IN THE HIGH COURT OF SOUTH AFRICA KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 4536/17P

In the matter between:

RESULTANT FINANCE (PTY) LTD APPLICANT

and

THE HEAD OF DEPARTMENT, FOR THE DEPARTMENT OF HEALTH KWAZULU-NATAL 1ST RESPONDENT

MEC FOR THE DEPARTMENT OF HEALTH, KWAZULU-NATAL 2ND RESPONDENT

CASE NO. 10475/17P

In the matter between:

THE MEC OF FINANCE IN THE PROVINCE OF KWAZULU-NATAL APPLICANT

and

RESULTANT FINANCE (PTY) LTD 1ST RESPONDENT

ARKEIN CAPITAL PARTNERS (PTY) LTD 2ND RESPONDENT

JUDGMENT

MNGADI J

Introduction

[1] The litigation relates to three interrelated applications. There is a main application, a counter-application to the main application and a review application. The main application and the counter-application falls under case No. 4536/17P and the review application is under case No. 10475/17P. The applicant in the main application is Resultant Finance (Pty) Limited ("Resultant Finance") a company duly incorporated in terms of the company laws of the Republic of South Africa. The first respondent is the Head of the Department for Health KwaZulu-Natal the administrative head of the Provincial Department ("Head of Health"). The second respondent is the Member of the Executive Council of the Provincial Department of Health, KwaZulu-Natal ("MEC for Health"). In the Review application the applicant is the Member of the Executive Council of the Department of Finance in KwaZulu-Natal ("MEC for Finance"). The first respondent is Resultant Finance and the second respondent is Arkein Capital Partners (Pty) Limited("Arkein Capital") a company duly incorporated in terms of the company laws of the Republic of South Africa.

[2] Resultant Finance has instituted proceedings under case number 4356/17P ("the main application"), seeking to have the contract under Bid ZNB5709/2014-H ("the

contract") declared to be extant and valid. The ancillary relief sought, is for specific performance in terms of the contract. Alternatively, cancellation of the contract as a result of culpability on the part of Department of Health, KwaZulu-Natal. The later has counter-claimed seeking to have the contract cancelled based on the breach by Resultant Finance. In the review a9plication the MEC for Finance seeks to have reviewed and set aside the ward of tender and the resulting contract to Resultant Finance. Arkein Capital had been a co-bidder with Resultant Finance but has not taken part in the litigation.

[3] Briefly, the issue in the main application is whether the contract is extant and valid. In the counter-application is whether cancellation of the contract was of force and effect, whereas in the review application, the issue is whether the award of the tender to Resultant Finance falls to be set aside on the grounds that it was irregular, unlawful and *ultra vires.* With consent of the parties and for convenience due to the interrelatedness of the applications, the parties submitted combined heads of argument and the applications were heard together, and one combined judgement is given. This has had some implications relating to costs.

[4] In October 2014 the then Head of the Provincial Department of Health, after having consulted the Provincial government and the National Department of Health decided to lease medical and non -medical equipment for the department rather than to purchase the equipment. The Department of Health commenced the procurement process to appoint a service provider to acquire and lease to it the required equipment for a period of five (5) years. The Bid Specifications Committee, having determined the bid specifications, invited bids by the publication in the Government Tender Bulletin the invitation for bids on 5 February 2015. Only two bids were received, one from Arkein Capital and one from Resultant Finance. The Technical Evaluation Committee found Arkein's bid non-compliant and excluded Arkein. On 5 March 2015 the Bid Evaluation Committee recommended that the bid be awarded to Resultant Finance. On 8 April 2015 Resultant Finance was informed that it had been appointed as a service provider to manage the leasing of medical and non-medical assets for the department. The description of the service was stated to be ' to manage leasing of medical and non-medical assets for KwaZulu-Natal Department of Health at an agreed contract price including applicable taxes at a total charge for cost of borrowing on a full maintenance contract and administration cost of 5.9% for period of five (5) years commencing on 22 April 2015 expiring on 30 April 2020'.

[5] Soon rather than later problems arose around the contract. The parties did not conclude a written contract with a service level agreement. The Health Department required proof of funding from Resultant Finance before it issues purchase orders. Resultant Finance could not proceed to procure equipment without purchase orders. It had not been stated in the bid requirements how much finance needed to be confirmed as available by the bidder and in what format the confirmation needed to be. The funders prepared to fund Resultant Finance required some confirmation from the Department and the Department would not provide the required undertakings.

Positions of Parties

[6] According to Resultant Finance pursuant to the request for acquisition of the equipment, a consultation process needed to take place between it and various internal stakeholders of the Department of Health in order to address various issues regarding

the procurement of the equipment, including the identification of priority items and the turnaround times regarding the procurement of the equipment. It engaged with the officials of the Department but found that they were not co-operating.

