



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**Not Reportable
Case No: 804/2024**

In the matter between:

BAGALE CONSULTING (PTY) LTD

APPLICANT

AND

MEMBER OF THE EXECUTIVE COUNCIL

NORTH WEST DEPARTMENT OF HEALTH FIRST RESPONDENT

SUPERINTENDENT-GENERAL: NORTH

WEST DEPARTMENT OF HEALTH SECOND RESPONDENT

MIB INFRASTRUCTURE DEVELOPMENT

(PTY) LTD THIRD RESPONDENT

Coram: Petersen ADJP

Date heard: 14 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down of the judgment is deemed to be 14h00 on 09 January 2026.

ORDER

1. The decision to appoint and the appointment of MIB Infrastructure Development (Pty) Ltd ('MIB') by the former Administrator of the North West Department of Health through a letter dated 16 March 2022 as consultants for architectural services for the planning, design and commissioning of the upgrading of General De La Rey District Hospital under tender NWDOH 31/2020 is declared unlawful, invalid and reviewed and set aside.
2. The conclusion of the service level agreement dated 1 September 2022 between the North West Department of Health and MIB in respect of the latter's appointment as consultants for architectural services for the planning, design and commissioning of the upgrading of General De La Rey District Hospital under tender NWDOH 31/2020 is declared unlawful, invalid and reviewed and set aside.
3. It is declared that the appointment of the Applicant ('Bagale') as project managers of the Lichtenburg Hospital turnkey project under tender DPW 055/08, *which was amended to a traditional appointment* by the North West Department of Health is valid, lawful and enforceable.
4. The First and Second Respondents shall pay the costs of the Applicant on Scale C of Rule 67A, which costs shall include the costs of counsel.'

JUDGMENT

Petersen ADJP

Introduction

[1] The applicant ('Bagale') seeks relief in the following terms:

‘1. That the decision to appoint and the appointment of MIB Infrastructure Development (Pty) Ltd ('MIB') by the former Administrator of the North West Department of Health through a letter dated 16 March 2022 as consultants for architectural services for the planning, design and commissioning of the upgrading of General De La Rey District Hospital under tender NWDOH 31/2020 be declared unlawful, invalid and reviewed and set aside.

2. That the conclusion of the service level agreement dated 1 September 2022 between the North West Department of Health and MIB in respect of the latter's appointment as consultants for architectural services for the planning, design and commissioning of the upgrading of General De La Rey District Hospital under tender NWDOH 31/2020 be declared unlawful, invalid and reviewed and set aside.

3. That it be declared that the appointment of Bagale as project managers of the Lichtenburg Hospital turnkey project under tender DPW 055/08 by the North West Department of Health is valid, lawful and enforceable.

[2] The application is opposed by the first respondent and the second respondent, referred to as the Department for ease of reference. The third respondent ('MIB'), having been duly served has not entered opposition.

[3] The matter was set down for hearing on 14 August 2025. On even date an application for postponement was moved from the bar by Adv Montsho-Moloisane SC for the MEC and SG and opposed by Bagale. The application was duly considered and refused with full reasons supplied in an ex tempore judgment. The reasons for refusal of the postponement are not traversed in this judgment, save to point out what was said by the SCA in *South African Legal Practice Council v Kgaphola and Another*¹ where the respondent similarly sought a postponement from the bar without a substantive application:

‘Application for postponement

[3] At the hearing of the appeal, the respondent sought the postponement of the appeal, which the LPC opposed. We dismissed that application with costs on an attorney and client scale and undertook to furnish the reasons for that order in this judgment. Below are the reasons.

...

[4] The respondent failed to file his heads of argument in this Court. At the hearing of the matter, counsel appeared on behalf of the respondent and applied for a postponement. The application for postponement was made orally from the bar without a substantive application.

...

[6] It is necessary for an applicant for a postponement to give a full and satisfactory explanation of the circumstances that necessitate a postponement.² An application for postponement should be sought as soon as a litigant realises the need for it. It is self-explanatory that the closer to the hearing the application for postponement is made, the greater the risk of prejudice to the other litigants involved in the matter and inconvenience to the court.

¹ *South African Legal Practice Council v Kgaphola and Another* (795/2023) [2025] ZASCA 66; 2026 (1) SA 84 (SCA) (23 May 2025).

² *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* [2022] ZASCA 143; 2022 JDR 3071 (SCA) para 6, with reference to *Myburgh Transport v Botha t/a S A Truck Bodies* [1991] 4 All SA 574 (NmS); 1991 (3) SA 310 (NmS) at 576-578.

[7] As this Court emphasised in *McCarthy Retail Ltd v Shortdistance Carriers CC*:³

‘[A] party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day...Accordingly...an applicant for a postponement ... must show a “good and strong reason” for the grant of such relief’.⁴

In *Lekolwane and Another v Minister of Justice*,⁵ the Constitutional Court explained:

‘The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement ...’⁶

...

[9] Even after all these events, there is no explanation why the respondent took no steps to obtain the transcribed record between December 2023 and when this appeal was heard in September 2024. Apart from the fact that the application for postponement lacked merit, the respondent also showed flagrant disregard for the rules of this Court, as explained above. For these reasons, we marked our displeasure by dismissing the application with a punitive costs order on an attorney and client scale. As counsel for the respondent had no mandate to argue the merits of the appeal, he was excused and the appeal proceeded unopposed.’

[4] Notwithstanding an intimation from this Court that Adv Montsho-Moloisane SC could still address the Court on the merits of the application on the papers (which includes opposing papers) without heads of argument from the Department, considering the fact that on her own account she was fully acquainted with the history of the matter, the invitation was declined.

³ *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] ZASCA 14; [2001] 3 All SA 236 (A); 2001 (3) SA 482 (SCA).

⁴ *Ibid* para 28.

⁵ *Lekolwane and Another v Minister of Justice* [2006] ZACC 19; 2007 (3) BCLR 280 (CC).

