

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 2025-188920

In the matter between:

**AFROPULSE 46 (PTY) LTD
t/a POWER STATIONERY**

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL: EASTERN CAPE
DEPARTMENT OF EDUCATION**

First Respondent

LEBONE LITHO PRINTERS (PTY) LTD

Second Respondent

DSV ROAD (PTY) LTD

Third Respondent

DSV CONTRACT LOGISTICS (PTY) LTD

Fourth Respondent

MINISTER OF FINANCE

Fifth Respondent

MINISTER OF EDUCATION

Sixth Respondent

PALM MANUFACTURERS (PTY) LTD

Seventh Respondent

FREEDOM STATIONERY (PTY) LTD

Eight Respondent

AFRICAN PAPER PRODUCTS (PTY) LTD

Ninth Respondent

GEMINI STATIONERY MANUFACTURERS (PTY) LTD	Tenth Respondent
EDUSTART AFRIKA (PTY) LTD	Eleventh Respondent
POWER SPINKS INVESTMENTS (PTY) LTD	Twelfth Respondent
KHUMZI INVESTMENTS (PTY) LTD	Thirteenth Respondent
BENTOCORP (PTY) LTD	Fourteenth Respondent
JOYSPRING TRADE AND INVEST 14 (PTY) LTD	Fifteenth Respondent
ANDIVECT OFFICE SUPPLIES (PTY) LTD	Sixteenth Respondent
MAKWANDE MAQIYA SUPPLIERS AND SERVICES CC	Seventeenth Respondent
RAPTOSCORE (PTY) LTD	Eighteenth Respondent
SIMOSEC (PTY) LTD	Nineteenth Respondent
REMAINING UNSUCCESSFUL BIDDERS	Twentieth Respondent

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....
DATE	SIGNATURE

JUDGMENT

POTGIETER J

INTRODUCTION

[1] Government procurement¹ is a critical aspect of public administration in South Africa. It is both economically substantial² and central to the delivery of goods and services to the public. As such, it has been accorded constitutional status under section 217³ of the Constitution and is governed by a legal framework that promotes fairness, transparency, accountability, and economic transformation. The legal principles governing public procurement ensure the effective and equitable use of public resources while also pursuing broader societal objectives, such as social justice and the redress of historic inequalities. None of this is in issue in this matter.

[2] It is apposite to provide a brief background to the case

¹ Also referred to as public procurement, can be defined as the acquisition of goods or services: cf Bolton, *The Law of Government Procurement in South Africa* (2007) p1 n2 (Bolton); The New Shorter Oxford Dictionary (1993) p. 2366. The inoperative Public Procurement Act, assented to in July 2024, contains a similar definition. (Judgment has been reserved on 19 May 2026 by the Constitutional Court in a challenge to the constitutionality of this Act). The court in *Airports Company of South Africa SOC Ltd v Imperial Group & Others* 2020(4) SA 17 (SCA) at para 63 said that the 'ordinary meaning of "procure" is "obtain" '.

² The value of public sector procurement in South Africa is estimated to amount to approximately 14% of gross domestic product (GDP) cf Bolton p3. This compares well to the average spent in the European Union and even in the United States of America. It is predicted that the SA Government will spend R1.5 trillion in public procurement over the next three years.

³ The section provides as follows:

'Procurement

217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

BRIEF BACKGROUND

[3] The second to fourth respondents ('the Consortium') have been awarded a tender ('the Department Tender') in July 2023, in broad terms, to provide Project Management Services as a Project Management Agency ('PMA') to the Eastern Cape Department of Education ('the Department') for the acquisition and provision of learner and teacher support material ('LTSM') to all the schools in the province.⁴ To this end, the Department and the Consortium concluded a Service Level Agreement ('SLA')⁵ on 2 August 2023, which governs their contractual relationship.

