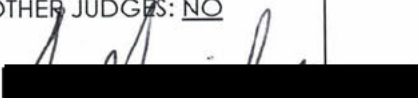




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2024/028669

(1)	REPORTABLE: <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>NO</u>
30/5/2024.	
DATE	SIGNATURE

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD

Applicant

and

AIRPORTS COMPANY SOUTH AFRICA SOC LTD

First Respondent

VENUS SECURITY INTERNATIONAL (PTY) LTD

Second Respondent

G4S AVIATION SECURITY (SA) (PTY) LTD

Third Respondent

JUDGMENT

S. VAN NIEUWENHUIZEN AJ

Introduction

[1] This matter came to me during the urgent motion week of 7 May 2024 and after the applicant and first respondent concluded their respective arguments, I reserved judgment. The second and third respondents were cited due to their interest in this matter but did not appoint any legal representatives to participate in the matter.

[2] The applicant seeks the following urgent interim relief:

"1 That the applicant's non-compliance with the Rules relating to form and service be condoned, and that this application be heard as one of urgency in terms of Uniform Rule 6(12).

2 Pending final determination of the review application set out in Part B below ("**the review application**"), the First Respondent ("ACSA")

2.1. is interdicted from taking any further steps toward implementing the "Emergency Request for Bids for the Inclusion in the Panel of Licensed Security Services Providers for a Period of no less than Twelve (12) months" at airports operated by the First Respondent, in accordance with Tender No:COR7412/2024/E-Revised ("**the tender**"). or giving any further effect to the tender, including the evaluation, adjudication, and awarding of the tender;

2.2 is interdicted from evaluating, adjudicating, awarding and implementing and/or giving any further effect to the tender.

2.3 Directing ACSA to pursue all lawful methods of procuring security services at airports operated by it, including the continued appointment of the applicant on a two-monthly basis to provide security services at the sites which it is currently servicing on the same terms and conditions as those which are currently in place, pending the outcome of the review application filed under High Court case number 106910/2023.

3. *Directing that the further conduct of the proceedings in Part B and the filing of the record of the decision under review be in terms of time periods agreed to by the parties or directed by the Court.*
4. *That the costs of this application be paid by ACSA, including the costs of two counsel."*

[3] The contemplated review in Part B is a so-called PAJA-review and in the alternative a review based on the principle of "legality".

[4] For the sake of convenience, the applicant will be referred to as "Fidelity" the first respondent as "Acsa", the second respondent as "Venus", and the third respondent as "G4S."

Background

[5] The notice of motion was issued on 15 March 2024 for hearing of the matter as a matter of urgency on 24 April 2024.

[6] According to Fidelity's attorney, Mr Kotze, the matter was argued before Mahalelo J on 25 April 2024 who ruled that the matter is urgent and thereafter struck it off her roll due to the non-joinder of all the bidders who submitted a bid for tender COR7412/2024/E ("the tender").¹

[7] To overcome this problem, he addressed a letter under cover of an email sent by his personal assistant to ACSA's attorney of record and requested them to provide his firm with the details of all bidders for

¹ See para 4-5 of his affidavit dated 30 April 2024

tender COR7412/2024/E, including but not limited to the bid register or similar document reflecting the names of the bidders and their contact details.²

[8] He required this information by no later than Monday 29 April 2024 given that the intention was to re-enrol the urgent application on the urgent roll.

[9] Pending the receipt of the above and due to the urgency of the matter, he addressed a letter to each of the *potential bidders* listed on the virtual briefing session email sent by ACSA on 29 February 2024 which he obtained from Fidelity on 25 April 2024. This list is annexed to his affidavit marked "DK3"

[10] In this letter to *potential bidders*, he informed them as follows:

"12.1 That Fidelity launched an application to interdict ACSA from evaluating, adjudicating and awarding of the tender;

12.2 That the matter is set down for hearing in the above honourable Court on 7 May 2024;

12.3 That the tender is deemed unlawful and ought to be reviewed and set aside;

12.4 That the bidder has the right to oppose the relief sought by Fidelity, and if so, they should inform our offices by 30 April 2024 of their intention or not to oppose the application.

13 A copy of the Fidelity's application, the notice of set down for 7 May 2024 and a draft order were annexed to our email."

² See the email annexure "DK1" and the letter attached thereto.

