AII

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

CASE NO: 13991/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

9/5/2017

In the matter between:

TRANSNET SOC LTD	Applicant
and	
MAZOTHANDO (PTY) LTD	Respondent

JUDGMENT

MIA, AJ

INTRODUCTION

[1] The applicant sought an order declaring its decision to appoint the respondent to supply and deliver B90 Black Loco Sand in 25 kg bags to the applicant as constitutionally invalid and unlawful and to set aside the aforesaid decision. It sought further an order to declare the agreement concluded between itself and the respondent pursuant to the aforesaid decision, for supply and delivery of sand to be declared constitutionally invalid and unlawful and to set aside the agreement.

The respondent opposed the application. The first issue that arose on the papers was the respondent's objection to the applicant's late filing of the replying affidavit.

[2] The respondent objected initially to the admission of the replying affidavit as evidence in the proceedings as it was filed five months after it was due. The applicant did not launch a substantive application to condone the late serving and filing of the replying affidavit. When the matter was heard this issue was no longer persisted. Rule 27 permits the Court to condone any non-compliance with the rules where good cause is shown.

BACKGROUND

[3] The facts which inform the background to the dispute are the following. The applicant is an organ of state. It procures goods and services from time to time in the course of executing its functions. The applicant issued a request for quotations (RFQ) on 25 August 2015. The request was for the supply of B90 Black Loco Sand in 25 kg bags for 10E, 11E and Diesel Locomotives at three sites in Ermelo, Mpumalanga for a period of three months. The invitation did not specify the number of bags required. This was a necessary specification and the failure to do so it was contended compromised the RFQ process.

[4] In response to this request for quotations the respondent enquired directly from one of the applicant's user departments what their consumption of black loco sand was per week. The respondent was informed that the amount was 110 bags per week. The respondent submitted a quotation taking into account an additional 10 bags per week to allow for spillage. The respondent submitted a quotation calculating usage at 110 bags per week plus 10 extra bags per week for spillage over 3 months and submitted a quotation for the total

amount of R1322,856,00 being the amount it would charge for the supply and delivery of the sand required by the applicant over three months.

[5] The applicant accepted the quotation and awarded the contract to the respondent. A written contract was concluded on 22 September 2015. Clause 4.1 of the agreement provided:

> "This agreement is an agreement under the terms and conditions of which the supplier will arrange for the supply to Transnet of goods which meet the requirements and specifications of Transnet delivery of which is controlled by means of purchase orders to be issued by Transnet and executed by the supplier in accordance with this agreement."

[6] The applicant issued purchase orders for the period 22 September until the end of October 2015 for the delivery of sand. The respondent delivered a total of 4140 bags of sand which deliveries were accepted by the applicant and utilised. At the end of the period the respondent issued an invoice for the amount of R2 616 744, 60 which was considerably more than the amount that had been agreed upon. The quotation reflected the amount of R1322 856.00. The applicant refused to pay the invoice. The applicant averred the goods were procured in contravention of its procurement policy and sought to set aside the contract concluded.

[7] Mr Tsatsawane, counsel for the applicant, argued that the applicant is required to procure goods and services in terms of a prescribed procurement policy which is governed by section 217 the Constitution. Section 217 of the Constitution provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a

system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

The applicant had thus formulated and adopted a supply chain management policy which informed its procurement and gave effect to the provisions of section 217 of the Constitution.

[8] He argued further that the applicant's supply chain management policy provided for various methods whereby the applicant could procure goods and services. This policy he argued was therefore the source of authority to procure goods and services and directed the methods to be employed. One such method of procurement was the quotation method which was the particular method employed before the agreement was concluded between the parties.

[9] The quotation method required the invitation of quotations and the submission of quotations by service providers. Service providers indicated the amount they would charge for a particular service or to provide certain goods required by the applicant. Upon receipt of all the quotations, the applicant conducted and assessment to identify a successful bidder based on particular criteria. The successful bidder once identified concluded a procurement agreement and fees were disbursed for goods provided or services rendered.

[10] Of particular relevance to the present matter is the applicants supply chain management policy which provides in clause 14.3.1 that:

> "The quotation system is a procurement system for transactions below R2 million (exclusive of VAT) that are required on a non -repetitive basis."

