intervening Applicant)**

and

HEAD OF DEPARTMENT: MPUMALANGA DEPARTMENT OF COMMUNITY SAFETY, SECURITY AND LIAISON	**First Respondent**

AND THIRTEEN OTHERS	**Second to Fourteenth Respondents**

REASONS

Roelofse AJ

INTRODUCTION

[1] This application is about procurement by the State. The Mpumalanga Department of Community Safety, Security and Liaison (the Department) contracted for the provision of services (the tender). The services are for the provision security at several provincial government buildings for a period of three years (the services). The contracts were preceded by a bidding process. Contracts were eventually awarded to seventeen service providers (the successful bidders). The combined value of the contracts amounts R 1.25 billion (rounded to the nearest R 1 000 000).

[2] The applicants are amongst the many unsuccessful bidders. The first applicant (Mathata[1]) launched the application. The second applicant (Mabotwane[2]) and the third applicant (Mafoko[3]) were respectively, after applying, granted leave to intervene and join in the application.

[3] The first respondent is the Head of the Department and therefore also the Department's Accounting Officer.[4] The second respondent is Member of the

Executive Council for the Department.[5] The third to seventeenth respondents appear to be some of the other unsuccessful bidders.

[4] The successful bidders who were awarded the tender were not cited in the application.

[5] In this matter I had to consider: whether to grant interim relief on an urgent basis to the applicants pending the review and setting aside of the decision of the Department pertaining to the procurement process (the decision); whether to review and set aside the decision; the remedy the court must grant if the decision was reviewed and set aside; and costs.

[6] I came to the conclusion that the award of the tender was unconstitutional. I granted an order: declaring the award of the tender unconstitutional; suspended the declaration of invalidity; provided for a process to determine an appropriate remedy following upon declaration of invalidity; and gave the successful bidders and all other interested parties an opportunity to participate in the further proceedings provided for in the order if they so wish.

THE COURSE OF THE APPLICATION

[7] The application was enrolled before me as an urgent application to be heard on 21 June 2022. Only the first and second respondents (the Department) delivered a notice to oppose the application. The Department's answering affidavit was delivered late. This led to the late delivery of the applicants' replying affidavits.

[8] Two further applications were instituted. These applications included Mabotwane's application for joinder in the application and Mafoko's application to intervene in the proceedings.

[9] The application was set down for 09:00 on 21 June 2021. When I received the court file, the answering affidavit, the joinder application, the intervention application and the replying affidavits were not part of the papers. Just prior to the matter being called, my attention was drawn thereto that the further papers mentioned above were filed. When the matter was called, I informed the parties that the matter would stand down until 22 June 2022 in order for me to consider the further papers that were filed.[6]

[10] The Department opposed the applications for joinder and intervention. I heard argument on these applications on 22 June 2022. I granted the application for joinder and the intervention application. I ruled that Mabotwane be joined in the proceedings as second applicant and Mafoko be joined as third applicant. I gave *ex tempo*re reasons for my ruling. It is not necessary to repeat the full reasons for granting the joinder and intervention applications besides to say that I found Mabotwane and Mafoko had established a real and substantial legal interest in the outcome of the application for they participated in the bidding process, albeit unsuccessfully.

[11] I also ruled that the parties shall address me on both urgency and merits because the nature of the urgency that was before me would require time to consider. A disposal of the issue of urgency only and then to return at a later stage for a hearing

of the merits if the matter was enrolled as an urgent application, would not be in the interest of a speedy finalisation of the entire application.

[12] After hearing argument on urgency and merits, I stood the matter down until 23 June 2022 for the granting of an order. I indicated to the parties that the order would be furnished to them by email and that the reasons for the order would be furnished to them in due course.

