IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Of interest

Case no. 3641/2023

In the matter between:

SKG AFRICA (PTY) LTD	Applicant
and	
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	First respondent
STHATHU FUNDING (PTY) LTD	Second respondent

JUDGMENT

LAING J

[1] This is an application for, inter alia, the review and setting aside of the decision of the first respondent ('SALGA') to reject the bid submitted by the applicant ('SKG') for the provision of office accommodation in East London. The application

also seeks to review and set aside the decision to award the tender to the second respondent (‘Sthathu’).

Background

[2] On 17 November 2022, SALGA advertised the tender, indicating that it was subject to, inter alia, the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 (‘PPPFA’), the Preferential Procurement Regulations, 2017, and SALGA’s Supply Chain Management Policy (‘SCMP’). It stipulated that it required a minimum of 1100 m^2 and that the premises should be suitable for a typical administrative work environment.

[3] To SKG’s query, SALGA confirmed that a bid could include different options and costs, provided that the distinction was clear. Consequently, SKG submitted two bids for premises at the Waverly Office Park, each priced at R10 802 113; it also submitted two bids for premises at the Beacon Bay Crossing, each priced at R11 134 712.

[4] SALGA informed SKG on 30 May 2023 that its proposal was unsuccessful and that it had awarded the tender to Sthathu, at a cost of R12 518 992. This prompted SKG to launch urgent proceedings in terms of the Promotion of Access to Information Act 2 of 2000 (‘PAIA’), which culminated, eventually, in the present matter.

Applicant’s case

[5] It was apparent from the record that both SKG and Sthathu achieved the functionality threshold of 70 points. The Bid Evaluation Committee (‘BEC’) did not, however, recommend either party because the terms of reference for the tender were vague and failed to attract enough bidders; they also failed to address occupational health and safety (‘OHS’) concerns. The BEC recommended to the Bid Adjudication Committee (‘BAC’) that the tender be cancelled to address the shortcomings.

[6] The BAC met on 16 March 2023. It recorded that the BEC's recommendation was inconsistent with the parties' scores for functionality, both having achieved the 70-point threshold. The BAC referred the matter back to the BEC to revisit the evaluation of the bids, with closer focus on the parties' respective capacity and capability, and the location of the premises. Consequently, the BEC met on 17 May 2023. It revised Sthathu's functionality score to 88 points, and SKG's score to 55 points, resulting in the latter's disqualification. When the BAC met on 29 May 2023, the chairperson of the BEC explained that the initial recommendation had been based on the members' misunderstanding of how to evaluate and score the bids.

[7] In setting out its grounds for review, SKG relied primarily on the assertion that the BEC had considered only two of its four bids. These pertained to the premises situated at Beacon Bay Crossing. SKG referred to, inter alia, photographs taken of the bids that it submitted on the closing date, as well as email correspondence and attendance registers, to allege that the BEC had not only been aware that SKG had submitted bids regarding Waverley Office Park but had also inspected the premises in question on 1 February 2023. Furthermore, SKG alleged that the BAC had referred the initial evaluation and recommendations back to the BEC in contravention of its SCMP. It also alleged that the BEC had incorrectly penalised SKG for wrongly perceived deficiencies in a reference letter; a misplaced assessment of its capability, based mainly on cashflow concerns arising from its annual financial statements; the failure to include SAPOA certificates when this was not the case;[1] and alleged shortcomings in the location of the premises despite no reference thereto in the tender specifications. Overall, SKG contended that there was no correlation between the scores awarded and the comments made by members of the BEC. It contended, too, that supply chain management staff had interfered with the BEC's evaluation of the bids. The absence, moreover, of the BEC's initial report and recommendation at the BAC meeting on 29 May 2023 meant that more recent members of the BAC had an incomplete picture of the evaluation that was carried out.

Respondents' case

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[1] A SAPOA certificate is understood as a reference to verification provided by the South African Property Owners Association regarding the rentable area of a premises.

