

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. 353/2022

In the matter between:

SOMA INITIATIVE (PTY) LTD

Applicant

and

THE PREMIER, EASTERN CAPE

First Respondent

PROVINCIAL GOVERNMENT

THE MEMBER OF THE EXECUTIVE COUNCIL

Second Respondent

FOR HEALTH, EASTERN CAPE

THE MEMBER OF THE EXECUTIVE COUNCIL

Third Respondent

FOR EDUCATION, EASTERN CAPE

THE MINISTER OF PUBLIC SERVICE AND

ADMINISTRATION OF THE REPUBLIC OF

SOUTH AFRICA

Fourth Respondent

ALEXANDER FORBES HEALTH (PTY) LTD

Fifth Respondent

PROACTIVE HEALTH SOLUTIONS (PTY) LTD

Sixth Respondent

THANDILE HEALTH RISK MANAGEMENT

(PTY) LTD

Seventh Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR

CO-OPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS, EASTERN CAPE

Eighth Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR

COMMUNITY SAFETY, EASTERN CAPE

Ninth Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR

ECONOMIC DEVELOPMENT, ENVIRONMENTAL

AFFAIRS AND TOURISM, EASTERN CAPE

Tenth Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR

HUMAN SETTLEMENT, EASTERN CAPE

Eleventh Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR

PUBLIC WORKS AND INFRASTRUCTURE,

EASTERN CAPE

Twelfth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
RURAL DEVELOPMENT AND AGRARIAN
REFORM, EASTERN CAPE**

Thirteenth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
SOCIAL DEVELOPMENT, EASTERN CAPE**

Fourteenth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
SPORT, RECREATION, ARTS AND CULTURE,
EASTERN CAPE**

Fifteenth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
TRANSPORT, EASTERN CAPE**

Sixteenth Respondent

**PROVINCIAL TREASURY DEPARTMENT FOR THE
EASTERN CAPE**

Seventeenth Respondent

JUDGMENT

LAING J

[1] This is an application for the First to the Third Respondents and the Eighth to Seventeenth Respondents to be interdicted from implementing the appointment of the Fifth Respondent as the Health Risk Manager for the Eastern Cape Provincial Government pursuant to the Fourth Respondent's issue of a request for proposals ('RFP'). The RFP pertained to the implementation of the Policy and Procedure on Incapacity Leave and Ill Health Retirement ('PILIR') in the public service. The Applicant brought the application on an urgent basis.

[2] The application has been brought pending an application to be heard in due course for a declarator in relation to the decision to appoint the Fifth Respondent; for the appointment of the Applicant as the Health Risk Manager, alternatively for the decision to be remitted back to the First Respondent for final determination; and for costs.

[3] A summary of the underlying facts follows.

Background

[4] The abuse of incapacity leave and ill health retirement is an issue that needs to be addressed on an ongoing basis in the public service. The absence of

employees has a negative impact on service delivery and has financial implications for the state. In or about 2006, the PILIR was approved by Cabinet so that structures and systems could be established to allow suitable interventions and the management of incapacity leave to accommodate temporary or permanently incapacitated employees and to address the consequences of such incapacity. For such purposes, Health Risk Managers are appointed to assess employees' applications for temporary or permanent incapacity leave and ill health retirement, and to make recommendations to the state employer in that regard. They are independent entities, comprising a range of multi-disciplinary experts but with specialisations in occupational medicine.

[5] Originally, the Department of Public Service and Administration ('DPSA') appointed a Health Risk Manager for each implementation area, being a province or a national department. In 2009, however, the DPSA moved from a centralised to a decentralised model, to the effect that a panel would be appointed from which a provincial or national department could select and appoint its own accredited Health Risk Manager. The role of a Health Risk Manager is, *inter alia*, to assess individual applications and to provide recommendations to a Head of Department in either the provincial or national sphere of government. This entails an analysis of the details submitted by an applicant as well as the information provided by the applicant's medical practitioners.

The 2012-2013 tender process

[6] The DPSA previously issued an RFP for the 2012-2013 tender, which was a 36-month appointment to provide services to the various provincial and national departments that had been identified by the DPSA. The Applicant submitted a proposal that consisted of technical information, supporting documents, and a bid price that was based on the fee to be charged per employee. A Bid Evaluation Committee ('BEC') evaluated the bids received, whereupon five entities were appointed to an accredited panel of Health Risk Managers, including the Applicant. In that regard, the Applicant was responsible for the Cluster 3 and Cluster 4 national

departments,¹ the Eastern Cape Provincial Government, the Mpumalanga Provincial Government, and the North West Provincial Government.

[7] At that point, the DPSA invited those entities that had been appointed to the panel to engage in negotiations over a uniform price to be charged by all Health Risk Managers. Upon reaching agreement, the entities entered into a contract with the DPSA, regulating the standard of services to be provided and the relationship in general between the DPSA and the entity in question. The contract made provision for an 'employer', constituting all provincial and national departments,² and a further selection process that was to be carried out for the appointment of an entity to a specific department. The contract also stipulated that a separate service level agreement would be concluded by the specific department and the entity, to which the contract between with the DPSA would be attached as an annexure.

[8] Subsequent to the appointment of the panel, successful bidders were invited to make presentations to various provincial and national departments, in accordance with a prescribed format and in relation to pre-determined issues identified by the DPSA. Delegates from the various provincial and national departments then voted for the Health Risk Manager of their choice.