[13] On 23 June 2022, I granted the following order:

> '[1] A *rule nisi* is hereby issued calling upon all interested parties, including the parties in this matter, the successful bidders listed in annexure 'CL1' to the First and Second Respondent's answering affidavit, dated 15 June 2022 (attached to this order, marked "X") (the service providers), to show cause on 8 August 2022, why the orders in paragraphs [2] to [7] below should not be made final.
>
> [2] It is declared that the award of the tender Number: SS/048/21/MP, for the provision of security services for the Mpumalanga Provincial Government buildings for a period of three years (the tender) is constitutionally invalid.
>
> [3] The declaration of invalidity of the tender is suspended pending determination of a just and equitable remedy.
>
> [4] The Applicants, the First to Fourteenth Respondents, the interested parties and the service providers are directed to furnish factual information on affidavit, as well as further written submissions, on the following aspects:
>
> (a) The time and steps necessary in the initiation, response and completion of a new tender process for the provision of security services for the Mpumalanga Provincial Government buildings (the services).
>
> (b) The time and steps necessary, and the costs likely to be incurred, in the implementation of the services after the new tender process, if so ordered is completed.

The just and equitable arrangements that should be made for the continued delivery of the services until new agreements for the services are implemented.

(c) The cost implications for the Applicants, the Respondents, the service providers if a new tender process is ordered and implemented, and how these costs could be ameliorated or offset.

(d) What would be in the public interest when determining a just and equitable remedy.

(e) The exact extent of the implementation of the tender to date, including all contracts concluded, payments made, amounts received and costs incurred in respect of the tender.

(f) Any other information considered relevant.

[5] The Applicants, the First to Fourteenth Respondents, interested parties and the service providers must comply with the directions in paragraph [4] above by no later than Wednesday, 26 September 2022 or on such extended date the court deems meet.

[6] Parties are directed to, by no later than 3 october 2022 approach the Registrar of this court with a duly completed Form B to this court's Practice Directive for purposes of case managing the proceedings for the grant of a just and equitable remedy.

[7] The grant of a just and equitable remedy is reserved pending the further hearing on a date determined during the case management in paragraph [6] above.

[8] The First and Second Respondents are directed to:

(a) Within 5 (FIVE) days of the date of this order, to furnish a copy of this order to the Third to Fourteenth Respondents and the service providers;

(b) File a service affidavit setting out full compliance with the order in paragraph [8](a) above.

[9] The First and Second Respondents are ordered to pay the applicants' costs and, in Mathata's instance, the costs consequent upon the employment of two counsel.'

[14] What follows is the reasons for the order.

BACKGROUND

[15] The Department advertised Bid Number: SS/048/21/MP (the bid). The bid was for the provision of the services. The services were to be rendered in different clusters within the province.

[16] Prospective bidders had to submit their bids before the closing date of the bid on 10 December 2021. The offer to bid was valid for 90 days from the closing date of the bid. The bid validity period therefore expired on 10 March 2022.

[17] The Department was unable to finalize the tender by 10 March 2022 and published three extensions of the validity period of the bids.[7] The extensions of the validity period of the bids were published in the Provincial Tender Bulletin. The extensions were merely published and no consent was sought from any of the bidders for the extension.

[18] Ultimately, the tender was awarded to seventeen bidders. Eighty-four bidders were unsuccessful. On 3 June 2022, the Department requested the Head of the Treasury Department of Mpumalanga to publish the names of 'THE WINNING AND UNSUCCESFUL BIDDERS ON WEBSITE [*sic*]'.

[19] The Department alleges that contracts had been entered into with the successful bidders. The successful bidders commenced with the services on 1 June

2022.

RELIEF SOUGHT BY THE APPLICANTS

[20] Mathata seeks an urgent interim interdict pending the finalization of the review and setting aside of the decisions that were taken in respect of the tender; interdicting and restraining the Department from implementing, giving effect to, or to continue in any manner and respect whatsoever with the appointment of service providers for the tender. Mathata also seeks an order directing the Department to furnish it with certain documentation relating to the tender. Mabotwane only seeks its joinder in these proceedings. Mafoko seeks the same relief as Mathata. However, in the alternative, Mafoko seeks that the Department's decision to appoint the service providers for the tender be reviewed and set aside.