⁶ *Ibid* para 17. See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 181D; 1999 (3) BCLR 280 (C) at 287E; *The National Police Service Union and Others v The Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) paras 4-5.

[5] The application proceeded with very brief submissions from Adv Chwaro SC for Bagale with an indication that Bagale relied primarily on its submissions advanced in its heads of argument.

Background

[6] The factual background of the matter extrapolated mainly from the founding affidavit and considered against the answering affidavit is essentially as follows. It is common cause that Bagale was appointed by the North West Department of Public Works, as project managers for the planning, commission and construction of the Lichtenburg Hospital, which has interchangeably been referred to as the General De La Rey Hospital, on a turnkey basis, under the capital projects of the Department on 23 December 2008.

[7] The initial appointment of Bagale on a turnkey basis, meant that Bagale as the project manager was also entrusted with the appointment of the entire professional team in the various built industry disciplines to execute the appointment. The Department asserts that whilst the initial appointment of Bagale was on a turnkey basis, this was changed when the project was transferred to the Department. After the transfer of the capital projects to the Department, during or about 2010, the then Superintendent-General of the Department, Dr LK Sebego, after approving the internal submission to this effect, issued another letter to Bagale essentially confirming Bagale's appointment on the project.

[8] Bagale in its papers raises the fact that it was concerned about the change of its mandate being changed from an appointment on a turnkey basis to a normal or traditional appointment. It, however, proffers no further evidence of a challenge to this decision, other than the concern raised in this regard with the Department. The Department, on this score, refer to the minutes of a meeting held

on 29 October 2012, sent to Bagale and responded to on 07 February 2013. The Department contends that on a reading of paragraph 2 of Bagale's letter, Bagale acknowledged that the Department would be changing the nature of their appointment from 'turnkey' to a normal or traditional appointment. In the letter of 07 February 2013, Bagale records its discomfort in the manner which the Department was changing the nature of its appointment but did nothing to seriously challenge the decision.

[9] The fact that Bagale's appointment was amended to a normal or traditional appointment was raised again at a meeting held with the Department on 14 May 2013. Bagale, as it appears from the papers still did nothing to challenge this. The Department accordingly contends that, Bagale as of 2013 were no longer appointed on a turnkey basis and had no right to appoint any other person to the project.

[10] The Department further contends that it is incorrect to refer to the General De La Rey Hospital as the same institution as the Lichtenburg Hospital. It maintains that the Lichtenburg Hospital which was intended to be built on the land adjacent to the General De La Rey Hospital was earmarked for use as a Nursing College. The Department maintains that MIB was appointed for the planning, design and commissioning for the upgrade of the existing General De La Rey Hospital.

[11] As to the latter contention, the Department asserts reliance on the '*Invitation of Closed Quotation for Architectural Services for the Planning, Design and Commissioning (Turnkey) for the Upgrading of General De La Rey Hospital*' which closed on 17 February 2022 at 11h00. For this reason, it contends that, conceptually, the construction of a new hospital to wit Lichtenburg Hospital

is distinct from the upgrade project of the existing hospital, known as the General De La Rey Hospital.

[12] A number of milestones were achieved between 2009 and 2015, including the completion of drawings/renderings by architects, which were approved by the Department on 10 April 2015. At each stage of the project between 2009 and 2015, Bagale submitted invoices to the Department which were duly honoured and paid.

[13] As a result of the work done by Bagale, including consultations with clients, finalising the project brief and presenting the completed designs of a 150-bed hospital to the National Department of Health Peer Review Team, the designs and drawings were approved. Bagale contends that it has since the approval of the designs and drawings, been ready to go out on a public tender for the appointment of a competent contractor to execute the project.

[14] Bagale maintains that there has been a period of non-activity on the project since it provided the Department with the completed designs and bill of quantities related to the project. When the new infrastructure Unit System Support Regulations ('IUSS Regulations') came into effect in 2015, the National Department of Health reviewed the completed designs and instructed Bagale to incorporate the regulations into the designs. At this stage, it became clear that a portion of land acquired by the Department, was insufficient to accommodate the designs including the IUSS Regulations. Bagale consequently assisted the Department to acquire a portion of land adjacent to the Lichtenburg Hospital, which was consolidated with the existing site.

[15] A bone of contention exists whether this consolidated site constitutes the full extent of the mandate of Bagale under which it was appointed to render consulting services to the Department. The Department accepts that the site where

the new Lichtenburg Hospital was to be constructed, was adjacent to the existing General De La Rey Hospital, and that same was consolidated into one property. The Department, however, denies that Bagale was appointed for projects on the consolidated site, which incorporates the General De La Rey Hospital.

[16] The Department challenges the assertion of Bagale that with the consolidation of the two sites, Bagale was now responsible for the project on the entire site. This it states is incorrect and premised on a misconstruction of the 2008 tender and the terms of Bagale's appointment. It maintains that if there was such a change that the Department would have had to confirm with Bagale that its scope of work had been increased to include all the projects for the existing General De La Rey Hospital, in which case the value of the project would have been adjusted accordingly. The Department remains adamant that Bagale's scope of work was never increased to include the old General De La Rey Hospital.

[17] After Bagale submitted the revised designs incorporating the IUS Regulations to the Department in 2016, there was a hiatus of some seven years until 2023, with Bagale asserting that it had made various attempts to ascertain whether any progress had been made by the Department regarding the execution of the project.

[18] The Department counters the latter assertion by Bagale. It contends that the terms and conditions set out in the letter of appointment of Bagale entailed the provision of 'milestones' to Bagale by the Department, to be executed in furtherance of the project. Bagale would in turn execute the milestones, issue an invoice for the work completed and afford the Department an opportunity to verify such work done, with the Department subsequently making payment upon approval of such work. The Department contends that it stands to reason, where there were no 'milestones' provided, there could be no enforceable rights accruing

to Bagale, which extends to circumstances where budgetary constraints affected the completion of the project. It therefore maintains that in terms of the agreement between Bagale and the Department, in the absence of further milestones provided, the agreement would ordinarily be deemed to be terminated or concluded.