[8] SALGA did not dispute the sequence of events or broad factual basis upon which SKG relied. Addressing SKG's allegation that the BEC had considered only one of its bids, SALGA stated that it was unaware of any prior communication with its staff or the circumstances under which SKG submitted four bids. No such opportunity was provided to Sthathu or any other bidder. The tender documents did not allow the submission of multiple bids. SALGA admitted that its officials and SKG's representatives had inspected the premises at both Waverley Office Park and Beacon Bay Crossing, but argued that SKG had effectively submitted one bid, which the BEC evaluated in accordance with the criteria set out in the tender, viz. capacity, capability, technical compliance, location, accessibility, and appearance.

[9] The BAC's referral of the matter back to the BEC was correct, said SALGA; the provisions of its SCMP obliged the BAC to, inter alia, ensure that the scoring of bids was done correctly and to refer a recommendation back to the BEC for reconsideration when any disagreement in that regard was process related. The BEC's initial scoring had been flawed. Its members did not penalise SKG for, inter alia, the omission of an additional SAPOA certificate, the safety risk posed by having premises situated next to an informal settlement, the lack of designated parking bays, and concerns created by a pattern of financial losses for the past three consecutive years.

[10] Furthermore, asserted SALGA, the fact that SKG had initially achieved the functionality threshold of 70 points was inconsequential. This was because the BEC had recommended that no bidder be appointed.

[11] Sthathu aligned itself with SALGA's defences but could not dispute that SKG had submitted two bids for premises at Waverley Office Park and that these had not been evaluated or adjudicated. It accepted that this gave rise to an irregularity. Regarding what would constitute a just and equitable remedy, Sthathu emphasized that it had concluded a five-year lease agreement with SALGA after the award of the tender on 31 May 2023. The lease pertained to premises situated at The Ridge, […] B[...] Terrace, in relation to which SALGA had previously occupied a portion, but under different ownership. Sthathu incurred substantial expenses in meeting

SALGA's requirements for both tenant installation and fit-out,[2] amounting to R677 790. Similarly, SALGA incurred expenses for additional tenant installation requirements that were not contemplated in the tender specifications. These were calculated as R747 983. Considering the above expenses and the time that had already elapsed, argued Sthathu, SALGA's decision to award the tender should continue to stand. SKG never challenged the validity of Sthathu's bid.

Issues to be decided

[12] The immediate issue for determination is what to make of SKG's submission of multiple bids in response to SALGA's tender. Closely allied to this is whether SALGA properly evaluated and adjudicated such bids, and whether a failure to do so gave rise to a reviewable irregularity.

[13] To the extent that a ground of review was established under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), it will be necessary to decide what would constitute a just and equitable remedy. Costs must be determined, too. A brief overview of the relevant principles follows.

Legal framework

[14] The principles governing public procurement are well-known. In terms of section 217 of the Constitution, when an organ of state contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. The PPPFA serves as the framework for the implementation of a procurement policy that provides for categories of preference in the allocation of contracts, as well as the protection or advancement of persons disadvantaged by unfair discrimination.[3] The Preferential Procurement

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[2] Sthathu explained that 'tenant installation' refers to the process of customizing the interior of a property in accordance with a tenant's requirements and preferences for various amenities, fixtures and systems; 'fit-out' refers to the period during which tenant installation occurs.

[3] The Public Procurement Act 28 of 2024 repeals the PPPFA but has yet to come into effect.

Regulations, 2017 (made in terms of the PPPFA) were applicable at the time that SALGA advertised the tender in the present matter.[4]

[15] It is trite that, in general, decisions made by an organ of state in relation to a public procurement process are examples of administrative action. These fall within the ambit of PAJA.[5] In terms of section 6(2) thereof, a court is empowered to review the disqualification of a bidder or the award of a tender if one or more of the numerous grounds listed thereunder has been established.