[21] The Department opposed all the applications and delivered one answering affidavit wherein it set outs its defence to each application. The applicants filed and delivered replying affidavits.

[22] The Department raises two preliminary defences, namely, urgency and the non-joinder of the successful bidders in the application. The Department also defends its decision on the merits.

Urgency

[23] Uniform Rule 6(12)(b) provides:

> '(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.'

I proceed to deal with the two requirements for urgency namely: the circumstances that render the matter urgent; and, the reasons why the applicant could not be afforded substantial redress as a hearing in due course. Both the requirements must be met for an applicant to succeed on urgency.

Was the urgency self-created?

[24] Mathata's application was issued on 1 June 2022. Mabotwane's application was served on 6 June 2022. Mafoko's application was issued on 15 June 2022.

[25] Mathata, in support of its quest to have the interim relief and request for information from the Department adjudicated urgently alleges that:

[25.1] From March 2022 to the date the founding affidavit was deposed to[8], it enquired on a daily and weekly basis whether there was any publication on the Department's website and E-Tender Publication Portals in respect of the tender but, according to Mathata, there was none;

[25.2] On 8 March 2022, Mathata's attorneys wrote to the Department seeking an update in the process of evaluating the bids;

[25.3] On 29 March 2022, the Department responded wherein it advised Mathata that the Department was still considering the tender;

[25.4] On 24 May 2022, Mathata's attorneys informed the Department that it has come to Mathata's attention that it was not shortlisted;

[25.5] On 30 May 2022, Mathata was informally told that service providers had been appointed to commence with their contracts on 1 June 2022;

[25.6] Should the application be heard in the normal course, the successful bidders would have commenced with the services for which they were appointed on the basis of an unlawful tender process, same goes if the applicant requested reasons for its decision within the normal time limits provided for in the Promotion of Access to Administrative Justice Act No. 2 of 2000;

[25.7] Money coming from the public purse would be wasted if the contacts are allowed to continue only to be set aside in the normal course.

[26] Mabotwane's grounds for urgency mimic those of Mathata.

[27] Mafoko in support of urgency alleges that:

[27.1] It stood to suffer substantial financial loss and its employees would lose their employment if the matter is not adjudicated urgently;

[27.2] On 31 May 2022 and 1 June 2022, Mafoko wrote to the Department requesting information regarding the tender;

[27.3] On 1 June 2022 it only learnt that successful bidders were appointed;

[27.4] On 3 June 2022, the Department wrote to Mafoko informing it that the successful bidders' will be published and that Mafoko was unsuccessful;

[28] In the Mathata and Mabotwane's heads of argument, they argue that Mathata did not drag their feet but rather commenced with their enquiries as early as March 2022. In addition, Mathata did everything in their power to determine the progress of the tender by engaging with the Department. Instead of informing Mathata of the progress of the tender, the Department did not respond. Having regard to Mathata's persistent enquiries only to ultimately be advised that the successful bidders were appointed and would resume their duties on 1 June 2022, Mathata and Mabotwane therefore brought the application as expeditiously as possible.

[29] The Department is of the view that the applicants' urgency is self-created in that the applicants were aware that the tender validity period had expired on 10 March 2022 yet they waited to launch their applications. Upon Mathata and Mabotwane's versions, they were informed by the end of May 2022 that no decision had been taken in respect of the award of the tenders.

[30] Firstly, the applicants did not create their own urgency. It is trite that self - created urgency does not constitute acceptable urgency for purposes of Uniform Rule 6(12) justifying the determination of a matter on an urgent basis.[9] In this matter,

the applicants did not create their own urgency. Mathata directed enquiries to the Department and, when it realised that it was a foregone conclusion that it was not successful because other service providers were appointed, it approached the court a mere two days later. Mabotwane brought its joinder application within six calendar days of becoming aware that it was not successful with its bid. Mafoko became aware that the successful bidders were appointed on 3 June 2022. It launched its application on 15 June 2022. I find that also in Mafoko's instance, they did not delay in approaching the court.

