REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1186/2024

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

DATE 02/04/2024 SIGNATURE [redacted]

In the matter between:

MAMAYILE BUSINESS ENTERPRISE CC **APPLICANT**
(Registration nr: 2008/084769/23)

And

THE MEC FOR THE DEPRATMENT OF TRANSPORT AND COMMUNIT SAFETY, LIMPOPO PROVINCE **FIRST RESPONDENT**

MUSHOMA SECURITY SERVICES AND PROJECTS CC **SECOND RESPONDENT**
(Registration nr: 2008/216187/23)

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The date of this judgment is deemed to be 02 April 2024.

JUDGMENT

DEANE AJ

Introduction and Background

[1] This is an urgent application for a procurement review arising from a tender process wherein the first respondent published Tender PUDP 786 for the provision of physical services at Head Office (Tender 786).

[2] The following factual chronology of events is essentially common cause or not disputed.

[3] The first respondent published an invitation to tender in Tender 786 on 11 August 2023. The initial closing date was 4 September 2023.

[4] Tender 786 provided for a three-year contract of 24-hour physical security services at the Head Office of the Department of Transport and Community Safety, Limpopo Province.

[5] The closing of Tender 786 was 1 September 2023 at 11h00.

[6] The tender validity period was 90 days.[1]

[7] The Applicant duly applied and timeously submitted a tender bid in respect of Tender 786 which was to be evaluated by the Bid Evaluation Committee (BEC) of the first respondent.

[8] The BEC initially recommended that the Applicant be awarded the Tender 786.[2]

[9] On the basis that the Applicant was disqualified the first respondent proceeded to award the tender 786 to the second respondent who was identified as the highest-scoring tenderer in respect of Tender 786.

[10] Having informally learnt on 30 January 2024 that it was unsuccessful and observing that the representatives of the second respondent had *"already mobilised to the subject site, thus manifestly having been appointed by*

[1] First Respondents Answering Affidavit Index 2, at p 190.
[2] Rule 153(3) Notification, at p 127

thė first respondent"[3] the applicant proceeded by way of an urgent review application to this court.

[11] The Applicant seeks an order against the Respondents in the following terms:

1. That this application be heard as an urgent application;
2. That the decision of the first respondent to award Tender 786 to the second respondent be declared constitutionally invalid, reviewed and set aside;
3. That any service level agreement concluded between the first and second respondents pursuant to the awarding of Tender 786 be set aside;
4. That tender 786 be awarded to the applicant;
5. Directing that the costs of this application be on the scale of between attorney and client, jointly and severally, the one paying the other to be absolved.

[12] In answer to the applicant's application, the first respondent raises the following disputes:

1. The urgency of this application;

[3] Founding Affidavit Index 2, at p 15.

2. The non-joinder of all 208 bidders that were evaluated in terms of the BEC report;
3. The permissible number of affidavits that may be filed specifically the filing of a supplementary affidavit by the applicant;
4. The Lapsing of Tender 786.

[13] I will proceed to first deal with the matter of urgency.

Urgency

[14] The legal principles governing urgency is set out in Rule 6(12) of the Uniform Rules of Court ("the Rules"). The Courts have over the years provided guidelines as to the application of this Rule. Rule 6(12) (a) confers a discretionary power on a court seized with an application of this nature to dispense with the forms and service envisaged in the Rules, and to dispense of the application at such time and place and in a manner and to prescribe the procedure as it deems appropriate. The preliminary enquiry is aimed at the determination of whether there must be a departure at all from the usual process.[4]

[15] In ***Hultzer v Standard Bank of SA (Pty) Ltd*** it was stated that:[5]

[4] See *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) at 136H-137F
[5] (1999) 20 ILJ 1806(LC) at 1809.

"The court will, however, only grant such relief where an applicant is able to persuade the court that extremely cogent grounds for urgency exist."

[16] Rule 6 (12) (b) renders it peremptory for the applicant to:

"set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that substantial redress could not be afforded at a hearing in due course."

