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| Reportable:               | YES / NO |
| Circulate to Judges:      | YES / NO |
| Circulate to Magistrates: | YES / NO |



**IN THE HIGH COURT OF SOUTH AFRICA**  
**NORTHERN CAPE DIVISION, KIMBERLEY**

**Case No: CA & R 659/2016**  
**Heard on: 28/02/2017**  
**Delivered on: 31/03/2017**

**In the matter between:**

**DEFENSOR ELECTRONIC SECURITY SERVICES (PTY) LTD      Applicant**  
**(REGISTRATION NUMBER: 2012/038837/07)**

**And**

|                                           |                            |
|-------------------------------------------|----------------------------|
| <b>HEAD OF DEPARTMENT</b>                 | 1 <sup>st</sup> Respondent |
| <b>NORTHERN CAPE DEPARTMENT OF HEALTH</b> |                            |
| <b>MEMBER OF THE EXECUTIVE COUNCIL</b>    | 2 <sup>nd</sup> Respondent |
| <b>NORTHERN CAPE DEPARTMENT OF HEALTH</b> |                            |

Coram: Mamosebo J et Snyders AJ

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**JUDGMENT ON REVIEW**

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**MAMOSEBO J**

**Introduction**

- [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.<sup>1</sup>

- [2] The applicant is Defensor Electronic Security Services (Pty) Ltd (Registration Number 2012/038837/07). The first respondent is the Head of Department: Northern Cape Department of Health (HOD). The Second respondent is the Member of the Executive Council: Northern Cape Department of Health (MEC). The respondents are therefore organs of state as contemplated in s 239 of the Constitution<sup>2</sup> and s 1 of the Promotion of Administrative Justice Act<sup>3</sup> (PAJA).
- [3] This is a review application in terms of Rule 53 of the Uniform Rules of Court. When the application was heard Part 1 thereof had become academic or moot in that the respondents had already provided the reasons for the administrative action as well as the record thereof. The only issue for determination relates to costs which were reserved. What serves before us is the second part of the application which pertains to the constitutional challenge on the validity of the administrative action taken by the respondents.
- [4] The applicant sought an order in the amended notice of motion in the following terms:
- 4.1 That the period of 180 days provided for in s 7(1) of PAJA during which an application for judicial review had to be brought be extended, as provided for in s 9(1) of PAJA read with

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<sup>1</sup> S 217 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996

<sup>2</sup> The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>3</sup> The Promotion of Justice Act 3 of 2000 (PAJA)

Regulation 5<sup>4</sup>, for a further period lapsing on the day of delivery of this notice;

- 4.2 declaring the HOD's failure to ensure that the applicant's bid be considered and adjudicated upon during both the tender offer validity period and the extended tender offer validity period, unlawful and constitutionally invalid;
- 4.3 declaring the HOD's decision to cancel Tender: NC DOH/009/2014 unlawful and constitutionally invalid;
- 4.4 reviewing and setting aside the HOD's decision to cancel Tender: NC DOH/009/2014;
- 4.5 extending the tender offer validity period for a period of 60 (sixty) days from the date of the granting of this order;
- 4.6 ordering the HOD to ensure that the applicant's bid is considered and adjudicated upon in terms of the evaluation methodology prescribed in Clause 10 of the bid document, within the extended tender offer validity period contemplated in the preceding prayer.

### **Condonation**

- [5] Adv Vorster, for the applicants, laboured under the impression that the condonation would not be opposed since there was no suggestion to the contrary. However, counsel for the respondents, Adv Stanton, made the submission that the respondents are indeed opposing the condonation. It would have been prudent for counsel, as officers of the Court, to have discussed their respective positions on this aspect before the hearing commenced.