[19] On 23 January 2023, Bagale received communication from the Chief Director: Infrastructure Development and Technical Services of the Department, informing it that the Department had resolved to utilize the designs Bagale had compiled for the Lichtenberg Hospital for another project, known as Madibogo District Hospital. Resultantly, the Department invited Bagale to a meeting on 03 February 2023.

[20] At the meeting of 03 February 2023 Bagale, the Department confirmed that it intended utilising the designs of Bagale at the Madibogo Project. Bagale contends that it was not informed, whether before or during this meeting, that the Department had cancelled the Lichtenburg Hospital project or that it had appointed another entity.

[21] A second meeting was held on 23 March 2023 at Magaliesburg to discuss the project and to determine the way forward. The MEC was present at this meeting. No concrete resolutions or decisions were forthcoming from this meeting.

[22] On 21 June 2023, Bagale received communication from the Department, under signature of Dr M Tlhogane, the SG at the time, that the Department had decided to re-assign the Madibogo Project to Bagale. Bagale maintains that it was taken by surprise by this turn of events since that project was some 100 kilometres from the Lichtenburg project.

[23] On 03 August 2023 a meeting was held at the Klerksdorp offices of the Department to discuss Bagale's concerns regarding the turn of events. Once again, no concrete resolutions or decisions emanated from this meeting. The discussions according to Bagale centred around its concerns regarding the legalities of the appointment of another service provider at the Lichtenburg Hospital site where it had been appointed, and the difference between the two projects.

[24] On 10 August 2023, Bagale wrote to the Department to confirm the discussions of 03 August 2023. Bagale further attached the project site layout and consolidation diagram to demonstrate that the project site was inclusive of the Lichtenburg Hospital. No response was forthcoming from the Department. Instead, on 07 September 2023, a further meeting was held with the Department, where it undertook to finalise the issue related to Bagale's appointment, within 10 days, by either terminating their appointment or dealing with Bagale in accordance with the law.

[25] On 20 September 2023, Bagale wrote to the Department confirming the discussions of 07 September 2023, with a reminder to the Department to cancel its appointment as it had indicated. On 28 September 2023, Bagale received a letter from the MEC, informing it that the Department intends terminating Bagale's appointment in respect of the Lichtenburg Hospital in terms of the contract. In that letter, the Department also retracted its intimation that Bagale would be re-assigned to the Madibogo project.

[26] The Department accepts that it cannot legitimately be disputed that Bagale would prefer its appointment to be terminated by the Department so as to invoke the termination fees in respect of the project. They accept that whilst it is true that the Department acted in a manner where they purported to terminate the

agreement, the Department was later advised that it was not necessary to do so, nor was it a legal requirement. This legal advice was premised on the common cause fact that the last milestones were provided in 2015, and that this meant the project ended as soon as there were no milestones provided.

[27] On 03 October 2023, Bagale responded to the letter of 28 September 2023. Bagale asserted in this letter that it maintained that it was still in possession of the project site, had hoped that the Department had not appointed another service provider for the same project at the same site, that the instruction to stop any work did not amount to termination of the contract and that it awaited the termination letter with clearly set out costs. This letter was followed up with a letter on 06 October 2023, with a request that the matter be finalised within seven days.

[28] On 15 November 2023, Bagale directed a further letter to the Department seeking an assurance that the acting Superintendent-General was briefed on the matter and requesting a meeting with her to discuss the project. No response was received from the Department on any of the aforesaid correspondence.

[29] The directors of Bagale, concerned by the silence of the Department, on 19 December 2023, directed a request for information to the Department, to inform it if any service provider had been appointed at the Lichtenburg Hospital site. On 01 February 2024, the Department, through its Director: Legal Services responded to Bagale's request for information. It is at this point, that Bagale became aware of the facts surrounding the appointment of MIB; and received legal advice that it had to institute a PAJA application within 180 days of gaining knowledge of the appointment of MIB.

[30] On the application for the review of the appointment of MIB, the Department states that the case of Bagale is essentially that the delisting of the project was deliberate conduct intended to render its appointment moribund and

then appoint MIB on a project that had already been executed and implemented up to stage 4. That Bagale in the circumstances contends that the delisting of the construction project was motivated by malice and was arbitrarily made.

[31] The Department contends, on the review issue, that on the grounds relied on by Bagale, there is nothing wrong with appointing various consultants on the same site, provided that the scope of the works to be conducted is not the same.

[32] Against the backdrop of the aforesaid exposition, Bagale launched the present application on 16 February 2024.

The declaratory order sought in prayer 3 and the point in limine raised by the Department

[33] Bagale seeks a declaratory order maintaining that it seeks to protect what is its' right as the duly appointed consultant in respect of the construction site known as Lichtenburg Hospital, which includes the existing General De La Rey Hospital ('the consolidated site') situated in the town of Lichtenburg, under tender number DPW055/08. The Department, however, maintains that Bagale was initially appointed on a turnkey basis under tender DPW055/08, to facilitate the construction of the new Lichtenburg Hospital on a new site. The appointment of MIB, according to the Department, which was under tender NWDOH31/2020, was solely for the upgrading of the existing General De La Rey Hospital. To this end, they refer to the tender documents and the SLA concluded between the Department and MIB.

[34] The Department points out that conceptually, the construction of a new hospital is quite different from the upgrading of an existing hospital; and that the two projects differ materially. Bagale on its assessment of the case for the

Department, surmise that the case for the Department is essentially that it is impermissible for Bagale to seek a declaratory order which is abstract, academic and moot since there is no dispute upon which this Court must determine the rights of Bagale. This, on the version of the Department implicates prayer 3 of the Notice of Motion.

[35] Bagale disagrees with this stance taken by the Department. Bagale contends that the declaratory order is sought against what the Department seeks to suggest are different construction sites in respect of the appointment of Bagale and MIB. Bagale contends that it is on this very point of disagreement that this Court is requested to provide a declarator.

