IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 4104/2023

In the matter between:

MKHONTO WETHU TRADING (PTY) LTD t/a

ECO CHEMICAL SOLUTIONS Applicant

and

KING HINTSA TVET COLLEGE 1st Respondent

MINISTER OF HIGHER EDUCATION

AND TRAINING 2nd Respondent

T.E NTLANGANO N.O. 3rd Respondent

MS N BALFOUR N.O. 4th Respondent

JUDGMENT

RUSI J

[1] Where does the interplay between public and private law begin and end? When and how, do contractual terms bear on public law duties, and when and how do they yield to them?[1] This is the question at the heart of the present dispute.

[2] On 23 August 2022, and by means of an appointment letter, the applicant was awarded by the first and second respondents a contract for the provision of hygiene services at first respondent (the College). This, after the applicant successfully traversed the College's tender bid process under tender number KHC BID 01/2022 (the tender or contract). The duration of the tender was 36 months.

[3] The applicant's quotation, with pricing schedule, which it submitted as part of the tender documents, amounted to R1 148 811.64. This amount is stated in the quotation as *'totals per annum'* representing *'annual rentals and services and annual deep cleaning services.'* The applicant was awarded the tender for the contract price of R1 148 811.64, and it was required by the College to enter into a service level agreement.

[4] It was in the service level agreement that the further terms and conditions of the intended contract between the applicant and the College would be encapsulated. The contract price of R1 148 811.64, as was ostensibly offered and accepted between the applicant and the College was subsequently stipulated in the service level agreement as the total amount of the contract for the period of 3 years.

[5] By a letter dated 30 November 2022, the College cancelled the applicant's appointment and later re-advertised the invitation for tenders for the provision of the same services under the same tender bid number. Subsequent to the cancellation and re-advertisement, the applicant launched the present application in

[1] Cora Hoexter: A matter of feel? Public Powers and Functions in South Africa, p 168.

terms of section 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in which it seeks the review of the College's decision in cancelling the tender award, and its decision in re-advertising the tender.

[6] In tandem with this relief, the applicant sought a substitution order directing its re-instatement, with immediate effect, as the service provider under the tender until its expiry. The applicant contends, chiefly, that its offer was not for the contract price of R1 148 811.64 which the College accepted and awarded the tender on but it was this amount multiplied by 3years. In other words, the applicant states that it ought to have been awarded the 3years' tender for the price of R3 446 434.92. It further sought a mandamus for the provision by the College, of a service level agreement that was drawn in line with these calculations.

[7] The applicant also sought compensation in the sum of R95 734.30 representing the value of the hygiene services it rendered for a period of 3 months from 01 September 2022. It further sought compensation in the sum of R351 025.73 on the ground that the College was in possession and use of its cleaning equipment from the time of its installation until the date on which this Court makes its order. On this score, the applicant states that the College did not invite it to collect its equipment after the cancellation.

[8] The application is opposed only by the first, third and fourth respondents (the respondents) who state that the College cancelled the contract following its repudiation by the applicant and on the basis that there was lack of consensus between the parties regarding the contract price – a material terms of the contract. The respondents also filed a counter application for self-review of the decision to award the tender to the applicant. The self-review is contingent on a finding, should one be made by this Court, that there is a valid agreement between the applicant and the first respondent for the total price of R3 446 434.92.

[9] In seeking to review the decision to award the tender, the respondents state that the tender was not lawfully awarded to the applicant on the grounds of defective tender documents that the applicant submitted, and its failure to meet the threshold of cost effectiveness and the applicable point system under the Preferential Procurement Framework Act 5 of 2000 (the Procurement Act).

[10] The applicant, in turn, opposes the counter application on the grounds that it stands in contradistinction to the respondents' defence that there was never a valid contract hence it was cancelled, and on the ground that, in any event, 'no case has been made by the respondents for that self-review under PAJA.'

The common cause facts

[11] The applicant was among several tenderers that made offers to the College in response to its invitation for tenders for the provision of hygiene services. In its tender documents, the applicant quoted the already mentioned amount of R1 148 811.64. This amount is stated in the 'form of offer' annexed to the tender documents that formed part of the record of the decision under review which the respondents submitted. The other tenderers whose specific identities are not material for the present purposes, had tendered the amounts of R563 047.79; R639 078.00; R1 187 545.20; R1 538 303.80; R1 692 543.37; R2 342 727.28; R2 618 847.63; R2 712 798.68; R3 625 200.00, and R6 448 252.86, respectively. After the applicable bid evaluation and adjudication process, with some of the tenderers disqualified on various grounds, the applicant was awarded the contract for the tender price of R1 148 811.64 as the tenderer that scored the highest points on the relevant selection criteria.