[7] On 26 January 2016 the Department of Health addressed a letter to Resultant Finance demanding from it reasons as to why the contract should not be cancelled. Then and by virtue of the conduct of the Department it became apparent to Resultant Finance that the Department no longer desired to be bound by the contract and wanted to resile from it. It was repudiating the contract. Resultant Finance rejects the repudiation and demands specific performance, alternatively, that the contract be cancelled due the Department's repudiation. Resultant Finance states that clause 17 of the contract stipulated that: 'goods and services shall be rendered only upon a written official order or signing of a contract with the province and accounts shall be rendered as indicated on the official order or in the contract, as the case may be.'

[8] Resultant Finance states that on 31 August 2015 the Head of the Department of Health approved the initial order comprising a batch of certain electro medico equipment at an estimated value of R400 million. On 8 September 2015 the Department required Resultant Finance to put in place a service maintenance agreement for certain life support system. Other preparatory work done by Resultant Finance included setting up electronic assets register; setting up of a regime on maintenance and servicing equipment framework. It avers that the conduct of the department, showing that it was repudiating the contract, included refusal of its officials to meet with Resultant Finance's representatives. On 24 November 2015 the KZN Health Central Supply Chain requested from Resultant Finance a project update. It indicated that it was not able to proceed with repairs to equipment since the purchase orders had not been issued to it. A request from the Public Investment Cooperation (PIC), its funder, that it be confirmed by the Provincial Treasury that all amounts due on quarterly basis for the first batch would be ring fenced was only issued in January 2016

[9] Resultant Finance avers that despite the letter issued to it to show cause why the contract should not be cancelled, it remained unclear whether the department was still committed to complying with the contract or not. On 20 September 2016 the Department advised Resultant Finance that the Provincial Treasury was conducting a forensic investigation and the outcome thereof would provide guidance on the way forward. On 23 February 2017 Resultant Finance issued the statutory notice of its intention to institute legal proceedings against the Department for an order seeking specific performance in terms of the contract. On 21 April 2017 it launched the current proceedings. On 13 June 2017 the Department notified Resultant Finance that it was cancelling the contract.

[10] The Department responded to the application by lodging a counter - application. If the counter-application succeeds, it trumps the main application. The Department avers that the contract with Resultant Finance was cancelled on 15 June 2017 because Resultant Finance did not have the required funding to execute its obligations in terms of the contract, and it was also not registered as a financial services provider with the Financial Services Board as required. It states that in July 2015 a new Head of the Department took office. He initiated investigations which showed that the award of the contract to Resultant Finance needed to be reviewed. The reasons were, *inter alia,* lack of financial capacity; roles of the Provincial Treasury and Department's Health Technical Services not clearly defined in the contract and not clear how Resultant Finance would procure the required assets; and critical assets required had not been

leased.

[11] The Department stated that up to date Resultant Finance had not procured any assets and Resultant Finance has not received any payment because Resultant Finance has been unable to secure any funding as required to enable it to procure the equipment. The investigation commenced in August 2016 and it was concluded in March 2017. It stated that soon after the contract was awarded the institutions that were to fund Resultant Finance required certain conditions to be met relating to guarantees and security from Provincial Treasury, required the creation a special purpose vehicle by the Provincial Treasury and the contract to be transferred from Resultant Finance to the funding institutions; a direct funding agreement between the Department and the financial institutions and the exclusion of the maintenance from the contract. The conditions, it states, defeated the purpose of entering into the contract with the applicant and were contrary to the legislation that governed the Department and Provincial Treasury.

[12] The Department states that by December 2016 some seven(7) months post award of the tender, Resultant Finance failed to secure funding for the execution of the Works Information as per the contract. It was not able to procure funding for the contract and to develop a funding model as required by the bid and contract respectively. After the January 2016 letter to show cause, the Department had to wait for the outcome of the forensic investigation and the internal government processes it needs to follow. In March 2017 it received a draft report which does not differ from the final report. It confirms that all financial institutions were willing to provide funding subject to various conditions, the financial institutions were not willing to comply with the contractual conditions of the bid and the contract. It concluded that Resultant Finance was not able to procure funding for the contract and it was non-compliant in that it was not registered as a financial services provider with the Financial Services Board (FSB). It was required of the bid that potential bidders were required to be registered financial services providers with FSB. Resultant Finance had not formed a joint venture or partnership agreement with an entity registered as a financial services provider. The Department admits that that Resultant Finance would have been mandated to procure any assets in terms of the contract if a purchase order was issued. No such purchase order was issued to date. The Department has now validly cancelled the contract.