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<sup>4</sup> of Rules of Procedure for Judicial Review of Administrative Action (No. R966 of 09 October 2009)

- [6] The Supreme Court of Appeal made the following pronouncements pertaining to condonation:<sup>5</sup>

*'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that will be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.'*

- [7] Undoubtedly, these proceedings fall within the purview of s 7(1) of PAJA which stipulates:

*“(1) Any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –*

- (a) Subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
- (b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and*

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<sup>5</sup> *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F:

*the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”*

- [8] The applicant’s averment is that it only became aware of the outcome of the administrative acts on 12 June 2015 and urged that the date be used as the inception date to calculate the period from which relief could be reasonably sought under PAJA. This means that the review application should then have been brought on 29 December 2015. Legal advice was sought from different practitioners. Each practitioner’s role in the matter is explained in the founding papers. The conundrum was created by the withdrawal of the initial review application which necessitated the filing of a fresh application. The second application was out of time by a period of three months. Having considered the explanation tendered for the delay as well as the importance of this matter I am of the view that condonation should be granted in the interests of justice.

### **Factual background**

- [9] A historical background to the facts is necessary. On Sunday, 13 March 2014, the Northern Cape Department of Health (the department) issued an invitation in the City Press Newspaper for the submission of bids for the appointment of a service provider to render security guarding services for the Northern Cape Department of Health NC DOH/009/2014. The tender document was available from the Projects Office at a cost of R500 00. It is common cause that the applicant together with 37 other bidders tendered for this service. A compulsory briefing session conducted by Mr Faas, Director: Supply Chain Management, was held on 16 April 2014 at 10h00 in the Auditorium of the Kimberley Hospital Complex. The closing date and time for the bid submissions was 30 April 2014 at 11:00.

- [10] The applicant, represented by Mr Gert Reinier Van Rooyen, its director, deposited the bid at 10:30 in the Bid Box. Mr Faas opened the Bid Box at 11:00. The applicant was allocated bidder number 27. It is common cause that the other bidders, in exception of the applicant, were disqualified as evinced on form “FA20” at the technical stage, for non-compliance with mandatory and key requirements as stipulated in the bid document.
- [11] The expiry of the 90-day validity period was 30 July 2014. From the papers it seems that the Department now limited their communication to the applicant only. Mr S Booie: Assistant Director, Supply Chain Management, addressed an undated communication to the applicant under the head: Extension of Validity Period (please respond urgently) “FA05”. The request informed the applicant that the validity period of 90 days has expired before the bid adjudication committee (BIC) could award the bid. The enquiry was meant to solicit from the applicant whether it was amenable to extend the validity period from 30 July 2014 to 28 November 2014. The applicant was agreeable. There is a proviso in the communication to the effect that: “...*should the bids not be adjudicated during the current period, the right is reserved to ignore your bid if the amendment has the effect of increasing or decreasing the bid price.*” The bid had still not been awarded during the first extension. A second, similar and final request, was addressed to the applicant extending the period from 28 November 2014 to 09 April 2015. Still no award had been made at this stage.
- [12] Despite several enquiries: on 31 October 2014, 10 November 2014 and 08 December 2014 by the applicant on the status of the bid the ambivalence continued. The applicant lodged a complaint with the office of the Public Protector and in addition lodged a Request for access

to the Record of Public Body<sup>6</sup>. The applicant also served a Notice of Appeal on the HOD. The applicant was asked to pay an initiation fee of R40.00 before it could receive a response, which was complied with.

- [13] The first response to the applicant's erstwhile attorney, Mr Nico Gouws, "FA 15" dated **28 January 2015**, was by the department's Director: Legal Services, Mr DB Ndlovu. He advised that **the bid is still pending and has not been awarded due to a delay in processing it**. What this processing entailed is unspecified. He reminded that the applicant had agreed to an extension of the validity of the bid. The applicant states that a meeting was held between its attorney, Mr Gouws, and the HOD on 16 April 2015 in Gouws' office. The HOD does not deny that a meeting took place but disputed the assertion that she said the applicant will be awarded the bid. She does not say what decision was taken, if any, at the aforesaid meeting.
- [14] On 21 May 2015 at 11h00, a period also after the expiry of the validity period of 09 April 2015, officials from the Department Mr Faas, and Mr Ngcoboti, Director: Management Accounting, visited the applicant's premises to conduct a vendor assessment in terms of Supply Chain Management Guidelines for Accounting Officers pursuant to which a report was compiled. The report also confirms the site inspection. Counsel for the respondents was pressed to explain why such a visit was undertaken if it was not a further step towards ensuring that the successful bid ticked all the boxes. No cogent explanation was forthcoming from the HOD.