[12] The College communicated its acceptance of the applicant's offer in the appointment letter written by the third respondent and dated 23 August 2022, which appointment the applicant accepted on the same day. The material portion of the appointment letter reads as follows:

"It is with great pleasure to inform you that your offer for the provision of hygiene services at King Hintsa TVET College has been accepted.

This acceptance is in accordance to bid amount R1 148 811.64 that you submitted for this service for a period of three years.

An official purchase order will be issued to you in due course, and you will be expected to enter into a Service Level Agreement (SLA) to be signed between yourself and the College outlining detailed scope, terms and conditions of the appointment.

Once again, congratulations on your appointment and hope that the College will have a fruitful relationship with Eco Chemical Solutions. . ."

[13] The service level agreement mentioned in the appointment letter stipulated, among other things, the following terms:

'3. **APPOINTMENT AND ACCEPTANCE**

3.1 The College hereby appoints the Service Provider to render the Services detailed in the Scope of Work in this Agreement.

3.2 The Service Provider hereby confirms its acceptance of the appointment and undertakes to execute its obligations at the cost and on the forms regarding the time for delivery and/or execution as set out in:

3.2.1 the bid Documentation

3.2.2 this Agreement

3.3.3 any other terms and conditions as may be agreed upon in writing by the parties.

3.3 In the event of any conflict between the provisions of this Agreement and the bid documentation, the provisions of this Agreement shall prevail.'

[14] In terms of the service level agreement, the duration of the contract was, 3 years (36 months) from 01 September 2022 to 31 August 2025. The bid amount of R1 148 811.64 for which the award was made to the applicant is stated in the said agreement as R1 148 811.64 for the period of 3 years. The service level agreement

further provides that the applicant would bill the College monthly on the stated tender amount.

[15] While no purchase order had been issued to it, the applicant commenced the rendering of the services from 01 September 2022, and it had not signed the said agreement, and it installed the hygiene and cleaning equipment.

[16] During September 2022, the applicant submitted its first invoice for an amount of R95 734.30 which it calculated on the amount of R3 446 434.92. A disagreement emerged at that time regarding the contract price that was offered and accepted between it and the College. The Applicant alleged that its quotation of R1 148 811.64, was a computation of its prices for a year, made up of the monthly prices for the monthly billing. The College, on the other hand, alleged that it understood the applicant's quotation as being the computation and statement of the contract price for the entire period of 36 months.

[17] Following this discord, and while the service level agreement had not been signed, a meeting was held between the applicant and the officials of the College on 29 September 2022, in which the matter was ventilated. In that meeting, it emerged that there was no meeting of the minds between the applicant and the College regarding the amount of the quotation and what the College envisaged when it appointed the applicant. This meeting, together with a trail of communication that was exchanged between the parties in an attempt to resolve the impasse yielded no positive results.

[18] The applicant persisted in its unwillingness to sign the service level agreement, and the College subsequently cancelled its appointment as the provider of hygiene services by the aforementioned letter dated 30 November 2022.

The issues to be determined

[19] Appropriately paraphrased from the parties' respective practice notes, the issues to be determined in the main application as outlined by the applicant are–

(a) Whether the contractual dispute between it and the first respondent is a purely private law matter or whether it is subject to administrative justice.

(b) Whether the decision of the respondents to withdraw the awarded tender is liable to be reviewed under PAJA on the ground of procedural fairness. In this regard, the court must determine whether the College met the threshold of transparency and fairness in making the decision to cancel the contract in circumstances where the applicant attempted to attain consensus between it and the respondents by negotiating a fair outcome; and

(c) Whether the applicant had any vested or accrued rights in the award of the tender.

[20] From the respondents' perspective, this Court must determine whether the relief that the applicant seeks is competent. The respondents sate that the decision to cancel the contract is not susceptible to review under PAJA. In the event of a finding being made that the decision concerned is reviewable, the respondents seek a self-review of the applicant's appointment as the service provider on the grounds already mentioned.

Condonation

[21] Both the main application and the counter application have been filed out of time. Condonation has been sought by the parties, respectively, of the late filing of the applications. The respondents' explanation is, in essence that since the College had cancelled the contract in terms of the law of contract, it did not anticipate that its decision would be taken on review under PAJA. The respondents do not oppose the applicant's application for condonation. I am indeed satisfied that a sufficient

and reasonable explanation has been proffered by the applicant for the late filing of its application.

