Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

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

Case No: CA&R 24/2023; 319/2023
Heard: 20 May 2024
Judgment delivered: 5 July 2024

In the matter between:-

BOINKO TRADING AND INVESTMENT (PTY) LTD **APPLICANT**

and

NORTHERN CAPE AGRICULTURAL HIGH SCHOOL **FIRST RESPONDENT**

MEC: DEPARTMENT OF EDUCATION
NORTHERN CAPE PROVINCIAL GOVERNMENT **SECOND RESPONDENT**

ZAKMOR SUPPLIERS & GENERAL TRADING **THIRD RESPONDENT**

CORAM: MAMOSEBO J ET STANTON J

JUDGMENT

Stanton J:

INTRODUCTION: -

[1] Zakmor Suppliers and General Trading ("*Zakmor*") was the successful tenderer in a contract between the Northern Cape Agricultural High School

("the School") and the MEC: Department of Education Northern Cape Provincial Government ("the Department") (jointly *"the Respondents*") for the demolishment and disposal of the asbestos hostel Asterhof and for repairs and renovations to the school hostel (Lekkerboer) and abattoir, under tender number ST100/2022/23 (*"the tender*").

[2] In this review application the applicant, Boinko Trading and Investments (Pty) Ltd (*"Boinko*"), as the unsuccessful tenderer, seeks the following relief in its amended notice of motion, that: -

2.1 The decision by the Department to award the tender to Zakmor be reviewed, declared unlawful and set aside;

2.2 The contract entered into between Zakmor and the Department pursuant to the award of the tender be declared *ab initio*, void and setting same aside;

2.3 All payments made by the School to Zakmor pursuant to the award of the tender be declared void; and

2.4 The Department be directed to award the tender to Boinko, alternatively that the School be directed to re-evaluate and adjudicate all bids received and to make an award in line with the tender documents.

[3] The Department and the School opposed the application. Zakmor did not.

[4] The essential facts, not in dispute, are briefly these. According to the Department's Norms and Standards published during November 2016, the first-line priority of the Department included the removal of all inappropriate structures made from materials such as asbestos, wood and metal by November 2019. In view of the fact that the Department has limited Implementing Agents and no supply chain management policy, a school allocation was done in terms of sections 44 and 45 of the Public Finance Management Act, Act 1 of 1991 authorising the principal of the School to perform all duties in respect of the tender on the Department's behalf (*"the*

School Allocation policy"). On 17 November 2022, the project was advertised on the bulletin board of OK Grocer and Shoprite in Jan Kempdorp, on the School's Facebook page and bulletin board as well as at Toubrin Internet and in the newspaper. The information session was scheduled and took place on 23 November 2022. The closing date for the submissions of bids was 07 December 2022. Thirteen applications were submitted of which only three were found responsive. The Department's price specification was an amount of R8,325,692.95. Zakmor's price bid was R8,008,525.98. Although Boinko scored the highest points on tables 3 and 4, its financial offer was considered and found to be 27,6% short of the estimated budget. The tender was awarded to Zakmor on 15 December 2022, who had to complete the work within five months. Boinko filed its review application on 15 February 2023, but did not seek interim relief for Zakmor's appointment to be stayed pending the outcome of the review application.

[5] According to Boinko, the application is subject to the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA") as well as the principle of legality by virtue of the fact that the impugned decision is unlawful, invalid and unconstitutional as a result of the School's disregard of the supply chain management policies and section 217 of the Constitution of the Republic of South Africa, more specifically in that: -

5.1 The tender box was not opened and the bid prices were not read out in public on the date and time of the closing of the tender;

5.2 Zakmor should have been disqualified as unresponsive on the basis that it failed to submit a valid Central Supplier Database report ("CSD report") and a valid asbestos certificate; and

5.3 The respondents were obliged to appoint Boinko as it was the contractor with the highest score and lowest price as provided for in the School Allocation policy, and accordingly the Bid Adjudication Committee ("the BAC") had acted irregularly, with bias and therefore unfairly.