The January 2016 letter read as follows:

'RE ZNB 5709/2015-H REQUEST FOR PROPOSAL RFP, FOR THE APPOINTMENT OF SOLUTION PROVIDER TO MANAGE LEASING OF MEDICAL AND NON-MEDICAL ASSETS FOR KWAZULU-NATAL DEPARTMENT OF HEALTH, 5 YEAR CONTRACT

The above-mentioned contract was awarded to Resultant Finance (Pty) Ltd by the KwaZulu-Natal Department of Health for a period of five years

The contract was signed on 13 April 2015 and validated on 22 April 2015 and there has been no delivery to date. In view of the above kindly advise why this contract should not be cancelled. The response to reach this office by not later than seven working days from the date of receipt of this letter'.

[13] Resultant Finance in its replying affidavit, stated that although itself is not registered as a financial services provider, it submitted its bid having partnered with or in co-operation with Standard Bank of South Africa and Stanlib which both are registered financial services providers. It signed a co- operation agreement with the two institutions and the co-operation agreement was attached to its tender. Regarding

funding it stated that at all material times it had funding running into millions of Rands available to it. The funders never requested security and guarantees from Provincial Treasury. Their major requirement was the assurance by the Provincial Treasury that the KZN Health tender complied with all applicable PFMA and Treasury regulations, but the Department's official felt that there was no need to give such an assurance.

[14] In a letter dated 3 February 2016 in reply to the January 2016 letter to show cause, Resultant Finance denied that nothing had happened since the signing of the contract in April 2015. It stated that a first official list of equipment required by the Department was finalised by Health Technology Services on 31 August 2015 and officially handed to it on 11 September 2015; when the tender was first awarded a facility of R100 million was made available by Standard Bank but the terms and conditions of the funding were not acceptable to the Department; On 8 September 2015 Rand Merchant Bank granted funding facility of R500 million subject to terms and conditions being negotiated; As an alternative, Public Investment Cooperation(PIC) issued a letter of comfort dated 28 October 2015 and PIC was in the process of reviewing its terms and conditions. Resultant Finance stated that the delay was due to vigour displayed by the Department in scrutinising the terms and conditions by the various institutions. PIC had undertaken to issue a final decision on February 2016 thereafter the first batch approved in September 2015 of approximately R400 million would be processed. The letter concluded that the delays are inevitable in the project of such magnitude and there is no reason to cancel the contract.

[15] Pursuant to the letter of January 2016 to show cause, on 13 June 2017 the Department by a letter to Resultant Finance cancelled the contract with immediate effect. It stated that the reasons for the cancellation are that although Resultant Finance in terms of the bid was required to be registered as a financial services provider it was not so registered and it had not submitted a valid certificate for such a registration, secondly, it has failed to secure funding for the execution of the contract, and thirdly, it was unable to execute the Works Information as contained in the Request for Proposals document.

[16] Resultant Finance challenges the cancellation. It claims that it is as a result of political interference. It elaborates its basis for the view that it was as a result of political interference. It states that it was always able to perform in terms of the contract. Its efforts were frustrated by the officials of the Department.

[17] In the application for review, the MEC for Finance is the applicant. The respondents are Resultant Finance and Arkein Capital. The MEC for Finance seeks an order that the bid process which resulted in the award of the contract to Resultant Finance be set aside as *ultra vires* and null and void, alternatively, unreasonable. Arkein Capital cited on the basis that it was one of the bidders has not participated in the litigation. If the review application succeeds, it defeats the main application.

[18] The Member of the Executive Council of the Province of KwaZulu-Natal deposed to the founding aidavit. She stated that she is the executive authority responsible for Provincial Treasury of KwaZulu-Natal. The Provincial Treasury plays a transversal role within the provincial government framework in that it performs its own internal treasury and budgetary related functions but also assists other departments with those functions. In addition, it plays a monitoring and oversight function over other departments, particularly in relation to fraud and procurement matters. The Provincial Government has an interest in ensuring that irregular processes are set aside and that

public funds are not irregularly dissipated and that fruitless and wasteful expenditure is curbed.

[19] The MEC for Finance states that Provincial Treasury conducted the initial review into the prior procurement processes in the Department of Health. It noted irregularities and appointed forensic audit firm to do forensic investigation into a number of procurement processes. In May 2017 Provincial Treasury took over the procurement process for the Department of Health. On 13 August 201rshe received the forensic report. The report resulted in the decision to apply for the review and setting aside of the award of the contract to Resultant Finance.