- [11] A copy of this letter and the covering emails sent to all the bidders is annexed to his affidavit as "DK4".
- [12] On 29 and 30 April 2024 Inge Jonker of his offices telephonically contacted all the bidders listed on Annexure "DK3" to enquire from them whether they received "DK4".
- [13] Full disclosure is made of the potential bidders who could not be telephonically contacted (whether same was due to such potential bidder not answering the phone or not having contact details or refusing to confirm receipt.). Mr Kotze also caused Inge Jonker to file a confirmatory affidavit in which she confirms the contents of Mr Kotze's affidavit to the extent that same refers to her.
- [14] By 30 April 2024 none of these entities have indicated that they intended to oppose the relief sought by Fidelity.
- [15] ACSA's attorneys reverted to Mr Kotze by 30 April 2024 and a copy of their response is attached to his affidavit as annexure "DK5".
- [16] The said response revealed that ACSA had already completed the evaluation of the tender and that it is awaiting the probity report. They further indicated that the submission would then be submitted for adjudication and that an award shall be made within 30 days.

- [17] Unsurprisingly Mr Kotze found the response quite troubling and indicative of constructive contempt of the process pending before this court.
- [18] A further consequence of the aforesaid is that the adjudication of this matter is even more urgent.
- [19] In this response ACSA accuses Fidelity of making a “material misrepresentation” insofar as Fidelity alleges that it does not know who the bidders are. ACSA’s attorneys claim that Fidelity had the list sent to it on 6 March 2024.
- [20] An examination of this list, annexed as annexure “FS1” to ACSA’s response demonstrates that same is nothing but the list of proposed bidders.
- [21] The actual list of bidders, ACSA contends should have been cited in this matter, are annexed as Annexure “FS3”
- [22] Mr Kotze points out that the Annexure “FS3”, the list of all the actual bidders contains the names of 36 entities.³ When compared to the invitation to potential bidders, 11 of these entities were not even invited to bid.⁴

³ See paragraph 59 of Mr Kotze’s affidavit.

⁴ See paragraph 60 of Mr Kotze’s affidavit

- [23] In its supplementary answering affidavit ACSA merely “notes” this discrepancy without furnishing any explanation, alleging that this is irrelevant.⁵
- [24] Fidelity in any event notified these entities in a similar fashion as it did in respect of the proposed bidders.⁶
- [25] In its supplementary Answering Affidavit dealing with the affidavit of Mr Kotze, ACSA has taken the stance that Fidelity has misled the Court to the extent that Fidelity alleges that only ACSA knows the names of the bidders. It alleges that on 6 March 2024 Fidelity was sent a copy of the register of bidders and hence when Fidelity launched the Urgent application on 15 March 2024 it knew who the bidders were and should have cited them as interested parties.
- [26] ACSA ultimately maintains that now that Fidelity knows who the bidders are it should join them by way of substantial joinder to give effect to Mahalelo J's order as understood by ACSA.⁷
- [27] It is clear that ACSA's attorneys' accusation of Fidelity making a “material misrepresentation” is patently false in as much as annexure “FS1” is the list of potential bidders invited to the briefing session as opposed to the actual bidders who are listed on Annexure “FS3”.

⁵ See paragraph 50.1 of ACSA's supplementary answering affidavit.

⁶ See paragraph 61 of Mr Kotze's affidavit and the affidavit of Tracy Lynne Jacobs

⁷ See paragraph 50.2 of ACSA's supplementary answering affidavit.

[28] ACSA's own attorneys actually state in their response that:

"It is glaring that in your email of 26 April 2024, your client has already contacted all the bidders using the list acquired from our client on 6 March 2024 (Annexure FS1)"

[29] From this it would appear that there is no dispute on the part of ACSA that all bidders have been notified. The only real dispute is whether Mahalelo J ordered that the parties who were not cited should be joined or simply dismissed the application for non-joinder. This is evident from the supplementary replying affidavit filed by Mr Kotze on behalf of Fidelity in which he explains that a junior advocate, Adv Aphiwe Burhali, was briefed to note the judgment. After the appearance, Adv Burhali sent him an email which stated that *"Justice Mahalelo ordered that the application be struck off the roll due to non-joinder with costs"*. A copy of Adv Burhali's email is annexed as "DK1" to this supplementary replying affidavit. No mention was made of any order or directive that the applicant was required to formally join all the bidders.

[30] ACSA does not produce any other evidence or contemporaneous note re the judgment. There is a difference between an order to join certain parties as opposed to being struck off the roll for non-joinder.