APPLICABLE LAW: -

[6] It is well established that a tender process implemented by an Organ of State is an "administrative action" within the meaning of PAJA. The awarding of government tenders is governed by section 217(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Awards must be made in accordance with a system that is fair, equitable, transparent, competitive and cost effective. But a procurement system may provide for categories of preference and for the advancement of categories of persons as provided for in (section 217(2)). National legislation must prescribe the framework for the implementation of any preferential policy (section 217(3)). This is done by the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPF Act"). It provides that Organs of State must determine their preferential procurement policy based on a points system. The importance of the points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the awarding thereof to another tenderer (section 2(1)(f)).

[7] As observed by Cameron JA in the matter of ***Logbro Properties CC v Bedderson NO and others*** [1]: -

> *"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 given for it..."*

[8] What is fair administrative process depends on the circumstances of each case. In ***Metro Projects CC & another v Klerksdorp Local Municipality & others***[2], the Supreme Court of Appeal confirmed that:

> *"Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the*

[1] 2003 (2) SA 460 (SCA) at page 466 para 5.
[2] [2003] JOL 11590 (SCA) at para 13.

process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost effectiveness."

The opening of the tender box: -

[9] Boinko *inter alia* challenges the award of the tender on the basis that the opening of the tender box was not in accordance with the tender specifications, that it was not opened in public in the presence of the tenderers, and therefore the process was unfair, neither equitable nor transparent or competitive.

[10] The tender documents specified the closing date for the submission of the tender and the opening of the tender box as 16:00 on 07 December 2022.

[11] According to Boinko: -

11.1 The tenderers present at 16:00 on 07 December 2023 were informed that the tenders would be opened at 10:00 on 08 December 2022 as the Department's officials were absent;

11.2 The School's principal, the SGB chairperson and the Department's officials were again not present; and the opening of the tender box did not take place on 08 December 2022;

11.3 It received the Bid/Tender opening information from the School's principal on 15 December 2022, having demanded same on 14 December 2022; and

11.4 The Bid/Tender opening information reflects the opening date of the tenders as "07-08/11/2022 at 11H00".

[12] Mr P Mthombeni, on behalf of Boinko, in support of his argument that the tenders had to be opened in public in the presence of the service providers, and the failure to do so, resulted in the procedure to be not transparent and grossly irregular, relied on the fact that the School Allocation policy required the advertisement to stipulate that the *"BIDS WILL BE OPENED IN THE*

PRESENT OF THE SGB MEMEBERS, NCDOE OFFICIALS AND SERVICE PROVIDERS/REPRESENTATIVE." [sic] He contended that it would be non-sensical to specify it as a requirement for the advertisement, and then disregard that requirement when the tender box is opened.

[13] This argument however, is not borne out by facts. The School Allocation policy does not stipulate the manner in which, or in whose presence, the opening of the tender box should occur. Furthermore, the School Allocation policy does not stipulate at which time and on which date the tender box would or should be opened. It merely reads *"With the closing of tenders, all submissions should be placed in a (SEALED) box/STEEL (LOCKABLE CONTAINER) and opened in an SGB meeting or a delegation of the SGB. A list should be made with the names and the tender price of the contractors who submitted. This list should form part of the meeting minutes."* In addition, the minutes of the Bid Evaluation Committee ("the BEC") specify that the opening procedure was done in the presence of the principal, Mr VB Mgwevu, Mr M Motshabi, SGB members and officials from the Department, Ms M Jantjies and Ms N Loff. Mr Mgwevu, Mr Motshabi, Ms Jantjies and Ms Loff all deposed to confirmatory affidavits.

<u>The CSD report and asbestos certificate: -</u>

[14] It is common cause that the tenderers were required to submit a valid CSD report and asbestos certificate to qualify for consideration.