[17] In ***East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and Others*** the court held that:[6]

[6] The import thereof is that the procedure as set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant, must state the reasons why he claims that he cannot be afforded the substantial redress in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of the absence of substantial redress in the application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the

[6] 2011 ZAGPJHC 196, at para 6.

normal course laid down by the rules, it will not obtain substantial redress....

[10] In ***Apleni v The President of the Republic of South Africa and Another*** the Court said:[7]

"Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered."

[11] The first respondent denies that this application is urgent.

[12] Subsumed with urgency is the disputed question of substantial redress. It behoves a court to come to the assistance of a litigant, as in this application, if the applicant were to wait the normal course as set out by the Rules, and the applicant would not obtain substantial redress.

[13] This Court is seized with a judicial discretion to abbreviate the various time frames set out in the Rules of Court to allow for the expeditious ventilation of disputes, based on sufficient and satisfactory grounds as presented by the applicant.

[7] 2018 (1) All SA 728 (GP).

[14] Central to the shortened times is the disputed question of prejudice. Prejudice manifests itself within the paradigm of urgency on three planes. Firstly, the prejudice that applicant is likely to suffer by having to wait for a hearing in the ordinary course; secondly the prejudice that other litigants may have to endure by what may be perceived as a preferential hearing of a matter; and thirdly prejudice that respondent might suffer by the shortened prescribed times and accelerated hearing.

[15] In ***PFE International and Others v Industrial Development Corporation of South Africa Ltd*** the court held that:[8]

[30] Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may in the interests of justice depart from its own rules."

[8] 2013 (1) SA 1 (CC) at para 30.

[16] In accordance thereof and after due consideration of the principles governing the law on urgency, I find that the applicant, has met the threshold of urgency and as such condone the non-compliance with the Rules of Court.

[17] Having found that this matter may proceed by way of an urgent application I now turn to the other issues raised by the first respondent.

RE: <u>Supplementary Affidavit</u>

[18] The First Respondent raised the dispute that the applicant exceeded the permissable number of affidavits to be filed in motion proceedings by filing two affidavits.

[19] Rule 53(4)[9] clearly provides that:

"The applicant may within ten days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add or vary the terms of his or her notice of motion and supplement the supporting affidavit."

[20] In this case the applicant in their notice of motion indicates the following:[10]

[9] Uniform High Court Rules.
[10] Page 3 to the Notice of Motion.

PLEASE TAKE NOTICE FURTER that the applicant shall amend, add to or vary the terms of its notice of motion and accompanying affidavit, should it prove to be necessary to do so, on or before 23 February 2024.

[21] It has been submitted by the Applicant that this proviso stems from the requirement that the first respondent delivers the record of its decision in terms of Rule 53(3). The record was delivered on 21 February 2024 and court stamped 23 February 2024.

[22] The Applicants supplementary founding affidavit consequently falls within the parameters and permissibility allowed for in terms of the Rule 53(4).

RE: ***<u>Non-Joinder of All Bidders</u>***

[23] The first respondent argues that the applicant should have joined all 208 bidders that were evaluated in terms of the BEC report.

[24] It is now settled law that any party who has a direct and substantial interest in the subject matter must be joined in the proceedings to safeguard their interests.[11] The Supreme Court of Appeal in ***Absa Bank Ltd v Naude NO***[12], formulated the test for non-joinder as follows:

[11] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) at para 21.
[12] [2015] ZASCA 97 at para 12.

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined."

[25] Considering the above, if the answer is in the affirmative, the party that has a direct and substantial interest in the subject matter must be joined in the proceedings as failure to do so may result in the matter not being heard. If the answer is in the negative, a court may depending on the circumstances of the case, proceed to adjudicate over the case as the outcome will not have a dire impact on third parties who are not cited in the proceedings.

[26] The question that then arises is whether the applicant should have joined all the participating tenderers in this application.

[27] In ***Gordon v Department of Health, Kwa Zulu Natal,***[13] the court stated that:

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected

[13] 2008 (6) SA 522 (SCA).

prejudicially by the judgment of the court in the proceedings concerned.[14] In the *Amalgamated Engineering Union* case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.[15] The court formulated the approach as, first, to consider whether the third party would have *locus standi* to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.[16] This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.[17]"

[28] These cases referred to further illustrate the point that the order or judgment of the court is relevant to the question of whether a party has a direct and substantial interest in the subject matter of any proceedings.