[31] Given that only interim relief is sought pending a return day there can hardly be any harm to the notified parties if interim relief is granted. In my view a rule nisi would take adequate care of any non-joinder

problem. If it later turns out that Mahalelo J indeed granted an order for the joinder of all bidders, same can be complied with in due course.

- [32] I will consider whether section 217 of the Constitution has been breached and if so whether an alleged ongoing unlawful activity by a State Owned Entity (SOE) should be stopped in its tracks or should be tolerated.

Unlawful Conduct on part of Acsa

- [33] Fidelity has been rendering security services to Acsa since 2018 pursuant to a public tender. During February 2023 Acsa advertised Tender COR7070/2023/RFP - Panel of Security Services for a period of five (5) years at airports operated by Airports Company South Africa Soc Ltd defined in the present application as the "2023 tender".
- [34] Fidelity and approximately 58 other bidders submitted responses thereto. On 6 October 2023 Fidelity was notified that its bid was unsuccessful due to same not being financially sustainable.
- [35] Given that its implementation date was set for 1 November 2023 Fidelity issued an urgent application on 18 October 2023 for an interim interdict pending the review and setting aside of the award of the 2023 tender.

- [36] Fidelity's main grounds for seeking the review and setting aside the tender were as follows:

"46.1 ACSA's notice to extend the validity period of the tender was invalid, rendering the subsequent award of the tender after the expiration of the validity period equally invalid;

46.2 ACSA's decision to exclude the applicant based on financial sustainability grounds was entirely irrational.

46.3 The allocation of preference points in the tender conflicted with the 8-BBEE Act, and the contradictory manner in which preference points were allocated in the tender document rendered it invalid;

46.4 The tender document failed to comply with the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") and the 2022 Regulations.

46.5 The tender document was vague and ambiguous.

46.6 The award of the tender to certain bidders was in conflict with the terms of the tender document."

- [37] Venus and G4S also launched applications for interim interdict pending the review and setting aside of the award of the 2023 tender.

- [38] The aforesaid applications were heard by Epstein AJ who granted an interim interdict on 6 December 2023 in the following terms:

"49.1 ACSA is directed to suspend the implementation of any acts taken under or in terms of the procurement process relating to the tender, including but not limited to the suspension of any rights acquired by the successful bidders;

49.2 The licences awarded to the tenderers on the new panel are suspended;

49.3 Any allocations made to members of the new panel by ACSA pursuant to the procurement process relating to the tender or in relation to the newly awarded licences, are suspended;

49.4 The new panel members are interdicted from concluding contracts with ACSA and/or ACSA's stakeholders pursuant to the procurement process relating to the tender or in relation to the newly awarded ACSA licences;

49.5 It is declared that insofar as any of the applicant, Venus or G4S's licences expired by virtue only of the decision not to appoint them to the new panel in terms of the first phase of the tender procedure, such licences remain extant;"

- [39] Pursuant hereto Fidelity, Venus, and G4S have been and continued to provide security services to ACSA at their various airports.

- [40] On 27 February 2024, ACSA issued a Request for Bids (RFB) for the emergency tender. The closing date was 11 March 2024 at 16h00. A copy of the bid document is attached to the application marked "FA2".

- [41] It is contended by Fidelity in respect of Part B of the Notice of Motion that ACSA's decision to publish the emergency tender constitutes administrative action for purposes of PAJA, and as such are subject to review in terms of Section 6(1) of PAJA based on the grounds of review set out in Section 6(2) alternatively, that the decision to publish the emergency tender is reviewable based on the principle of legality.

- [42] The relevant sections of PAJA read as follows:

"6 Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

- (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
- (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) purpose of the empowering provision;
 - (cc) the information before the administrator; or

- (dd) *the reasons given for it by the administrator;*
- (g) *the action concerned consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful."*

[43] On the basis that the aforesaid grounds of review give effect to the fundamental right to just administrative action, it was submitted that ACSA's procurement decisions must, in a nutshell, be lawful, reasonable and procedurally fair.

[44] From the aforesaid it would follow that once a ground of review under PAJA is established, Section 172(1)1a) of the Constitution requires the decision to be declared constitutionally invalid. This section reads as follows:

" Powers of courts in constitutional matters

- (1) *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,*

[45] It was thus submitted that Fidelity's right to lawful administrative action, conferred by Section 6 of PAJA as well as the applicant's right to a fair

procurement process, conferred by Section 217 of the Constitution, have been violated.