[16] The above principes have been explored in the substantial body of case law that has emerged with the advent of the constitutional era. The decisions that are relevant to the present matter will be considered in the paragraphs that follow. At this stage, it is necessary to consider the legal position regarding SKG's submission of multiple bids, before exploring the consequences of SALGA's possible failure to have carried out the proper evaluation and adjudication thereof.

Multiple or alternative bids

[17] SALGA contented that SKG's submission of multiple bids was, per se, unlawful. By implication, as the court understands the argument, the failure to evaluate and adjudicate all the bids did not result in an irregularity that could serve as a ground of review.

[18] Neither the PPPFA nor the Preferential Procurement Regulations, 2017 addresses the subject of multiple bids. The Public Finance Management Act 1 of 1999 ('PFMA') is silent; there is also no mention of it under the Treasury Regulations.[6] Interestingly, National Treasury's guidelines for accounting officers

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[4] The Preferential Procurement Regulations, 2022 came into effect on 16 January 2023, repealing the earlier regulations mentioned.

[5] See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), paras 20 to 23; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) 481 (SCA), para 4.

[6] GN R225, published in GG 27388 on 15 March 2005, as amended. As far as can be ascertained, there are no regulations or instructions issued by National Treasury in terms of section 76 of the PFMA that deal directly with the subject of multiple bids.

contemplate the submission of ‘alternative bids’, but reference thereto is made only in passing.[7] SALGA’s SCMP does not deal with the subject.

[19] Bolton, however, comments as follows:

> ‘It may be possible for an organ of state to reserve the right for itself to consider alternative or qualified tenders in a tender call. The right to consider alternative or qualified tenders should, however, be clearly specified by an organ of state in its call for tenders to ensure compliance with the notions of fairness, transparency and competitiveness. The submission of a qualified or alternative tender by a tenderer should also not amount to a tender that is “substantially” or “materially” different from the tender specifications.’[8]

[20] There seems to be no reason why, in principle, an organ of state cannot invite multiple or alternative bids. This would enhance the competitiveness of the tender by increasing the number of possible solutions for the buyer of the goods or services required, as well as encourage the overall cost-effectiveness of the purchase. Importantly, however, the opportunity to submit multiple or alternative bids must be clearly communicated and must be made available to all potential bidders to satisfy the constitutional principles of fairness and transparency. The procuring entity must, furthermore, evaluate and adjudicate each responsive bid without infringing the basic principles stipulated under section 217 of the Constitution.

[21] Arising from this is the question whether the submission of multiple or alternative bids would meet the requirements of an ‘acceptable tender’. The term is defined under section 1 of the PPPFA as:

> ‘. . . any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.’

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[7] National Treasury for Republic of South Africa *Supply Chain Management- A Guide for Accounting Officers / Authorities* (2004) at 44. The guide indicates that, at the opening of bids, the name of a bidder and the total amount of each bid and ‘any alternative bids’ should be read aloud, if requested.

[8] P Bolton *The Law of Government Procurement in South Africa* (2007) at 214.

[22] Bolton points out that an alternative bid must not differ substantially or materially from the tender specifications. Since publication of her seminal work on the subject, however, there have been significant developments in the case law regarding what constitutes an 'acceptable tender'.[9] A flexible and purposive approach, as reflected in *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and others,*[10] appears to have yielded to the strict approach followed in *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another.*[11]

[23] In the present matter, SALGA's SCMP defines a 'bid' as follows:

> '. . . a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive bidding processes or proposals.'

[24] The definition of an 'acceptable tender', as provided in terms of both section 1 of the PPPFA and SALGA's SCMP, is wide enough, arguably, to encompass a written offer that comprises multiple or alternative bids, unless expressly prohibited under the specifications and conditions of the tender in question. It cannot be said, in the circumstances, that SKG's submission of multiple bids was unlawful. The issue is what to make of SALGA's actions in this regard.

Evaluation and adjudication of SKG's bids

[25] SALGA argued that members of the BEC visited both premises, not only those situated at Beacon Bay Crossing. Their scoresheets, moreover, indicated as much; they referred to 'properties', in the plural.