---

[14] *Bowring NO v Vrededorp Properties* CC 2007 (5) SA 391 (SCA) para 21.
[15] At p 657.
[16] See also *Collin v Toffie* 1944 AD 456 at 464; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521A and *Peacock v Marley* 1934 AD 1 at 3; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) at para 7.
[17] *Bekker v Meyring, Bekker's Executor* (1828–1849) 2 Menz 436.

[29] *In casu*, I am not convinced that the court is being asked to make an order which might prejudice all of the participating tenderers. As stated in ***SSG Security Solutions (Pty) Ltd v Vaal University of Technology and Another***[18]

"As I see it, the court is not asked to make any order which might prejudice the non-responsive tenderers. Their position was determined by the administrative actions which rejected their tenders for non-responsiveness. No request has been made to vary or set aside the administrative actions which terminated the participation of the non-responsive tenderers in the tender process. Until so varied or set aside, those actions are decisive in ending the participation of the non-responsive tenderers in the process."

[30] I align myself with the sentiments expressed in this case and find that the joinder of all of the tenderers or bidders was not required of necessity. The non-joinder point taken therefore fails.

RE: ***<u>The Lapsing of Tender 786</u>***

---

[18] (67027/17) [2018] ZAGPPHC 775.

[31] Tender 786 was published in the Limpopo Provincial Tender Bulletin No 19 of 2023/24 dated 11 August 2023 as follows:[19]

BID NO	DESCRIPTION OF SERVICES OR SUPPLIES	CONTACT DETAILS	BID DOCUMENT PRICE (NON-REFUNDABLE)	DUE AT 11H00	BID DOCUMENTS AVAILABLE FROM	POST OR DELIVERED BIDS TO (SEE ANNEXURES 1&2
PUPD 786	Provision of Physical Security Services at Head Office	Bidding process Bopape MM @ 015 294 8420	N/A	01/09/2023	www.idot.limpopo.gov.za OR www.etenders.gov.za	106

[32] The tender validity period was for 90 days.[20]

[33] Seeing that the tender validity period for Tender 786 was initially 90 days, being 1 September 2023, the validity period would expire on 30 November 2023. The evidence on the papers before me that relate to the

[19] Rule 153(3) Notification, at p 8.
[20] First Respondents Answering Affidavit Index 2, at p 190.

extension of the validity period of tender 786 are consequently as follows:[21]

1. The Limpopo Provincial Tender Bulletin No. 35 of 2023/24 dated 1 December 2023; and
2. The Limpopo Provincial Tender Bulletin No. 38 of 2023/24 dated 12 January 2024

[34] The first respondent contends that the tender remains valid through the publication of these Bulletins.

[35] The applicant, on the other hand, contends that the Tender 786 lapsed on 30 November 2023, and it was therefore not possible for the first respondent to resuscitate the lapsed tender. In addition, it is contended by the applicant that it was necessary for the first respondent to timeously request all participating tenderers for their consent to an extension and to obtain the timeous consent of each participating tenderer, and which was not done herein.

[36] The importance of the validity period was dealt with in ***Joubert Galpin Searle Inc and Others v Road Accident Fund and Others***[22] where it was stated that:

[21] Rule 153(3) Notification, at pp. 158-9, 175.

[72] The issue that I now turn to is whether, having heard the views of the bidders whose hats, ostensibly, remained in the ring, the RAF could extend the tender validity period after it had already expired – and thus whether the unsuccessfully concluded tender process could, in this way, be revived.

[73] In my view, there is a simple answer to this. It is to be found in the National Treasury's *Supply Chain Management: A Guide for Accounting Officers/Authorities*, which is part of what Froneman J in *Allpay Consolidated Investment Holdings*[23] called 'the constitutional and legislative procurement framework'. As such, it forms part of those provisions that both empower and limit the powers of public bodies involved in the procurement of goods and services and is not merely an internal prescript that may be disregarded at whim.[24] The document provides a step-by-step guide which institutions such as the RAF must apply when engaged in procurement processes.[25] It makes it clear that an 'extension of bid validity, if justified in exceptional circumstances, should be requested in writing from all bidders before the expiration date'.[26]

---

[22] (3191/2013) [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP).
[23] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC) at para 31-37.
[24] At para 40.
[25] Section 4.1.2.
[26] At p 39.