- [46] Before inquiring into the alleged violations, the question arises whether any administrative decision has been made or not. Fidelity alleges that the RFB is administrative action in itself. Acsa denies this. Fidelity submitted that ACSA's attorneys contend that the issuing of an emergency tender is not in itself administrative action but constitutes a notice of the proposed administrative action. The *AllPay*⁸ judgment of the Constitutional Court was invoked as authority for this position.
- [47] Fidelity quite rightly points out that in *AllPay* the Constitutional Court did not state that the issuing of a tender document *could never constitute administrative action*. The statement by Froneman J in paragraph 90 of the judgment that "*the tender documents give notice of the proposed administrative action*" must be understood in context. The central point that the Court made in the paragraph was that vagueness could render a procurement process procedurally unfair, since a key element of procedural fairness is that persons are entitled to know what case, they must meet. Seen in the context of s 3(2)(b)(i) and (ii) of the PAJA, which deals with procedural fairness, the tender documents could be seen as "notice" of the **proposed** (my emphasis) administrative action and responding bids as "representations" before the decision to award is

⁸ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of SASSA*
2014(1) SA 604 (CC) para 90

made. The Court emphasized that the notice of the proposed administrative action (the awarding of the tender) must be clear. But the Court did not rule out the possibility that in certain instances the issuing of a tender document per se could constitute administrative action. The issuing of the tender document is the mechanical act performed on the back of an administrative decision/action in other words an administrative decision preceded same.

[48] PAJA itself defines “administrative action” as follows:

- “... 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, but does not include-*
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;*
 - (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;*
 - (cc) the executive powers or functions of a municipal council;*
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;*

- (ee) *the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;*
- (ff) *a decision to institute or continue a prosecution;*
- (gg) *a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;*
[Para. (gg) substituted by s. 26 of Act 55 of 2003 (wef 31 March 2005).]
- (hh) *any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or*
- (iii) *any decision taken, or failure to take a decision, in terms of section 4 (1);"*

[49] PAJA also defines "decision" as follows:

".... any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;*
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) imposing a condition or restriction;*
- (e) making a declaration, demand or requirement;*
- (f) retaining, or refusing to deliver up, an article; or*
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly"*

[50] In Minister of Defence and Military Veterans v Motau and Others⁹ the Constitutional Court had to consider the difference between administrative action and executive action. The Court held that:

“The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions. In the present matter there are two elements in dispute: whether the minister's decision under s 8(c) of the Armscor Act is of an administrative nature (element (a)) and whether it falls under any of the listed exclusions (element (g)). Both can be answered by interrogating the nature of the power.”

[51] To my mind the issuance of the RFB with the alleged violations discussed below certainly has the capacity to affect the legal rights of Fidelity in the sense discussed in AllPay at para 60. Put differently the conduct of Acsa is ripe for the present challenge.¹⁰

[52] The alleged violations are:

- 52.1 the emergency tender does not satisfy the legal requirements for an emergency tender;
- 52.2 the preference point system in the RFB is unlawful;
- 52.3 the RFB contains an unlawful tender validity extension provision.

⁹ 2014 (5) SA 69 (CC)

¹⁰ Cf Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others 2020 (4) SA 17 (SCA) par 14-18

[53] I will now analyse the underpinning basis for each alleged violation.

53.1 The alleged violation in paragraph 54.1 is underpinned by reliance on the definition of an “emergency situation” as same is to be found in Supply Chain Management (SCM) instruction 3 of 2021/22 issued under the Public Finance Management Act 1 of 1999 (the PFMA). The latter defines an "emergency situation" as

"a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls for urgent action and there is insufficient time to follow a competitive bidding process".

A copy of the instruction is annexed as "FA3".

53.2 If it is borne in mind that the Epstein AJ order did not leave Acsa without a panel from which they could source security services, it is immediately clear that none of the requirements for an “emergency situation” prevails at present. On the contrary security services have been sourced from Fidelity on an ongoing basis and could be sourced from the panel of security service providers until a valid and normal tender process for competitive bids has run its course. If a SOE wants to issue a tender to deal with an emergency situation there should at least be a semblance of an emergency situation.