[4] Pursuant to the conclusion of the SLA, the Consortium issued a public Request for Proposals ('RFP') or an invitation to tender on 10 June 2025 to appropriate suppliers to provide LTSM for schools in the province.⁶ The applicant ('Power Stationery'), an established supplier of LTSM to the Department, responded to the RFP and advanced through the evaluation process to the stage at which price was considered. The Consortium subsequently informed Power Stationery in August 2025 that its tender was unsuccessful. This prompted an investigation into that process, followed by the present proceedings, instituted by Power Stationery on an urgent basis, to challenge the process initiated by the Consortium and the rejection of its tender ('non-award decision').

[5] The following relief is being sought in the amended notice of motion:

1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, service, and time periods is condoned, and this application is dealt with as a matter of urgency under Uniform Rule 6(12).
2. It is declared that the second, third, and fourth respondents' ("**Consortium**") and first respondent's ("**Department**") purported delegation of the powers to make procurement decisions on behalf of or in the place of the Department, or to act as the Accounting Officer of the Department, to the Consortium, is unconstitutional and unlawful.

⁴ There are 4705 schools and 1 733 120 learners in the province from Grades R to 12.

⁵ Annexure 'KM7' to the Consortium's answering affidavit, Case Lines record ('CL') 003-128.

⁶ CL 001-258 – 281 annexures 'FA6' and 'FA7' to the Founding Affidavit ('FA').

3. It is declared that the Consortium and Department's abdication of the procurement obligations under section 217 of the Constitution and all of the legal and constitutional obligations of the Department, including those contained in the Department's Supply Chain Management Policy and the duties of the Accounting Officer, is unconstitutional and unlawful.
4. It is declared that the decision of the Consortium not to award the Stationery Tender to the applicant, or not to appoint the applicant as one of the successful suppliers ("**Non-Award Decision**") conveyed on or about 19 July 2025, is unconstitutional and unlawful and is reviewed and set aside.
5. The costs of this application, including the costs of two counsel, are to be paid jointly and severally by any respondents opposing it on scale C.
6. Further and/or alternative relief.

[6] The application is being opposed only by the Consortium and the first respondent, the relevant Member of the Executive Council ('MEC') in the province, who is the political head of the Department. The National Minister of Education⁷ has been cited as the sixth respondent, but (like the remaining respondents) has not entered the matter.

SUMMARY OF THE MATERIAL FACTS⁸

[7] In 2023, the Department issued Bid No. SCMU6-22/23 – 0019⁹ (being the Department Tender). As indicated, the bid was for the appointment of a project manager. The tender was awarded to the Consortium in April 2023, and the Consortium subsequently concluded an SLA with the Department on 2 August 2023. The SLA is

⁷ In terms of Schedule 4 Part A of the Constitution, school education is a functional area of concurrent National and Provincial legislative competence. Tertiary education is a national competency.

⁸ The relevant section in the applicant's heads of argument, as well as the Consortium's Plascon Evans factual matrix, which was filed with the leave of the court after the conclusion of the argument, was most helpful in the preparation of this summary.

⁹ The title is: 'Standard Bidding Document: Request For Proposal From Reputably Qualified Service Provider For Provisioning of Project Management Services, Which Shall Include Procurement, Warehousing, Inventory Management (Furniture) And Delivery Of Both Electronic And Paper Learning And Teaching Support Material (LTSM And ELTSM) For Period Of Three (3) Years With An Option To Renew The Contract For A Period Not Longer Than Two (2) Years At The Descretion (*sic*) Of The Eastern Cape Department Of Education, Informed By The Budget Availability, The Need Including The Performance Of The Service Prvider (*sic*)'.

valid for three years with an option to renew for a further two years. All obligations under the SLA have been fulfilled.

[8] Before the appointment of the Consortium in 2023, Power Stationery had been awarded a tender by the Department on 6 January 2022 to supply scholastic stationery.¹⁰ Power Stationery performed under the tender award for four academic years, from 2022 to 2025. The Department itself procured the supplies from Power Stationery (and other suppliers) during this time.