[9] For the 2012-2013 tender, four out of the five successful bidders who were appointed to the panel went on to receive a fair distribution of work from the various implementation areas.³ The Applicant received about 355,000 'PILIR lives' while the others received about 302,000, 260,000 and 160,000 'PILIR lives' respectively.⁴ The Applicant alleges that the distribution amongst the four Health Risk Managers ensured that each would remain commercially viable but points out that there were inherent difficulties with the tender process overall. Ultimately, the appointments were extended on several occasions until 2021.

¹ The Applicant explains that the DPSA has divided national departments into four clusters, approximately equal to each other in number of employees.

² The definition specifically excluded the South African Police Services ('SAPS').

³ The Applicant notes that only Metropolitan Health Risk Management (Pty) Ltd received no work. It can advance no reason for why this was so.

⁴ The allocation was presumably done with reference to the number of employees or 'PILIR lives' (as the Applicant terms it) for each implementation area.

The 2021-2022 tender process

[10] The DPSA issued another RFP at the end of last year for a 36-month appointment of a maximum of six Health Risk Managers to the panel, commencing 1 January 2022. In that regard, the DPSA divided the public service into 13 implementation areas, comprising the nine provincial governments and four national department clusters. A selection interview would be held for the various implementation areas, which would consider, *inter alia*, the Health Risk Manager's capacity and the implementation areas with regard to which it had previously been appointed. The DPSA would provide technical assistance during the preparations for and conducting of the interviews but would not participate in the decision-making process itself. As with the earlier tender, a successful bidder would be required to enter into a contract with the DPSA for appointment to the panel, after which service level agreements would be concluded with the individual provincial or national departments in question. Bidders were invited to match or improve the price stipulated in the RFP, which was subject to later negotiation.

[11] The BEC would evaluate bids in accordance with two phases: a Minimum Mandatory Criteria Evaluation Phase, during which bids would be assessed for compliance with the minimum compulsory criteria; and a Substantive Evaluation Phase, during which bids would be assessed in accordance with the applicable technical criteria. The BEC's report would then be referred to the Bid Adjudication Committee ('BAC'), which would in turn make recommendations to the DPSA's Director-General.

[12] Consequently, the Applicant submitted a bid and was appointed to the panel. Thereafter, it negotiated a price with the DPSA, which was eventually set at R8.75 per employee (VAT inclusive), and it entered into a contract that contained with the same material terms as that for the 2012-2013 tender.

[13] The DPSA arranged for selection interviews to be conducted with the various provincial departments and national department clusters. The interview for the Eastern Cape departments was scheduled for 22 December 2021. Prior to the interview, the DPSA distributed an interview questionnaire, indicating the topics to be addressed during the presentation to be conducted by each successful bidder. The

interview proceeded and the representatives for the various provincial departments voted to appoint the Fifth Respondent ('Alexander Forbes') as Health Risk Manager for the Eastern Cape.

Applicant's basis for the application

[14] The Applicant alleges that there were a number of problems with the interview process. More specifically, there was no formal structure for the adjudication of presentations and how voting would be done. There were no set criteria to determine how an entity would be appointed to an individual department.

[15] Furthermore, the Applicant avers that the Department of Health and the Department of Education were not represented during the voting. This was problematic inasmuch as the departments, combined, employed 86.69% of the total workforce in the Eastern Cape Provincial Government and accounted for 84.62% of the incapacity leave cases and 87.28% of the ill health retirement cases for the period, 2016-2021. Moreover, the departments paid a combined total of 86.47% of the monthly or annual fees payable to the Health Risk Manager.

[16] By the time that the Eastern Cape interviews were held, eight out of the 11 implementation areas had already appointed Alexander Forbes and the Sixth Respondent ('Proactive Health'), consisting of 733,500 of the 873,800 'PILIR lives' available at that time- or 84% of the total. Besides the Eastern Cape, only the North West interviews remained. The DPSA representative who attended the presentations made little comment about this during the deliberation process.

[17] In correspondence sent afterwards to the Director: General Benefits for the DPSA, Ms Christa Brink, the Applicant's managing director, Dr Douglas Baard, expressed his unhappiness with the manner in which provincial and national departments had appointed Health Risk Managers. To this, Ms Brink responded that once appointed to the panel, a service provider enjoyed an equal chance of further appointment to an implementation area. However, the final decision lay with the relevant implementation area; the DPSA played no role in the decision-making process other than facilitating it and providing certain information. Subsequently, the Applicant's attorneys sent a letter to the DPSA and the First Respondent ('the

Premier'), requesting that the implementation of the decision to appoint Alexander Forbes as Health Risk Manager for the Eastern Cape be suspended, pending the outcome of a review application.

State Respondents' submissions

[18] The Director: People Management (HRM&D) in the Office of the Premier, Ms Nwabisa Ntantiso, deposed to the main answering affidavit on behalf of the First to Fourth and Eighth to Seventeenth Respondents ('State Respondents'). She explained that she coordinated and chaired the Eastern Cape interview process, which commenced with a request from the Director-General in the Office of the Premier ('the D-G') to the various Heads of Department to ensure suitable participation in an online 'virtual' meeting to be held electronically with prospective Health Risk Managers on 22 December 2021. The D-G indicated that each Department was required to nominate at least one representative and emphasised the importance of proper attendance, in anticipation of the expiry of the existing contracts on 31 December 2021. The contracts arising from the appointment of Health Risk Managers as a result of the 2012-2013 tender had previously been extended on four separate occasions and the National Treasury had indicated that no further extensions would be granted.