[15] According to Boinko, Zakmor submitted a CSD report dated 17 December 2022, indicating that Zakmor was granted the opportunity to submit same after the closing date, where other bidders were not granted the same opportunity; and were accordingly found to be non-responsive. Boinko also contends that Zakmor did not submit a valid asbestos certificate as the certificate included in the record was only valid from 30 September 2019 until 29 September 2022. Mr Mthombeni submitted that the respondents' explanation in their answering affidavits is unacceptable as the valid A Man Asbestos (Pty) Ltd certificate should have been included in the record, and not attached to their answering affidavits. Boinko therefore submits that the

BEC was obliged to disqualify Zakmor, or to declare it non-responsive, which it failed to do, and as a result, the process was not fair, equitable, transparent or competitive as required by section 217 of the Constitution.

[16] In my view, this ground of review is unmeritorious in view of the following: -

16.1 The respondents proffered the following detailed explanation in their answering affidavit: -

16.1.1 Mr OG Mogatle, the deponent to the respondents' answering affidavit and the Director, Legal Services of the Department, was informed by Mrs M Owambo, the secretary of the BAC, who also deposed to a confirmatory affidavit, that she had prepared the file of the successful bidder by removing the file binding of the Zakmor tender and placing same together with the minutes of the BEC and BAC into one Lever Arch file;

16.1.2 Zakmor submitted 2 asbestos certificates in the names of Mamfene Trading CC and A Man Asbestos (Pty) Ltd;

16.1.3 The valid A Man Asbestos (Pty) Ltd certificate that formed part of the record, must have accidentally been removed when the record was compiled;

16.1.4 The Mamfene Trading CC asbestos certificate, which was included in the record, expired on 29 September 2022, but the A Man Asbestos certificate, attached to the founding affidavit, is valid from 29 August 2022 to 28 August 2025; and

16.1.5 Zakmor submitted a valid CSD report dated 4 December 2022, as is evident from the certification thereof. The CSD report, dated 17 December 2021 was filed as it is a requirement that before a supplier is appointed, the supplier's CSD status has to be verified again; and

16.2 The minutes of the BEC also confirm that Zakmor was not disqualified on the basis that it had not submitted a valid CSD report and asbestos certificate.

Evaluation of Boinko's tender against that of Zakmor: -

[17] According to the minutes of the BEC: -

17.1 Boinko scored the highest in respect of the 80/20 preference point system, which is reflected as follows: -

NAME OF BIDDER	BID PRICE	PRICE: POINTS	B-BEE POINTS	TOTAL
BOINKO TRADING AND INVESTMENTS	R6,072,570.40	80	20	100
ZAKMOR SUPPLIERS AND GENERERAL TRADING	R8,000,525.89	54.60	20	74.60
GEEZFIX	R8,838,491.75	43.56	20	63.56

17.2 Boinko is a reputable contractor with numerous similar R&R projects that have been completed successfully; and it can be concluded that Boinko has the prerequisite experience and is considered capable of successfully executing the tender;

17.3 Zakmor was ranked highest based on financial offer and preferences; and its financial offer was considered very competitive and considerably lower than the allocated budget estimate; and

17.4 The BEC recommended that Zakmor, who scored the second highest in accordance with the PPPFA, should be appointed.

[18] The BAC's minutes reflect that:

"As per scoring, BOINKO TRADING AND INVESTMENTS scored the highest, however, in terms of pricing, he reached 27,06% short from the estimated budget which was more than the prescribed 20% and his prices were not market related. This company has elaborated on Page 34 of the Tender document that they have current commitments.

Therefore, coming in second place is ZAKMOR SUPPLIERS AND GENERAL TRADING and his prices are more market related prices and only has a shortfall of 3,9%. This company also elaborates on Page 34 of the Tender Document that he does not have any current commitments that could hinder him from execution of the project.

These recommendations were consulted with the Chief Works Inspector (Mr Donavan van Wyk) from NCDoE and are attached."

[19] Mr D van Wyk's report confirms that Boinko's tender amounts are too low (more than 20%) and not market related, but that Zakmor's tender is market related and acceptable as it only has a 3,91% shortfall.

