

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


16 May 2025

Case No: 2024-031868

In the matter between:

INDEPENDENT DEVELOPMENT TRUST (IDT)

First Applicant

(Registration No. IT669/91)

TEBOGO MALAKA N.O

Second Applicant

ZIMBINI HILL N.O

Third Applicant

THIMOTHY SUKAZI N.O

Fourth Applicant

DR MICHAEL SUTCLIFFE N.O

Fifth Applicant

PROF. RAYMOND NKADO N.O

Sixth Applicant

KARABO SIYILA N.O

Seventh Applicant

LERATO KUMALO N.O

Eighth Applicant

PRUDENCE MKHWANAZI N.O

Ninth Applicant

MPILO MBAMBISA N.O

Tenth Applicant

KRISHEN SUKOEVI N.O

Eleventh Applicant

ADV LUFUNO NEVONDWE N.O

Twelfth Applicant

REHANA PARKER N.O

Thirteenth Applicant

And

MOEPATHUTSE PROPERTY INVESTMENTS (PTY) LTD

Respondent

(Registration No. 2015/114982/07)

JUDGMENT

MYBURGH, AJ

INTRODUCTION:

- [1] The Applicants are the Independent Development Trust, registered as such, being a Schedule 2 state-owned entity and programme implementation agency as prescribed by the Public Finance Management Act 1 of 1999 (PFMA), represented herein by its current trustees, the second to thirteenth applicants. In this judgment I will refer to the Applicants jointly as “the IDT”.
- [2] The IDT launched an application seeking an order that the IDT’s decision, taken on 04 November 2022, to award the bid to the respondent to provide suitable office space at 48 Sovereign Drive, Building B, Route 21 Corporate Park, Irene, Pretoria to the IDT for a period of sixty (60) months is declared constitutionally invalid, reviewed, and set aside.
- [3] The IDT further sought an order declaring that any contract and/or lease agreement and/or service level agreement concluded between the IDT and respondent pursuant to the decision to award the bid to the respondent, is declared null and void *ab initio*.

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK:

- [4] At the onset of the hearing it was common cause that the review being sought was a legality review. As again stated by Ponnann JA in ***Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality*** 2021 (3) SA 25 (SCA) at para 71, *‘[t]he objective of state self-review should be to promote open, responsive and accountable government.’* The relief being sought should be considered against the prescripts of the applicable constitutional and legislative framework, being section 217 read with section 172(1)(b) of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (“PPPFA”) and the Public Finance Management Act 1 of 1999 (“PFMA”).
- [5] In addition, the IDT relied of its own Supply Chain Management Policy (“SCM policy”), which was drafted to give effect to its Constitutional and legislatively

imposed procurement duties. Regulation 16A3.1 and 16A3.2(a) of the Treasury Regulations issued pursuant to section 76 of the PFMA require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that must be fair, equitable, transparent, competitive and cost-effective. Such system should therefore echo section 217 of the Constitution.

- [6] Section 217 of the Constitution lays down the threshold requirements for a valid procurement process, being a process which is “*fair, equitable, transparent, competitive and cost effective*”. See in this regard ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*** 2019 (4) SA 331 (CC) at para 89.
- [7] As referenced with approval by Theron J in ***Buffalo City***, the SCA commented on these Constitutional requirements in ***Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd*** 2000 (4) SA 413 (SCA), at para 30, as follows:
- “One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender.”*

THE EVIDENCE CONSIDERED:

HEARSAY EVIDENCE:

- [8] At the onset of the matter, I was requested to rule on the admissibility of the hearsay evidence proffered by the IDT. The Founding Affidavit identified such

hearsay evidence as the evidence that related to one Mr Meyer, who refused to depose to a confirmatory affidavit.