[26] Upon closer inspection, however, a different picture emerges. There is no indication from the scoresheets of 17 May 2023 that members distinguished between

[9] See the court's discussion of the matter in *Zen JV v Department of Transport, Province of the Eastern Cape and others* 2024 JDR 3696 (ECMk).
[10] [2008] 2 All SA 145 (SCA).
[11] [2014] 1 All SA 545 (SCA).

SKG's bids for the premises situated at Waverley Office Park and the premises at Beacon Bay Crossing. They only considered the latter. A recurring theme that appears in the comments added to the scoresheets is that the location of the premises was unsatisfactory. It was situated in a lifestyle centre that was adjacent to an informal settlement and a construction site; members expressed concern about how this aspect would affect SALGA's corporate image and the safety of its staff in the event of 'riots' or 'strikes', as it was put. This was not a concern that would have arisen in relation to the premises at Waverly Office Park, situated entirely elsewhere.

[27] If the BEC had indeed evaluated both premises proposed by SKG, then separate scoresheets with separate point allocations and separate comments would have been expected. To assert that the scoresheets reflected an evaluation of SKG's bid, overall, is simply implausible. It is more likely that the distinction between the premises was overlooked; alternatively, the BEC decided, for unknown reasons, that it would evaluate only the premises located at Beacon Bay Crossing.

[28] The BEC's report of 17 May 2023 further undermines SALGA's argument. It reflects a price of R11 134 712 for SKG's bid, which refers to the premises at Beacon Bay Crossing. The report is silent about the price quoted for the premises at Waverley Office Park. Similarly, the BAC report of 29 May 2023 takes the matter no further. It refers only to 'two tender proposals', indicating that SKG's proposal was disqualified for having failed to achieve the functionality threshold of 70 points, leaving Sthathu's proposal as the winning bid. The report makes no mention of the composite nature of SKG's submission. The response to SKG's request for reasons is also of no assistance. It refers merely to 'the bid submitted by SKG' and to a single building, clearly the premises at Beacon Bay Crossing.

[29] In its answering papers, SALGA acknowledged, interestingly, that SKG submitted multiple bids with two different prices. It said that this contravened the conditions of the tender and infringed the principle of competitiveness; SKG's conduct, not SALGA's, was unlawful. This argument has, however, already been discussed and rejected. SALGA's position on the issue is self-evidently contradictory. There can be no doubt, ultimately, that it failed to evaluate and adjudicate, properly, the four bids that SKG submitted.

Whether SALGA's conduct gave rise to an illegality

[30] SALGA's specifications and conditions of tender did not prohibit an offer such as that submitted by SKG, comprising proposals for premises at both Waverley Office Park and Beacon Bay Crossing. The difficulty that faces SALGA is how it responded to SKG's query about whether it could offer more than one office space at the same premises. In that regard, SALGA stated:

> 'Yes you may— please just make clear mention of the different options and costings.'

[31] As SALGA admitted in its answering papers, it did not extend the above communication beyond SKG; no other bidder was aware that it could submit multiple bids. SALGA's conduct undoubtedly infringed the principles of fairness and transparency. The primary review ground upon which SKG bases its case, however, is not SALGA's failure to have notified other bidders about the opportunity to submit multiple bids but its failure to have evaluated and adjudicated SKG's bids in relation to the premises situated at Waverley Office Park.

[32] In *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others*,[12] the Constitutional Court, per Froneman J, held that:

> '. . . To the extent that the judgment of the Supreme Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that, even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.

[12] 2014 (1) SA 604 (CC).

> . . . This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.'[13]

[33] SALGA's conduct regarding the Waverley Office Park bids cannot be exonerated by arguing that it somehow corrected the initial irregularity of SALGA's having failed to notify other bidders that they could submit multiple bids. The outcome of the tender was far from inevitable. At the very least, the Waverley Office Park bids were more cost-effective than Sthathu's.[14] Why the BEC overlooked the former or chose to evaluate only the Beacon Bay Crossing bids is, as previously noted, simply unknown.