[22] The applicant, however, opposes the respondent's application for condonation. As a ground of its opposition, it states that the respondents made no case for such condonation under section 9 of PAJA. The respondents contend that owing to the importance of the case to the parties, and the fact that the applicant has not pleaded any prejudice should the condonation be granted, the condonation ought to be granted. Subject to what I will state below regarding applicant's PAJA contention in so far as it relates to the respondent's application for self-review, I need only state, for the present, that a case has been made by the respondents for the granting of the condonation sought.

The applicants' case

[23] In seeking the present review, the applicant relies on section 6 of PAJA and alleges that the cancellation of its appointment was unlawful, in that, the College failed to properly apply its mind to its bid documents and pricing schedule for the services to be rendered. Had they done so, they would have understood that the amount it quoted was a yearly amount as opposed to the total contract price for the 36 months (3 years) of the tender. The cancellation, so the contention continues, was also procedurally unfair in that the College failed to afford it or its indigent employees who relied on it for work a fair hearing and an opportunity to make representations before cancelling the appointment.

[24] The applicant goes on to state that the cancellation creates a serious risk of loss of employment for the indigent and unemployed community members, whereas employment is integral to a person's meaningful participation in the country's economy. The cancellation was mala fides and therefore, a referral back to the College would be a waste of time, hence, it seeks a substitution order as envisaged in section 8(1)*(c)(ii) (aa)* of PAJA is the appropriate relief. The applicant

further states that since the College had utilized its hygiene and cleaning equipment and still has them in its possession even after the cancellation of the contract, it is liable to compensate it in the sums already stated.

[25] Dealing with its dissatisfaction with the cancellation of the contract, the applicant states as follows in the relevant portion of its founding affidavit:[2]

"The cancellation and withdrawal of the cleaning contract and appointment is unlawful. King Hintsa together with the other <u>Respondents do not have the right in terms of the law of contract</u> to unilateral (sic) take a decision to terminate the agreement prematurely before it ends within the three-year period, <u>it is based on this reason that the Applicant, in terms of the law of contract, repudiated the contract</u> and holds the decision of the Respondent unlawful in terms of the Promotion of Just Administrative A34ct (sic). . . <u>The Applicant exercised it contractual right to repudiate the Respondent's cancellation,</u> and directed that the Respondent comply with the agreement. . ."

[26] In holding the College to the contract, the applicant states that it reasonably construed its acceptance of the offer of R1 148 811.64 as an acceptance of this amount per annum at the total price of R3 446 434.92 for the period of 3 years. In essence, the applicant relies on quasi-mutual assent. The applicant further states that there was an oral agreement between it and the College that it would commence with the rendering of services and sign the service level agreement in the course of time. Its subsequent refusal to sign that agreement was as a result of the dissensus regarding the tender price.

[27] Regarding its failure to sign the service level agreement, the applicant avers that it refused to do so in the light of the absence of consensus between the parties pertaining to the contract price that was offered and accepted between them. When the College cancelled the agreement, it 'repudiated' the cancellation, hence it seeks to hold it to the agreement by means of this application.

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[2] See paragraph 25 and 26 of the applicant's founding affidavit.

The case for the respondents

[28] The respondents raised two points in limine. The first one was that the review relief sought is ill-conceived, in that, the cancellation was an exercise of the first respondent's contractual right after the applicant repudiated the contract. This, so the respondents contend, was so, notwithstanding that when it invited tenders up to their evaluation and adjudication, it was exercising public power. According to the respondents, when the applicant was appointed as the service provider, this marked the beginning of a purely contractual relationship, hence, PAJA finds no application in the first respondent's decisions to cancel the appointment and to re-advertise the invitation for tenders.

[29] As regards the second point in limine, the respondents raise two issues. Firstly, they contend that an order directing the College to provide a service level agreement which accords with the contract price contended for by the applicant would amount to this Court concluding a contract for the parties against the firmly entrenched principle of the law of the privity of contracts.

[30] Secondly, the respondents contend that being directed to recalculate the contract price according to the specifications postulated by the applicant would result in the appointment of a service provider with the most expensive tender among other tenderers, and this would be in breach of the Procurement Act and section 217 of the Constitution which enjoin organs of state to contract for procurement of goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

[31] On the merits of the application, the respondents assert that the applicant's appointment was lawfully cancelled after it failed to sign the service level agreement, thereby repudiating it; and on the basis that there was no consensus between the parties regarding the contract price that the applicant offered.