[36] Bagale submits that the appointment of MIB to do consulting work in respect of what the Department refers to as the upgrading project of General De La Rey Hospital under a different contract number is an encroachment on the construction site that was initially allocated to Bagale under circumstances where Bagale's appointment has not been terminated by the Department. Bagale further submits that the Department is seeking to rely on form over substance by asserting that Bagale was appointed under a different contract number; and to design drawings for a new hospital adjacent to the Lichtenburg Hospital, whereas MIB was appointed under a different contract number for the upgrading of the latter hospital. The Department contends to the extent that Bagale maintains that MIB was appointed to a site in respect of which they were already appointed, this is without merit and legally unsustainable.

[37] Bagale contends that MIB has been appointed to work on the same construction site it is appointed to, with a view to enhance or increase the bed capacity of the existing hospital to accommodate more patients following the

closure of the nearby Thusong Hospital. That being the case, neither Bagale nor MIB can execute their respective mandates with either of them being on site.

[38] The Department submits that it is trite that a court cannot grant a declaratory order where the legal position has already been clearly laid down by statute or is unambiguous. Also, that a court cannot grant orders that are abstract or academic.

[39] Bagale against the factual background of the matter sketched by it, submits that the existing, future or contingent right of Bagale to execute its mandate as appointed by the Department is being placed at risk by the appointment of MIB to do work on the very same site that has been allocated to Bagale. On this basis Bagale contends, that a declarator should be given confirming its existing right over the construction site, which constitutes the consolidated portions of land upon which the only public hospital in Lichtenburg is situated.

[40] As indicated above, the Department concedes that it is not in dispute that Bagale was appointed as project manager for the new Lichtenburg Hospital, under tender DPW055/08 by the North West Department of Public Works and Roads, and that the project was later transferred to the Department. On Bagale's contention that the Department has appointed MIB to the same site it was assigned under tender DPW055/08, they contend, on legal advice, that Bagale is in law, only entitled to seek relief in instances where its rights, conferred in terms of tender DPW055/08, are violated. They contend that tender NWDOH31/2020 and the subsequent SLA entered into by the Department and MIB, does not encroach on the rights that accrued to Bagale under tender DPW055/08, which was limited to the envisaged new Lichtenburg Hospital project.

[41] The Department begs the question why this Court should issue a declaratory order in respect of the validity of the same agreement that Bagale is

enforcing. It contends that Bagale is doing so, as it is aware that the agreement has come to fruition and simply wants to squeeze the Department for more funds, and unduly so, in addition to the R93 000 000.00 (ninety three million rand) it had already received in respect of the appointment of service providers, based on the milestones set by the Department for the new Lichtenburg Hospital, on a site adjacent to the old General De La Rey Hospital.

[42] The Department submits that there would be no benefit to Bagale in real terms if a declarator is granted in its favour. Further, that even if a declarator was granted, it would not settle the issues between the parties as the scope of the work to be completed in the construction of a new Lichtenburg Hospital is different from the upgrading of the General De La Rey Hospital, which culminated in the appointment of MIB.

[43] The Department concludes that a declaration must relate to a right and not a fact; and what Bagale seeks from this Court is the declaration of a fact, that Bagale was appointed a project manager for the construction of the new Lichtenburg Hospital under tender DPW055/08.

[44] Bagale relies on s 21(1)(c) of the Superior Courts Act 10 of 2013, to assert its right to a declaratory order. Section 21(1)(c) provides:

‘21 Persons over which and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a) ...

(b) ...

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’ (emphasis added)

[45] Bagale cites *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁷ where the SCA, in interpreting the previously worded provision similar to section 21(1)(c) stated that:

‘Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an ‘existing, future or contingent right or obligation’ and nothing more is required. (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F). In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:

‘The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an “existing, future or contingent right or obligation”, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.’”

[46] It is important in my view to add what Jafta JA (as he then was) said further in *Cordiant* at paras 17 and 18, in clarification of para 16:

‘[17] It seems to me that once the applicant has satisfied the court that he/she is interested in an ‘existing, future or contingent right or obligation’, the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect

⁷ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16.

that once satisfied that the applicant is an interested person, ‘the Court must decide whether the case is a proper one for the exercise of the discretion’ should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the court, the prerequisite factors for the exercise of the discretion the court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as envisaged in the subsection (cf *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A-E).

[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an ‘existing, future or contingent right or obligation’. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court’s discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.’ (emphasis added)

[47] Bagale places much store on the dictum in *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T) that an existing and live dispute cannot be a prerequisite for a court to invoke its discretion in deciding whether to grant a declaratory order or not.

[48] Bagale submits that it and the public have an interest in the declaration of invalidity of the impugned contract, on a contention that it was concluded in contravention of a constitutional imperative as contained in section 217 of the Constitution of the Republic of South Africa, 1996.

[49] Bagale further asserts that the Department is not suggesting that it has terminated Bagale’s appointment in respect of the project for the Lichtenburg Hospital and to that extent, this Court must declare the right of Bagale *vis a vis*

the Department on the one hand and MIB on the other, in respect of the construction site.

[50] On the case law relied on, Bagale contends that the law is settled in that it is not a requirement that must definitely be a dispute between the parties but rather that there should be a party against whom the declaratory order, if granted, will be binding. It relies in this regard on *Langa v Hlophe* and *Ex parte Nell*.

[51] Bagale lastly contends on this issue that the relief it seeks must be considered against the dictum of the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*⁸ it stated as follows regarding a declaratory order:

‘It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.’

The review of the appointment of MIB and the conclusion of the Service Level Agreement between the Department of Health and MIB

[52] Bagale asserts that the appointment of MIB is reviewable in terms of ss 6(2)(c), 6(2)(e)(iii), 6(2)(b), 6(2)(i) of PAJA and is irrational, unreasonable, unlawful and ought to be reviewed and set aside in terms of the principle of legality.