[74] The reason for this provision is clear. By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*,[27] the tender process has been concluded, albeit unsuccessfully. The result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to do. In the language of s 6(2)(a)(i) of the PAJA, the decision-maker – the board, in this instance – 'was not authorised' to take the decision. Put in slightly different terms, there were no valid bids to accept, so the RAF had no power to accept the expired bids.

[37] The applicant in support of their contention that the validity period of Tender 786 had lapsed cites the authority of *Telkom SA v Merid Training (Pty) Ltd and Others*.[28] In that matter, Telkom published a request for proposals to appoint service providers. The request for proposals stipulated a closing date as 12 December 2007, and a tender validity period of 120 days from the closing date, during which the offers made by

---

[27] *Telkom SA Limited v Merid Training (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Limited & others* [2011] ZAGPPHC wherein the judge at para 14 indicated that: "Southwood J then went on to conclude:
'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 or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it 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 or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced.'

[28] (27974/2010,25945/2010) [2011] ZAGPPHC 1.

bidders would remain open for acceptance by Telkom. By the time the tender validity period expired on 12 April 2008, no decision had been taken by Telkom and the tender validity period had not been extended. Despite this, Telkom continued to evaluate and short-list the bids it had received. It was only after the tender validity period had expired that Telkom sent emails to the 15 bidders it had short-listed requesting them to agree to an extension of the tender validity period. Some agreed to do so. The decision to accept the bids of six respondents was only taken after the expiry of tender validity period of 120 days. Before any contract had been concluded with the accepted bidders, Telkom decided, on legal advice, to apply for the setting aside of its own decision.

[38] Southwood J then went on to conclude:

[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 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 or competitive. All the tenderers were entitled to

expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals.

It failed to award a tender within the validity period of the proposals it 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 or competitive. In my view the first and fifth respondents' reliance only on rules of contract is misplaced."

[39] I am in agreement with Southwood J for the reasons given by him. As a result, it is my view that, *in casu*, once the tender validity period had expired on 30 November 2023, the tender process had been completed, albeit unsuccessfully.

[40] Accordingly, a timeous request to and favourable response from all the bidders in Tender 786 was not only a requirement, but it was required that this be done prior to the expiry of that tender. Failing which, the tender comes to an end. The first respondent does not argue at any time that written requests to the 208 bidders for these extensions were given.

[41] I cite with approval the following judgment in *All Pay Consolidated* ***Investment Holdings (Pty) Ltd and Others v Chief Executive***

***Officer, South African Social Security Agency and Others* 2014(1) SA 604 (CC)** wherein Froneman, J stressed that compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework is thus legally required and that they are not merely internal prescripts that may be disregarded at whim. The Judge went further to state that:

The Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") defines an "acceptable tender" as any tender which in all respects, complies with the specification and conditions of tender as set out in the tender document. Once the tender/bid had expired, the bid is no longer an "acceptable tender" and cannot be resuscitated after expiry.

[42] Furthermore, in the ***City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others*** case,[29] the court held that to extend the validity period, all bidders are required to consent to the extension before the expiration of the validity period. If there is no consent by all bidders, the tender process has come to an end. A tender process cannot be open-ended.

[43] *In casu* the first respondent has failed to consider the nature of the validity period and specifically that a tender process cannot be open-

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

ended. It has become clear that in the absence of any valid extension of the tender validity period, the tender would have lapsed on 1 December 2023. The applicant's submission is that on this basis alone, prayers 2 and 3 of the notice of motion should be granted.

[44] In deciding the way forward thereto, and having found that Tender 786 has lapsed what then happens when this point has been reached. I am once again further guided by the dicta in ***Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*** wherein the court found that:

I have found that the RAF acted irregularly when it awarded the tender to the second to 34th respondents. What happens when this point is reached was dealt with in the *Allpay Consolidated Investment Holdings* case, in which Froneman J stated:[30]

'Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b).