[32] According to the respondents, the applicant did not offer R3 446 434.92 as the contract price. For a valid offer of this amount, so the respondents say, the applicant ought to have transferred to the form of offer that accompanied its tender documents, the total bid for the 3-year period. The respondents go on to state that this requirement was explained in a compulsory briefing session that was held on 23 February 2022 in which the applicant was duly represented by its agent. In this regard, they annexed the minutes of the briefing meeting in which a summary is given, inter alia, of the explanation that was provided to the tenderers on how the final contract price is to be computed and stated on the form of offer.

[33] I interpose to mention that the record of the decision under review indicates that on the form of offer annexed to the applicant's tender document, which was not part of the documents that the applicant relied on in seeking the review, the total contract price is stated as R1 148 811.64. There is indeed no indication *ex facie* the form of offer, that the offered price was for one year or it was a yearly amount that would be payable to the applicant. The result, so the respondents' contentions continue, is that the amount of R1 148 811.64 as stated in the applicant's offer from was accepted as the applicant's bid amount for the entire period of 3 years. For these reasons, the respondents contend that the dissensus was a material one which rendered the contract void from inception.

The applicant's reply

[34] In reply, the applicant asserts that the respondents are at fault for misconstruing its quotation since, in it, it computed the contract price in clear terms as being an annual amount of R1 148 811.64. They failed to properly apply their minds to its tender documents. It denies that when it refused to sign the service level agreement, it acted in breach of the agreement between it and the first respondent.

[35] As regards the alleged lack of consensus between the parties, the applicant states that the dispute before this Court 'has nothing to do with the requisites of a valid contract but with the unlawfulness of the first respondent's decision to cancel its appointment.' The applicant further states that the respondents failed to follow a proper dispute resolution process and unlawfully cancelled the contract while the dispute regarding the contract price was pending.

The counter application

[36] In the counter application for self-review, the respondents state, in essence, that the tender was not lawfully awarded to the applicant in that its tender documents were defective for failure to state the total contract price in accordance with the procurement specifications of the College. They further state that there were other tenderers who submitted acceptable bids but whose offers were lower than the amount of R3 446 434.92 which the applicant contends for as being the contract price he offered.

[37] It is the respondents' contention further, that, a tender for the amount contended for by the applicant would be in breach of sections 2(1)(b)(ii) and 2(1)(f) of the Procurement Act. In terms of section 2(1)(f), the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer. Section 2(1)(b)(ii) provides for the point system applicable on the prescribed evaluation criteria.

[38] The respondents go on to state that a tender amount of R3 446 434.92 would offend the requirement of a fair, transparent, competitive and cost-effective tender process as such amount was not publicly made known at the opening of the bids, but the amount of R1 148 811.64 that the applicant offered was.

The applicant's opposition to the counter application

[39] Shorn of all verbiage, the applicant's opposition to the counter application is premised on two grounds. The first ground is that the application for self-review is diametrically opposed to the respondents' assertion that it lawfully terminated the contract based on lack of consensus, hence, according to the applicant, there is no decision to review. The applicant re-iterates that the principles of contract have no bearing in this matter.

[40] In reply to this opposition, the respondents re-iterate that the self-review is conditional upon a finding being made in favour of the applicant in the main application. It further contends that since it seeks a self-review, it is not available to it to employ the provisions of PAJA.

The parties' submissions

[41] Mr *Vobi*, who, together with Mr *Nase*, appeared for the applicant, submitted that since the applicant did not sign the service level agreement, no contract came into existence between it and the College. What was in place between the applicant and the College, so the submission continued, was a promise to contract which did not constitute an agreement. For this reason, so Mr *Vobi* submitted, the decision to terminate the contract fell within the ambit of PAJA and constituted administrative action in that the College was performing a public function in the course of the procurement process.

[42] In making these submissions, Mr *Vobi* relied on several authorities which I do not deem necessary to enumerate. Those authorities deal with the reviewability of the exercise of public power in the context of the procurement process and other types of administration action unrelated to the matter at hand. This is unsurprising, since, on the applicant's version, the decisions under consideration were purely administrative. Whether this characterization is correct is the question I am called upon to answer.

[43] It was further submitted on behalf of the applicant that the College was bound by the principles of administrative justice to give the applicant a hearing before it cancelled the award. Mr *Vobi* went on to submit that the College cancelled the award without following proper process. It failed to have regard to the fact that the applicant still intended to have the matter resolved and thus prematurely terminated the award. As regards the counter application for self-review, Mr *Vobi* submitted that it stands to be dismissed, as no case was made for it under PAJA and because it stands in contradistinction to the respondents' defences in the main application.