[19] Most of the Departments were represented at the meeting, except for the Department of Education and the Department of Community Safety. The DPSA was represented by a Mr Desmond van der Westhuizen and a Ms Fredah Tabane. The former confirmed that the meeting could proceed because a quorum of 50% plus one had been met, notwithstanding the absence of two of the Departments. Mr van der Westhuizen further pointed out that the representatives of each of the Departments present were required to decide whom they wanted as their Health Risk Manager; there was, moreover, no need to score the prospective service providers inasmuch as this had already been completed during the underlying tender process conducted under the auspices of the DPSA. A decision should be reached by consensus, failing which the majority would decide, with the chairperson's having a casting vote in the event of a deadlock. This approach had been the practice that had been followed since the inception of PILIR.

[20] Alexander Forbes delivered the first presentation, describing its B-BBEE status and the nature and extent of its operations. It offered real-time claim tracking and maintained turn-around times of 16-18 days. Proactive Health Solutions followed, dealing with similar aspects, but also with questions pertaining to whether it had local offices and details of its information and communications technology ('ICT') systems. The same areas of relevance were addressed during succeeding presentations by the Seventh Respondent ('Thandile Health') and the Applicant itself. Each prospective service provider was allocated the same amount of time for its presentation and the questions that followed.

[21] At the conclusion of all the presentations, Mr van der Westhuizen explained to the representatives of the departments that decisions had already been taken to appoint Health Risk Managers for the majority of implementation areas. Only the North West had yet to make such a decision, which translated to 69,000 'PILIR lives'. This information had to be taken into account for purposes of the selection of the Health Risk Manager for the Eastern Cape. For her part, Ms Ntantiso highlighted the areas of interest for the province: capacity, experience, B-BBEE status and equity considerations, project management practices, change management processes, and what offices would be established for providing the services required.

[22] The representatives for the departments agreed that the decisions already taken by other provincial and national departments with regard to the allocation of work would be taken into account but would not be a decisive criterion. The value that each prospective Health Risk Manager offered would also be considered. During the voting process that followed, six of the departments supported Alexander Forbes and four supported the Applicant, resulting in the appointment of the former. The representative for the Department of Health was unable to vote because she lost her online connection; there were no representatives for the Department of Education or the Department of Community Safety.

Alexander Forbes's submissions

[23] The Head of the Health and Management Solutions, Ms Myrna Sachs, deposed to the answering affidavit for Alexander Forbes. She stated that the company had been involved with PILIR since its inception, when the company

entered into a consortium with Proactive Health in 2003 for purposes of a PILIR pilot project with the Department of Correctional Services in both the Eastern Cape and Mpumalanga. Subsequent to the full implementation of PILIR in or about 2006, the same companies have competed for appointment to the DPSA panel over the years, with varying degrees of success.

[24] Ms Sachs emphasised that the RFP clearly indicated that the departments would, through a separate interview process, select a Health Risk Manager of choice from the panel. It stipulated that the departments would consider, *inter alia*, the Health Risk Manager's capacity and implementation areas with regard to which it was already contracted. The interviews would not be a repeat of the tender process but would take into account the terms of reference contained in the RFP. Moreover, the departments were at liberty to develop their own interview questionnaire.

[25] It was a condition of the RFP, said Ms Sachs, that the selection of a Health Risk Manager would take place in accordance with the above interview process. She asserted that the Applicant, as a bidder, had participated in the tender with full knowledge of the interview process and by doing so it had accepted the underlying conditions, which would in due course form part of the contract to be concluded upon appointment to the panel. She noted that the Applicant had done so previously, without complaint, for earlier tenders. Moreover, she pointed out that the Applicant had been advised of the interview criteria in terms of the interview questionnaire that had been attached to the RFP.

[26] Alexander Forbes became aware of its appointment to the Eastern Cape on 28 December 2021. Service level agreements were consequently entered into with the various provincial departments, the last one being signed on 4 January 2022. Consequently, the Applicant made immediate arrangements with Alexander Forbes for the handover of employee files.

[27] At the heart of the Applicant's complaint, asserts Ms Sachs, is the alleged uneven distribution of work. This, however, was the reality of appointment to the panel and the discretionary selection process that followed. Historically, this was how

the procurement of a Health Risk Manager had always been conducted and to which the Applicant had willingly subjected itself previously.

Recent developments

[28] Subsequent to argument of the matter on 4 March 2022, the Applicant made application for the admission of Dr Baard's supplementary affidavit. It dealt with the Applicant's receipt from the State Respondents, on 14 March 2022, of the transcription of the recording for the virtual meeting held on 22 December 2021.

[29] The court accepted that the transcription was indeed relevant to the main application and that it would be of immediate benefit for purposes of Part A. The transcription supplemented, significantly, the rather sparse minutes attached to the State Respondent's answering papers and appeared to raise an issue that pertained directly to the proper determination of whether the Applicant had demonstrated that the relief was necessary to protect a *prima facie* right. This will be discussed further, below, when dealing with the merits.