[20] The MEC for Finance states that after the contract was awarded to Resultant Finance it was for various reasons not brought into effect, between April 2015 and September 2015 with regard to the funding of the leases. Up to date no one confirmed funding for Resultant Finance. Further, she states that in clause 2.34 of the Special Terms and Conditions of the contract, it specified that bidders must be registered as financial services providers with FSB, it reads as follows: 'The bidder must be a Registered Financial Services Board (FSB) financial services provider. The relevant certificate must be submitted with the bid, failure to comply with this clause will invalidate the bid. If the bidder is a Joint Venture or Consortium or Partnership at least one member thereof must be registered with FSB and proof to that effect must be attached. Failure to submit will invalidate the proposal submitted and the bid will not be considered for evaluation'. AND Further, the MEC states that bidders were required to submit a valid Broad Based Black Economic Status Level Verification Certificate. Resultant Finance did not do so and indicated that it was 100% black owned, and 5,2% black women owned. But the background check revealed that Resultant Finance is 100% owned by Mduduzi Gama. The Bid Evaluation Committee should have, she states, disqualified Resultant Finance for the above reasons. In fact, she states, it was not proper to continue with one bid after it had disqualified Arkein Capital as that meant the process was not competitive as required by section 217 of the Constitution; section 38(1)(a)(ii) of the PFMA, and Treasury Regulation 16 which provide that procurement must be done in accordance with a system which is fair , equitable , transparent , competitive and cost effective. The Bid Adjudication Committee comprised of three members whereas the Departments Supply Chain Management Delegation specified that it should be comprised of a least five members. Further, the bid specifications and advertisement were not approved by the Supply Chain Manager as required by section 8.2 paragraph 1 of the SCM Process standardisation document. The bid specifications were amended, reviewed on 12 February and ratified on 13 February 2015 whereas the invitation to bid had already been published in the Government Tender Bulletin of 6 February 2015, so says the MEC.

[21] The MEC for Finance explains the reasons for the delay in bringing the review as follows. The officials concerned concealed the irregularities, alternatively, were blindly unaware thereof. The irregularities only surfaced when the new Head of the Department of Health was appointed, and the forensic investigation was initiated.

[22] Resultant Finance opposes the review application. It challenges the *locus standi* of the MEC for Finance. It commences by stating that the MEC for Finance has misconstrued her role. It does not confer on her the formal authority over the Department of Health authorising her to institute the review application. It is irregular not to join the Department of Health in the proceedings despite the fact that the Department of Health has consented not to be joined in the proceedings. The decision sought to be reviewed was the decision of the

Department of Health. It is for Health to seek to correct its own decision. The failure to cite Department of Health, avers Resultant Finance, is fatal to the review application. Likewise, the citing of Arkein Capital whereas it has no interest in the legal proceedings renders the application fatally flawed. Further, Resultant Finance avers that the review application is flawed as it is not in accordance with rule 53. It does not call upon the Department of Health to show cause why its decision should not be reviewed, and it does not require that the decision of Department of Health be placed before the review court.

[23] On merits, Resultant Finance avers that the decision to initiate investigation and to review the award of the tender to it is due to political interference. That certain section of the provincial leadership of the ruling party instructed that Resultant Finance be frustrated in its execution of the contract without taking into account the interest of patients in the province of KwaZulu-Natal. It states that from inception interested persons were consulted and representatives of Provincial Treasury were roped in and were part of the decision to procure medical and non-medical equipment by leasing them as well as in the procurement process to ensure compliance in particular one Mr Sangweni. Since the representatives of Provincial Treasury were involved in the process, the MEC for Finance must be taken to have been aware of what was happening from the time the decision was taken to procure the equipment and what happened in the procurement process. The delay in failing to institute the review timeously is not explained, so it is argued. It stated that the decision to review the award of the tender is due to political interference.

[24] Resultant Finance states hat as part of the bid process, it was required that bidders attend a briefing session and in the briefing session it was explained that if the funders of the bidder were registered with FSB that was sufficient. It was well known when the tender was awarded to it, that it was its funders with whom it entered into a cooperation agreement, that were registered with FSB. It has always had access to funding. Funding was not withdrawn but certain conditions precedent in line with section 66(2) of the PFMA and Treasury Regulatio1 s were specified.

[25] Resultant Finance states that the tender was awarded in April 2015. The new Head of the Department *of* Health Dr Mtshali was appointed in July 2015 and he soon commenced with the investigations. The MEC states that the investigations commenced in September 2016. The provisional forensic report was published in March 2017. It is incorrect that the MEC became aware of the irregularities in the forensic report only in August 2017. The review application was launched to trump the main application which sought to compel the Department of Health to perform in terms of the contract.

[26] Resultant Finance denies that the bid process was not in compliance with the provisions of section 217 of the Constitution. The contract was awarded to it in a fair process and its bid was the most competitive. It states that there were no irregularities in its B-BBEE status and documents, it reflected the true position at the time and it was never raised with Resultant Finance as a query. It was partly owned by Safika Holdings (Pty) Ltd which in turn was partly owned Black women. It states that it played no role in the constitution of the Bid Evaluation Committee. It was a committee set up for procurement in the Department of Health and the persons constituting the committee would know better. There is no indication that all the tenders awarded by the said committee are being reviewed.