[44] It is necessary at this point, to swiftly dispose of Mr *Vobi*'s submission regarding the applicability of PAJA in a self-review. This submission is founded on the wrong premise that an entity exercising public power that seeks to invalidate its own decision must do so in terms of PAJA. The correct legal position is that such a review cannot be dealt with under PAJA but under the legality review.[3]

[45] On behalf of the respondents, Ms *Mathe-Ndlazi* submitted the applicant mischaracterized the matter as falling within the purview of public law. She submitted that when the applicant's offer was accepted by the College, a contract came into being and their relationship was governed by the law of contract. The cancellation of the contract, so the submission went, was the result of lack of consensus between the parties regarding a material term of the contract and the applicant's repudiation. Consensus is indeed the foundational requirement for a valid agreement, there must be a meeting of the minds between the parties, in that, they are on par regarding all the material aspects of the contract and are aware of the other party's intention. The corollary is that in the absence of such an

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[3] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC) para 41; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC); see also, *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* (610/2021) [2023] ZASCA 98 (14 June 2023), para 28.

agreement between the parties, one cannot speak of a valid contract giving rise to rights and obligations.[4]

[46] Ms *Mathe-Ndlazi* went on to submit that, notwithstanding the lack of consensus, the applicant was given a hearing at the meeting that was held for the purpose of resolving the matter.

The relevant legislative framework and legal principles

[47] The constitutional imperative of just administrative action enjoins those exercising public power to observe the rules of administrative justice in making decisions that may affect the rights of others. PAJA defines 'administrative action'[5] as any decision taken, or any failure to take a decision by –

(a) an organ of state, when —

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person, and which has a direct effect external legal effect.

[48] The same Act further defines 'decision'[6] as any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

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[4] Van Huyssteen et al Contract General Principles, 6th edition (Juta) 2020, p 30.

[5] Section 1 of PAJA.

[6] Id.

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

[49] And, 'empowering provision'[7] is defined to mean a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

[50] It is indeed a constitutional injunction that organs state in the national, provincial or local sphere of government, or any other institution identified in national legislation, in contracting for goods or services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.[8] To this end, the organs of state and such other institutions are endowed with powers to implement the relevant and appropriate procurement policies. The Procurement Act is the legislation that gives meaning to this constitutional injunction. The relevant Regulations promulgated under this Act are the legislative instruments that further guide the procurement process in the government sphere and in relation to relevant public institutions.

[51] It is trite that the tender process constitutes administrative action which entitles a party contracting with an organ of state or institutions exercising public power, to a lawful and procedurally fair process and an outcome, where its rights were affected or threatened.[9]

[52] The answer to the legal debate regarding whether, once a tender has been awarded, the parties' relationship becomes a purely contractual one, or remains

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[7] Id.

[8] Section 217 of the Constitution.

[9] *Logbro Properties CC v Bedderson NO and Others* (372/2001) [2002] ZASCA 135; [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) (18 October 2002) *(Logbro)*, at para 5, and all authorities referred to therein.

governed by the principles of administrative justice, was explained by Cameron JA in *Logbro*,[10] with reference to an earlier decision of that Court, in *Cape Metro*[11], as follows:

'[T]he Court's judgment makes it plain that the answer depends on all the circumstances. The critical passage in the reasoning of Streicher JA is this:

'Those terms [ie entitling the public authority to cancel the contract] were not prescribed by statute and could not be dictated by the [public authority] by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The [public authority], when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position would have been had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the [public authority] was exercising a public power.'[12]

The learned Judge went further and said:

'The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.'[13]

[53] The Court, in the subsequent case of *Steenkamp*,[14] said:

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[10] *Logbro*, footnote 6 supra.
[11] *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others* (10/99) [2001] ZASCA 56; 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (A) (30 March 2001), para 18.
[12] *Logbro*, para 9.
[13] Id, para 10, and re-affirmed by the Constitutional Court in *Steenkamp NO v Provincial Tender Board of the Eastern* Cape (CCT71/05) [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006), para 50.
[14] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) *(Steenkamp)*.