[30] In essence, the transcription reveals that no recording was made of the deliberations conducted after the presentations made by the Health Risk Managers in question. The Applicant contends, accordingly, that it cannot ascertain how the decision to appoint Alexander Forbes was reached.

[31] The State Respondents filed Ms Ntantis's supplementary affidavit, wherein she explained that the recording was stopped to avoid the risk of the Health Risk Managers' having access to the deliberations before the provincial leadership was informed of any resolution taken. Furthermore, it was stopped so as to facilitate free discussion by representatives of the various departments.

Issues to be decided

[32] The issues to be decided in the present matter are: (a) whether the Applicant has demonstrated sufficient urgency for non-compliance with the usual rules and practice of this court to be condoned; and (b) whether there is a basis upon which to grant interim relief.

[33] The requirements for interim relief are well-established. In *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC),⁵ the Constitutional Court affirmed the principles set out in *Setlogelo v Setlogelo* 1914 AD 221 and later refined in *Webster v Mitchell* 1948 (1) SA 1186 (W): a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the granting of the interdict; and the applicant must have no other remedy.

[34] Crucially, the court is concerned only with Part A of the application. The determination of Part B must be left for another court at another time.

Urgency

[35] The Applicant asserts that it was informed of the decision to appoint a Health Risk Manager for the Eastern Cape on 28 December 2021. However, the deponent to its founding affidavit, Dr Baard, only became aware of procedural irregularities on 13 January 2022. By reason of the complexity of the matter, a number of consultations with the Applicant's legal representatives were required, culminating in the delivery of a letter of demand on 24 January 2022. The Applicants instituted urgent proceedings on 7 February 2022 once it became clear that the State Respondents were not prepared to suspend the implementation of the decision.

[36] The State Respondents point out that the Applicant was aware that the previous service level agreements between the various departments and the Health Risk Managers appointed as a consequence of the 2012-2013 tender process were to expire on 31 December 2021. The Applicant was also aware that new service level agreements were concluded between the departments and Alexander Forbes during the period of 28 December 2021 until 4 January 2022. Notwithstanding, the Applicant allowed at least a month to pass before commencing with litigation.

[37] Alexander Forbes makes the same point, although mentions that the last service level agreement was signed on 11 January 2022. In addition, Alexander

⁵ Referred to as *OUTA* for purposes of the judgment.

Forbes asserts that the Applicant's general manager, Ms Anita Paulse, began making arrangements for the handover of employee files and related documentation from as early as 28 December 2021 and that this exercise continued until as late as 28 January 2022, without the Applicant's having raised any concerns. This was done despite Ms Paulse's communication of possible irregularities to Dr Baard on 13 January 2022. Furthermore, Alexander Forbes observes that the Applicant registered its concern with the DPSA and sought, at the same time, its assistance to persuade the North West to appoint it as its Health Risk Manager. The Applicant, however, sent no correspondence to Alexander Forbes until delivery of the present application on 7 February 2022. It took 41 days to institute proceedings, affording Alexander Forbes a mere week within which to prepare and deliver its answering papers. Moreover, the appointment of the company had already been implemented.

[38] There can be no dispute that the present matter is complex, with a lengthy history and a complicated set of circumstances that accompanied the decision to appoint Alexander Forbes. The preparation and commencement of legal proceedings occurred at a notoriously difficult time of the year, when organizations and individuals are often unavailable by reason of holiday closure or leave. Although some of the criticism levelled at the Applicant may be warranted, it cannot be said that the Applicant failed to act with sufficient alacrity at all or that the situation was entirely devoid of urgency. Whereas Alexander Forbes argues that the harm that the Applicant sought to prevent had already been inflicted, inasmuch as the last of the service level agreements had already been signed on 11 January 2022, it would be difficult to refute that the nature and extent of the services to be provided, entailing the allocation of staff, equipping of local offices, and proper acceptance and management of a substantial number of employee files, mean that the implementation of the appointment would become increasingly difficult to reverse in the event that a legal challenge was deferred or subjected to the usual timeframes under rule 6(5). The Applicant was well-advised to have proceeded without delay.

[39] Moreover, the Applicant patently has commercial interests at stake in the matter. The loss of its appointment to the Eastern Cape, a position that it had previously enjoyed for a period of at least nine years, has an impact on its revenue, with implications for its staff and its overall business operations. As such, *Twentieth*

Century Fox Film Corporation v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W), at 586F-G, is good authority for the proposition that the urgency of commercial interests may justify the invocation of rule 6(12) no less than any other interests. See, too, *Bandle Investments (Pty) Ltd v Registrar of Deeds and others* 2001 (2) SA 203 (SECLD), at 213E.

[40] Consequently, the court finds that there was sufficient basis upon which the application could have been brought as one of urgency. This aspect has, to a large extent, been rendered moot; the State Respondents and Alexander Forbes have, despite protest, been able to file comprehensive sets of papers, including supplementary submissions. Nothing further needs to be said in that regard.

Nature of the right

[41] The question that arises immediately is what is the right that the applicant seeks to protect? The applicant no longer has a right to continue providing health risk services to the State Respondents. It is common cause that such right, contractual in nature, fell away when the service level agreements that it had previously concluded with various departments expired on 31 December 2021. What the applicant has, however, is a right to just administrative action, as guaranteed in terms of section 33 of the Constitution.⁶

[42] The right to just administrative action is given effect by the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The grounds upon which a court may judicially review administrative action are well known and are listed under section 6(2) thereof.