[31] Therefore, not one of the applicants delayed their applications. In my view, they acted with the prerequisite haste to approach court. There is no merit in the challenge by the Department that the urgency was self-created.

Substantial redress in due course

[32] The second leg of the enquiry into urgency is to consider whether an applicant would be afforded substantial redress at a hearing in due course. The Department alleges that the applicants have failed to show why they would not be afforded substantial redress at a hearing in due course.

[33] The relief that is sought by the applicant must take prominence in this leg of the urgency enquiry because, in my view, the real question is whether an applicant would be prejudiced if the relief he or she seeks is not granted immediately and will be deprived of his or her remedy while being forced to wait to be heard in the normal course. To put it differently, is there a good reason not to assist the applicant immediately and what would be the effect if the applicant is not assisted

immediately? The facts of each case determine whether substantial redress is obtainable in due course.[10]

[34] Mathata alleges that: it will be prejudiced by the appointment if the successful bidders is kept in force if the matter is heard in the normal course because by then the successful bidders would have delivered services in terms of an invalid tender and that the fiscus will be prejudiced by the successful bidders delivering the services founded upon illegal contracts and benefitting therefrom. Mabotwane mimics Mathata's stance in this regard. Mafoko laments that it will suffer significant losses is it is forced to wait for relief to be granted in due course.

[35] What Mathhta and Mabotwane therefore rely upon in respect of this requirement, is not only that they will not obtain substantial redress in due course but also that, in the wider public interest, the unlawful award of the bids must be stayed until same is reviewed and set aside and that this could not wait to be heard in the normal course.

[36] Surely, the review proceedings the applicants contemplate in the normal course will in all likelihood have corrected the wrong and may still have provided redress. I am well aware of the sound principle that urgency must not be abused by parties. However, in my view, in the clearest of cases where the review and setting aside of an administrative decision is inevitable, it will be irresponsible for any court to perpetuate the unlawful decision by holding it in force for the normal course to expend. It is upon this basis that I am not willing to refuse to hear the application on an urgent basis. After all, there is a strong interest in both certainty and finality. The fundamental right to fair administrative action is at stake. Why delay the inevitable?

In *Merafong City Local Municipality v AngloGold Ashanti Limited*[11] Cameron J, speaking about delay in the institution of review proceedings said:

> 'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision making body itself.'

[37] I am fully aware that *Merafong* dealt with a delay in the instituting of review while I am dealing with a procedural requirement in Rule 6(12)(b). What *Merafong* lay down is that courts are expected to prevent potential prejudice that would endure if the uncertainty over the lawfulness of the administrative decision remains. Under these circumstances a court cannot be hamstrung for *'[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.'*[12] Therefore, in my view the law dictates that I in any event enquire urgently into the legality of the appointment of the successful bidders.

<u>Non-Joinder</u>

[38] The Department alleges that I am precluded from making an order in the application because the successful bidders were not joined in the proceedings by the applicants. It is common cause that they were not joined. It is also common cause that the Department only disclosed the identities of the successful bidders in its answering affidavit. That was the first time the applicants became aware who the successful bidders were. Therefore, the applicants are not to blame for not joining the successful bidders. Whatever the reason for the non-joinder the question remains whether the court could grant the relief the applicants were seeking in the absence

of the successful bidders. After all the successful bidders have a clear interest in the outcome of the application for the order that might have followed is bound to impact upon their rights as successful bidders who have already commenced with the services in terms of agreements they must have already entered into with the Department.

[39] Under these circumstances, I had two options. The first option was to postpone the matter for the successful bidders to be joined in the proceedings. The second option was to ensure that the successful bidders are heard if they wished before the order is made final. I elected to take the second option for requiring the successful bidders to be joined first would only delay the matter and to join them *mero moto*, would deny them the right to be heard on their interest and would have forced them into this litigation.

[40] In my view, the issuing of a *rule nisi* suspending the order pending the return day would give the successful bidders an opportunity to participate in the proceedings if they so wished.