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<sup>6</sup> in terms of s 18(1) of the Promotion of Access to Information Act, 2 of 2000



- [15] The Supply Chain Management Guide, issued by the National Treasury, has been in force since February 2004. The following is pertinent therefrom: Suppliers should be assessed by the Supply Chain Management practitioners (SCM), for possible risks such as the availability of adequate facilities, financial standing, capacity and capability to deliver, previous performance in terms of quality and service delivery, as well as attainment of goals.
- [16] Counsel for the respondents submitted that it is unknown whether Mr Faas, holding a rank of Director: SCM went on a frolic of his own when he conducted the vendor assessment. But this submission lacks merit. Mr Faas was entrusted with this bidding process from inception and nothing untoward was alleged against him until the issues of the vendor assessment were laid at the HOD's door. Mr Faas was accompanied by another senior official of the department, the aforesaid Mr Ngcoboti. Nothing was said about his participation. Their report clearly stated that the vendor assessment was for supply chain processes to provide due diligence assurance as far as the bid was concerned. The report was destined for the HOD's further bid process determination.
- [17] The HOD states that Mr Faas was not authorised to conduct a vendor assessment but was required to conduct a due diligence. In the SCM process reference is made to vendor assessment not due diligence as claimed by the HOD. It is incomprehensible why she would ask Mr Faas to conduct due diligence on a lapsed or invalid tender. The contention by the HOD in relation to the vendor assessment by Mr Faas lacks substance. Besides, the applicant cannot be blamed if the Department muddle or misconstrue their own internal responsibilities.



- [18] On 08 June 2015 when the applicant did not receive the appointment letter attorney Gouws was instructed to demand it. He addressed three almost identical letters to the HOD, the MEC and the Director: Legal Services, Mr DB Ndlovu, demanding the appointment letter be issued by 12 June 2015.
- [19] Interestingly, the said Director: Legal Services, responded on 12 June 2015 in these terms:
- “Your letter dated 09 June 2015 refers.*
- I have been advised by Supply Chain that on 21 May 2015 they visited your client to do vendor assessment and not pre-appointment due diligence as you allege.*
- Regarding your appeal for access to information we responded on 28 January 2015 and **the vendor assessment is part of the preliminary bid evaluation.***
- At this stage, your client or any other bidder cannot receive the appointment letter since the **bid evaluation and the adjudication committees have not sat and advised the HOD on the outcome of the bid.**”*
- [20] Mr DD Madyo, Head: Ministry of Health responded under the letter head of the office of the MEC for Health stating *inter alia*:
- “The tender is out-with the prescribed tender period and therefore it is no longer valid.”*
- [21] The HOD did not file a supplementary affidavit. She furnished the following explanation in paras 24.6 and 24.7 of her answering affidavit:
- “24.6 The tender was never adjudicated and the applicant cannot submit that it should be awarded to it or that the Court should arrogate to*

*itself the power to award it to the applicant. The applicant's application is stillborn.*

- 24.7 *The reason of the tender not being awarded to any of the tenderers appears from a letter which the MEC for Health Mr NM Jack wrote to me on 27 May 2015. I attach a copy of the letter as GEM-6. In this letter the MEC stated that no appointments of new service providers of security service and other so-called urgent matters should be made due to the serious financial challenges faced by the Department. A further reason why **the tender was allowed to lapse** was the presentation by the Ministerial Task Team on Safety and Security arising from a meeting of the National Health Committee on 23/24 April 2015. I attach hereto, marked GEM-7, a copy of the presentation. As appears therefrom, there is consideration to provide in-house security personnel and develop internal management capability."*