[27] In Reply, the MEC states that the review is based in the failure by the officials

concerned to comply with the applicable legal prescripts. Resultant Finance in its bid documents stated that it was not bidding as a Joint Venture or Consortium or Partnership. Concerns were raised with the bid process, and Internal Audit commenced investigations. In due course investigations were broadened and Delloitte and Touche assisted in the investigations. Various reports were concluded in March 2017 to June 2017. The reports were submitted to management for comment. The MEC only received the report in August 2017. The reports indicated irregularities and the National Government, and the Provincial Government directed MEC for Finance to put in place corrective measures as a matter of urgency which included Provincial Treasury taking over procurement of the Department of Health. The interventions were carried in terms of the provisions of section 18(2)(g) of the PFMA which section requires Provincial Treasury to intervene to address a serious or persistent material breach of the PFMA by a provincial department.

[28] The MEC states that it was necessary to bring an independent review proceeding rather than to join as a party in the main application. It was not necessary to launch the review application in compliance with rule 53. It had in its possession all the necessary documents and such documents had been made available to Resultant France an interested party. Mr Sangweni from Provincial Treasury was part of the technical evaluation done by the Bid Evaluation Committee and the necessary disciplinary action will be taken against him and other officials involved.

Analysis

(i) Counter-application

[29] The main application was launched in April 2017. Health cancelled the contract in June 2017. Resultant Finance regarded the cancellation as repudiation of the contract which it rejected. In any event, Resultant Finance brought the application for specific performance because it had realised that Health was reluctant to perform in terms of the contract. In January 2016 Health issued a letter to show cause why the contract should not be cancelled, and Resultant Finance responded in February 2016. The fact that Health did not take any action from February 2016 until June 2017 shows that it had no basis to issue the letter to show cause and likewise to purport to cancel the contract on the same grounds specified in the January 2016 letter without in the interim having issued another letter placing Resultant Finance on terms, show that the reasons for the cancellation are questionable.

[30] In the letter to show cause nothing is stated about failure to furnish proof of funding and again nothing is said about failure to register or be registered as a financial services provider with FSB, which in the letter of cancellation are claimed to be the reasons for cancellation.

[31] In my view, it is clear that there were various issues that needed to be sorted out between the parties before performance in terms of the contract. They did not have a contract with specifics. They had not signed as service level agreement. Therefore, the obligations of each party were not spelt out. It soon became clear that for whatever reasons (probably as a result of having a new head not committed to the process and concerns being raised around the project) there was no commitment from Health to reach an agreement on the outstanding issues. Instead investigation was initiated, and Health stalled for the outcome of the investigation.

[32] In my view, there is no substance in the claim by Health that Resultant Finance was in breach of the contract in that it failed to show that it had access to funding to

perform in terms of the contract. It was not specified what was required from the bidder to show that the bidder had access to funding. Further, it was never specified that the bidder had to show access to funding of how much. Resultant Finance was never placed on terms and failed to meet reasonable terms stipulated. Therefore, for Health to abruptly cancel based on failure to furnish proof of funding was repudiation of the contract. See *Datacolor International (Pty) v lntamarket (Pty) Ltd* 2001 2 SA 284 (SCA)paras1,16,17 and 18

[33] Health at not stage claimed any misrepresentation made by Resultant Finance in relation to registration as a financial services provider. Health during the bidding process knew the position of Resultant Finance, but it proceeded, and it awarded the contract to Resultant Finance. There was no stipulation in the contract that Resultant Finance needed to register as a financial services provider. In the letter to show cause nothing was stated about the registration as a financial services provider. The fact that Resultant Finance was not registered as a financial services provider cannot constitute breach of the contract. Again, the purported cancellation on this ground by Health amounted to repudiation of the contract. Health had awarded the contract to Resultant Finance. If the award of the tender to Resultant Finance was irregular, it was not within Health to take decision that it was irregular and of no force and effect without approaching the court with an application to review and set aside the award of the tender. Failing that, in the eyes of the world it remained an award of the tender to Resultant Finance which was binding and to be respected. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222(SCA); *MEG for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* .2014 (3) SA 481(CC)

[34] Lastly, Health purported to cancel the contract on the basis that there was no delivery by Resultant Finance. It is common cause that Resultant Finance could only acquire the required equipment after being given purchase orders. Health admits that it did not issue any purchase orders. The parties needed to sort out the question of the issue of purchase orders before calling upon the other party to deliver. It is not possible on the papers to arrive at a conclusion as to whose fault was it that the purchase orders were not issued. There is no indication that Health was wrong to insist that the question of access to adequate funding needed to be sorted out before it could issue purchase orders. There is no indication that Health acted in an unreasonable manner in rejecting confirmation of funding with terms and conditions not acceptable to it. There were no specific terms relating to these issues in the contract and no implied term has been pleaded. But it was in the bid document that the bidder was required to provide proof of access to funding to enable it to deliver in terms of the contract. See *Alfred McAlpine and* Son *(Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 at 417.