[41] Mr Rip, who appeared for the Mathata and Mabotwane argued that the issuing of a *rule nisi* would protect the interests of the successful bidders. Mr Rip referred the court to *Amalgamated Engineering Union v Minister of Labour*[13] where Fagan AJA said:

> 'The fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it. Indeed, I cannot see that in this respect the position of the

> two litigants would be any better than that of a single petitioner who applies ex parte for an order which may affect another party not before the Court. The third party's position cannot be prejudiced by the consensus of the two litigants that they do not wish that party to be joined.'[14]

and

> 'It is, of course, a well-known practice of our Courts to issue a rule nisi in appropriate cases, calling upon parties not before the Court to show cause why an order which may affect them, should not be made.' [15]

[42] Mr Mtsweni, who appeared for the Department took a different view. He argued that to issue of a *rule nisi* when same is not asked for by the parties would offend the role of a judge as neutral arbiter. On this score, Mr Mtsweni referred me to *National Commissioner of Police and Another v Gun Owners of South Africa*.[16] *National Commissioner of Police* found that it is inappropriate for a judge as neutral arbiter to of own accord amend the final relief sought. In that case, the Judge proposed to the applicant's counsel that certain amendments be made to the final relief, which the applicant accepted.[17]

[43] Mr Mtsweni also referred me to *City of Johannesburg Metropolitan Council v Ngobeni*.[18] In *City of Johannesburg Metropolitan Council*, the issue was the conduct of the trial judge who *mero moto*, called witnesses, called for an inspection *in loco* to be held and unduly interfered when a witness testified. The Supreme Court of Appeal censured the trial judge's conduct.

[44] Mr Mtsweni's argument has no merit. Firstly, the granting of a *rule nisi* does not constitute final relief. Secondly, the issue of joinder concerns process, therefore it is part of the adjective law while the final relief which was granted in the court of first instance in *National Commissioner of Police* flowed from the substantive law.

Thirdly, the court has an overriding power to regulate its own process and has an obligation to ensure that fairness prevail.

[45] The successful bidders are not before court not as a result of any remiss on the applicants' side. Rather they are not before court due to the Department's failure to act transparently by not informing the applicants of the outcome of the bidding process when the Department was requested to do so. In my view, *City of Johannesburg Metropolitan Council* has nothing to do with the course I prescribe in the interest of the speedy finalization of the matter without denying all persons who has an interest in the outcome of the application an opportunity to be heard.

[46] I have decided to issue the *rule nisi* as set out in the order in the interest of the speedy and effective resolution of the dispute over the validity of the award to the successful bidders. Ordering anything else would only have delayed the matter and would have denied the successful bidders a hearing. Even worse, the irregular reward would prevail for much longer than necessary and would be more challenging to eventually redress.

MERITS

[47] I commence by considering the validity of the award because that has a bearing on *the prima facie* right requirement that had to be established by Mathata and Mafoko as one of the requirements for an interim interdict. However, there is a more important reason to commence with the enquiry into the validity of the award. Mafoko, in the alternative, sought the review and setting aside of the tender. If the alternative relief that was sought by Mafoko succeeded, there would be no need to

consider the requirements for an interdict because the award would have been set aside. What then would have remained is a determination of an appropriate remedy.

The validity of the award

[48] It is common cause that the validity period of the bid was extended three times. This extension of the validity period of the bid was put in issue by the applicants. Mathata alleges as follows:

> 'The Court's attention is highlighted to the fact the tender had a validity period of ninety (90) days. Accordingly, the tender process would lapse after 30 March 2022. The Department did not issue notices by way of public advertisement that the tender would be extended. The applicant as a bidder was also not notified of any extension of the tender validity period or requested to extend his bid past the (90) day period.
>
> Accordingly, the tender validity period lapsed on 30 March 2022. Any award of the bid to any other party after 30 March 2022 would constitute an invalid and void step.'[19]

[49] Mafoko alleges as follows:

> 'Mafoko submits that the purported decision to award the tender was patently unlawful because the tender validity period was not extended lawfully and in accordance with the requirements of procurement law and the tender document.'[20]

[50] The Department counters these allegations[21] by submitting that:

> '......these arguments are devoid of any merit. I say this for the following reasons:
>
> 5.8.1 there are two decisions that are relevant in these proceedings. These are:
>
> 5.8.1.1 The decision to extend the tender by way of notice in the tender bulletin in February, March, April and May 2022; and

5.8.1.2 The decision to award the tender.

5.8.2 On reading of the Applicants' papers, it is clear that the Applicants do not challenge the decision to extend the validity period.

5.8.3. I am advised and respectfully submit that in absence of a challenge to the decision to extend the tender validity period, the decision to extend remains intact and capable of producing legal consequences. In this regard, the legal consequences of decisions to extend, that the tender was extended and with the consequences, the award is lawful.'

[51] Regarding the extension of tender validity period, the Mathata responds in its replying affidavit as follows:

> 'The purpose of the tender validity period is the time during which the Department's tender up offer remains valid and open for acceptance by bidders as set out in the tender particulars. The conduct of the Department illustrates another gross irregularity on its part and another reason why the relief sought by the first and second applicants ought to be granted.'

Although the applicants raised this issue in the context of the award of the tender to the successful bidders prior to the expiry of the last extension of the validity period, in my view, same applies to the first extension of the validity period of the bid.

[52] In his argument, Mr Mtsweni referred me to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[22] wherein the principle that was established is that an administrative act stands with all its consequences until reviewed and set aside.

[53] There is no merit in Mr Mstsweni's argument. Firstly, the applicants squarely challenge the extension of the validity period of the bid.[23] Secondly, while the

principle in *Oudekraal* is undoubtedly sound and has been followed by our courts ever since, the error in Mr Mtsweni's submissions is that each decision in the bidding process leads to an end result which is the award of the bid to the successful bidder. It is that decision the applicants seek to challenge.

[54] It is common cause that the extensions were advertised. During argument, Mr Rip raised the issue of the clear inability of the applicants to properly identify the bid in the advertisements due to the paucity of the information that was published. The advertisements[24] read as follows:

'**EXTENSION OF VALIDITY FOR BIDS IN THE DEPARTMENT OF SAFETY AND SECURITY**

DESCRIPTION	CLOSING DATE FOR BID	BID VALIDITY EXPIRY DATE (90-DAYS)	BID VALIDITY EXTENSION (30 DAYS)
Provision of Security Services for the Mpumalanga provincial government building for a period of three years	10 December 2021	10 March 2022	10 April 2022

[55] It is immediately apparent that no bid number is reflected in the advertisement. Together with the Department's advertisement, many other notices and advertisements appeared simultaneously in each of the publications. The specific advertisement was so obscured that I found it difficult to locate same when I considered the papers. The only obscured clues that the advertisement may have a

bearing on the specific bid is the description and, in the case of the first advertisement, the closing date for the bid and the 10 March 2022 date. In the later advertisements the closing date of the bid and the initial closing date of the bid are not reflected.

[56] I agree with Mr Rips's contention. If at least the bid number was reflected in the advertisement, Mathata, who was making enquiries on the web based platform regarding the tender, may have been immediately directed that it was the specific bid that was referred to.

[57] In *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others*[25] the consent of the bidders were requested to extend the validity period of the bid. However, the request did not reach one of the bidders and the bid was awarded after the initial validity period. The Supreme Court of Appeal found that once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully.[26] The appellant's appeal against the decision of the court of first instance to set aside the awards and to suspend the declaration of invalidity pending the commencement of a new tender process was dismissed.

[58] In this matter, the conduct of the Department was even worse. It extended the bid validity period without the bidders' consent. The publication of the extension of the bid validity period is of no moment without the prior consent of the bidders.