⁸ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 107.

[53] Bagale contends that the decision taken by the then Administrator of the Department to appoint MIB through a letter dated 16 March 2022 is reviewable and must be set aside because it was procedurally unfair, was otherwise unconstitutional or unlawful, a mandatory procedural requirement was not complied with and was taken because irrelevant considerations were taken into account and relevant considerations were not considered.

[54] According to Bagale, the decision to appoint MIB was made without involving and/or consulting and/or informing Bagale about the appointment related to the same construction site (Lichtenburg Hospital/ General De La Rey Hospital) which site is the subject of the appointment of Bagale. Bagale maintains that principles of good governance and logic dictate that an organ of state like the North West Department of Health, should have been alive to the existing appointment of Bagale on the same site and thus caused Bagale to be terminated prior to appointing MIB.

[55] The officials of the North West Department of Health never informed Bagale about the appointment of MIB and the former only became aware of the appointment following a request for access to information. Had relevant considerations being considered, the North West Department of Health would have firstly engaged with Bagale about the apparent change of scope (from construction of a new hospital to upgrading) prior to appointing MIB despite Bagale having offered to do a redesign of the scope, if there was a need to do so.

[56] Bagale therefore concludes that the decision to appoint MIB is susceptible to be reviewed and set aside as prayed for. The basis for assailing the decision to appoint MIB on the principle of legality is anchored on the decision of the

Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Another*⁹ where the court stated as follows:

‘The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution’.

[57] Bagale contend that MIB did not comply with the requirements of tender issued by the Department since bid specifications and requirements set out in an invitation to tender, together with the applicable constitutional and legislative provisions that deal with procurement, constitute the legally binding framework within which public tenders must be submitted, evaluated and awarded.

[58] Bagale latches on to the fact that one of the requirements for appointment of MIB was that as a service provider it was required to submit a certificate of professional registration for the person responsible for the project. The bid closing date was 17 February 2022 at 11h00. At the time of submission of the bid documents, MIB submitted a certificate of one Tafadzwa Mtisi, as evidence of professional registration of the person who was going to be responsible for the project. Bagale maintains that upon perusal of the purported ‘certificate of registration’, it became evident that the said certificate of registration was only valid until 1 January 2022 which means that at the time of submission of the bid documents of MIB, there was no valid professional registration certificate that was submitted on behalf of MIB. This says Bagale should have disqualified MIB from being appointed.

⁹ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) para 49.

[59] None of the directors of MIB were registered persons in terms of the Code of Conduct published in terms of section 27 read with section 36 of the Architectural Profession Act 44 of 2000 and thus could not by law, portray MIB as a firm of architects. The end result, there was material non-compliance with the requirements of the Department's own tender requirements regarding the professional registration of the person responsible of the project as well as non-compliance with the statutory provisions regulating the architectural profession.

[60] In the circumstances says Bagale the appointment of MIB and the conclusion of the service level agreement was done contrary to the law and the provisions of section 217 of the Constitution read with section 38(1)(a)(ii) of the PFMA, and it therefore falls to be reviewed in accordance with the grounds of PAJA relied on and the principle of legality, within the parameters set out in *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others*¹⁰ (CCT 182/17; CCT 240/17) [2018] ZACC 21; 2018 (9) BCLR 1067 (CC) (17 July 2018).

[61] The Department with reference to the deponent to Bagale's affidavit asserting that MIB was appointed in circumstances where they did not satisfy the requirement that the bidder's directors must be registered with the South African Council for the Architectural Profession, contend that the registration requirement relied on by the deponent, does not contemplate that a director should be registered with the South African Council for the Architectural Profession. They further contend that the entity is required to disclose the name of the person who is responsible for the project and such a person must be registered with the South African Council for the Architectural Profession; and consequently, any person

¹⁰ *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* (CCT 182/17; CCT 240/17) [2018] ZACC 21; 2018 (9) BCLR 1067 (CC) (17 July 2018).

employed by MIB can be disclosed as a person responsible for the project. The Department ultimately contends that the contention that a director of MIB must be registered with the South African Council for the Architectural Profession is premised on an incorrect understanding of the terms of the bid.

[62] Bagale's challenge relating to the inclusion of the project in the Table B5 list of projects, contends the MEC and SG is non-meritorious as it remains the prerogative of the Department which projects should be included in Table B5. The creation of the Table B5 list they continue is nothing but an administrative tool to set out the projects which have to be prioritized for a particular financial year. The listing of the project does not mean that such a project would be implemented for that particular financial year, and neither does the inclusion of such a project in the aforesaid list create any form of rights to Bagale.

[63] What it means is that the inclusion of the project in the list purely depends on the priorities of the Department and/or whether the project is funded for a particular financial year. The budget allocated by the Provincial Treasury plays a major role in construction projects. In casu, the construction project was removed because the Department was experiencing budgetary constraints and it was not practically possible to construct the new Lichtenburg Hospital.

[64] The criticism levelled against the Department by Bagale that the exclusion of its project on the table list was a stratagem to ensure that the project is not funded, they posit is far reaching, considering that no evidence was proffered to support such an assertion.

Discussion

The appointment and conclusion of the SLA with MIB

[65] This application presents a complex intersection of administrative law, constitutional procurement principles and the intricacies of large-scale infrastructure project management within the purview of tenders in the South African public sector. The dispute which is centred on the construction and upgrading of the Lichtenburg Hospital (also identified as the General De La Rey District Hospital), involves a multi-decade timeline beginning in 2008. The complexity of the matter provides no easy solutions and requires reliance by this Court, as best as it can on precedent.