[34] The provisions of SALGA's SCMP require the BEC to evaluate all bids received in accordance with the criteria specified in the tender documents, including those pertinent to functionality. This is a core function of the BEC. The requirements set out in the SCMP are derived from the provisions of section 2(1) of the PPPFA,[15] read with regulation 5 of the Preferential Procurement Regulations, 2017.[16] The purpose thereof is to give effect to the constitutional principles of fairness, equitability, transparency, competitiveness, and cost-effectiveness when an organ of state such as SALGA contracts for goods and services. SALGA's failure to have evaluated and adjudicated the Waverley Office Park bids, notwithstanding that they comprised part of the set of multiple bids that SKG submitted, amounted to material

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[13] Paras 23 and 24.

[14] The Waverley Office Park bids were each priced at R10 802 113; Sthathu's bid was priced at R12 518 992. The difference is R1 716 879.

[15] The provisions in question stipulate that an organ of state must determine its preferential procurement policy and implement it within the prescribed framework.

[16] The regulation requires bids to be evaluated on functionality and indicates how this must be done.

non-compliance with the provisions described above. This gave rise to a further reviewable (and material) irregularity.

[35] SKG set out, at length, why SALGA's decision to disqualify its Beacon Bay Crossing bids was also reviewable and capable of being set aside. Considering the court's findings regarding the Waverley Office Park bids, however, there is no need to explore this aspect further.

[36] Froneman J went on to find in *AllPay*, in an oft-quoted passage, that:

> '. . . Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.'[17]

[37] The court is satisfied that the irregularities relied upon by SKG provide a basis to declare SALGA's conduct invalid in terms of section 172(1)(*a*) of the Constitution. What would be a just and equitable order in terms of section 172(1)(*b*) is the question to which the court must now turn.

Just and equitable order

[38] The remedies available to a court for the determination of a just and equitable order are described in terms of section 8 of PAJA. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[18] the Constitutional Court, per Moseneke DCJ, held that:

> '. . . It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the

[17] *AllPay*, n 12, para 25.
[18] 2007 (3) SA 121 (CC).

> injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'[19]

[39] The learned judge remarked, further, that section 8 of PAJA confers on a court a 'generous jurisdiction' to make just and equitable orders.[20] In *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*,[21] the Constitutional Court, per Froneman J, confirmed the position, observing that:

> 'This "generous jurisdiction" in terms of section 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.'[22]

[40] Returning to the present matter, SKG contended that SALGA's decisions should be declared unlawful. It did not, however, persist in seeking that the matter be remitted back to the BEC for reconsideration. Instead, SKG argued that the tender should be readvertised, using revised criteria where necessary, and that this be done within a strict timeframe. For its part, SALGA accepted that if the court found against it then it agreed that a just and equitable order would be for the tender to be

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[19] Para 29.
[20] Para 30.
[21] 2011 (4) SA 113 (CC).
[22] At paragraph [83].

readadvertised, but within a more reasonable timeframe; Sthathu should be allowed to remain in occupation, pending the outcome of a fresh tender. This was the same approach adopted by Sthathu itself during argument.

[41] The question that arises is whether a court can permit the parties to continue to benefit from SALGA's invalid conduct. More specifically, it is necessary to decide to what extent the existing lease agreement between SALGA and Sthathu can remain extant, pending the possible readvertisement of the tender.