[59] Confronted by the authority of *City of Ekurhuleni Metropolitan Municipality*, Mr Mtswani argued that the applicants' inaction subsequent to the Department's resolve to extend the bid validity period amounted to tacit consent by the applicants.

This argument has no merit. The Department did not plead tacit consent on the papers before me. In addition, the invitation to tender constituted the Department's offer. One of the terms of the Department's offer was that the tender validity period would expire on 10 March 2022. The bidders' submission of their bids constituted an acceptance of the offer. An agreement came into being one of the terms being that the tender would expire on 10 March 2022. With regard to the application of the law of contract once the bids were received, see *City of Ekurhuleni Metropolitan Municipality*[27] where it was stated:

> 'Plasket J, who took the view that the judgment in Telkom SA was 'essentially on all fours with [Searle]'observed:
>
> '[68] As with this case, what had to be decided, according to Southwood J, was "the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received." In deciding this issue, Southwood J's starting point was four inter-related propositions. They are that: (a) the decision to award a tender is an administrative action and the PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, "even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid."'

[60] Even if it accepted that a tacit consent by the bidders for the extension of the bid validity period was possible, which I doubt, the bidders could not have consented to something they were unaware of i.e. the Department's decision to extend the bid validity period.

[61] The award of the bids after 10 March 2022 in the absence of all the bidders' express consent renders the decision by the Department to award the bids invalid.

The subsequent award of the tender to the successful bidders was therefore unconstitutional and must be so declared.

Just and equitable remedy

[62] Section 172(1) of the Constitution of the Republic of South Africa, 1996 provides:

> 'Powers of courts in constitutional matters.—(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[63] As indicated before, Mathata and Mabotwane seek interim relief pending the outcome of an application for the review and setting aside of the award as well as access to information as prayed for in Mathata's notice of motion. Mafoko also seeks interim relief. However, in the alternative, Mafoko seeks final relief in the setting aside of the award.

[64] The Mathata and Mabotwane pleaded:

> 'The Applicant is of the respectful view that the award of the tender by the Department to the service providers is the result of a flaw, unlawful, unreasonable, and procedurally unfair

> tender evaluation, and adjudication process. This further aggravates the Department's non-compliance with its statutory procurement obligations.'[28]

[65] Mafoko pleads that the decisions that were taken by the Department constitute administrative action as defined in section 1 of the Promotion of Access to Administrative Justice Act No. 3 of 2000 (PAJA). In addition, Mafoko pleads:

> 'The Department's decision to award the tender is reviewable in terms of section 6 (1) of PAJA if one or more of the grounds of review codified in section 6(2) are present.'[29]

[66] There can be no doubt that State procurement which is initiated by an invitation to bid, the evaluation of bids received and the ultimate award of the tender, constitutes administrative action.[30]

[67] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*[31], the Constitutional Court said:

> 'Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.' (Endnotes omitted)[32]

[68] Section 8 of PAJA provides:

‘Remedies in proceedings for judicial review.—(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders—

(a) directing the administrator—

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and—

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders—

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs.’

[69] I proceed to deal with the consequences of the declaration of invalidity of the awards to the successful service providers. A just and equitable order must be considered and made.

[70] What would be a just and equitable remedy depends on the circumstances of each matter having due regard to the facts. In *BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation*[33], the Supreme Court of Appeal said:

> 'Section 172(1)(b) of the Constitution empowers a court when deciding a matter, to make any order which it deems just and equitable with reference to the circumstances of a particular matter. This simply means that the effects of the declaration of invalidity may be ameliorated by the court in the exercise of its just and equitable discretion at the remedy stage.'

[71] In *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [34], the Constitutional Court said:

> 'However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity.'

[72] I took the aforesaid fundamental principles into account when I considered the order I made.