(ii) Main application

[35] Resultant Finance makes a case that it concluded the contract with Health in April 2015. It has been unable to deliver in terms of the contract due to the lack of co-operation by Health. It was in February 2016 when Resultant Finance responded to the letter to show cause. It launched the main application in April 2017. Taking into account the activity around the project and the period of inactivity, Resultant Finance was justified to be concerned. It was conveyed to Resultant Finance that certain investigations were being conducted and the way forward regarding the contract will be determined by the outcome of the investigations. There was nothing from the part of Health showing any commitment to the contract. The refusal or failure to attend meetings with Resultant Finance and calling upon Resultant Finance to show cause

why the contract should not be cancelled were clear indications that there was no commitment to the contract. It was prudent that Resultant Finance launched the main application for the relief sought in the main application. Health has not answered the case made by Resultant Finance except to counter with its own counter-application.

(ii) Review application

[36] The review application is not in the format envisaged in Rule 53. The MEC for Finance, the applicant, states that the format prescribed in Rule 53 is for the benefit of the applicant in review applications. It seems that compliance with Rule 53 is not a peremptory requirement. Finance had received from Health all the required documents for purposes of the review and Resultant Finance had been furnished with copies which made it unnecessary to follow the format in Rule 53. See *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661-2

[37] The *locus standi* of the MEC for Finance is disputed. The MEC for Finance cannot act on behalfl f the Provincial Government. The Premier of the Province cannot authorise an MEC to act on behalf of the Provincial Government. The MEC for Finance cannot act on behalf of another MEC even if requested by that MEC or the Premier of the Province. The *locus standi* of the MEC for Finance must be found in legal prescripts that give authority to her. It is common cause that Provincial Treasury falls under the MEC for Finance. Matters of concern to Provincial Treasury are of her concern. Provincial Treasury is concerned with the expenditure of the Provincial Government, consisting of the various provincial departments. Further, section 18 of the PFMA authorises the MEC for Finance to intervene and take corrective measures. The contract awarded to Resultant Finance was a high value contract for period of five years relating the expenditure of the substantial part of the budget of the Department of Health. The MEC for Finance had a direct and substantial interest in the subject matter and therefore she has *locus standi* to bring the review application. See *Bowring NO v Vrededorp Properties* CC 2007 (5) SA 391 (SCA) par.21. Having resolved the issue of *locus standi* in favour of the Minister of Finance. It appears to me the principle enunciated by the Constitutional Court in *State Information Technology Agency* SOC *LTD* v *Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) can naturally be extended, where the fundaments are the same, to a situation where an organ of state which has *locus standi* within the government sphere, can seek review a decision of another organ of state.

[38] Resultant Finance has raised the issue of non-joinder of the MEC for Health. The MEC for Health has deposed to an affidavit that Health supports the application by the MEC for Finance and it wishes not to join or be joined in the proceedings. The rationale for joinder is that a party be given an opportunity to protect its own interests. Where the party has indicated that it wishes not to be joined, it is ii s own decision and an order justified on the papers may be made even if it affects that party. Therefore, the non-joinder of the Department of Health has no consequences to the application. Further, Resultant Finance raised the issue that Arkein Capital was not supposed to be joined in the review application. Arkein Capital has not participated in this litigation. It was a bidder that was disqualified, and it did not raise any objection that it was not correctly disqualified. In my view, it has no interest in these proceedings and it should not have been joined. That does not render the application flawed, it is of no consequence to the application.

[39] The procurement of large quantities of medical and non-medical equipment by means of a lease from a third party was viewed as an innovative, cost effective and efficient way to procure and maintain the equipment and at the same time transferring

the risk to a private third party. There were no experiences or precedents in that area. It had the potential not to be in accordance with the legislative prescripts of the State. It had no clear channels and it soon faulted. It then required the intervention of Finance, the Provincial Government and the National Department of Health. There had been non-delivery in terms of the contract. The parties could not reach a common ground on the term and conditions of the funding required from Resultant Finance. The change of the Heads of Health in July 2015 resulted in concerns in the manner of procuring equipment and services. It resulted in investigations which revealed that the tender was awarded to Resultant Finance not in compliance with prescribed requirement.