[9] During the above-mentioned four academic years, the Department continued to issue orders directly to suppliers (including Power Stationery, as evidenced by the order forms in the record)¹¹ and to make payments to suppliers.¹²

[10] Power Stationery (along with others) supplied the Department with school stationery up to the end of the 2025 academic year.¹³

[11] The Department terminated the tender in January 2025.¹⁴

¹⁰ Para 74 of the FA, CL 001-56 read with 'FA4' a copy of the tender/ the Department's invitation to bid for the supply and delivery of scholastic stationery to schools in the Eastern Cape, dated 16 August 2021, issued by the Department in its own name, and 'FA5', CL001-192 and 001-251 (a copy of the 6 January 2022 letter of award in favour of Power Stationery, also issued by the Department).

¹¹ Cf CL 006-29 annexure 'RA1' of the replying affidavit ('RA') to the Department's answering affidavit, being purchase orders issued to Power Stationery by the Department.

¹² Para. 74 of the FA, CL 001-56. In its answering affidavit, the Department states that 'since the signature of the SLA' pursuant to the Departmental Tender, the Consortium has 'contracted goods and services as sole supplier to the Department on a centralized basis' (paragraph 29 of the Department's answering affidavit, CL 005-11). This averment is in contention. Power Stationery has pleaded that it had a tender with the Department to provide stationery until the 2025 academic year. It (along with other suppliers) supplied the Department directly with stationery, not through the Consortium as the sole supplier. After the Consortium was appointed in 2023, it appears to have initially remained a service provider. In paragraph 69 of the Department's answering affidavit, CL 005-18, it is contended that Power Stationery failed to explain the earlier tender in its papers. This is doubtful. More importantly, the Consortium's attorneys admit the earlier tender in para 6 of their letter dated 3 September 2025, annexure 'FA18', CL 001-331. The same admission is contained in the Consortium's factual matrix.

¹³ Para 35 of the Preliminary RA, CL 006-21.

¹⁴ The termination letters for all the successful bidders in this tender are contained in the Consortium's Rule 53 record, CL 007.

[12] During 2025, at a time when the Department Tender had already been in place for two years, the Consortium began acting for the first time as the 'sole supplier' of goods to the Department rather than just as a project manager.¹⁵ That occurred at the stage when procurement of stationery for the 2026 academic year began.¹⁶

[13] On 10 June 2025, the Consortium issued a tender, referred to herein as the 'Stationery Tender'.¹⁷ The tender invited bids for the supply, warehousing, picking, packing, and delivery of stationery packs to schools in the Eastern Cape.

[14] The Stationery Tender set out the process for evaluating bids, which included an administrative evaluation, a functionality assessment, and the allocation of preferential points in terms of the Preferential Procurement Regulations promulgated under the Preferential Procurement Policy Framework Act No 5 of 2000 ('the Framework Act' or 'the PPPFA').¹⁸

[15] Power Stationery submitted its bid on 11 July 2025, provided the Consortium with physical 'sample packs' on 15 July 2025,¹⁹ attended a 'Quality Assurance Session' on 28 July 2025,²⁰ submitted a revised pricing schedule on 1 August 2025,²¹ and attended a second quality assurance review meeting on 5 August 2025.²²

[16] On 19 August 2025, the Consortium sent an email to Power Stationery informing it that its 'bid was not successful' because its price exceeded the approved budget.²³ This is referred to herein as the 'non-award decision'.

¹⁵ Para 32 of reply to the Department, CL 006-21.

¹⁶ Para 36 of reply to the Department, CL 006-22.

¹⁷ The Consortium invited companies, including Power Stationery, to submit a proposal in response to "REQUEST FOR PROPOSAL FOR SUPPLY, WAREHOUSING, PICKING AND PACKING OF STATIONERY PACKS TO ALL DESIGNATED SCHOOLS FOR THE EASTERN CAPE DEPARTMENT OF EDUCATION" (para 76 of the FA, CL 001-56 read with the Stationery Tender which is attached as "FA6", CL 001-257).

¹⁸ See para 80.2 of the FA, CL 001-57.

¹⁹ Para 84 of the FA, CL 001-59, read with FA9, CL 001-285.