[11] The above requires that goods and services required in excess of R2 million are secured by alternate means such as by way of tender. The applicants supply chain management policy provides further in clause 14.3.2 that:

> "b) The quotation system is intended for non-frequent purchases of **fairly low value**. It should not be used on a continual/ repetitive basis for the same commodity i.e. where the same commodity is purchased (sometime even form the same supplier), but on different purchase orders/requisitions. This will be regarded as parcelling."
>
> c) The quotation system is best suited in the following circumstances where:
>
> i) transactions are valued at less than R2 million;
>
> ii) The purchase is **not required on a repetitive basis**. Where the same purchase is regularly made, consider a fixed term as and when required contract..
>
> iii) the value of the transaction would make it impossible, impractical or economically inviable to call for Open Bids;
>
> iv) there are opportunities to develop suppliers in order to achieve transformational objectives. This mechanism is considered to be the best avenue to facilitate entry to the market for emerging small B-BBEE companies."(my emphasis)

[12] Mr Tsatsawane argued further that the procurement of goods and services was informed and guided by a public procurement system informed by section 217 of the Constitution to ensure good governance and to ensure responsible and accountable use of funds. Section 2 of

the Constitution provided that any law or conduct which is inconsistent with the Constitution is invalid and the obligations imposed by the Constitution must be complied with. A failure to do so rendered the conduct or law in issue invalid. In view hereof the applicant was thus obliged to monitor and resist any contracts concluded in contravention of the procurements system which occurred or was concluded contrary to the procurement system as it was thus contrary to section 217 of the Constitution.

[13] He argued that the contravention occurred in that the quotation system allowed for the purchase of goods to the value of R2 million on a once off basis. It was not for purchases which would be repetitive in nature. The fact that the value of the procurement exceeded R2 million, despite the invoice reflecting an amount of R1.322 856 million appeared from the respondents own invoice and was thus in contravention of the procurement policy. The respondents invoice and claim against the applicant in the Gauteng Local Division exceeded the quotation and the agreed amount per the terms of the agreement.

[14] The applicant's officials were required to take steps to determine whether goods or services required would exceed R2 million. This should have informed the procurement method which they would need to employ. They ought to have specified the number of bags required in the RFQ to ensure transparency and accountability. When the request for quotations was issued this specification was lacking. This resulted in the service provider approaching a particular office to determine usage. The decision makers were thus not able to determine whether the total price would exceed R2 million in these circumstances as the information furnished was incomplete. The failure to do so resulted in irregular unauthorised expenditure and the procurement method was not appropriate under the circumstances. This then resulted in the procurement transactions being *ultra vires*. The service also required a

repetitive purchase of sand which was contrary to the procurement policy.

[15] The above irregularities were in violation of the supply chain management policy and the agreement concluded pursuant thereto was constitutionally invalid, unlawful and fell to be set aside. He argued that the agreement was reviewable in terms of section 6(2) (a) (i) of the Promotion of Just Administrative Action Act (PAJA) in that the relevant officials were not authorised to procure the services in the manner they employed. They were not empowered to do so in terms of clause 14.3.1 and 14.4 of the applicant's supply chain management policy.

[16] He argued further that section 6(2) (b) of PAJA was applicable in that the mandatory material procedure prescribed by the empowering provision namely clauses 14.3.1 and 14.4 of the supply chain management policy were not complied with because the quotation method was utilised for services and goods purchases which exceeded R2 million and were repetitive contrary to the supply chain management policy. Further that section 6(2)(i) of PAJA was applicable as the decision to purchase from the respondent was unlawful and unconstitutional in so far as the process adopted prior to concluding the agreement and identifying the successful bidder was not a competitive and transparent process.

[17] Mr Mathibedi, counsel for the respondent, argued that this matter arose out of the same cause of action pending in the South Gauteng Division of the High Court. The applicant was aware that the respondent had issued summons in the Gauteng Local Division and summary judgment which the applicant launched in that Division was dismissed. The matter was thus pending. The applicant served and filed an exception to the respondent's particulars of claim. The exception is yet to be

heard. The respondent filed a notice to amend its particulars of claim. There was no opposition thereto. If indeed the applicant sought to challenge the conclusion of the agreement between the parties, it ought to have done so in that forum as set out in this application.

[18] The respondent distinguished between the agreement under attack and the requisition and delivery of the B 90 Black Loco Sand. Mr Mathibedi argued that the submission of the quotation and the agreement concluded for the amount of R1322 856.00 did not fall foul of the procurement policy and thus was not invalid. The quotation submitted resulted in the respondent being declared the successful bidder. This culminated in the conclusion of the agreement under attack. The agreement allowed for the services of the respondent to be secured in terms of the applicant's supply chain management policy. This was in line with section 217 of the Constitution as well as the applicant's Supply Chain Management Policy.

[19] Mr Mathibedi argued further that the delivery of sand was in compliance with the agreement. The respondent only delivered sand as requested. He argued further that the only portion of performance that was open to question was the delivery of sand in excess of R1322 856.00. This he submitted the respondent could claim on the basis of unjust enrichment. The respondent intended to amend its particulars of claim accordingly to claim for the excess sand on the basis of unjust enrichment in the Gauteng Local Division.

[20] He argued that in the event that the Court found that the conclusion of the agreement was contrary to the applicant's Supply Chain Management Policy and section 217 of the Constitution, he argued that the Court ought to adopt a just and equitable approach. In this regard he submitted that the Court should consider whether it would be

appropriate and just and equitable to set aside the agreement with the applicant who did not tender return of the sand and it was now impossible to do so. Further that the Court should consider that the lifespan of the agreement had expired and no reasons had been advanced by the applicant why once it did come to the applicant's attention that excess sand had been delivered that it did not take steps to refuse the excess sand alternatively that it did not return the excess sand.