- [22] It is disconcerting that no cogent explanation was furnished or exists why the Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC) did not deal with the tender within the validity period or the two extended periods. In fact there is nothing in the papers, a concession correctly made by counsel for the respondents, justifying the failure by the respondents to make a decision. Counsel submitted though, that the tender offer validity period has now lapsed. The excuse proffered for the lapse were that the BEC and the BAC did not carry out their obligations within the tender period. All that they said for themselves is that they did not meet but did not give reasons for such failure. It cannot be in the interests of fair administrative action to be as nonchalant as that. See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v*

*Chief Executive Officer, South African Social Security Agency, and Others*<sup>7</sup> where the Constitutional Court highlighted the following:

*“..[W]ith reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.”*

- [23] The applicant’s counsel submitted that if the respondents took the decision to allow the tender to lapse because they did not want to cancel it, in effect, amounts to cancellation of the tender. The failure to provide reasons why the tender validity period was allowed to lapse renders the process devoid of transparency. The failure also signifies that no good cause exists or there are ulterior motives which do not call for the applicant’s speculation.
- [24] The letter by the MEC is dated 27 May 2015. Therein he instructs the HOD not to make any financial commitments or appoint new service providers. This letter was written long after the tender process had been completed and the extended periods had elapsed. The letter was therefore not integral to the considerations relating to the bids, the evaluation and adjudication process. It is unclear what reasons the HOD had prior to the receipt of the MEC’s letter why the process was not finalised within the set timeframes and the further indulgences. Nowhere in the Answering

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<sup>7</sup> 2014 (1) SA 604 (CC) at 615D – E ( para 27)

Affidavit was I able to locate any reasons other than the letter of the MEC which has been *ex post facto* employed to justify this dereliction of duty.

[25] Administrative action as contemplated in s 1 of PAJA means “any decision taken or any failure to take a decision, by –

(a) an organ of state, when –

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, .... and which is not specifically excluded in the list of exceptions”.

[26] In *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>8</sup> Olivier JA held that in determining whether action constitutes administrative action, the threshold requirement is whether the body in question “exercised a public power or performed a public function”. The consideration and award of tenders has been held to constitute administrative action under the constitution. Cameron JA made the following pronouncement in *Logbro Properties CC v Bedderson NO and Others*<sup>9</sup>

*“The starting point must be that the tender process constituted an administrative action under the Constitution. This entitled the appellant to a lawful and procedurally fair process and an outcome, where its rights were affected or threatened, justifiable in relation to the reasons*

<sup>8</sup> 2001 (2) BCLR 176 (SCA); 2001 (1) SA 853(SCA) para 36

<sup>9</sup> [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) at 466 para5

*given for it. I say must be since in the light of several decisions of this Court applying the Constitution's administrative justice provisions to governmental tender processes the statement seems obvious. Yet counsel for the province asserted the contrary."*

[27] The bid document specified the following pertaining to the '**bid validity period**': Responses to this bid received from vendors will be valid for a period of 120 days counted from the closing date of the bid.

27.1 Counsel for the applicant urged us to make a finding relating to the distinction between a "**bid validity period**" and a "**bid offer validity period**".

27.2 Counsel submitted that the bid or tender was valid for three years (36 months) whereas its bid offer validity period has to be calculated from the closing date of the bid for 120 days, allowing for extensions; The two phrases cannot be used interchangeably as it seems to be the norm currently; that a further difference lies in the fact that the tender validity period of three years still has two years to run whereas the tender offer validity period was allowed to lapse.

[28] Although this argument does not seem baseless, however the main focus when such matters are brought on review is for the courts to determine whether the administrative action following the tender process was procedurally fair and the system followed was also fair, equitable, transparent, competitive and cost-effective. As much as the end result may be the signing of the contract for the implementation of the bid, the courts are mandated by the Constitution to pay attention also on the fairness of the process.