[42] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*,[23] the Constitutional Court found that the appellant's award of a contract contravened section 217 of the Constitution, and declared it to be invalid.[24] The court held, nevertheless, that justice and equity dictated that the appellant should not benefit from either the false assurances that it had given to the respondent or the undue delay in instituting proceedings. Consequently, the court ordered that its declaration of invalidity would not have the effect of divesting the respondent of rights to which, but for the declaration, it might have been entitled.[25] Shortly afterwards, in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,[26] the Constitutional Court adopted the same approach taken in *Gijima* to declare a construction contract invalid for the appellant's failure to have followed a proper procurement process. Considering, however, that the respondent had already performed, the court declined to set the contract aside. This was done to preserve the rights that had already accrued to the respondent in terms thereof, without permitting it to obtain further rights.[27]

[43] The same principles apply in the present matter. It was not SKG's case that Sthathu's bid was non-compliant. Furthermore, it did not dispute that Sthathu incurred substantial expenses in meeting SALGA's requirements for both tenant installation and fit-out. It was common cause, moreover, that SALGA effectively remained in occupation of the same premises after the expiry of its previous lease,

[23] 2018 (2) SA 23 (CC).
[24] Paras 40, 41, and 52.
[25] Paras 53 and 54.
[26] 2019 (4) SA 331 (CC).
[27] Para 105.

with a different landlord, and that it concluded a five-year lease with Sthathu with effect from 1 June 2023. Whereas section 172(1)(*a*) of the Constitution enjoins the court to declare SALGA's conduct regarding the procurement process invalid, the above factors are relevant to the determination of a just and equitable order under section 172(1)(*b*). It would seem unfair to penalise Sthathu, entirely, for the consequences of unlawful conduct in which it played no part.

Costs

[44] There was considerable argument about where to attach liability for the costs of SKG's urgent application for interim relief, as well as its application to compel SALGA's filing of the complete record. SKG abandoned proceedings in both instances before the matters were heard.

[45] In *Germishuys v Douglas Besproeiingsraad*,[28] the court held that, where a litigant withdraws an action, very sound reasons must exist why the defendant or respondent should not be entitled to his or her costs. The plaintiff or applicant is in the same position as an unsuccessful litigant.[29] The principle remains, however, that the court enjoys a wide discretion when awarding costs. In *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and others*,[30] the court observed as follows:

> '. . . even in cases where litigation has been withdrawn, the general rule is of application, namely, that a successful litigant is entitled to his costs unless the Court is persuaded, in the exercise of its judicial discretion upon a consideration of all the facts, that it would be unfair to mulct the unsuccessful party in costs.'[31]

[46] In the present matter, SALGA informed SKG on 30 May 2023 that its bid was unsuccessful. This prompted SKG to request further details on 27 June 2023; at the same time, it enquired whether any lease had been concluded pursuant to the award

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[28] 1973 (3) SA 299 (NC).
[29] At 300D–E.
[30] 2005 (6) SA 123 (E).
[31] At 131B–C.

of the tender. SALGA failed to respond satisfactorily, leading to SKG's institution of proceedings under the provisions of PAIA, which SALGA opposed. On 30 August 2023, SKG requested SALGA to suspend the implementation of the award, pending a possible challenge. SALGA indicated, on 4 September 2023, that it was preferable to await the outcome of the application, while confirming that it was, nevertheless, considering SKG's request. On 19 September 2023, Beshe J ordered SALGA to produce the requested information. SKG requested SALGA, again, on 6 October 2023, to suspend implementation. SALGA failed to deal with the request, leading to SKG's launching an urgent application for interim relief on 11 October 2023. It was only on 31 October 2023, when SALGA delivered its unsigned answering papers, that SKG discovered that SALGA and Sthathu had already concluded a lease.[32] This resulted in SKG's withdrawal of the application for interim relief.

[47] The provisions of section 195(1)(*g*) of the Constitution stipulate that, within the context of public administration, transparency must be fostered by providing the public with timely, accessible, and accurate information. Despite SKG's clear requests for information and clarity about whether a lease had been concluded, SALGA inexplicably refused or failed to disclose the true factual position for more than three months. Whether this was done to gain a tactical advantage in anticipation of litigation or otherwise, such a response (or lack of a response) cannot be justified when weighed against the constitutional principles involved. An organ of state must play open cards. The simplest and most direct response would have been for SALGA to have indicated, immediately, that a lease had been concluded and that the appropriate information was available. Anything else from an organ of state was unacceptable.