[43] It is settled law that public procurement constitutes administrative action. See *Logbro Properties CC v Bedderson NO and others* [2003] 1 All SA 424 (SCA), at [5]. Interestingly, however, the drafters of the Constitution deemed it necessary to include specific provision for public procurement and to stipulate, expressly, that the system in terms of which an organ of state contracts for goods or services must be

⁶ Section 33(1) of PAJA provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

fair, equitable, transparent, competitive and cost-effective.⁷ Consequently, it can be said that public procurement in South Africa must meet the general standards apparent from section 33 as well as the specific standards apparent from section 217(1) of the Constitution.

[44] A court may review an organ of state's decision to contract for goods or services in the event that one of the section 6(2) grounds of PAJA exists. In *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC), the Constitutional Court held, at [25], within the context of a tender dispute, that:

'[o]nce 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.'

[45] For national and provincial government, the Public Finance Management Act 1 of 1999 ('PFMA') echoes the specific constitutional standards for public procurement in section 38(1)(a)(iii), where it places a duty on the accounting officer to ensure, *inter alia*, that a department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Unlike the detailed set of regulations that governs public procurement in the sphere of local government,⁸ the regulatory framework for public procurement conducted by a department is confined to regulation 16A in the Treasury Regulations published in terms of GNR 225 of 15 March 2005. Of relevance to this matter is that regulation 16A6.6 thereof provides that:

'[t]he accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors.'

[46] The interpretation to be given to the above has a bearing on whether the Applicant's right to just administrative action has been infringed.

⁷ Section 217(1) of the Constitution.

⁸ See Part 1 of Chapter 11 to the Local Government: Municipal Finance Management Act 56 of 2003, to be read with the Municipal Supply Chain Management Regulations, published in terms of GN 868 of 30 May 2005.

The infringement of the Applicant's right

[47] The Applicant does not take issue with the tender process followed by the DPSA with regard to the appointment of Health Risk Managers to its panel. It challenges, however, the lawfulness of the subsequent selection of a Health Risk Manager by the departments in the Eastern Cape Provincial Government, arguing that the interview process was entirely arbitrary and lacking in objective criteria. The State Respondents justify the approach that was adopted, asserting that the Applicant knew full well what was entailed at the time that it submitted its bid because the process was described in the RFP itself. Furthermore, the provisions of regulation 16A6.6 permit the departments to participate in the contracts that were concluded between the DPSA and successful panel appointees.

[48] The relevant portions of the RFP are set out below. The following appears under the sub-heading, 'Contract objectives':

'1.1.2. Procure and establish a Panel of a maximum of six (6) Accredited Health Risk Managers from which an individual department could contract a Health Risk Manager with due consideration to time and cost efficiency, with effect from 1 January 2022. The contracts in both instances will be for a period of 36 months.'

[49] And the following appears under the sub-heading, 'Background':

'2.4. In summary, the decentralisation model entails the appointment of the Panel of Accredited Health Risk Managers by the DPSA through a single bid process. The appointment to the Panel is concluded with a panel contract entered into between the DPSA and the preferred Health Risk Managers. Departments within the identified implementation areas subsequently through a selection interview, select a Health Risk Manager of choice from the Panel of Accredited Health Risk Managers. Departments shall during the selection interviews consider, among others, the Health Risk Manager's capacity, implementation areas already contracted or having been selected with a view to secure a contract.

2.5. The selection interviews shall not be a repeat of a tender process. The selection interview shall take into account these terms of reference. The respective implementation areas may develop their own selection interview questionnaire. In conducting the selection process, implementation areas shall take into account whether a Health Risk Manager have been selected in other implementation areas. The DPSA shall provide implementation areas with technical assistance during the preparations for and conducting of the selection interviews. Therefore, the DPSA will participate in the selection interviews, but will not participate in the implementation areas final decisions.'

[sic]

[50] For the sake of completeness, it is necessary to include the salient portions of the contract concluded between the DPSA and a successful panel appointee. These state, under the heading, 'Recordal', that:

'3.1 It is recorded that the purpose of this contract is to—

3.1.1 appoint the Health Risk Manager to the panel of accredited Health Risk Managers;

3.1.2 regulate the relationship between the DPSA and the Health Risk Manager appointed to the panel referred to in clause 3.1.1;

3.1.3 describe and regulate the consultancy service to be rendered by the Health Risk Manager appointed to the panel referred to in clause 3.1.1;

3.1.4 describe and regulate the roles and responsibilities of the Health Risk Manager in relation to the consultancy service; and

3.1.5 describe and regulate the uniform norms and standards relevant to the Employer⁹ in the context of the consultancy service described and regulated in this contract. Therefore, references to the Employer must therefore be interpreted and understood in this context.

3.2 With effect from the date of signature, the DPSA appoints the Health Risk Manager as part of the panel of accredited Health Risk Managers.

⁹ The 'Employer' is defined in sub-clause 2.1.17 as 'all National and Provincial Departments excluding the South African Police Services.'