‘Everything though is not administrative law. Seen in isolation, the invitation to tender is no doubt an offer made by a state organ ‘not acting from a position of superiority or authority by virtue of its being a public authority’, and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private concern who does so on an equal footing with the public authority. The evaluation of the tender is however a process governed by administrative law. Once the tender is awarded the relationship of the parties is that of ordinary contracting parties although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship.’[15]

[54] And, two years later, in *Thabiso Chemicals*,[16] a case in which the contract was cancelled on the ground of misrepresentation relating to the tender documents submitted, after the tender was awarded, the Court, with reference to *Cape Metro*[17] and *Steenkamp NO*,[18] said the following:

‘I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law. The fact that the Tender Board relied on authority derived from a statutory provision (ie s 4(1) (eA) of the State Tender Board Act) to cancel the contract on behalf of the Government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the Tender Board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the Regulations. . . became part of the contract through incorporation by reference.’[19] (footnotes omitted)

With these legal principles in mind, I proceed to determine the dispute before me.

Discussion

[55] There is an overlay between respondents’ first point in limine and their assertion that the contract was cancelled owing to absence of consensus between the College and the applicant regarding a material term of the contract.

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[15] Ibid, at para 12.
[16] *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* (148/2007) [2008] ZASCA 112; 2009 (1) SA 163 (SCA) ; [2009] 1 All SA 349 (SCA) (25 September 2008) *(Thabiso Chemicals)*.
[17] Supra footnote 8.
[18] Ibid, paras 11 and 12.
[19] *Thabiso Chemicals*, para 18.

[56] In dealing with the first point in limine – that the cancellation of the contract was not an administrative action, reference will inexorably be made to contractual principles as they relate to the nature and creation of contracts. For germane to the question whether the matter is a purely contractual relationship between the parties or whether their contractual relationship must yield to the principle of just administrative action, are the features of the function that the College performed when it cancelled the contract and the particular facts of the case.

[57] In the present case, regard must be had, first, to the fact that once the applicant's offer was accepted by the College, a contract came into being. This accords with the principle as enunciated in *CGEE Alsthom Equipment Et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd*[20] and *Jicama 17 (Pty) Ltd v West Coast District Municipality*.[21] Mr *Vobi*'s submission, which suggests otherwise, cannot be sustained. I need not deal with the distinction between such a contract and the *pactum de contrahendo* (a promise to enter into an agreement in the future). In any event, on the applicant's own version, a contract came into being between it and the College, but it was unlawfully terminated.

[58] The question whether the College's decision to cancel the contract is an administrative action susceptible to review, must be understood against the background of the case that the applicant has pleaded. On its own showing, the applicant exercised its contractual right to repudiate the contract when it became evident that there was lack of consensus between it and the College. I must state that despite its own assertion in this regard as I quoted it elsewhere in this judgment, the applicant has, in its founding papers, simultaneously, and perhaps ill-advisedly, asserted its right to just administrative action in terms of PAJA.

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[20] 1987 (1) SA 81 (A) at 92A-E.
[21] 2006 (1) SA 116 (C) at 120F-I.

[59] It is also worth noting that in its reply, the applicant sought to distance itself from the assertion it made in its founding papers. I need only re-state that an applicant stands and falls by its founding papers,[22] and it is not permissible of the applicant to make out one case in its founding papers and another in its replying affidavit.[23]

[60] With all of this said, regard must here be had to the fact that the tender process which, as mentioned, constituted administrative action had become completed. After all, the applicant has not approached this Court complaining that the tender was cancelled for any reasons relating to its evaluation and adjudication. That process came and went, and the applicant emerged as the successful bidder.

[61] The applicant also acknowledges that it repudiated the contract as a matter of its contractual right in the light of the fact that the parties were not *ad idem* regarding the contract price which was a material term of the contract that was purportedly offered and accepted between the parties. I take note of the fact that the applicant accepted its appointment on the same date of receipt of the appointment letter. That the parties would have to enter into a service level agreement which detailed the scope, terms and conditions of the appointment, was foreshadowed in the appointment letter.

[62] Repudiation is a form of anticipatory breach of contract which alludes to a forecasted malperformance. When it takes place, the other party is entitled to enforce the remedies for breach of contract.[24] The College had the right to exercise any of the remedies for this kind of breach. The position of power that the College was in during the stage of stipulating the terms of the tender, its evaluation and adjudication, and its decision to ward the tender was no longer at play.

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[22] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B.

[23] *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260AD.

[24] Van Huyssteen et al, supra, pp408-409.

[63] In cancelling the contract following the applicant's admitted repudiation, the College was not exercising any statutory powers, their relationship was purely a contractual one. From this, it ought to follow that the parties were on an equal footing. As a result, the College did not have an obligation to observe the rules of administrative justice before cancelling the contract.