- [9] In its Replying Affidavit the IDT however sought the admission of the hearsay evidence both related to Meyer as well as Ms Moloi, albeit that the hearsay evidence of Ms Moloi was limited to the hearsay evidence of impropriety of her then boss, Mr Mathikhi.
- [10] In argument of the ruling it was pointed out to the representatives of the IDT that, notwithstanding the Founding Affidavit referencing confirmatory affidavits of both Ms Moloi (referred to as Annexure “FA3”) and Mr Makhura, the Acting General Manager of the SCM in the IDT at the time (referred to as Annexure “FA28”), no such affidavits were attached. Thus, any reference to the evidence of Ms Moloi and Mr Makhura would constitute hearsay evidence.
- [11] The IDT then applied, in terms of Section 3(1)(c) of the Law of Evidence Amendment Act 1988 for the admission of the hearsay evidence, which reads as follows:
- (1) *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*
 - (c) *the court, having regard to-*
 - (i) *the nature of the proceedings;*
 - (ii) *the nature of the evidence;*
 - (iii) *the purpose for which the evidence is tendered;*
 - (iv) *the probative value of the evidence;*
 - (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
 - (vi) *any prejudice to a party which the admission of such evidence might entail; and*

(vii) *any other factor which should in the opinion of the court be taken into account,*

is of the opinion that such evidence should be admitted in the interests of justice.'

- [12] Some of the hearsay evidence involved a first-hand account of a past event. This was limited to the evidence of Moloi and Meyer confirming a visit to a property of the Respondent by representatives of the IDT on 9 March 2022, at which meeting Mr Mathikhi, a representative of the IDT, arrived in the same vehicle as one Mr Mathebula, who was a director of a company that performed property management services for the Respondent. On a reading of the application these facts were common cause.
- [13] The hearsay evidence of Mr Makhura was limited to a general confirmation of non-compliance with the SCM Policy, applicable legislation, and processes. His evidence, if allowed, would constitute an attempt to usurp the functions of this Court. There was in any event no explanation why a confirmatory affidavit by Makhura, which was referenced in the Founding Affidavit, was not attached.
- [14] In paragraph 25 of the Founding Affidavit the deponent states that the arrival of Mathikhi accompanied by Mathebula, at the property on 9 March 2022, “*caused grave concern*”. The deponent was not present and such concern is not attributed to any person. Similarly, and in paragraph 26 of the Founding Affidavit, mention is made of specific statements made by Mathebula to Mathikhi during such visit. Again, this is not attributed to any person who might have overheard it and is denied by the Respondent. The deponent was not at such visit. This hearsay evidence was oblique and depended on speculation and inference. See in this regard ***S v Ndhlovu and Others*** 2002 (2) SACR 325 (SCA) para 44. As the deponent failed to identify the source, such hearsay evidence also conflicts the requirements set out in ***Galp v Tansley NO & Another*** 1966 (4) SA 555 (C) at 559G.

- [15] I further considered the probative value of the disputed hearsay evidence. I find the probative value to be minimal. The Court has been provided with a detailed and complete record of decision, which contains all relevant minutes of meetings and documents related to the award of the tender to the Respondent. I further considered the prescripts of the matter ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 3 SA 623 (A) at 634.
- [16] It was evident that the application in terms of section 3(1)(c) was, at least in part, necessitated by the IDT's failure to ensure that confirmatory affidavits, which were available, were attached to its Founding Affidavit.
- [17] There is similarities between the present matter and the matter of ***Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa*** 2020 (1) SA 76 (SCA), where Lewis JA stated, in paragraph 19 that '*...while hearsay evidence is generally not permitted in affidavits, where there is no reason to doubt the reliability of the allegations made, they are uncontested, and the deponent says he believes them to be true, they will be admissible.*' In that matter, also a self-review application, the Court *a quo*, correctly, allowed hearsay evidence. One of the distinguishing factors between that matter and the present is however that the documentary evidence in ***Swifambo*** supported the hearsay evidence, where in the present matter it did not.
- [18] Taking all factors into account I ruled that the hearsay evidence of Meyer, Moloi and Makhura was not admissible save insofar as such evidence was common cause. I was not convinced that the interests of justice demanded such inclusion. Such ruling also excluded the hearsay evidence of which the source was not identified.