[40] The MEC for Finance as a ground of review raised the following:

1. That Resultant Finance provided a Broad Baes Black Economic Status Level Verification Certificate which did not reflect the true position. It claimed to have 5,2% black women owned but on investigation it transpired that it was100% black men owned. The sequence indicates that the bidding process commenced in February 2015. In my view, it is not explained why there was no verification done up to the stage that the tender was awarded in April 2015. Why it needed auditors to do the verification about two years after the award was made. I find that there is no substance in this ground.
2. Exclusion of Arkein Capital resulted in skewed process. There were only two bids. Arkein Capital was disqualified and the bid documents of Arkein are missing. It was disqualified because it did not provide an undertaking that there was no exclusivity agreement with manufactures. It was not requested to furnish such an undertaking and it was unfairly excluded which favoured Resultant Finance. In my view, Arkein Capital participated in the bidding process, if it was unfairly disqualified it could have pursued remedies available to it. It is not a ground to review the award of a bid to Resultant Finance

3. The exclusion of Arkein Capital resulted in Resultant Finance being the only bidder. Given the value of the bid and the fact that the bid could not be benchmarked, it meant that the bid should have been cancelled and re-advertised. In my view, the MEC does not point to any legal prescripts stipulating that in such instances the bid process should not proceed. There was a published invitation of bids. Interested entities submitted bids. The fact that some bidders were disqualified is part of the process. It is no ground to review and set aside a bid that was awarded.

4. The process was illegal, irrational and ill considered. The MEG has not indicated on what basis was the process illegal, irrational and ill considered. In my view, there are no basis for such conclusion in the papers. Before Health embarked on the process, the necessary consultation was done. It was a decision to procure equipment in that manner and there is no indication that the decision was taken by persons who did not have authority to take such a decision. There was no law prohibiting the equipment through a lease. The current leadership might not be in favour of procuring equipment through a lease but that does not without further ado means that the decision taken at the time is irrational, illegal and ill considered.

5. There was a failure to consult Health Technology Services Standard Operation Procedures. In my view, there is nothing in the papers that such a consultation was a requirement and it was not done. The same applies to the claim that he bid specifications and advertisement were not approved by the SCM Manager. I

find no merit in these grounds.

6. The Bid Adjudication Committee was composed of three members instead of five members. As stated above in this judgement, this ground is not properly supported in my view. There is no affidavit by a person in charging of setting up this committee or the chairperson of the committee. It is not explained how it happened that it took two years to find out that such a critical committee in charge of procurement for the entire department was not properly constituted.

7. The real issue, in my view, relates to the requirement stipulated in clause 2.34 of the Special Terms and Conditions of Contract. Reliant Finance admits that the requirement was stipulated, and it was required to be complied with. It argues that it was a nonsensical requirement and that in the briefing session it was explained that if the bidder had a funder registered with FSB that will suffice. In my view, what was said in the briefing session cannot change a requirement stipulated in the Bid Specifications. Whether the bidder regards the requirements as nonsensical or not is irrelevant. There was no ambiguity in the requirement and it needed no interpretation. It stated that the bidder was required to be a registered financial services provider with the FSB. If it was Joint Venture or Consortium or partnership it would suffice if one of its members was so registered. It was common cause that Resultant Finance made a bid alone. It was not a Joint Venture, Consortium or Partnership. Clearly the award of the tender to Resultant Finance was irregular. Health had no authority to award the bid to Resultant Finance in contravention of the Bid Specifications. The awarding of the tender to Resultant Finance was unfair in that it favoured Resultant Finance over other entities not registered as required and it deprived entities so registered of being awarded the tender. It rendered the process uncompetitive and unfair in that a bidder who was supposed to be disqualified was awarded a tender. It deprived Health of acquiring a service provider properly registered as required, such service provider would have been an entity compliant with the registration requirements as financial services provider. It was illegal in that in contravened section 217 of the Constitution, Treasury Regulations and the SCM policy of the Department of Health. The award of the tender to Resultant Finance allowed corrupt practices in that set published requirements were not applied. It resulted in an unfair process. See *Al/pay Consolidated v Chief Executive Officer SASSA* 2014 1 SA 604 (CC).

Condonation

[41] MEC for Finance sought condonation for the late lodging of the review application, if it is found that there was a delay. The tender was awarded to Resultant Finance in April 2q15. The review application was launched in September 2017. The MEC for Finance states that after the new Head of Health was appointed in July 2015 he reviewed a number of procurement processes including the award of the bid to Resultant Finance. In August 2016 an initial review was conducted by Provincial Treasury which noted irregularities and appointed Deloitte and Touché to undertake detailed forensic investigations. In May 2017 Provincial Treasury took over from Health its procurement processes. She received the Deloitte report on 13 August 2017. The MEC for Finance confirms that Provincial Treasury's role in the procurement in question was limited to technical assistance and approval to extend the proposed leasing from 3 to 5 years. Further, she confirms that Mr Sangweni from Provincial Treasury was part of the technical evaluation done by the Bid Evaluation Committee. She states that the forensic report has recommended action be taken against him as

part of the action to be taken against a number of employees for failing to disqualify Resultant Finance's bid as it was not registered with FSB.