[66] The genesis of the dispute as adumbrated above, lies in the appointment of Bagale on 23 December 2008 by the North West Department of Public Works. Originally, Bagale was appointed as project managers for the planning, commission, and construction of the Lichtenburg Hospital on a ‘turnkey’ basis. A turnkey contract typically implies a project delivery method where the contractor or consultant assumes full responsibility for design, procurement, construction, and commissioning, delivering a facility ready for immediate operation, literally ‘turning the key’.¹¹

[67] It is inescapable that a significant factual and legal pivot occurred during the transfer of capital projects from the Department of Public Works to the Department of Health around 2010, and the subsequent change of Bagale’s appointment on a turnkey basis to a normal or traditional appointment. Bagale remains adamant in its resolve that its’ initial appointment on a turnkey basis by

¹¹ The basics of a turnkey contract - Master Builders KwaZulu-Natal, <https://www.masterbuilders.co.za/news/697976/The-basics-of-a-turnkey-contract.htm>

the Department of Public Works and later by the Department under signature of Dr. LK Sebego, remains unchanged. The meetings and correspondence exchanged between the parties during 2012 and 2013 is critical to the resolution of this issue.

[68] Critically, the minutes of the meeting of 29 October 2012, clearly indicate the Department's intention to change the appointment from turnkey to a 'normal' or traditional appointment. In its letter of 07 February 2013, Bagale acknowledged the Department's intent to change the nature of the appointment, recording its 'discomfort' with that change, but failed to take formal legal steps to challenge this variation. Tellingly, the meeting of 14 May 2013 reiterated that the appointment was no longer on a turnkey basis.

[69] In a traditional appointment, design responsibility is often separate from construction, and the client (the Department) retains greater control over the appointment of the professional team.¹² By Bagale's apparent acquiescence to this change in 2013, its claim to an exclusive, all-encompassing turnkey mandate is arguably weakened.¹³

[70] It is common cause that Bagale achieved several project milestones, including the completion of drawings for a 150-bed hospital, which were approved in April 2015. Bagale assisted in the consolidation of land to accommodate the new designs, but a hiatus of seven years followed until 2023. However, after the introduction of the Infrastructure Unit System Support (IUSS) Regulations in 2015, the project entered a period of stagnation.

¹² The Consulting Engineer in Turnkey Project – FIDIC. <https://fidic.org/node/758>.

¹³ *Heyneke v Umhlathuze Municipality* (D908/09) [2010] ZALCD 8 (24 March 2010).

[71] The high watermark of the defence of the Department on the declaratory relief sought is that the agreement with Bagale was functionally ‘terminated or concluded’ in the absence of new milestones. The logic of the Department in this regard, is essentially predicated on three arguable points. First, that the agreement with Bagale was dependent on milestones, and since no milestones were provided by the Department from 2015, no enforceable rights accrued to Bagale. Second, that since Infrastructure projects are tied to the Provincial Treasury’s budget and the ‘Table B5’ priority list, the de-listing of the project due to funding shortages effectively paused or ended any contractual obligations with Bagale. Third, the effluxion of time, with a hiatus of nearly a decade since the last milestone in 2015, implies that the contract had reached its natural fruition or had been abandoned.

[72] Bagale however maintains that it had not abandoned the project and remained ‘in possession’ of the site. In adumbrating this assertion, Bagale points to a series of meetings in 2023, including one with the MEC in Magaliesburg and another in Klerksdorp, where the Department discussed re-assigning Bagale to the ‘Madibogo Project’ or using Bagale’s designs elsewhere. These interactions according to Bagale confirms that the Department still viewed Bagale as a validly appointed service provider, as the Department even wrote a letter on 28 September 2023 ‘intending to terminate’ the appointment.

[73] It is trite that under our law of contract, an intention to terminate implies that a valid contract is still in existence. If a party purports to terminate a contract without a valid legal basis or without following the prescribed procedure, it may be guilty of ‘wrongful termination’ or repudiation.

[74] In determining whether or not Bagale is entitled to the declarator it seeks, the two-stage test for declaratory orders set out in *Cordiant Trading* above is determinative of the issue. In the first leg of the enquiry, Bagale must establish

that it is an ‘interested person’. To this end, Bagale must prove an ‘existing, future or contingent right’. Bagale asserts an existing right predicated on its appointment for the Lichtenburg Hospital project. The Department argues that the two projects awarded to Bagale and MIB respectively are distinct projects. That may be the case, but the argument overlooks the fact that the project awarded to Bagale, aside from the project awarded to MIB, remains extant since it has not been cancelled by the Department. It does not avail the Department to simply state that on legal advice, contrary to its prior positive conduct which acknowledged that the contract with Bagale remained extant, that the provision of no further milestones implied that the contract was terminated or ended.

[75] Bagale’s interest is clearly an ‘existing, future or contingent right’ to the fees and work associated with its 2008 appointment. I am accordingly satisfied that Bagale has made a case on the first leg of the enquiry. What remains is to determine whether or not the case made out by Bagale is a proper one for the exercise of the discretion envisaged in the second leg, to avoid an abstract or academic order.

[76] The point in limine raised by the Department is essentially that what Bagale seeks is a declaration of a ‘fact’ rather than a ‘right’. Since Bagale’s ‘right’ to work on the project is inextricably linked to the Department’s provision of milestones and funding; and because the project was de-listed from Table B5 and the nature of the appointment shifted in 2013, this Court by implication must consider whether a declarator would have any practical effect.

[77] On the divergent submissions of Bagale and the Department, it is clear that the agreement between the parties was not cancelled by mutual agreement, no reasonable notice was furnished to Bagale. It is trite that termination for convenience or budgetary reasons usually requires the settlement of outstanding

fees and costs. It is common cause from the meetings and correspondence that the Department only provided an ‘intention’ to terminate, not a final termination letter with costs.

[78] The Department further has not explained its initial intention to engage Bagale on the transfer of the Lichtenburg project to Modibogo, which by implication is an admission that the Lichtenburg contract remained extant. The Department’s argument that the contract ‘automatically ended’ due to a lack of milestones is legally tenuous. While an offer may lapse after a reasonable time, a concluded contract (especially one that has reached Stage 4 of design) remains binding until it is formally terminated by effluxion of time, completion of the project, or a specific termination act. Since the ‘Lichtenburg Hospital’ project was never completed and the Department continued to engage with Bagale about the site as late as 2023, the contract cannot be said to have terminated by conduct.