THE IDT'S SUPPLY CHAIN MANAGEMENT POLICY:

- [19] Central to the IDT's arguments advanced was their own Supply Chain Management Policy ("SCM policy"). A SCM policy was incorporated into the Rule

53 record filed and was also attached to the Founding Affidavit as Annexure “FA27”. Although its attachment and reliance elicited no specific dispute from the Respondent, such SCM policy, as placed before Court, only took effect on 26 June 2023. There was no evidence or argument as to the exact policy applicable during the period March 2022 to 10 November 2022, the latter being the date on which the tender was awarded to the Respondent.

- [20] The deponent to the Founding Affidavit makes specific mention of the SCM policy in paragraphs 58 to 60 of the Founding affidavit, quoting from clause 13 of such policy. The Respondents took no issue with the quoted passage, save to dispute any breach thereof.
- [21] I therefore proceed with the judgment on the basis that the SCM policy in effect during the period 9 March 2022 to 10 November 2022 was, at least insofar as the IDT referred to or relied on specific clauses thereof which the Respondent did not dispute, similar to the policy attached.

CHRONOLOGY OF EVENTS:

- [22] On 23 February the Board of the IDT resolved to sell off its offices at Glenwood Office Park. As such the IDT was in need of alternative offices.
- [23] On 09 March 2022 certain representatives of the IDT visited buildings, including one of the Respondent's properties, described as 48 Sovereign Drive, Building B, Route 21 Corporate Park, Irene, Pretoria. The representatives were Ms Moloi, Mr Meyer and Mr Mothikhi. Their visit to this property was not pre-arranged.
- [24] On 22 April 2022 there was a meeting of the IDT's Bid Specification Committee (“BSC”), which resulted in the publication of the Bid. This meeting was attended by Sam Mathikhi, Theuns Booyens, Melvil-Eugene Moroka, Bongekile Goqo and Sam Makhura.

- [25] On 16 May 2022 Mr Sam Mathikhi was appointed as the Chairperson of Bid Evaluation Committee ("BEC"). On 17 May 2022 Ms Mahali Moloi and Mr Pikkie Meyer were also appointed as members of BEC.
- [26] On 19 May 2022 the BEC met.
- [27] At some point after 19 May 2022 the bid was cancelled. According to the IDT this was done due to the insistence of the Minister of Public Works, who is the Executive Authority of the IDT, that the specification should include norms and standards.
- [28] On 1 August 2022 the Acting CEO of the IDT appointed the members of the BSC to redraft the specification and terms of reference. Mr Sam Mathikhi was appointed as Chairperson of the BSC.
- [29] On 8 August 2022 the BSC met and approved the specifications and terms of reference, and on 12 Aug 2022 the second Bid was advertised.
- [30] On 19 August 2022 a compulsory briefing session took place, and on 2 September 2022 the bid closed.
- [31] On 13 October 2022 the BEC met to consider and decide on the tenders received. In total, six tenders were received. It was decided to award the tender to the Respondent. On 21 October 2022 the IDT's Management Bid Adjudication Committee (MBAC) met and, after considering the BEC decision, did not award the bid to the respondent. Certain concerns were raised, being the preferential point system used (80/20 and not 90/10), inclusion of preferential points for the recommended bidder, signing of the COC for the recommended bidder and a calculation error.
- [32] On 2 November 2022 the BEC resubmitted its finding to the MBAC, addressing the concerns raised, and on 4 November 2022 the MBAC approved the awarding of the tender to the Respondent.