[64] Therefore, it can hardly lie in the mouth of the applicant, to state that the College was obliged, as a matter of just administrative process, to afford it a hearing before cancelling the contract. The first respondent's first point in limine, that the cancellation of the contract was not an administrative action must, therefore, be upheld. In the light of these findings, I shall not have to determine the counter application.

[65] Even if I am wrong in making the above findings, there are other grounds on which the application would have to fail. From the common cause facts, there can be no denying the fact that there was no consensus between the College and the applicant regarding a material term of the contract. This much is acknowledged by the applicant despite its attempt to later disavow its own assertion of lack of consensus. Not even the applicant's reliance on the quasi-mutual assent would be of assistance in its quest to hold the College to the contract. In order to successfully rely of quasi-mutual assent, the applicant must establish that the conduct that induced its belief is attributable to the College.[25]

[66] In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) (Ltd) v Pappadogianis,*[26] it was held:

'[T]he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?. . .To answer this question, a three-fold enquiry is usually necessary, namely, first, was there a misrepresentation as to one

[25] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).
[26] 1992 (3) SA 234 (A), at 239I -240A.

party's intention; secondly, who made that representation, and thirdly, was the other party misled thereby?. . .The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?’ (footnotes omitted)

[67] The minutes of aforementioned briefing session, together with the relevant form of offer in which the correct computation and/or statement of the tender price ought to have been recorded in keeping with the instructions communicated in the briefing session, have been produced by the respondent. The applicant has not, it its reply, dealt with this significant aspect with any degree of particularity. As a rule, the respondents’ assertions in this regard must be accepted as being uncontroverted and correct.

[68] The respondents make reference to the fact that contrary to the instructions and specifications that were issued in the briefing session as aforementioned, the applicant’s form of offer did not have any specific mention of the fact that the amount of R1 148 811.64 was for one year, in circumstances where the invitation to tender made no provision for a yearly price, but a contract price for 3 years. Nor does the applicant’s form of offer indicate a multiplication of that amount by 3 years so as to give the total for the duration of the contract.

[69] Moreover, in the appointment letter, the College stated in clear terms that its acceptance of the applicant’s offer was in respect of R1 148 811.64 for the period of the contract which was 36 months. The appointment was accepted by the applicant without any objection regarding the stated terms of its appointment. The Colleges’ assertion regarding the contract price and the duration of the contract is repeated in the service level agreement that the College provided the applicant to sign. I am satisfied that the College did not misrepresent its true intention to the applicant. The applicant’s reliance on the quasi-mutual assent is, therefore, unavailing to it. For all the foregoing reasons, the applicant’s review application must fail.

[70] I must deal next with the applicant's claim for compensation on the basis set out at the commencement of this judgement. The respondents have indeed conceded the payment of an amount of R95 734.30 representing the services that the applicant rendered for three months from 01 September 2022. However, they deny liability for the sum of R351 025.73 which the applicant states, is the value of the remainder of the of the period for which the respondents were in possession and use of is cleaning equipment. It is the applicant's contention, in support of this latter portion of compensation, that the respondents never invited it to collect the cleaning equipment, instead, it continued using it.

[71] In denying liability for R351 025.73, the respondents allege that the applicant knew that it was entitled to collect its equipment and the College did not have to request it to do so. The respondents further deny that the College used the applicant's equipment and allege that it appoints companies that render cleaning services on quotation and rotation basis. Even though the College did not need to tender any restitution in the cancellation letter, in law, it is the cancelling party's duty to restore what it received under the contract.[27] The respondents' view that the applicant knew that it was entitled to collect its equipment subsequent to the cancellation is ill-conceived.

[72] Ordinarily, it is just, that there be restitution following the cancellation of the contract, unless there are exceptional grounds for there not to be restitution.[28] In supporting its claim for compensation for the cleaning services and equipment provide for three months from 01 September 2022, the applicant has annexed to its founding papers, 'Annexure A' which tabulates quantities of and cost of various items of hygiene equipment it installed at the College. From Annexure A, the total amount of the tabulated equipment is readily discernible. As mentioned, the

[27] *Northwest Provincial Government and Another v Tswaing Consulting CC and Others*, 2007 (4) SA 452 (SCA) at 458 (para 17); *Van Schalkwyk v Griesel* 1948 (1) SA 460 (A) at 472.
[28] *Northwest Provincial Government and Another v Tswaing Consulting CC and Others*, supra, para 17.

respondents conceded the College's liability for this portion of the applicant's claim to compensation.