3.3 The Employer shall select and contract a Health Risk Manager from the panel to—

3.3.1 assess and provide advice and recommendations with regard to applications for short- or long-term temporary incapacity leave and applications for ill-health retirement including specialist and allied professional referrals;

3.3.2 provide systems, processes, administrative capacity and medical expertise in relation to incapacity leave and ill-health retirement assessments;

3.3.3 maintain an electronic database in relation to the applications submitted and assessed for incapacity leave and ill-health retirement; and

3.3.4 provide regular reports to the DPSA and the Employer as required in terms of this agreement.

3.4 The Employer may base its selection on interviews with all or selected Health Risk Managers on the panel. The interviews shall take place on the request of the Employer only.

3.5 The Health Risk Manager offers the services referred to in 3.3 above and in particular has the necessary medical, occupational health and related expertise and infrastructure, systems and administrative facilities and capabilities to enable the DPSA and the Employer to achieve its objectives as per the requirements of PILIR.

3.6 The DPSA has agreed to appoint the Health Risk Manager, and the Health Risk Manager has accepted the appointment on the terms and conditions set out in this agreement, provided that the provisions contained in this contract will become applicable after the Health Risk Manager is appointed by a department.'

[51] The RFP clearly indicates that the appointment of a Health Risk Manager to the panel was no guarantee of its subsequent selection by a department. It would first be required to undergo an interview process. The same information was

repeated in the contract that a successful Health Risk Manager was required to conclude with the DPSA. There can be no dispute that the Applicant participated in the tender with its eyes wide open.

[52] The difficulty arises, however, with regard to how a department selects a Health Risk Manager. The RFP merely states that the department must consider, *amongst other things*, the capacity of the Health Risk Manager and the implementation areas to which it had already been appointed or which had been earmarked for the Health Risk Manager. It is not clear how capacity would be assessed; it is not clear, at all, what other criteria would be applied. A department was required to take into account the 'terms of reference' (presumably the RFP) but it is not clear what these were specifically. Disconcertingly, the department was entitled to develop its own 'interview questionnaire' but what could or should be contained therein is not indicated.

[53] As it turned out, the DPSA provided Health Risk Managers with an interview questionnaire prior to the interview. The questionnaire indicated the areas to be covered in the presentation: background and history, general issues, health risk management experience, capabilities, the implementation and application of PILIR, ability, and the overall impression of the presentation. In addition, it listed possible questions that could be posed but emphasised that that the departments were not limited thereto. Accordingly, it can be argued that the questionnaire ameliorated the lack of clarity that characterised the RFP.

[54] But it is from thereon that the interview process began to fall short of the specific standards of fairness and transparency. Each Health Risk Manager was required to convey, within less than an hour, the advantages and benefits of the services to be provided. This was to be assessed by representatives of the various departments who were not involved in the DPSA's evaluation and adjudication of the original bids. The only material available to the above officials was what the Health Risk Manager communicated verbally or by means of slides or a video presentation. Moreover, the officials had no means by which to verify the submissions made during the virtual meeting. To put it bluntly, the departments selected the Health Risk Manager to deal with the health risk issues pertaining to the workforce for the

Eastern Cape Provincial Government, over a period of 36 months, entirely on the basis of a 30- minute sales pitch.

[55] The minutes of the meeting, such as are available, illustrate the arbitrary manner in which the selection was made and the overall absence of objective criteria used in reaching a decision. The relevant portions thereof are reflected below, under the heading, 'Discussions and decision':

'The meeting as led by Ms N Ntantiso discussed and decided as follows:

- The DPSA gave the meeting a picture of how many contracts were awarded, nationally, amongst the four service providers to have a clear picture of the workload before a decision is made.
- The meeting decided not to use the above as a method of selecting the service provider *but looked at the value presented* by each service provider.
- All four service providers are not new in the Health Risk Management space.
- The meeting attendees were allowed to state their case about which service provider *stood out from the rest*.
- ...
- The meeting DECIDED that Alexander Forbes should get the contract as they were an *outstanding presenter* [sic] in terms of product offering.
- ...'

[Emphasis added.]

[56] From the above, it is evident that the officials considered the 'value added' by each service provider. The concept is not explained. Furthermore, the officials were unmistakably influenced by the superior presentation and overall communication skills of the Alexander Forbes delegates; there is little, if anything, from the minutes to indicate that the decision was made on the basis of the content of the interview questionnaire or any other set of objective criteria.

[57] The transcription of the minutes, admitted as evidence under cover of the supplementary affidavit of Dr Baard, serves to exacerbate the shortcomings described above. After the DPSA's representative, Mr Van der Westhuizen, had indicated the national distribution of Health Risk Manager appointments across the various implementation areas, the following was recorded:

CHAIRMAN: Chair?¹⁰

MS KOSANA: Yes, Mr Rexe.

CHAIRMAN: Sorry, Chair. I do not know if we keep on recording. Will the service providers not have access to our decisions? Can I propose that we stop recording or DPSA can guide us because if for instance we continue recording they can listen to our discussions at a later stage, you know, after the meeting. Can DPSA... [indistinct]?

MS KOSANA: Des, what is your proposal?

CHAIRMAN: I was going to propose that we stop the recording. However, we are continuing with the minute taking.

MS KOSANA: I also think so and then we can continue to take notes.

CHAIRMAN: Thank you.'

[58] The State Respondents explain that the recording was stopped to prevent potential service providers from gaining access to the deliberations before the outcome had been communicated to the provincial leadership and so as to facilitate robust discussion amongst the officials. The explanation is unconvincing and of little assistance. If anything, then it merely perpetuates the impression that the decision to appoint Alexander Forbes was entirely arbitrary.