- [33] On 2 December 2022 a Lease Agreement was concluded between the IDT and the Respondent, which commenced on 1 January 2023.
- [34] On 16 January 2023 a Proposed Floor Plan was submitted by the IDT to the Respondent, followed, on 27 January 2023, by an amended Proposed Floor Plan. On 20 February 2023 the IDT sent the approved Floor Plan to the Respondent. During April 2023 the building was ready for occupation by the IDT. The IDT's board of trustees inspected the building and found no faults or "snags".
- [35] On 18 April 2023 the respondent placed the IDT in mora through a written letter of demand. On 4 September 2023 the Respondent instituted action against the IDT.
- [36] On 8 February 2024 the Respondent cancelled the Lease Agreement.
- [37] On 26 March 2024 this review Application was launched.
- [38] At no time did the IDT take occupation of the leased premises.

OVERVIEW OF THE TENDER EVALUATION PROCESS:

- [39] A total is six tenders were received and considered by the IDT's BEC. During the administrative compliance stage four tenders were rejected, for the reasons as evidenced in the table below:

Name of Contractor	Bid price (Inclusive of VAT)	Outcomes
CENTURION VISION DEVELOPMENT	R 69 009 495,42	Submitted a letter from the building architect instead of a SAPOA RATING CERTIFICATE Eliminated from further evaluation
SKG AFRICA	R 59 549 686,32	All mandatory documentation submitted are fully compliant Recommended for further evaluation
ATTERBURY - RIVERWALK OFFICE PARK	R 88 993 316,50	Submitted an Area Certificate instead of a SAPOA RATING CERTIFICATE Eliminated from further evaluation
MOWANA PROPERTIES	R 79 905 488,76	Did not submit SAPOA RATING CERTIFICATE Eliminated from further evaluation

MOEPATHUTSE PROPERTY INVESTMENT	R 45 240 273,07	All mandatory documentation submitted are fully compliant Recommended for further evaluation
DELTA PROPERTY FUND	R 65 771 296,10	Did not submit SAPOA RATING CERTIFICATE Eliminated from further evaluation

[40] The outcome of the technical evaluation scoring on the two remaining tenders were as follows:

	WANDILE	PHASHA	CHRIS	AVERAGE SCORE	OUTCOME
SKG AFRICA	84	83	88	85	Recommended for further evaluation.
MOEPHATHUTSE PROPERTY INVESTMENT	96	98	97	97	Recommended for further evaluation.

[41] Both tenders therefore reached the minimum threshold of 70 points, whereafter the BEC proceeded with consideration of price and BBBEE. The outcome of such is reflected in the table below.

NO.	NAME OF TENDERER	B-BBEE Status Level of Contributor		PRICE POINTS (80)		GRAND TOTAL (GT)
		B-BBEE Status Level of Contributor	Total BBEE Points (20)	Tendered Price/Financial Offer (Vat Include)	Total Price Points (80)	
			A		B	GT = A + B
1	MOEPATHUTSE PROPERTY INVESTMENT	1	20	R45,240,273.07	80.00	100
2	SKG AFRICA	2	18	R59,549,686.32	54.70	72.70

[42] I interpose to state that once the minimum threshold in points was reached, and in terms of section 2(1)(f) of the PPPFA the tender had to be awarded to the highest-scoring tenderer, unless objective criteria justified the awarding of the tender to another. The Respondent was the highest scoring.

GROUND OF REVIEW:

[43] In the Heads of Argument submitted on behalf of the IDT, six grounds for review was identified and elaborated on. However, and at the onset of the hearing of this matter, Mothepe SC, on behalf of IDT, indicated that they were only persisting with four of the six grounds. The second and third grounds for review, as set out in the IDT's Heads of Argument were not persisted with, and as such will not be further discussed in this judgment.

[44] In the first ground of review the IDT submits that the exercise of power by the IDT and its officials must be consistent with the law, including section 217(1) of the Constitution. It was further required to comply with the PPPFA and its own SCM policy.

[45] It is submitted that the IDT failed to comply with section 217(1) of the Constitution, thus resulting in a decision to appoint the Respondent which is unreasonable

and/or unlawful and/or irrational and/or procedurally irrational that no reasonable person could have so exercised the IDT's power or performed the IDT's function.