[21] He also implored the Court to consider that setting aside the agreement would financially prejudice the respondent has the agreement had been concluded and performance had been completed. It was impossible for the applicant to tender return of the sand or the excess sand. In support of his argument to uphold the agreement referred to the matter of *Bengwenyama Minerals v Genorah Resources* 2011(4) SA 113 at para 85 where the court held:

> "The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case. "

[22] Regarding the authorities referred to by the applicant he submitted that they were distinguishable from the present matter. The applicant was required to make out a case in its founding papers, not from the bar. Regarding the submissions relating to transparency, this does not appear in the applicants founding affidavit and thus the applicant ought not be permitted to make out such a case from the bar. He argued further that to the extent that the good portions of the agreement may be severed from the bad the Court should uphold that portion of the agreement that was capable of been saved so as to ensure that there was no prejudice to the respondent.

[23] The applicants founding affidavit made reference to the Constitution and the Public Finance Management Act 1 of 1999. In so far as there was no reliance on PAJA I was referred to the matter of *Bato Star Fishing Ltd v Minister of Environmental Affairs and Others* 2004(4) SA 490 (CC) where the Court per O' Regan held at paragraph [26] and [27]:

"[26] In these circumstances, it is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies.

[27] The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify

clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action."

[24] The submissions made by counsel as well as the heads of argument filed herein, indicate in detail which sections the applicant relied on in PAJA to review the agreement which it seeks to have declared unlawful and to have set aside. It is apparent that the concern raised is the manner in which the empowering provision was flouted. Mr Tsatsawane referred to the decision in *Minister of Transport v Prodiba (Pty) Ltd* [2015ZASCA 38 (25 March 2015) where the court held:

"[38] The court below erred in holding that Mr. Mahlalela was acting well within his powers in concluding the agreement **without a competitive process** as the option he chose, namely to sign the agreement, was justified. In doing so, it ignored the principles set out above and misconstrued the facts."(my emphasis)

[25] The need for public officers or where public funds are expended to follow a particular process is evident in the case of *Chief Executive Officer, South African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) where the court noted at paragraph 21 the following in relation to the National Treasury Regulations:

"That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of reg 33."

[26] The applicant's conduct ought to be governed and informed by the Constitution and the principle of legality. Mr Tsatsawane referred to Fedsure *Life Assurance Ltd V Greater Johannesburg Transitional*

Metropolitan Council 1999(1) SA 374 (CC) where at paragraph [58] the Court held:

"[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.

[59] There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action' the principle of legality is enshrined in s 24*(a)*. In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question."

[27] The applicant was obliged at all times when procuring goods and services to exercise its powers and act in terms of its supply chain management policy and the PMFA. The services and goods procured required in terms of the PMFA and the procurement policy that a fair, competitive and transparent process be adopted in order to safeguard the integrity of the procurement process and to ensure the prudent use of public resources and also to prevent corruption and maladministration of public resources. The good procured were done contrary to the policy of the applicant in that it was repetitive in the order. Further the amount exceeded the R 2million limit set in the procurement policy and was not a once off purchase.

[28] In circumstances where an agreement is concluded without the prescribed statutory requirements such as the PMFA or prescribed procurement policy which is adopted in terms of section 217 of the Constitution, the agreement is invalid. The applicant cannot ignore or

avoid the requirements of the Constitution and is bound to address the issue once it comes to its attention. It has done so in the present matter. I have considered the submissions on behalf of the respondent that there will be prejudice to the respondent. There is prejudice to the respondent. The respondent is addressing this prejudice by way of proceedings in the South Gauteng Local Division by way of a claim for unjust enrichment against the applicant in the event that the agreement is set aside. The issue in the present matter is the question of the legality of the agreement and whether the procedure adopted contrary to procurement policy resulting in an unfair an uncompetitive process should be upheld. This cannot be. This would permit the harm which the policy and the Constitution seek to prevent. The applicant is required to adopt a proactive position rather than a defensive position in relation to procurement and it is appropriate that it seeks the order requested

ORDER

In view of the above it is ordered:

[29] 1. The applicant's decision to appoint the respond to supply and deliver B 90 Black Loco Sand in 25 kg is declared constitutionally invalid unlawful and is hereby set-aside,

2. The agreement concluded between the applicant and the respondent to supply and deliver B90 Black Loco Sand in 25 kg is declared constitutionally invalid unlawful and is hereby set-aside

3. The respondent to pay the costs of this application.

S C MIA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the applicant	:	Adv K Tsatsawane
Instructed by	:	Diale Mogashoa Attorneys
On behalf of the respondent	:	Adv TF Mathibedi
Instructed by	:	Makola Attorneys
Date of hearing	:	18 April 2017
Date of judgment	:	9 May 2017