[73] The successful service providers had already been appointed and had commenced with the delivery of their services on 1 June 2022. Contracts must have been entered into with them granting them rights and imposing obligations upon them. The tender was for the delivery of security services at government buildings

throughout the province. To cause the immediate discontinuation of those services would simply have been impossible. The security of government property, those persons who are employed in the buildings and the members of the public who are services at the buildings would be severely compromised. The buildings can simply not be left without protection. The successful bidders must have expended substantial amounts of money in order to bid and to commence with the services awarded to them. Their services are continuing, to which extent, I do not know because insufficient information is before this court and because they are not before court, what would be lost to them is yet to be established. Even if the award is set aside it would not necessarily follow that the awards to the successful bidders would not again be made to them. The Department demonstrated that the applicants would in any event had been unsuccessful because they would have fell out on price. There is a lack of information before this court on the loss (financial or otherwise), the applicants have suffered and will be suffering if the contracts are not set aside.

[74] All of these aforesaid factors are particularly relevant in deciding a just and equitable remedy. The order that I made is aimed at securing the information required in order to make a decision on a just and equitable remedy subsequent to the finding of invalidity of the award.

[75] Armed with the information that is to be gathered through the order, the court would be in a better position to decide the fate of the agreements, whether to order a new tender process and if such process is ordered, what it would entail time and money wise. Fore mostly the court would be in a position to manage the further continued and uninterrupted delivery of the all-important services.

COSTS

[76] The applicants were successful in the application. I saw no reason why the costs should not have followed the result.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING:	21 and 22 June 2022
DATE OF JUDGMENT:	29 June 2022

APPEARANCES

FOR THE FIRST AND SECOND APPLICANTS:	Adv MM Rip SC together with Adv JH Groenewald
INSTRUCTED BY:	David H Botha & Kruger Incorporated
FOR THE FIRST AND SECOND RESPONDENTS:	Adv Mtsweni
INSTRUCTED BY:	The State Attorney

[1] Mathata General Trading CC.

[2] Mabotrane Security Services.

[3] Mafoko Security Patrols (Pty) Ltd.

[4] Section 1 of the Public Finance Management Act 1 of 1999.

[5] No relief is sought by the first and second applicants against the second respondent.

[6] The additional papers comprised approximately 700 pages.

[7] On 4 February 2022 for an extension of 30 days. On 28 March 2022 for an extension to 10 May 2022. On 5 May 2022 for an extension to 10 June 2022.

[8] 1 June 2022.

[9] See: Police and Prisons Civil Rights Union v Minister of Correctional Services and Another, [2014] 5 BLLR 481 (LC) at par [6]; Workforce Group (Pty) Limited v National Textile Bargaining Council and Another, [2011] 11 BLLR 1136 (LC) at par [13] and Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd, 1969 (4) SA 443 (C).

[10] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[11] 2017 (2) BCLR 182 (CC) at para 73.

[12] Khumalo v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC) at para 45.

[13] 1949 (3) SA 637 (A).

[14] *Amalgamated* supra at p 649.

[15] *Amalgamated* supra at p 653.

[16] (561/2019) [2020] ZASCA 88 (23 July 2020).

[17] Para 6 of *National Commissioner of Police* supra.

[18] (314/11) [2012] ZASCA 55 (30 March 2012).

[19] Paragraphs 19.4 and 19.5 of Mathata’s founding affidavit.

[20] Paragraph 10 of Mafoko’s founding affidavit.

[21] Paragraphs 5.8 to 5.8.3 of the answering affidavit.

[22] [2004] 3 All SA 1 (SCA).

[23] *Loc cit* paragraphs 48 and 49.

[24] The advertisement of February 2022. The other advertisements followed the same format and wording except for the exclusion of the column headed ‘CLOSING DATE FOR BID’.

[25] (Case no 846/2021) [2022] ZASCA 82 (03 June 2022).

[26] Para 70.

[27] Supra at para 9.
[28] Para 20.2 of Mathata’s founding affidavit.

[29] Para 55 of Mafoko's founding affidavit.

[30] *Loc cit* para 59.

[31] 2014 (1) BCLR 1 (CC).

[32] Para 25 of *Allpay* supra.

[33] (1235/2019) [2021] ZASCA 47 (19 April 2021) at para 18.

[34] At para 53.