[48] Considering SALGA's conduct, it would be unfair to saddle SKG with the costs of its withdrawn application for interim relief. The order must be framed accordingly.

[49] In relation to the application to compel, SALGA delivered a record on 3 November 2023. It did not, however, include either a complete set of the applicant's bids or the agendas for the meetings of the BEC and BAC. SALGA's failure to

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[32] The version appears to contradict Sthathu's, in terms of which the lease was concluded considerably earlier, i.e. immediately after the award was made on 31 May 2023.

address a subsequent request in this regard led to SKG's institution of proceedings, on 7 December 2023, for delivery of all the bids submitted, the agendas, as well as the functionality scoresheets for SKG and Sthathu, respectively. On the same date, SALGA supplemented the record by filing SKG's bids for Beacon Bay Crossing. SKG responded a few days later, pointing out that SALGA had still not filed the additional documents requested. It was only late in the afternoon of 15 January 2024, the day before the application was to be argued, that SALGA filed the missing functionality scoresheets and informed SKG that it never received SKG's bids for Waverley Office Park and that there were no copies of the agendas in question.

[50] SALGA's conduct again fell short of what is expected from an organ of state. If it had acted with the alacrity, openness, and diligence required by section 195(1)(*g*), then SKG's application to compel would have been entirely unnecessary. Despite SKG's withdrawal thereof, SALGA is not entitled to the recovery of its costs.

Relief and order

[51] As already discussed, nothing prevented SKG from submitting multiple bids. SALGA's failure to have afforded such an opportunity to other bidders, however, gave rise to an irregularity; its failure to have evaluated and adjudicated SKG's bids for the premises at Waverley Office Park gave rise to a further (and material) irregularity. Consequently, SKG has succeeded in establishing a ground of review in terms of, inter alia, sections 6(2)(*b*) 6(2)(*e*)(iii) of PAJA.[33]

[52] Turning to what would constitute a just and equitable order, SALGA's conduct must be declared unlawful, and the tender must be readvertised, using revised specifications and conditions where necessary. This must be done within a specified timeframe. Since SALGA already has a set of specifications and conditions to serve as a point of reference, the timeframe need not be as generous as the period sought by SALGA in argument. It would not be just and equitable, however, for the lease agreement to be set aside, pending the conclusion of the fresh tender.

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[33] Section 6(2)(*b*) provides for a situation where a mandatory and material procedure or condition prescribed by an empowering provision is not complied with; section 6(2)(e)(iii) addresses a situation where the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.

[53] The determination of costs has already been discussion in relation to SKG's urgent application for interim relief and its application to compel. There is no reason why the general rule should not apply regarding the present application.

[54] The following order is made:

(a) the first respondent's failure to evaluate and adjudicate the applicant's bids for Phases 6A and 3 of the premises situated at Waverley Office Park, submitted in response to the tender advertised for the provision of accommodation in East London for the first respondent's Eastern Cape office (SALGA/20/2022), is reviewed and set aside;

(b) the first respondent's award of the tender and subsequent conclusion of a lease agreement with the second respondent are reviewed and set aside;

(c) the matter is referred to the first respondent for the commencement of a new procurement process regarding the provision of accommodation in East London for its Eastern Cape office, to be completed within six (6) months of the date of this order;

(d) the order described in paragraphs (a) and (b), above, is suspended until the tender envisaged under paragraph (c) has been awarded or until the expiry of the six (6) months referred to, whichever is sooner;

(e) in relation to costs:

(i) each party shall pay its own costs regarding the application for urgent interim relief, set out in part A of the applicant's notice of motion;

(ii) each party shall pay its own costs regarding the applicant's application to compel the filing of the record; and

(iii) the respondents are ordered to pay the costs regarding part B of the applicant's notice of motion, on scale B (under rule 69(7), read with rule 67A(3), of the URC), being jointly and severally liable.

JGA LAING

JUDGE OF THE HIGH COURT

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Date heard:	27 February 2025
Date delivered:	19 June 2025