53.3 For an emergency tender process to be followed there must be insufficient time to follow a competitive tender process. Yet that

is exactly what Acsa has followed under the guise of an “emergency situation”. This is best demonstrated by the fact that 80¹¹ bidders attended the briefing session and 61 bidders eventually responded to the tender.¹²

53.4 The fact that Acsa is of the view that the tender will be awarded for at least 12 months also points to the absence of an “emergency situation”. The aforesaid implies that the so-called “emergency situation” could extend well beyond a 12 month period. This in itself suggests that a true emergency situation does not prevail.¹³

[54] It is clear from what follows that the preference point system in the RFB is also unlawful.

54.1 The PPPFA was enacted to provide a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution and to provide for matters connected therewith. The Minister promulgated certain regulations under section 5 of the PPPF in 2017. These replaced the 2011 regulations which was deemed to be non-compliant with the PPPF to the extent that:

¹¹ Paras 17-19 of the RA.

¹² Para 68.2 of the AA

¹³ Cf Ngaka Modiri Molema District Municipality v Naphtronics (Pty) Ltd (M379/2015) [2018] ZANWHC 8 (25 May 2018)

“the Regulations attempted to restrict the framework for preferential procurement policies to Black Economic Empowerment (BEE) credentials to the exclusion of other goals contemplated in the Framework Act, causing the 2011 Regulations’ alignment to the Broad-Based Black Economic Empowerment Act’s Scorecard to be unlawful”¹⁴

54.2 The SCA subsequently had to consider the 2017 regulations and held:

“that the Minister’s promulgation of regs 3(b), 4 and 9 was unlawful. He acted outside his powers under s 5 of the Framework Act. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which is the national legislation that was enacted to give effect to s 217 of the Constitution. The framework providing for the evaluation of tenders provides firstly for the determination of the highest points scorer and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. The framework does not allow for the preliminary disqualification of tenderers, without any consideration of a tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act.
“

54.3 The order of invalidity was suspended for 12 months, and the invalidity only became effective on 1 November 2021. On 16 February 2022 and in Minister of Finance v Afribusiness NPC 2022 (4) SA 362 (CC) a majority of the Judges in the Constitutional Court dismissed an appeal against the SCA judgement.

¹⁴ See Afribusiness NPC v Minister of Finance 2021 (1) SA 325 (SCA)

54.4 As a consequence, the Preferential Procurement Regulations, 2022 was published under GN 2721 in GG 47452 of 4 November 2022 and in terms of Section 11 thereof, same took effect on 16 January 2023. Section 2(1) of the PPPFA read with National Treasury's Implementation Guide to the PPPFA regulations, 2022 requires that organs of state must first put a Preferential Procurement Policy (PPP) in place and then implement a preference point framework in accordance with its PPP.¹⁵ Thus, the PPP is a prerequisite for the implementation of a preference point framework. Absent a PPP, an organ of state cannot allocate preference points in a tender.

54.5 Acsa's response hereto in dealing with paragraphs 72-75 of the Founding Affidavit is in effect a denial. It contends that:

"73.2. I wish to emphasise that the points allocation for preference is 10 points based on BBBEE and 90 points for Price.

73.3. The preference allocation is based on ACSA's policy position on preferential procurement, which is contained in the attached hereto and marked as annexure "MPS3" ACSA Supply Chain Manual (SCM manual).

73.4. In terms of the SCM terms of ACSA's procurement process, ACSA must have regard to goals contained in its Transformation Policy, which goals are set out in paragraphs 11.42 of the SCM Manual.

73.5. For current purposes, I extract the specific goals relevant to "other goods and services" which security falls within the context of as it is not specifically catered for (see page 28):

¹⁵ See par 72-75 of the FA

[Table excluded]

73.6. The allocation of goals must be read with paragraph 11.44 of the SCM manual, which prescribes that points must be allocated in the following manner:

"Bidders will be ranked by applying the preferential point scoring of 80120 for bids with the rand value equal to or below R50 million and 90110 for bids with the rand value above R50 million."

73.7. In giving effect to the specific goals, as stated in the table above, ACSA uses the level of BBEE as a measure. This is evident from paragraph 11.56 of the SCM manual, which states:

"Preference points may only be awarded to Large Enterprises when there is an original valid or a valid certified copy of a B-BBEE certificate included, issued by the South African National Accreditation System (SANAS), accredited verification agency or an Independent Regulatory Board of Auditors (IRBA) approved auditor."