[30] At para 25.

[45] The judgment continues by articulating what is meant by a "just and equitable" remedy as contemplated by the Constitution. It states that section 8 of PAJA gives detailed legislative content to same:[31]

[94] Section 172(1) of the Constitution states:

'When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[95] Section 8(1) of the PAJA provides:

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

(a) directing the administrator-

[31] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* at para 94.

(i) to give reasons; or

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

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

(c) setting aside the administrative action and-

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

(ii) in exceptional cases-

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

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

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

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

(f) as to costs.'

[96] Howsoever a court fashions a remedy, it is required by s 38 of the Constitution to award a remedy that is not only just and equitable but also appropriate when, as here, a fundamental right has been infringed. Appropriate relief is relief that effectively remedies the

breach of the right.[32] It is relief that fits the injury: it must be 'fair to those affected by it yet vindicate effectively the right violated' and be 'just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law'.[33]

[46] The court in the *Joubert Galpin Searle*[34] judgment then cited with approval the case of ***Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others***:[35]

I believe it is fair to say that Froneman J made it clear that, even though courts always retain a discretion to refuse to award a remedy when unlawfulness is found, the default position is that the principle of legality should be upheld and vindicated, and that there must be compelling reasons to override this default position:[36]

[47] At para 84 of the ***Bengwenyama Minerals (Pty) Ltd & others*** case it was stated that:

---

[32] *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) at para 106.

[33] *Steenkamp NO v Provincial Tender Board, Eastern Cape* at para 29.

[34] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* at para 97.

[35] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC). See also *Mpumalanga Construction (Pty) Ltd & others v Buffalo City Municipality & another* ECD 25 August 2009 (case no. ECD29/2009; EL229/2009) unreported paras 25-26.

[36] At paras 84-85. See also *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* (note 3) at para 28; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 36.

'It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality.

[48] Additionally and of particular importance the court went on to say that:

[85] 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.'

[49] Reverting to the dicta in *Allpay Consolidated Investment Holdings* case the court stated that:

> [98] In determining whether it is just and equitable to refuse to award a remedy when administrative action has been found to be invalid (or to grant other relief such as a suspension of an order of invalidity for a period), a court must consider the interests not only of the parties, but also the public interest.[37]

[50] As indicated in the above cases and principles of law, I do not intend to shy away from the finding that the tender period had lapsed and that any

[37] *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA), at paras 22-23.

awarding of the tender thereof to the second respondent is consequently invalid.

[51] This is not the type of tender in which relief should be withheld because too much water has flowed under the bridge by the time that this matter is heard.

[52] Indeed, I am of the view and considering the discretionary powers of this court as well as the relatively short period that has passed since the granting of the award to the second respondent (based on the averments made on paper), it distinguishes this case from the typical situation where an irregularly awarded tender is allowed to stand because the work concerned has all but been completed by the time a matter like this is heard.[38]

[53] Taking into account that a relatively short period has lapsed between the awarding of the tender to the second respondent and the order of this court it is hereby ordered that:

53.1. This application is heard as an urgent application in terms of the provisions of Rule 6(2) of the Uniform Rules of Court.

[38] See for example *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others*, at para 29.

53.2. That the decision of the first respondent to award Tender PUDP 786 for the provision of physical security services at Head Office (Tender 786) to the second respondent is declared constitutionally invalid and is set aside.

53.3. That any Service Level Agreement concluded between the first respondent and the second respondent pursuant to the awarding of Tender 786 is set aside.

53.4. Costs will follow the result on the scale as between attorney and client.

[redacted]

T DEANE
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : Adv. APJ Els SC & Adv. A.A. Basson
INSTRUCTED BY : Thomas & Swanepoel Incorporated
FOR THE DEFENDANT : Mr. P. Malatji (Attorney)
INSTRUCTED BY : The State Attorneys: Polokwane
DATE OF HEARING : 12 March 2024
DATE OF JUDGEMENT : 02 April 2024