[59] To compound the problems associated with the selection, neither the Department of Health nor the Department of Education participated in the actual selection of the successful Health Risk Manager. It is not disputed that the departments, combined, employed 86.69% of the total workforce in the Eastern Cape Provincial Government, and accounted for 84.62% of the incapacity leave cases and 87.28% of the ill health retirement cases for the period, 2016-2021. Their

¹⁰ From the State Respondents' answering papers, it seems that a Mr Sivuyile Rexe initially chaired the meeting, after which Ms Ntantiso assumed the role, at the commencement of the decision-making process. This does not correspond with the transcription, but nothing turns on it.

share of fees payable to the Health Risk Manager for the period in question constituted 86.47% of the total. On the face of it, their lack of representation during the interview process, at that stage, would have prevented the officials present from having arrived at a fully informed decision.

Treasury regulation 16A6.6

[60] The State Respondents rely on regulation 16A6.6 to assert that there was no need for a repeat of the tender process by the time that the Health Risk Managers made their presentations. The DPSA had already completed the necessary evaluation and adjudication of the bids, in accordance with the principles of fairness, equitability, transparency, competitiveness, and cost-effectiveness. What remained was simply the selection of the service provider for the Eastern Cape, to be done at the discretion of the various departments involved.

[61] In *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* [2016] 1 All SA 721 (ELC), the court considered the interpretation of regulation 32 of the Municipal Supply Chain Management Regulations,¹¹ which provides for the same procurement mechanism as appears in regulation 16A6.6. The empowering statutory provision for regulation 32 is section 110(2) of the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA'). The provision in question stipulates that Part 1 of Chapter 11 of the MFMA, dealing with supply chain management, does not apply where a municipality or municipal entity procures goods and services under a contract secured by another organ of state. The court held as follows:

'[29] The point of departure is, accordingly, the compliance with section 217 of the Constitution and with the PPPFA and Chapter 11 of the LGMFA.¹² The ultimate enquiry is whether an organ of state which contracts for goods and services, had done so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. It follows that the exclusionary provisions of section 110(2) of the LGMFA and of regulation 32 must not only be restrictively interpreted, but the exclusion

¹¹ See n 8, *supra*.

¹² The abbreviations refer to the Preferential Procurement Policy Framework Act 5 of 2000 and the MFMA, referred to earlier.

of Part 1 under Chapter 11 of the LGMFA may not detract from or erode the constitutional imperatives of fairness, equity, competitiveness and cost-effectiveness.

[30] It cannot be gainsaid that a supply chain management policy which complies with the framework prescribed by section 112 of the LGMFMA and with section 217 of the Constitution, is not only costly, but the implementation is more often than not very time-consuming resulting in further escalation of costs and expenses. In order to prevent these inescapable consequences, the exclusionary provision under section 110(2) has as its object and purpose, in my respectful view, the prevention of unnecessary duplication of costly and time-consuming tender procedures and processes.

[31] Thus, where an organ of state had procured goods or services under a contract preceded by due processes in compliance with the prescribed supply chain management policy, then another organ of state which requires the same goods or services, may contract with the first organ of state for the supply of such goods or services. Of course, the supplier must agree to such procurement. This procedure removes the duplication of costs relating to bureaucratic red-tape from the tender process, whilst retaining all the elements of the constitutional imperatives under section 217 of the Constitution. It cannot be over-emphasised that the enquiry must always be whether the constitutional imperatives have been compromised by the exemption; if so, it is unconstitutional, if not, the exemption is permissible under section 110(2).'

[62] The restrictive interpretation to be given to regulation 32 and the overriding importance of the specific standards contained in section 217(1) of the Constitution are evident in later case law that directly concerns regulation 16A6.6. In *Excellerate Services (Pty) Ltd v Umgeni Water and others* [2020] JOL 47756 (KZP), the court viewed regulation 16A6.6 as a deviation from the obligations created in terms of section 217 of the Constitution. Consequently, there had to be a recognisable basis

for the deviation, rooted in law. Moreover, the deviation had to be narrowly and strictly applied.¹³

[63] The facts of this matter lend themselves to the application of regulation 16A6.6. Here, the departments participated in a contract secured by the DPSA in terms of a competitive bidding process; it is common cause that such procurement was unproblematic. However, the subsequent manner in which the departments selected Health Risk Managers fell short of the section 217(1) principles. As demonstrated earlier, the interview process was neither fair nor transparent.

[64] Whereas the procurement mechanism created under regulation 16A6.6 is designed to allow an organ of state to avoid the costs and delays associated with a tender process based on competitive bidding, the section 217(1) principles still apply. Fairness, equitability, transparency, competitiveness and cost-effectiveness must infuse and permeate the procurement of the goods or services required, from start to finish.

[65] Consequently, the court is satisfied that the Applicant has established that its right to just administrative action has been infringed. Whether such right is capable of protection for purposes of Part A of the application is an issue to which further attention will be given the paragraphs that follow later.

Doctrine of election

[66] At this point, it is necessary to pause and mention the argument made by Alexander Forbes to the effect that the doctrine of election applies in relation to the interview process. In other words, through its conduct, the Applicant indicated that it accepted the department's selection and cannot challenge it *ex post facto*. The common law principles of waiver and estoppel apply.