- [46] The fourth ground of review advanced by the IDT is that the exercise of power by the IDT and its officials must be consistent with the law, including clause 12.3 of the SCM policy. According to the IDT the decision to appoint the Respondent to provide suitable office accommodation did not comply with the said clause.
- [47] IDT therefore argues that the decision to appoint the Respondent to provide suitable office accommodation was not fair, equitable, and transparent. It contends that it was so unreasonable and/or unlawful and/or irrational and/or procedurally irrational that no reasonable person could have so exercised the IDT's power or perform the IDT's function.
- [48] The fifth ground of review is that, the exercise of power by the IDT and its officials must be consistent with the law, including clause 13.1 of the SCM policy, which clause was not complied with in appointing the Respondent, which failure made the decision to appoint the Respondent so unreasonable and/or unlawful and/or irrational and/or procedurally irrational that no reasonable person could have so exercised the IDT's power or perform the IDT's function.
- [49] The sixth ground of review advanced by the IDT is similar to the fifth ground, save that the sixth ground specifically refers to a contravention of clause 13.1.3(c) of the SCM policy. Again, according to the IDT, such failure results in the appointment of the Respondent as being so unreasonable and/or unlawful and/or irrational and/or procedurally irrational that no person could have so exercised the IDT's power or perform the IDT's function.
- [50] In this judgment I will firstly deal with the fourth, fifth and sixth grounds of review, as all three grounds related to the alleged non-compliance with the SCM policy of the IDT. Following that, I will deal with the alleged non-compliance with section 217 of the Constitution.

REVIEW DUE TO NON-COMPLIANCE WITH THE SCM POLICY:

- [51] Prior to dealing with the specific clauses of the SCM policy, relied upon by the Applicant, it would be appropriate to consider which factual allegations, made by the Applicant, has been established and should be considered in determining the legality of the tender awarded. I have already set out a brief chronology as well as an overview of the tender evaluation process. All of the facts stated therein has been established. I have further already dealt with the hearing on the admissibility of hearsay evidence *supra*. It is common cause that officials of the IDT, and on 9 March 2022, visited more than one building. It is common cause that the officials also visited the building of the Respondent, which visit was not prearranged but was done on the request of the officials of the IDT after they saw that the building was available. It is further common cause that various calls were made, as a consequence of which Mr Mathikhi, a representative of the IDT, arrived at the building in the same vehicle as Mr Mathebula, a representative of the Respondent's managing agent. Mr Mathebula concedes that, during the visit, he might have made some positive remarks regarding the availability of the building for occupation by the IDT.
- [52] The IDT submits that an inference of impropriety should be made flowing from the arrival of these two gentlemen in the same vehicle.
- [53] In support of this inference the IDT refers to the inclusion of a cafeteria into the specific building requirements and specifications which was incorporated into the subsequent tender. In the founding affidavit the IDT contends that office buildings do not generally include a cafeteria, and that the cafeteria was included into the requirements to advantage the Respondent at the expense of other potential bidders by excluding them. It is common cause that the cafeteria carried a weight of one point during the bid evaluation process, and became irrelevant once the minimum threshold was reached.