[79] That this Court’s discretion to grant a declarator under s 21(1)(c) of the Superior Courts Act is broad is made plain in *Rail Commuters Action Group v Transnet Ltd*. As the Constitutional Court emphasized, a declaratory order is a ‘flexible remedy’ that clarifies legal obligations. In this case, a declarator is necessitated to resolve the uncertainty created by the Department’s contradictory actions, by claiming on one hand that the contract ended in 2015, and on the other, negotiating Bagale’s assignment to the Madibogo project in 2023, with a later decision to withdraw such assignment.

[80] The only rider to granting the relief sought, within the ambit of further and or alternative relief is that the nature of Bagale’s ‘right’ in fact changed in 2013 through a variation from ‘turnkey’ to ‘normal’ or traditional. In circumstances where Bagale never challenged this, Bagale cannot now seek a declarator for a turnkey project.

[81] Bagale's appointment under tender DPW 055/08 remains valid, but its nature was varied by acquiescence in 2013 from a 'turnkey' basis to a 'normal' professional services appointment. The Department's argument that the contract automatically ended in 2015 is rejected; a contract of this magnitude requires a formal termination process, which the Department itself acknowledged by issuing a notice of 'intention to terminate' in September 2023. The declarator should, therefore, be limited to the validity of the appointment, as varied in 2013.

The review of the appointment of MIB and the conclusion of the Service Level Agreement between the Department of Health and MIB

[82] The Department maintains that the 'Lichtenburg Hospital' (Bagale's project) and 'General De La Rey Hospital' (MIB's project) are conceptually distinct, with the one being a new construction and the other an upgrade. Bagale counters that the consolidation of the land sites in 2016 merged these into one 'consolidated site' and appointing MIB to work on the same site while Bagale's appointment was active constitutes an unlawful encroachment.

[83] A comparison of the 'two projects' evinces the following. The Bagale project of 2008, included the planning, design, and construction of the new Lichtenburg Hospital, under tender DPW055/08. Its' key status was the provisioning of a 150-bed facility. No SLA was concluded. The MIB project of 2022 provided for architectural services for upgrading the existing General De La Rey Hospital, under tender NWDOH 31/2020, with an SLA concluded on 01 September 2022.

[84] From a procurement perspective, if the Department intended to 'upgrade' the existing hospital rather than build a new one, this constitutes a change in

scope. Bagale argues that, as the existing consultant, it should have been consulted or its contract terminated before another entity was appointed to the same geographic location. The appointment of MIB through a closed quotation process for a project on a site where another consultant (Bagale) already had a mandate for a major hospital development raises serious questions about transparency. The Department's decision to move the Madibogo Project to Bagale and then retract it, followed by the silent appointment of MIB, suggests a lack of transparency. A fair process would have required the Department to formally settle the existing contractual relationship with Bagale before initiating a new procurement process for the same site.

[85] The main bone of contention under this rubric, however, is Bagale's challenge under PAJA and the principle of legality, related to MIB's professional registration. This essentially entails that 'non-responsiveness' on the part of MIB related to the expired certificate of its architect, impacts the lawfulness of the tender.

[86] In *Eskom Holdings SOC Limited v Babcock Ntuthuko Engineering*¹⁴ (137/2023, 156/2023 and 148/2023) [2024] ZASCA 63 (29 April 2024), the SCA dealt with non-compliance with preemptory tender requirements as follows:

'[41] In considering the contentions advanced on behalf of Babcock it will be instructive at this stage to reflect on the approach adopted by this Court regarding the condonation of non-compliance with preemptory tender requirements. In *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others*¹⁵, the applicant's bid

¹⁴ *Eskom Holdings SOC Limited v Babcock Ntuthuko Engineering* (137/2023, 156/2023 and 148/2023) [2024] ZASCA 63 (29 April 2024).

¹⁵ *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA).

was disqualified because it had failed to sign a compulsory declaration of interest form. Having found that the applicable regulation empowered the tender board to accept tenders even if they fail to comply with tender requirements, this Court held that condonation of the applicant's failure to sign 'would have served the public interest as it would have facilitated competition among the tenderers.' The Court found further that by condoning the failure 'the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217 of the Constitution' because the applicant's price was significantly cheaper than that of the successful tenderer. A factor that also appears to have weighed heavily with the court was the fact that the applicant had duly completed the declaration form and had initialled both pages but had 'innocently' omitted to sign the document. The non-compliance was therefore not material, and having regard to the purpose of the document, the Court found that the tender committee acted unreasonably in disqualifying the applicant.

...

[43] Similarly, in *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd*¹⁶ (Overstrand Municipality) this Court, in considering the issue of substantial compliance with a mandatory tender requirement, cautioned that:

'One should also guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. In the present case the non-compliance is not of a trivial or minor nature. The tender by Veolia was not an 'acceptable' one in terms of the Procurement Act, in that it did not 'in all respects' comply with the specifications and conditions set out in the RFP. Thus, the challenge in terms of s 6(2)(b) of PAJA, namely that a "mandatory and material procedure or condition prescribed by an empowering provision, was not complied with".

[44] The materiality of Babcock's non-compliance with the compulsory tender requirements thus 'depends on the extent to which the purpose of the requirements is attained.'⁹ It is necessary, however, to stress that this dictum should not be construed as in any manner detracting from the fundamental importance of holding bidders to peremptory and material tender conditions in order to achieve the constitutionally enjoined ideal of fair, equitable, transparent, competitive and cost-effective public procurement. On the contrary, the Constitutional Court cautioned that 'deviations from fair process may themselves all too often

¹⁶ *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] ZASCA 50; [2018] 2 All SA 644 (SCA).

be symptoms of corruption or malfeasance in the process’ and said that the purpose of insistence on compliance with prescribed formalities is threefold, namely: ‘(a) it ensures fairness to participants in the bid process; enhances the likelihood efficiency and optimality in the outcome; and serves as a guardian against a process skewed by corrupt influences.’”