[73] According to the applicant, the College's liability is in respect of the alleged possession and use of its cleaning equipment after the cancellation of the contract, until the date of this Court's order, for which it claims R351 025.73. It may very well be that the latter portion of the compensation that the applicant claims, is founded on unjustified enrichment. As held in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*,[29] for the general remedy for enrichment, in assessing whether there has been enrichment, the defendant (respondent) must have been enriched; the plaintiff (applicant) must have been impoverished; there must be a causal link between the enrichment and the impoverishment; and the enrichment must have been unjustified for lack of legal justification.

[74] It is, however, not clear from the papers, how the applicant arrived at the amount of R351 025.73. This portion of the claim seems inchoate to the extent that the applicant has not pleaded the requirements that would sustain a claim under the general remedy for enrichment. It bears emphasizing that in motion proceedings, the function of affidavits is not only to identify the issues between the parties as would do pleadings in action proceedings, but also to place evidence before court, and the deponent to an affidavit must clearly and concisely set out the facts relied upon in the affidavit.[30] The need for precision in pleading in the affidavits the facts on which a party relies for the relief it seeks can never be over emphasized.

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[29] *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* (100/02) [2003] ZASCA 64; [2003] 3 All SA 1 (SCA); 2003 (5) SA 193 (SCA) (30 May 2003), para 17; *PRASA Corporate Real Estate Solutions v Community Property Company Ltd and Another* (384/2023) [2024] ZASCA 35 (28 March 2024), para 27.

[30] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F – 324D.

[75] In any event, unlike the first amount claimed by the applicant, the respondents dispute liability for this latter portion of the compensation sought. They deny using the applicant's equipment and the fact that it was at the instance of the College that the applicant never collected the equipment from the site. The respondents are placing at issue material facts concerning this portion of the compensation. As is trite, application proceedings are determined on undisputed facts.

[76] Be that as it may, I was not requested to refer this portion of the relief that the applicant seeks to oral evidence. In the light of the finding that I made that the relief sought by the applicant regarding the amount of R351 025.73 is, in any event, inchoate, I hold the view that the applicant, if so minded, may institute appropriate proceedings to pursue its claim for this portion of the relief that it sought.

[77] With that said, since the respondents appear to be able and willing to restore what they received from the applicant under the contract, *viz*, the cleaning equipment that was installed and used by the College for three months from 01 September 2022, I see no reason why such an order should not be made. I note that no request was made in the notion of motion for interest on the amounts claimed as compensation. As Centlivres CJ once said, 'interest is today the "lifeblood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor.'[31]

[78] Moreover, section 2 of the Prescribed Rate of Interest Act 55 of 1975 makes provision for payment of interest on 'a judgment debt' which it defines, inter alia, as 'a sum of money due in terms of a judgment or an order of a court of law'.

[31] *Linton v Corser* 1952 (3) SA 685 (AD) at 695.

There is no reason why, in this case, *mora* interest should not be awarded on the amount that the respondents have conceded as the restitution due to the applicant.

Costs

[79] Even though submissions were made in the applicant's heads of argument that if the application fails, the applicant ought to benefit from the protection of the *Biowatch*[32] principle regarding costs, this submission was not in any way pressed during oral arguments, nor was it indicated that the applicant stands by those written submissions made regarding *Biowatch*. On the contrary, Mr *Vobi* submitted that if the application succeeds, the applicant must be awarded costs as sought in the notice of motion. Since the review application falls to be dismissed, the converse ought to prevail – costs must accordingly follow the result.

[80] In the result, I make the following order:

1. The late filing of the application for review (the main application) and the counter application, is hereby condoned.
2. The main application is dismissed, with costs.
3. The first respondent shall pay to the applicant R95 734.30 for its use, for the period of 3 months from 01 September 2022, of the applicant's hygiene equipment, within 30 days from the date of this order.
4. The first respondent shall pay interest on the above stated amount of R95 734.30 at the applicable legal rate *a tempore morae* to date of payment.

L. RUSI

JUDGE OF THE HIGH COURT

[32] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009), para 23.

Appearances:

For the applicant	:	*Adv. Vobi*
		Adv. Nase
Instructed by	:	Xakwe Attorneys Inc.
		c/o Z. Mfiki Attorneys, Mthatha
For the respondents	:	*Adv. Mathe-Ndlazi*
Instructed by	:	T. L. Luzipho Attorneys, Mthatha
Date heard	:	27 March 2025
Date delivered	:	29 September 2025