- [29] Clause 10 of the bid document state the following relating to Evaluation Criteria and Weightings:

#### 10.1 **Mandatory requirements**

All bid responses that do not meet technical mandatory requirements shall be disqualified and not be considered for further evaluation. This is clearly contrary to the submission made by Ms Stanton, for the respondents, that all bidders are considered even though they have been disqualified at the technical stage. This submission would render Clause 10 nugatory. It is common cause that the applicant was the only bidder who survived the axe. Put differently, the only bidder left standing to progress to the next phase after the technical assessment.

- [30] As authority for her contention Ms Stanton invoked *Telkom SA Ltd v Merid Trading (Pty) Ltd & Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd & Others*<sup>10</sup>, particularly at para 14, thereof where Southwood J pronounced:

*“[14] The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view, it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable and competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within its validity period of the proposals. If it failed to award a tender within a validity period of the proposals it*

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<sup>10</sup> [2011] JOL 26617 (GNP)

*received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable and competitive.”*

[31] The Telkom case is distinguishable from the case *in casu* for the following reasons:

31.1 In the ***Telkom*** case, Telkom invited Requests for Proposals in order to appoint service providers to provide Telkom Network Services when required by Telkom to do so. Sixty one proposals were received. The proposals were to be open for acceptance for a period of 120 days after the closing date. **The 120 days expired without the validity period having been extended.** Although some of the respondents alleged that the validity period was extended, the Judge found no factual basis for it. fifteen proposals were shortlisted for further consideration. When the validity period lapsed Telkom had not accepted any of the proposals. It is only after the validity period had expired that Telkom sent an e-mail to the 15 proposers requesting an extension of the validity period of their proposals. Several of the proposers accepted the request to extend by a further 120 days. No agreement, not even a tacit agreement, was shown by the respondents to have been entered into. The six respondents were recommended and the tender was awarded to them. Clearly, this is not in line with what is contemplated in s 217 of the Constitution because there were 15 proposals. Telkom did not apply to Court to have its decision reviewed and set aside.

31.2 *In casu* all the other bidders were disqualified at the technical stage in exception of the applicant. No assessment by both the evaluation and adjudication committees was made despite the fact that the respondents had written to the applicant twice to extend the validity period in order that the process could be finalised;



31.3 Despite the contention by the respondents *in casu* that the validity period had expired and that the tender process was therefore complete, subsequent further steps were taken by them after the said expiry of the validity period. The inference that the tender process was not complete was firmly planted in the mind of the applicant. First, it is stated that the HOD held a meeting with attorney Gouws pertaining to the applicant's bid after the closing date; secondly, there were two extensions of the validity period: initially from 30 July 2014 to 28 November 2014 and thereafter from 28 November 2014 to 09 April 2015. The vendor assessment report was conducted six weeks after the date of the second extension, on 09 April 2015. If the department's intention was not to proceed with the award of the tender why were all the aforementioned processes allowed to happen?

- [32] Incidentally, counsel for the respondents submitted that the applicant's attorney admitted in a letter dated 24 April 2015 ("FA17") that the validity of the bid had expired therefore the applicant had conceded the expiry of the validity period. Counsel for the applicant argued that the incorrect legal concessions by an attorney should not bind the Court. In *Matatiele Municipality and Others v President of the RSA and Others*<sup>11</sup> Ngcobo J, writing for the majority pronounced:

*"Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others [1996 (4) SA 671 CC], this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, 'if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it'. Were it*

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<sup>11</sup> 2006 (5) SA 47 (CC) at 69B – D (para 67)

*to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct in fact is inconsistent with the Constitution. This would be contrary to the provisions of s 2 of the Constitution which provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'."*

- [33] The HOD maintained in the Answering Affidavit that the adjudication committee makes the decisions and her sole function was to sign agreements after the committee had made its decisions. This assertion cannot be correct. Clause 16A6.3 of the Supply Chain Management Policy accentuates the duties of the accounting officer or accounting authority. Froneman J has succinctly captured the process in the *Allpay Consolidated* case<sup>12</sup>, which in my view is on point *in casu*, that:

*"[36] The object of the Public Finance Management Act is to 'secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions' to which it applies, SASSA being one of them. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; . . . .'*

*[37] The Treasury Regulations issued pursuant to s 76 of the Public Finance Management Act require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that must be fair, equitable, transparent, competitive and cost-effective. In the case of procurement*

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<sup>12</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at 618 D- H (paras 36 and 37)

*through a bidding process, the supply chain management system must provide for the adjudication of bids through a bid adjudication committee; the establishment, composition and functioning of bid specification, evaluation and adjudication committees; the selection of bid adjudication members; bidding procedures; and the approval of bid evaluation and/or adjudication committee recommendations. **The accounting officer or accounting authority must ensure that the bid documentation and the general conditions of contract are in accordance with the instructions of the National Treasury, and that the bid documentation includes evaluation and adjudication criteria, including criteria prescribed by the Procurement Act and the Broad-Based Black Economic Empowerment Act (Empowerment Act).***” (Own emphasis)

- [34] It is untenable and to be deprecated in no uncertain terms that an accounting officer, vested with statutory powers, could shirk her responsibilities and, worse, shift the blame to her subordinates or the committee that she is exercising authority over.
- [35] Regulation 11 of the Preferential Procurement Regulations, 2011 places a duty to plan for invitation of tenders. It provides:
- “11 an organ of state **must**, prior to making an invitation for tenders -
- (a) properly plan for, and, as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made;
  - (b) determine the appropriate preference point system to be utilised in the evaluation of the tenders; and
  - (c) determine the deliverables or performance indicators in terms of which a person awarded a contract will be assessed.”

[36] The HOD maintains that because the MEC wrote to her on 27 May 2015 instructing her not to appoint the new service providers the tender was allowed to lapse. She denied that any of the applicant's rights have been infringed. Sec 33(1) of the Constitution<sup>13</sup> confers the right to reasons in writing on those whose rights have been adversely affected by the administrative action. The section affords everyone the right to administrative action that is lawful, reasonable and procedurally fair. It is the applicant's case that the respondents' failure to consider and adjudicate upon its bid its rights to a procedurally fair administrative action had been infringed. See *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>14</sup> and *Joseph and Others v City of Johannesburg and Others*<sup>15</sup>.

[37] The respondents cannot rely on a discretion not to award the tender because the discretion is constrained by Reg 8(4)<sup>16</sup> which stipulates:

*"an organ of state, may, prior to the award of a tender, cancel a tender if—*

*37.1 due to changed circumstances, there is no longer a need for the services, works or goods requested; or*

*37.2 funds are no longer available to cover the total envisaged expenditure; or*

*37.3 no acceptable tenders are received."*

[38] The HOD did not state in clear and unambiguous terms during the extension periods that the funds were no longer available. Belatedly in the

<sup>13</sup> The 1996 Constitution

<sup>14</sup> 2005 (6) SA 313 (SCA); [2005] ZASCA 43

<sup>15</sup> 2010 (4) SA 55 (CC)

<sup>16</sup> of the Procurement Framework Regulations, 2011

Answering Affidavit she alludes half-heartedly to the lack of funds as one of the reasons why the tender was not awarded. This is a lame and dismissible excuse because they still retain the services of Karibuni Security Company on a month to month basis or a three monthly basis. This does not point to changed circumstances where the goods and services are no longer available. The fact that the Procurement Framework Regulations required the HOD in its strategic planning to plan in advance for goods and services and set aside or estimate adequately for its budget would at the very least showup the HOD as incompetent. The advertisement provided for a budget to cover the total envisaged expenditure.

[39] Even if the MEC was entitled to withdraw the tender or as claimed by the HOD 'allowed the bid to lapse', they could only exercise such power with due regard to the principles of administrative justice. They could not do so capriciously or for improper or unjustified motives as that would be tantamount to unjustified administrative action. Had the evaluation committee and the adjudication committees sat and evaluated and adjudicated on the bid within the tender validity period or within the extended periods, the tender by the applicant would in all likelihood have been accepted.