[42] In its papers in the main application Health stated that the investigation commenced in August 2016 and concluded in March 2017. The internal audit report was received by Health from Provincial Treasury in June 2017. Resultant Finance states that the MEC for Finance has unconscionably delayed in bringing the review application; Finance was present at the briefing session held on 19 February 2015 wherein the issue of FSB registration was raised and discussed; at all times Finance had access to all the information relating to Resultant Finance's bid and it could have raised an objection and its application is two years 6 months from the date of the award of the bids.

[43] The Constitutional Court determined that a review by public authority of its own administrative action is not a PAJA review, but a legality review. As one of the requirements of a legality review is that it ought to have been brought timeously. Resultant finance submits that the delay can be a bar to a legality review, it stresses the point that a court will not set aside an irregular process if there was a delay in bringing the application. In *Cape Town v Aurecon SA (Pty) Ltd* 2017 4 SA 223 (CC) it was held that the date on which the 180-day period contemplated in PAJA starts to run is the date on which reasons for the administrative action becomes known or ought reasonably to have become known to the applicant. In *Gijima Holdings (Pty) Limited* it was held that the reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality. Time is of utmost importance. In my view, Provincial Treasury through its officials were involved in the procurement process up to the stage of the award of the tender to Resultant Finance. Whether there was a delay by the Provincial Treasury to challenge the awarding of the tender, the period commences from the date of the award of the tender. The MEC for Finance is in the same position as Provincial Treasury. The MEC for Finance is required to give a reasonable explanation for the delay failing which the delay will be an absolute bar.

[44] The MEC for Finance seeks to explain the delay by stating that Provincial Treasury officials did not bring to her attention the irregularity in the award of the tender to Resultant Finance. In my view, the other purported review grounds found to have no merit become irrelevant for consideration of condonation for the delay in bringing the review application. It has not been disputed that the MEC for Finance herself became aware of the irregularity in August 2017. No case has been made out that she ought to have been aware at an earlier date.

[45] Certainty in public administration is critical. It is important that administrative decision that have been taken, if not immediately challenged, must be deemed to have been properly taken. Consequences follow from administration actions and certainty promotes stability and it is the interest of proper planning and organisation. In my view, the question of prejudice to the immediate interested parties if the administrative action is set aside is not determinative but one of the factors to be taken into consideration. In *Merafong City Local Municipality v AngloGold Ashanti Limited* (2017) (2) SA 211 (CC) para 73 it was held 'the rule against delay in instituting review exist for good reason, to curb the potential prejudice that would ensure if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not for those who rely on the decision but

for the efficient functioning of the decision- making body itself. Factors to be considered are inter alia, nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue or ground of review.' etc.

[46] In my view, in this application factors that carry more weight are the following; there has been no delivery in terms of the contract; the ground of review is of substance; Resultant Finance is the author of the established ground of review; the contract was a high value contract; there were issues around the delivery in terms of the contract that had not been resolved by the parties which delayed delivery in terms of the contract. In conclusion, the delay in lodging the review application is condoned.

Just and equitable remedy

[47] Once it has been found that the award of the tender to Resultant Finance was unlawful, it is required that it be considered what would be the just and equitable remedy in the circumstances. There has been no delivery in terms of the contract. The affected parties are Resultant Finance and the Department. There are no consequences of the award that are irreversible. The noncompliance must be placed at the door of Resultant Finance and in my view, it was a substantial non-compliance. I find that it is a just and equitable remedy to set aside the award of the tender to Resultant Finance.

Conclusion

[48]. I make the following order:

1. The application in case No. 4536/17P and the counter-application are dismissed with no order as to costs.

2. The application in case No. 10475/17P is granted in terms of paraphs 2,3, and 4 of the Notice of Motion with no order as to costs.

MNGADI J

<u>APPEARANCES</u>

Case Number CASE N0 .4536/17P and CASE NO. 10475/17P

For the Applicant in the main application and Respondent in the review application: Adv P.F. LOUW SC

Represented by Mathopo Moshimane Mulangaphuma SANDTON

For the respondents in the main application And applicant in the review application: Adv. A.J. DICKSON SC

Instructed by PRK Attorneys PIETERMARITZBURG

Date of Hearing	10 August 2018
Date of judgement	24 August 2018