[67] For reasons that will become apparent, it is not necessary for the court to make any determination in this regard, save to remark that it appears that the Applicant's knowledge of the manner in which the selection of Alexander Forbes was

¹³ At [57].

carried out was only acquired well after the date of the virtual meeting, 22 December 2021. At worst for the Applicant, its full appreciation of the circumstances that accompanied the interview process seems to have coincided with its handover of employee files and associated documentation to Alexander Forbes.

[68] Moreover, it is doubtful whether a party within the present context can waive its right to just administrative action without an express and unequivocal assertion to that effect.¹⁴

The remaining requirements for interim relief

[69] The Applicant must demonstrate that there exists a reasonable apprehension of irreparable and imminent harm to its rights if an interdict is not granted. To that effect, it asserts that it would be constrained to retrench a significant number of its employees. This may be so in the short term but may not be so in the event that the Applicant is successful with regard to Part B. Furthermore, any harm sustained by the Applicant may be ameliorated to some extent by its possible appointment to the North West. It would be an exaggeration to describe it as irreparable. Companies contract and expand in unison with the ebb and flow of their business fortunes; too little evidence has been presented by the Applicant with regard to the nature, extent and probable impact of possible retrenchments.

[70] Similarly, its allegations in relation to possible reputational damage and questions that could be raised about its commercial viability are vague and unsubstantiated. If anything, then reputational harm has already been done inasmuch as the impression has been created that the Applicant failed to mitigate adequately against the business risks associated with its major dependence on the Eastern Cape contract.

[71] It is also necessary for the Applicant to show that the balance of convenience favours the granting of the interdict. Besides the fact that the implementation of the departments' decision commenced on 1 January 2022, entailing Alexander Forbes's

¹⁴ See *Mohamed and another v President of the RSA and others* 2001 (7) BCLR 685 (CC), at [61] – [67], where the court discussed whether or not a foreign national could be deemed to have consented to his deportation or extradition to the United States in circumstances where the prosecuting authority intended to press capital charges.

allocation of staff, equipping of local offices, and proper acceptance and management of a substantial number of employee files, the weakness in the Applicant's position is exposed when the consequences of granting interim relief are properly considered. The provision of health risk management services will be held in suspension, pending the outcome of Part B.

[72] The Applicant proposed, in reply, that it be permitted to continue to render risk management services to the Eastern Cape, alternatively that the work be distributed equitably between the Applicant and Alexander Forbes. In addition to the lack of a convincing legal basis upon which the court can accept the Applicant's proposal, the possibility still remains that the Applicant may not be successful with regard to Part B, entailing further disruption when responsibility for provision of the services changes hands yet again.

[73] The stronger the prospects of success in Part B, the less need for the balance of convenience to favour the Applicant.¹⁵ Nevertheless, the suspension of the implementation of the appointment of Alexander Forbes would not only prejudice, potentially, the interests of a significant number of employees in the Eastern Cape but would also present a risk of the abuse of incapacity leave and ill health retirement, potentially hampering public administration in general.

[74] To complete the requirements for interim relief, the Applicant must demonstrate that it has no other remedy. In that regard, it argues (correctly) that it would have no claim for damages.¹⁶ However, the review proceedings contemplated in Part B remain available to the Applicant.

Relief and order to be made

[75] Returning to the requirement of a *prima facie* right, the court is persuaded that the Applicant has proved the infringement of its right to just administrative action.

¹⁵ This is a well-established principle, as apparent from *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D), at 383D-G; *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A), at 691F-G; and the discussion, in general, in DE van Loggerenberg et al *Erasmus: Superior Court Practice* (Jutastat, RS 15, 2020), at D6-20-1.

¹⁶ The authority for this is *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), at [55].

Whether this enables it to overcome the first requirement for interim relief must still be decided.

[76] In *OUTA*, the Constitutional Court dealt with the merits of interdicting the South African National Roads Agency Ltd ('SANRAL') from proceeding with its 'e-tolling' system, designed to finance the upgrading of the road network in Gauteng. The court considered the traditional requirements for interim relief and held, at [50], that

'[u]nder the *Setlogelo* test the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*.'

[77] The Applicant's right to just administrative action remains intact; it does not call for further protection, pending the review proceedings envisaged under Part B of the application. The decision to appoint Alexander Forbes has already been implemented. Consequently, the court is not convinced that the Applicant has satisfied the requirements for interim relief.

[78] With regard to costs, there is no apparent reason why the determination thereof should be postponed until the conclusion of Part B. The State Respondents and Alexander Forbes have incurred substantial expenses for purposes of their successful opposition to the relief sought in terms of Part A and ought to be compensated accordingly.

[79] In the circumstances, it is ordered that:

- (a) the application for interim relief in terms of Part A is refused; and

(b) the Applicant is liable for the costs of the State Respondents and Alexander Forbes in relation to the proceedings under Part A, including the costs of two counsel where so employed.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the applicant: Adv Buchanan SC, instructed by Whitesides Attorneys, Makhanda.

Counsel for the 1st to 4th and 8th to 17th Respondents: Adv Rorke SC, instructed by Huxtable Attorneys, Makhanda.

Counsel for the 5th respondent: Adv Mullins SC, instructed by Netteltons Attorneys, Makhanda.

Date of hearing: 04 March 2022

Date of delivery of judgment: 17 May 2022