[87] A critical requirement of tender NWDOH 31/2020 was the submission of a certificate of professional registration for the person responsible for the project. The bid closing date was 17 February 2022. MIB submitted an architect’s certificate for one Tafadzwa Mtisi. It is common cause that the registration certificate for Mtisi was only valid until 01 January 2022. Under s 18(2) of the Architectural Profession Act 44 of 2000, a person may not practice in any of the registration categories unless registered with SACAP. It is therefore illegal to provide architectural services of any nature without being registered with SACAP. Since Mtisi was put forward as the person responsible for the project, and he was not validly registered at the time of the bid closing, the bid was technically non-responsive.

[88] The Department’s contention that ‘any person employed by MIB can be disclosed as a person responsible’ ignores the underlying requirement that the firm itself must be legally constituted to provide such services. A firm cannot lawfully tender for architectural services if it cannot provide proof of a *valid* and *current* professional registration for its project lead at the moment of the bid close.

[89] *Babcock*, with reference to the well-known authorities cited therein makes it clear that if a ‘mandatory returnable’ is not submitted by the deadline, or is invalid, the tenderer must be disqualified. *Babcock* further clarified that ‘actual compliance’ with material requirements is necessary, and organs of state do not have the discretion to condone non-compliance with terms that are material and integral to the services tendered. The professional registration of an architect is

undoubtedly a material requirement, as it goes to the legal capacity of the bidder to perform the work.

[90] The evidence of MIB's non-responsiveness is compelling. It was a mandatory requirement that the tender specifically required a professional registration certificate for the project lead, compliance with the tender requirements must be assessed at the time of the close of tenders, 17 February 2022. In the circumstances, the decision to appoint MIB on 16 March 2022 and the conclusion of the SLA on 01 September 2022 were unlawful and invalid. The Department failed to disqualify MIB for submitting an expired SACAP registration certificate, which was a mandatory tender returnable. It could not condone this non-compliance. This failure violated the principles of fairness and competitiveness enshrined in Section 217 of the Constitution and the standards set by the Supreme Court of Appeal in *Babcock*.

The conduct of counsel for the Department

[91] As to the conduct of Adv Montsho-Moloisane SC, I am constrained, as unenviable as it may be, to extend a reminder to counsel of where her fealty lies in respect of the administration of justice and the Court. A vitriolic attack was exacted on the Court following the dismissal of the application for postponement alluded to above, with counsel labelling the judgment and order of the Court an '*injustice to the client*'. Adv Montsho-Moloisane SC and her junior consequently withdrew as counsel for the Department, with a veiled threat from senior counsel, that they would await the judgment of this Court.

[92] I can do no better than refer to the sentiments expressed in *The Public Protector of South Africa v The Chairperson of the Section 194(1) Committee and*

*Others*¹⁷ (627/2023) [2024] ZASCA 131 (1 October 2024), where Ponnann JA remarked as follows:

‘[46] In his address, on 6 June 2000, to the Advocates’ Society Spring Symposium entitled the ‘Role of the Courts and Counsel In Justice’, the then Chief Justice of Ontario, The Honourable R Roy McMurty had this to say:

‘Lawyers are not solely professional advocates or “hired guns”. And while they do not surrender their free speech rights upon admission to the Bar, they are also officers of the court with fundamental obligations to uphold the integrity of the judicial process, both inside and outside the courtroom. It is the duty of counsel to be faithful both to their client and to the administration of justice.’

[47] The former Chief Justice of the Supreme Court of Victoria, the Honourable Marilyn Warren put it thus:

‘The lawyer’s duty to the court is an incident of the lawyer’s duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner’s role is not merely to push his or her client’s interests in the adversarial process, rather the practitioner has a duty to “assist the court in the doing of justice according to law.” ...

The lawyer’s duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind their role in the legal process and how the role might further the ultimate public interest in that process, that is, the proper administration of justice. As Brennan J states, “[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society.” When lawyers fail to ensure their duty to the court is at the forefront of their minds, they do a disservice to their client, the profession and the public as a whole.’ (footnotes omitted) (emphasis added)

¹⁷ *The Public Protector of South Africa v The Chairperson of the Section 194(1) Committee and Others* (627/2023) [2024] ZASCA 131 (1 October 2024).

Costs

[93] Costs follow the result. Bagale has been substantially successful in the relief sought and is entitled to its costs, inclusive of the costs of counsel.

Order

[94] Consequently, the following order is made:

1. The decision to appoint and the appointment of MIB Infrastructure Development (Pty) Ltd ('MIB') by the former Administrator of the North West Department of Health through a letter dated 16 March 2022 as consultants for architectural services for the planning, design and commissioning of the upgrading of General De La Rey District Hospital under tender NWDOH 31/2020 is declared unlawful, invalid and reviewed and set aside.
2. The conclusion of the service level agreement dated 01 September 2022 between the North West Department of Health and MIB in respect of the latter's appointment as consultants for architectural services for the planning, design and commissioning of the upgrading of General De La Rey District Hospital under tender NWDOH 31/2020 is declared unlawful, invalid and reviewed and set aside.
3. It is declared that the appointment of the Applicant as project managers of the Lichtenburg Hospital turnkey project under tender DPW 055/08, *which was amended to a traditional appointment* by the North West Department of Health is valid, lawful and enforceable.

4. The First and Second Respondents shall pay the costs of the Applicant on Scale C of Rule 67A, which costs shall include the costs of counsel.'



A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

Appearances

For the applicant: Adv OK Chwaro SC
Instructed by: CJP Oelofse Attorneys
Lichtenburg

For the respondent: Adv L Montsho-Moloisane SC with Adv K Nondwangu
Instructed by: The State Attorney
Mahikeng