73.8. Therefore, preference points are awarded based on B-BBEE. In this case, ACSA has chosen level 1 or 2 B-BBEE as a measure to determine preference. To this end, ACSA does have a preferential procurement policy measure, which it has considered in implementing the current Request for Bids, and it has not misdirected itself or committed an error of law.

73.9. ACSA is legally entitled to develop its preference policy, and through the SCM Manual, it has done so. The Applicant alleges that the PPPFA Regulations of 2022, refer to "specific goals" and not BBEE, this is correct. However, this does not mean BBEE is excluded, the meaning of "specific goals" which is defined as follows, includes BBEE considerations:

"means specific goals as contemplated in section 2(1)(d) of the Act which may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability including the implementation of programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994."

73.10 On 08 November 2022, the National Treasury issued a statement stating that the BBBEE remains applicable when Organs of State develop procurement policies. A copy of the statement is attached hereto and marked as annexure "MPS 4"

73.11. I stress that the current RFB is not a normal bid but rather an emergency bid; therefore, in terms of PFMA SCM instruction 3, ACSA is permitted to engage in emergency bidding. Further, in terms of paragraph 4, ACSA is permitted to deviate from normal bidding processes and engage in limited bidding.

73.12. BBBEE level 1 or 2 has been imposed as a pre-qualification criterion specifically for ACSA to engage in limited bidding for purposes of the emergency. Further, even in a normal process, the imposition of BBBEE as a pre-qualification criterion is not impermissible. For purposes of the emergency, BBBEE was utilised first to ensure ACSA aligns with its transformation and secondly, to ensure that the RFB is limited in a manner that allows ACSA to evaluate bids in a speedy manner. For ACSA to evaluate all bidders on price and preference in the context of an emergency without limitation would defeat the purpose of engaging in an emergency in the first place."

[55] Fidelity counters the above with the following:

"95 The contents hereof are denied to the extent that it is inconsistent with what is stated herein.

96 I deny the averments in subparagraphs 73.3 that the preference allocation in the tender document was based on ACSA's policy position on preferential procurement as contained in its SCM Manual. I have already explained that the approach to preference in the tender document and in the SCM Manual are chalk and cheese.

97 I also deny that the goals contained in the Transformation Policy are the same goals stipulated in paragraph 11.42 of the SCM Manual.

98 Despite the passing reference to the B-BBEE certificate in subparagraph 11.56 of the SCM Manual, the points for specific goals stipulated in the Manual are not based on the B-BBEE scorecard. They are based exclusively on black ownership, B-BBEE as outlined in the tables which appear under subparagraph 11.42. The scorecard may be

used for purposes of verifying an entity's back ownership, but it is not the basis for allocating preference points. (my underlining)

99. Yet, the tender document stands in conflict with the SCM Manual because it allocates all the preference points on the basis of the, B-BBEE scorecard alone. For this reason, ACSA cannot now invoke the SCM Manual as the basis for the allocation of preference points in the tender document, as it has attempted to do in sub paragraphs 73. 7 and 73.8. The SCM Manual provides no support for the allocation of preference points in the tender document.

100 Furthermore, contrary to what is stated in subparagraph 73.8, ACSA has not only chosen level 1 and 2 B-BBEE as a measure to determine preference, it has set [and] effectively used these levels as prequalification criteria. This is evident from subparagraph 3.3 item 4 of the tender document. Once again this stands in conflict with its own internal document annexed as "MPS2" which states that the use of prequalification criteria is "no longer applicable" (subparagraph 4.2). In subparagraph 73.12 ACSA actually admits that it has used B-BBEE levels 1 and 2 as prequalification criteria. It claims that this is "not impermissible" despite what is stated in subparagraph 4.2 of its own internal document.

101 I further deny that the SCM Manual qualifies as its Preferential Procurement Policy. Apart from some initials which appear on the document, it is unsigned and there is no indication that the document was properly approved and issued. And there is no indication that it ever served before or was approved by ACSA's board of directors.

102 I do not deny that B-BBEE can (and indeed should) form part of an organ of state's specific goals. However, ACSA's SCM Manual has not included B BBEE as a specific goal. Its focus is exclusively on black ownership" (my underlining)

- [56] The PPPFA defines a preferential procurement policy as a procurement policy contemplated in section 217(2) of the Constitution and section 2 enjoins a state organ to determine its PPP and implement it within the framework as set out in the PPPFA. The applicant takes the stance that it was incumbent on Acsa to show that it has a valid PPP in place, and it has failed to do so. The PPPFA certainly does not envisage that such policy should be made up of a hotch -podge of documents such as an ostensible unauthorised SCM Manual which is to be read with a

Transformation policy. Since ACSA does not have a PPP in place the allocation of preference points in the emergency tender is unlawful.