- [54] The IDT's contention regarding the cafeteria and its inclusion into the requirements is however devoid of any factual basis. There is no evidence before Court indicating that other bidders were unable to provide such facility. There is no factual evidence to show that inclusion of the cafeteria into the building requirements actually constituted some improper advantage to the Respondent.
- [55] In the IDT's founding affidavit it is further stated that, at the meeting of the BSC on 22 April 2022, Mr Mathikhi listed the specific building requirements to form part of the specifications, including, amongst other things, a canteen or cafeteria, showers and a bicycle shed. There is however no mention of showers, or a bicycle shed in the minutes of such meeting nor in the subsequently published building requirements. The minutes of the meeting also do not support the statement that Mr Mathikhi listed the requirement of a cafeteria. The minutes simply record the building requirements agreed upon by all members of the BSC.
- [56] In its answering affidavit the Respondent vehemently denies any improper communication between Mathikhi and Mathebula. The answering affidavit, to which was attached a confirmatory affidavit by Mathebula, states that Mathebula had not had any contact with Mathikhi for at least 15 years. On the day of the visit the Respondent's senior property manager, and deponent to the answering affidavit, received a telephone call from the Respondent's commercial leasing agent, Bosman, who informed him that people from the IDT apparently drove past the building, saw the advertisement sign and contacted her. The agent called him to ask whether it was possible for him to take the building's keys to the building to enable the representatives of the IDT to inspect the property. This he did. According to Mathebula he received a call from Mathikhi on the day in question to say that Mathikhi wanted to view of the Respondent's properties that his own vehicle was unavailable. Mathikhi then asked whether Mathebula was in Pretoria and if so if Mathebula would mind dropping him off at the property. Mathebula did not know how Mathikhi came to know that the property was owned by the Respondent. According to the Respondent the IDT had leased another property from the Respondent, in Polokwane, and thus it is possible that Mathikhi

recognized the Respondent's name and knew that Mathebula's company was the managing agent for the Respondent. In its answering affidavit the Respondent assumes that Mathikhi had Mathebula's telephone number from previous dealings regarding the property in Polokwane. The Respondent disputes any existing relationship between Mathikhi and Mathebula. Mathebula accepts that he might have made positive statements regarding the building itself.

- [57] According to the Respondent, and at the end of the visit to the premises, they were informed that the IDT was scanning the area for suitable buildings and would in due course publish a public invitation to tender.
- [58] Having considered all the evidence, and specifically the documentary evidence recording the tender process, I find myself unable to conclude that the Respondent's version "*consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers*". See in this regard **Plascon-Evans** referred to *supra*, and **National Director of Public Prosecutions v Zuma** *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.
- [59] On the contrary, a competitive bidding process resulted, in which six bids were received. The exclusion of certain bidders from further evaluation, objectively, was because of their failure to submit SAPOA documentation.
- [60] The inclusion of the cafeteria as a requirement did not result in the exclusion of any bidder. Two bidders, including the Respondent, reached the minimum threshold of 70 points. The tender being awarded to the Respondent, thereafter, was because of the Respondent's tender being cheaper and was thus awarded in compliance with the PPPFA.
- [61] Clause 12.3 of the SCM policy reads as follows:

"Ethics and Fair Dealing

All staff members of the Independent Development Trust associated with procurement, particularly those dealing directly with suppliers or potential suppliers, are required:

12.3.1 To recognize and deal with conflicts of interest or the potential thereof;

12.3.2 To deal with suppliers even-handedly;

12.3.3 To ensure they do not compromise the standing of the state through acceptance of gifts or hospitality;

12.3.4 To be scrupulous in their use of public property; and

12.3.5 To provide all assistance in the elimination of fraud and corruption.

[62] Therefore I find that the IDT has failed to show any conflict of interest, or the potential thereof. There was no evidence to show or even suggest some interest that Mathikhi might have other than his status within the IDT. The IDT has failed to show that suppliers were not dealt with even-handedly, improper acceptance of gifts or hospitality, that any representative of the IDT failed to act scrupulously in their use of public property or that there was a failure to aid in the elimination of fraud and corruption.

[63] The IDT has thus failed to show any breach of clause 12.3 of the SCM policy. The fourth ground of review should therefore fail.

[64] I now turn to the fifth and sixth grounds of review, both relating to the alleged non-compliance of with clause 13.1 of the SCM policy.

[65] Clause 13.1 of the SCM policy reads as follows:

13.1 Demand Planning and Management

13.1.1 Demand management is the first phase of SCM. This objective is to ensure that the resources required to fulfil the needs identified in the strategic objectives of the Independent Development Trust are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs. As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be

included as part of the strategic planning process of the Independent Development Trust and hence will incorporate the future needs.