[20] Boinko avers that it should have been appointed as the successful tenderer in view of the fact that it had the lowest bid price and scored a total of 100%, while Zakmor scored only 74,60%. In support of its arguments, Boinko relies on paragraphs 8 and 9 of the School Allocation policy, which reads: -

"8. The SGB or a delegation of the SGB should then meet and adjudicate the project. The process should be minuted and the scoresheet must form part of the minutes. The contractor with the highest score and the lower price should always be appointed. If for some realistic reason, the best candidate will not be appointed, the reasons should be minuted. (This should only happen in exceptional cases and with just reasons).

9. If the tender amount of the contractor with the highest score is more than 20% lower than the estimated amount, this contractor should be given the chance to withdraw their tender. If they are happy to continue with this price, he should be appointed."

[21] It is neither in dispute that Boinko had the highest score and lowest bid price, nor that Boinko was not given the opportunity to withdraw its tender in terms of paragraph 9 of the School Allocation Policy.

[22] The respondents, however, assert that the BAC considered all available information and documentation received from the BEC, including the report

submitted by Mr van Wyk. In addition, they allege in their answering affidavit that Mr Van Wyk, who deposed to a confirmatory affidavit, was called before the BAC to give an explanation on his finding and report; and that he explained that when the bid price differs from the price specifications by more than 20%, this is identified and considered as high risk as the contractor could run into financial difficulty and would not be able to complete the project, either on time or at all.

[23] On scrutiny of the minutes of the BAC, it is, however, not minuted that Mr van Wyk either attended or advised the BAC that the possible award to Boinko could be high risk. In contrast, the minutes of the BEC state that Boinko is capable of successfully executing the tender.

[24] In my view, neither exceptional circumstances nor just and realistic reasons therefore existed to justify the awarding of the tender to Zakmor as opposed to Boinko. The respondents also fell foul of the the PPPF Act.

[25] It follows that the award of the tender to Zakmor is invalid and reviewable.

[26] That is, however, not the end of the matter. In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in ***Oudekraal Estates (Pty) Ltd v City of Cape Town***[3]: -

> *"It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide."*

[27] Scott JA, in ***Chairperson: Standing Committee and others v JFE Sapela Electronics (Pty) Ltd and others***[4], with reference to ***Associated Institutions Pension Fund and others v Van Zyl and others***[5], confirmed that there is an element of public interest in the making of final administrative

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[3] 2004 (6) SA 222 (SCA) para 36 at 246D. Also see Moseme Road Construction CC and others v King Civil Engineering Contractors (Pty) Ltd and another [2013] 3 All SA 549 (SCA) at para 15.
[4] [2005] 4 All SA 487 (SCA) at paragraphs [28] and [29].
[5] 2005 (2) SA 302 (SCA at para 46.

decisions and the exercise of administrative functions, to which he added considerations of pragmatism and practicality. He held as follows: -

"In my view, the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court a quo correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards. It follows that in my view the court a quo erred in making the order it did and this Court is free to set aside that order."

[28] The five month project was awarded to Boinko on 15 December 2022, more than 15 months prior to the hearing of this application. In the present case Boinko did not file an application requesting an interdict pending the finalisation of its review application. Boinko does not submit in its founding or supplementary affidavit that the project has not been completed. In their answering affidavit, dated 28 June 2023, the respondents state that Zakmor *"...has by now completed the work, alternatively is almost at a stage of completion."* In reply, Boinko merely denies the allegations and states that *"The duration of the contract does not in any way exonerate the respondents from the unlawful awarding of the tender."*

[29] I can therefore come to no other conclusion than that the project has been completed; and that in this matter, by reason of the effluxion of time, the invalid administrative act must be permitted to stand.

[30] In view of my findings, an appropriate costs order in the circumstances would be that the parties pay their own costs.

<u>ORDER: -</u>

In the result, the following order is made: -

1. The application is dismissed.

[redacted]

STANTON J

I concur

[redacted]

MAMOSEBO J

Obo the Applicant:	Adv. P Mthombeni
On instruction of:	Motlhamme Attorneys
Obo the First and Second Respondents:	Mrs. M.P Olivier
On instruction of:	The State Attorney