- [57] The internal memorandum "MPS2" states that Acsa should determine its own PPP but in paragraph 3.2 states that its Transformation Policy is its PPP. The Transformation Policy is not ACSA's PPP. It does not even purport to be the PPP. In the words of the Applicant in the Replying Affidavit it:

"sets out at a high level what ACSA's transformation goals are, but it does not specify what "specific goals" ACSA should incorporate in its tenders or the weighting to be assigned to specific goals as required by the PPPFA".

- [58] Even if this conclusion is wrong the RFB contradicts the specific goals ACSA purportedly adopted as outlined in the internal document annexed to the answering affidavit as "MPS2". The internal document requires ACSA to allocate preference points based on percentage black ownership. The tender document on the other hand allocates preference points based on B-BBEE levels. These are 2 fundamentally different approaches. Black ownership is taken into account for purposes of determining an entity's B-BBEE level, but it is not a "stand alone" factor. It is taken into account along with various other pillars such as management control, skills development, enterprise and supplier development and socio-economic development. Despite ACSA's claims, the tender document does not reflect the specific goals which it says it has adopted.

[59] In addition, the preference point system outlined in paragraph 4.6.1.1 of the RFB is based on the repealed PPPFA regulations, 2017, rather than the current 2022 regulations. The clearest evidence of this is that paragraph 4.3.13 of the RFB defines the "PPPFA" as "the Preferential Procurement Policy Framework Act 5 of 2000 and its regulations published on 20 January 2017".

59.1 Further evidence that ACSA applies the incorrect regulations can be found in paragraph 4.6.1.1 of the tender document which states that

"In terms of Regulation 6(2) and 7(2) of the Preferential Procurement Regulations, preference points must be awarded to a bidder for attaining the B-BBEE status level of contribution in accordance with the table below "

The PPPFA regulations, 2022, contain no such provision. That provision (and the table of preference points which appear in paragraph 4.6.1.1 of the tender document) is entirely based on regulation 7(2) of the 2017 regulations, which is not applicable to this tender.

[60] Fidelity also submits that Regulations 6(2) and 7(2) of the PPPFA regulations, 2022, require that preference points be awarded to a bidder for the "specific goal" specified for the tender. It does not state that the 10 or 20 reference points "must" be allocated based on a bidder's B-BBEE status level of contribution. ACSA bases the preference points allocation entirely on the bidders' B-BBEE scorecard,

in the erroneous belief that this is what the regulations required. By doing so it clearly committed a material error of law.

[61] The RFB is also in breach of regulation 3(1)(b) of the PPPFA regulations, 2022, which requires that organs of state must stipulate in the tender document the "specific goal" for which preference points may be awarded. The RFB makes no reference to the "specific goals" for which points may be awarded. It does not even refer to the B-BBEE status level as the applicable specific goal for this tender.

[62] It is also submitted that the RFB is contradictory. One of the mandatory requirements listed in paragraph 3.3 of the RFB was that bidders had to provide a valid B-BBEE certificate demonstrating a Level 1 or 2 status level (item 4 of paragraph 3.3). Bidders were warned that this requirement was material and "*Bidders that DO NOT meet all the above requirements will be disqualified and not evaluated further*". This appears to serve as a prequalification criterion in that bidders with less than status level 1 or 2 would be excluded. Yet, the table of preference points in paragraph 4.6.1.11 read with paragraph 4.7 of the RFB indicates that bidders with B-BBEE status levels 1 to 8 may claim preference points in accordance with their B-BBEE level. Non-compliant bidders will be allocated a point of 0, but not excluded.

[63] This is contradictory to the mandatory requirement that bidders must submit a B-BBEE certificate demonstrating levels 1 or 2. Furthermore, the tender document was contradictory, vague and ambiguous with

regard to whether a B-BBEE certificate had to be provided at all by the closing date. As stated, the B-BBEE certificate demonstrating level 1 or 2 status level was first listed under mandatory returnable documents (para 5.1 item 5) and bidders who failed to provide the B-BBEE certificate would be disqualified. But the B-BBEE certificate was also listed under "other returnable documents" (para 5.2 of the RFB), where it was stated that "other returnable documents" were required but not mandatory and that ACSA may request bidders to submit documents after the closing date. These conflicting instructions gave the bidders unclear directions.