13.1.2 It is vital for managers to understand and utilize sound techniques to assist them in their planning, implementation and control activities. As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be dearly analysed. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc.

13.1.3 In performing demand planning as this initial stage of SCM process, the CEO should ensure that:

- a) Future as well as current needs are understood;*
- b) Requirements are linked to the budget;*
- c) Specifications are determined;*
- d) The needs form part of this strategic objective of the Independent Development Trust;*
- e) An analysis of this past expenditure may assist in determining the manner in which the Independent Development Trust fulfilled this need in the past;*
- f) The optimum method to satisfy the need is considered, including the possibility of procuring goods, works or services from other institutions (e.g. stationery, printing and related supplies from the Government Printer or furniture from the Department of Correctional Services), or on transversal or ad hoc contracts;*
- g) The frequency of the requirement is specified;*
- h) The economic order quantity is calculated;*
- i) Lead and delivery times are identified; and*
- j) An industry and commodity analysis is conducted.*

13.1.4 Managing demand will be a cross-functional exercise that brings the supply chain practitioner closer to the end user and ensures that value for money is achieved.

- [66] On 23 February 2022, and at a board meeting of the IDT, it was resolved that the IDT would sell or dispose of its then office building, following which the IDT's supply chain management unit (SCM unit) was instructed to initiate procurement processes by inviting bidders to provide suitable office space to accommodate the IDT's national office employees, based in Pretoria.
- [67] It is common cause that, on 9 March 2022, representatives of the IDT visited at least two properties in the Route 21 Office Park, Pretoria. One of these properties, as already discussed, was the property of the Respondent.
- [68] The IDT contends that the visit to buildings on 9 March 2022 was in contravention of the IDT's Supply Chain Management Policy, specifically clause 13.1 thereof, in that such a visit occurred before the drafting and adopting of the specifications or terms of reference for suitable office space.
- [69] Further in the affidavit, the IDT states that the BSC should have first objectively determined the actual demand and needs of the IDT before it took steps to compile the specifications. It stated that demand management entails procurement planning, analysis of goods and services required, and planning to acquire the right goods and services at the right price and right quality and right time. According to the IDT all these processes take place before the specifications is compiled.
- [70] In the fifth ground of review the IDT argues that the appointment of the Respondent following the tender was in contravention of clause 13.1 of the SCM Policy which required that, before bids can be advertised, the IDT needed to know in clear terms what type of goods or services it required, what is the quantity and quality, duration, and time of delivery.
- [71] The result of the initial BSC meeting on 22 April 2022 was an extensive list of specifications and requirements that the new building to be occupied had to comply with. Such a list is, per se, evidence of demand management and planning. Save

for the inclusion of the cafeteria, which I have dealt with *supra*, the IDT has advanced no evidence or argument to establish that the list of requirements, as decided upon by the BSC, was not the product of proper demand planning and management, or that the list was insufficient and/or incomplete in any way whatsoever.

- [72] In addition, the IDT did not take this Court into its confidence by elaborating on what it regarded as an appropriate or correct demand management or demand planning phase.
- [73] Save for the decision of the BSC on 22 April 2022 evidencing the contrary, I have no evidence before me indicating an actual failure to comply with the requirements of clause 13.1 of the SCM Policy insofar as it related to demand management and demand planning.
- [72] In the sixth ground of review the IDT argues that the decision to appoint the Respondent was not in compliance with clause 13.1.3(c) of the SCM Policy. The IDT submits that, before bids can be advertised, it must determine the specifications only after engaging in demand planning and management, which was not complied with. Like the fifth ground of review, this ground of review suffers from a lack of actual evidence to support it. The resolution taken by the BSC on 22 April 2022 evidence planning and elicited no criticism from the IDT. I have no evidence before me, save for the visits to the properties, of what that planning entailed or in what manner specifically such planning as was performed contravened clause 13.1.
- [73] I am furthermore unable to find that the actual visit to the Respondent's property on 9 March 2022 constituted, by itself, a breach of clause 13.1. I was not referred to any specific authority or rule that prohibited such visit to take place as part of the demand planning. On the contrary, I would regard it as prudent to view properties during planning. The issue of non-compliance with the provisions of the SCM policy is a question of interpretation, which cannot be done in a vacuum, and

must have a factual basis underpinning it. The factual basis to support the argument of the IDT is lacking.