[40] Adv Vorster, appearing for the applicant, submitted that the applicant does not claim entitlement that the tender should be awarded to it but that its bid should be considered by both the Bid Evaluation Committee and the Bid Adjudication Committee. That the applicant be afforded the opportunity to make written representations on any adverse factor. See

*Logbro Properties CC*<sup>17</sup>. Sight should not be lost of the fact that the Director: Legal Services did not cite financial constraints as part of the reasons in his letter to the applicant in explaining the delay in awarding the bid.

- [41] Chaskalson P, writing for the unanimous court in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*<sup>18</sup> stated that it is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

- [42] It is my view that the HOD's failure to ensure that the committees sit and evaluate and adjudicate upon the bid within the prescribed time limits coupled with her failure to make a decision and by nonchalantly allowing the validity period to lapse was arbitrary and hence unlawful and unconstitutional. From the discrepancies in the responses by the following functionaries: (a) the HOD; (b) the Director: Legal Services and (c) the Head: Ministry of Health 19, 20 and 21 (above), it is unquestionable that the manner in which the respondents dealt with this procurement process has been shown not to be fair, equitable, transparent, competitive and cost-effective and that, therefore, it will be just and

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<sup>17</sup> At para 25

<sup>18</sup> 2000 (2) SA 674 (CC) at 709D – H (para 90)

equitable for us to intervene. See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*<sup>19</sup>.

[43] **What remains is the question of costs.** The respondents' counsel submitted that the applicants were already furnished with reasons and the record when they applied for Part 1 of this application. Even though those reasons remained unchanged during Part 2 of the proceedings the applicant could not foresee that as a reasonable possibility and was entitled to err on the side of caution. In any event, not much time and energy was expended on the issue as to escalate the costs significantly. There is no need, overall, to draw a distinction between Part 1 and Part 2 as far as the costs are concerned. There is no reason why the costs should not follow the result as the applicant is substantially successful.

[44] In the result, the following order is made:

**It is ordered:**

1. That the period of 180 days as provided for in section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000, during which an application for judicial review had to be brought, be extended, as provided for in section 9(1) of the Act, read with regulation 5 of Rules of Procedure for Judicial Review of Administrative Action (No R966 of October 2009), for a further period, lapsing on the day of delivery of the Notice on 20 June 2016.
2. That the failure by the first respondent (the Head of Department) to ensure that the applicant's bid be considered and adjudicated upon

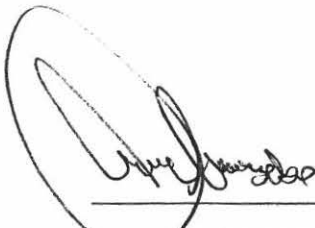
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<sup>19</sup> 2015 (5) SA 245 (CC) at 248 para 1.



during the Tender Offer Validity Period, and the Extended Tender Offer Validity Periods, is declared unlawful and constitutionally invalid.

3. That the decision by the Head of Department to cancel Tender: NC DOH/009/2014 is declared unlawful and constitutionally invalid;
4. That the decision by the Head of Department to cancel Tender: NC DOH/009/2014 is reviewed and set aside.
5. That the Tender Offer Validity Period be and is hereby extended for a period of 60 (sixty) days from date of this order.
6. That the Head of Department is ordered to ensure that the applicant's bid is considered and adjudicated upon in terms of the evaluation methodology prescribed in Clause 10 of the bid document, within 60 (sixty) days calculated from the date of this order.
7. The first and second respondents are to pay the costs of the application, the one paying, the other to be absolved.

  
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**MAMOSEBO J**

**NORTHERN CAPE DIVISION**

I concur

  
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**SNYDERS AJ**

**NORTHERN CAPE DIVISION**

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Instructed by:

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Instructed by:

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