[64] In *AllPay* the Constitutional Court stated that:

"the purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions".¹⁶

It also made it clear that vagueness and uncertainty were grounds for review in terms of s 6(2)(i) of PAJA (the action is otherwise unconstitutional or unlawful). It is trite that a tender document must speak for itself. It must be clear and unambiguous.¹⁷

[65] In the 2023 tender, the RFP contained a clause to the effect that ACSA did not need the express consent of bidders to extend the validity of their bids. In that matter Fidelity argued that the failure on the part of ACSA to obtain the consent of the bidders for the extension of the validity period of their bids was a cardinal error which vitiates the entire

¹⁶ See *Allpay* above para 92

¹⁷ Cf *The Premier of the Free State Provincial Government v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 29 -30.

tender process. In his judgment in the interdict proceedings Epstein AJ held (in para 45 thereof) there is a strong possibility that the review will succeed on this ground alone. The legal position has been settled by the SCA – if an organ of state intends to extend the validity period of a tender it must approach all bidders to provide their express, written consent to the extension(s) of the validity of its bid.¹⁸

[66] For all the above reasons the RFB is unlawful. There is no need to allow this position to prevail. To allow Acsa to ultimately award the tender whilst the RFB is manifestly unlawful would be to delay the inevitable.

[67] In my view the requirements for interim relief are met i.e.:

67.1 A prima-facie right to just administrative action and to fair procurement procedures, as enshrined in sections 33 and 217 of the Constitution has been demonstrated;

67.2 A well-grounded apprehension of irreparable harm if interim relief is not granted is self – evident. In considering this factor I bear in mind in particular that the state and SOE's are duty bound to follow the Constitution and the rule of law and that it is in the public interest that they do so. In fact, they should be seen to set the example.

¹⁸ See Ekurhuleni Metro Municipality v Takubiza Trading & Projects CC 2023 (1) SA 44 (SCA) para 13

67.3 The balance of convenience clearly favours the Applicant. The *prima facie* right made out is in my view strong and hence the balance of convenience need not necessarily favour the Applicant strongly. Nevertheless, Acsa has access to an existing panel of security service providers and pending outcome of the review Acsa is free to contract with them.

67.3.1 It can also follow any other lawful option, including the options outlined in the National Treasury's instruction. SCM instruction 3 of 2021/22 issued by National Treasury allows ACSA to deviate from a normal bidding process and to utilize "other means" of procuring services which include: (a) Limited bidding (sole source, single source bidding); and (b) Written price quotations

67.4 I also bear in mind that the present matter does not have any bearing on the separation of powers as was envisaged in *Outa*.¹⁹

[68] No alternative, adequate, ordinary and reasonable legal remedy which will grant similar protection seems to be available given the particular circumstances of the present matter.

¹⁹ National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)

[69] I am of the view that given the fact that only urgent *interim* relief is granted the costs should be reserved for decision by the Court ultimately dealing with the final relief.

[70] Hence, I make the following order:

- 1 The matter is declared urgent and to the extent that there has been non-compliance with the rules of Court same is condoned.
- 2 Pending judgment in this Court in the review brought by the Applicant to set aside the decisions taken by the First Respondent relating to COR7412/2024/E Revision ("the tender"):

2.1 A rule nisi is issued with return date on 18 June 2024, in terms of which all the bidders who submitted a bid for the tender are called upon to show cause, if any, why the following order should not be made final:

2.1.1 The First Respondent ("ACSA") be interdicted from taking any further steps toward implementing or giving any further effect to the tender, including the evaluation, adjudication, and awarding of the tender.

2.1.2 Why ACSA should not be ordered to explore all lawful means of procuring security services at its operated airports, including, but not limited to, maintaining the applicant's appointment on a two-

monthly basis to provide security services at the current sites, under the same terms and conditions as currently in place, until the review is concluded.

- 3 ACSA is to serve this order upon all the bidders who submitted a bid for the tender without delay, in accordance with the Rules of court, and to provide this court on the return date with proof of such service by means of Affidavit if necessary;
- 4 The order issued in paragraph 2.1.1 shall serve as an interim interdict with immediate effect.
- 5 The costs of this application are reserved for hearing by the Court on the return date.



S VAN NIEUWENHUIZEN

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 30 May 2024

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