[74] Therefore I find that the fifth and sixth grounds of review must fail.

REVIEW DUE TO NON-COMPLIANCE WITH SECTION 217 OF THE CONSTITUTION

[75] Section 217(1) of the Constitution constitutes the overriding principle against which the legality of the tender process and subsequent contract between the IDT and the Respondent should be measured.

[76] In ***State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*** 2018 (2) SA 23 (CC) at para 41 Madlanga J and Pretorius AJ stated the following:

“Section 217 of the Constitution insists on a system of public procurement that complies with certain factors. It provides that “[w]hen an organ of state . . . contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”.”

[77] In para 41 Madlanga J and Pretorius AJ stated the following:

“What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review” (footnote omitted, emphasis added).

[78] I have already dealt with the IDT’s allegations of non-compliance with the SCM Policy. The award of the tender to the Respondent was not in contravention of

such policy. There was further no argument that the award contravened specific provisions of the PFMA or of the PPPFA. On the contrary, after two bidders passed the minimum threshold, the prescripts of the PPPFA obligated the IDT to award the tender to the Respondent. This was the most cost-effective.

- [79] Guided by the principles in ***Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd*** at para 30, I find that the tender process that was followed was competitive and transparent. There was no evidence before the Court to indicate that the BEC deviated, during evaluation of the submitted tenders, from the published information and requirements. There is no evidence before the Court that any of the bidders were treated differently during the evaluation by the BEC. There is no evidence before this Court that either the BSC or the BEC manipulated the tender process to benefit the Respondent.
- [80] I therefore find that the appointment of the Respondent was not so unreasonable and/or unlawful and/or irrational and/or procedurally irrational that no reasonable person could have exercised the IDT's power or perform the IDT's function in this manner, to be unfounded. The decision to appoint the Respondent was rationally to the decision and the purpose to be achieved, being to obtain new offices. Such a decision therefor aligned with the principles enunciated in, amongst others, ***Law Society of South Africa and Others v President of the Republic of South Africa and Others*** 2019 (3) SA 30 (CC).
- [81] I thus find that the tender awarded to the Respondent by the IDT conformed to legal prescripts, which finding, effectively, ends the inquiry into this review application.
- [82] I therefore need not even consider a possible remedial order and the provisions of section 172(1)(a) of the Constitution.

UNDUE DELAY:

[82] Having pronounced on the merits of the grounds of review, it has become unnecessary to express on the delay of the IDT to institute this application, and whether such delay was indeed undue, requiring condonation.

CONCLUSION:

[83] The IDT has failed to show that the agreement concluded between itself and the Respondent was tainted by any illegality. I thus find myself in agreement with the argument made by the Respondent that this application is simply an attempt by the IDT to avoid liability in terms of the now cancelled agreement. At no stage during these proceedings did the IDT explain why it did not take occupation of the property.

[84] Albeit that the Respondent argued for a punitive cost order, I am not inclined to award such. Both parties were represented by senior and junior counsel, and as such I am inclined to award the cost of two counsel. There is no reason why this cost order should not follow the result of the application, nor was any reason argued.

[85] I therefore make the following order:

1. The application is dismissed.
2. The IDT is ordered to pay the costs of this application, such costs to include the cost of two counsel where employed, to be taxed on Scale C.



SJ MYBURGH

ACTING JUDGE OF THE HIGH COURT, PRETORIA

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 16 May 2025.

Date of hearing: 5 May 2025

Date of judgment: 16 May 2025

APPEARANCES:

For Applicants: Adv JA Motepe SC

Adv N C Motsepe

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Adv JL Myburgh