²⁰ Paras 85-86 of the FA 001-59, read with the email attached as FA10, CL 001-288.

²¹ Para 88 of the FA CL 001-60, read with the email attached as FA11, CL 001-290.

²² Para 89 of the FA CL 001-60, read with the email attached as FA12, CL 001-292.

²³ Para 91 of the FA CL 001-61, read with FA13, CL 001-294.

[17] The Consortium and Department confirmed the following further facts in their papers:

- (a) Neither the Consortium nor the Department regarded the Consortium to be acting as an agent for the Department, but as principal; and neither regarded the Consortium, in so acting, as bound to act in accordance with the prescripts of the Promotion of Administrative Justice Act 2 of 2000 ('PAJA'), or the procurement rules applicable to organs of state (and the Department).²⁴
- (b) The Consortium crafted its own tender specifications, including those related to specification and price, and administrative compliance and functionality.²⁵
- (c) The Department was not involved in any decision-making under the Stationery Tender. The Consortium procured under the Stationery Tender without any involvement from the Department, including in respect of its assessment of the bids and the decision on the award of the Stationery Tender.²⁶ The only 'oversight' exercised by the Department (apart from update meetings with the Consortium) was by Department officials who attended two 'Quality Assurance' meetings.²⁷

²⁴ Para 17 of reply to the Department, CL 006-11.

²⁵ See paras 37-38 of the Consortium's answering affidavit, CL 003 -18.

²⁶ Para 36 of the Consortium's answering affidavit, CL 003 – 18. This is confirmed by the Department's answering affidavit, which states that there was no approval or ratification, and that no decision was taken by the Department (through its accounting officer).

²⁷ The Department stresses that it 'had no role to play' in the selection of suppliers (paragraph 17 of the Department's answering affidavit, CL 005-8) and the Consortium acted entirely 'independently' of the Department in procuring the goods which are the subject of the Stationery Tender (paragraph 30 of the Department's answering affidavit, CL 005-11). The Department states that it had 'nothing to do with the specifications, evaluation, adjudication and award of the [Stationery Tender]' (para 116 of the Department's answering affidavit, CL 005-26).

- (d) The non-award decision was not approved, ratified, or taken by the Department (through its accounting officer),²⁸ and there is no delegation in place authorising the Consortium to make decisions on behalf of the Department.
- (e) The Consortium procured in terms of a budgetary allocation/amount prescribed by the Department, and for which the Consortium paid upfront and then invoiced the Department, which in turn paid the Consortium.²⁹ The Department explained in more detail that '[i]f and when the Department experienced budget challenges, the PMA [Project Management Agency] was expected to procure all the required items. The PMA would then pay for what it had procured, only for it to be paid by the Department upon availability of the budget.'³⁰ Further, that 'the Consortium has had occasion to pay suppliers of stationery out of its own funds.'³¹
- (f) When performing its procurement functions under the Department Tender, by distributing learning materials, the Consortium provided 'an essential service providing basic education to learners', that the 'right of schoolchildren to basic education is a constitutional right' and that it did so to assist the Department because it 'cannot fulfil its constitutional obligation without the supply and distribution of stationery and textbooks'.³²
- (g) The Stationery Tender invited bids from service providers 'to supply, warehouse, pick, pack, and deliver all stationery packs to schools based on data supplied by THE AGENCY [the Consortium]'.³³

²⁸ Para 17.3 of reply to the Department, CL 006-12.

²⁹ Paras 24-25 of the Consortium's answering affidavit, CL 003-15.

³⁰ Department's answering affidavit para 18, CL 005-8.

³¹ Ibid. para 19, CL 005-9.

³² Paras 26-31 of the Consortium's answering affidavit, CL 003-15 to 17.

³³ Stationery Tender, CL 001-259: 'PROJECT BRIEF'.

- (h) The Consortium at no stage either considered or acted in accordance with the Department's Supply Chain Management ("SCM") Policy in executing the Stationery Tender.³⁴

BROAD STATEMENT OF THE PRINCIPAL ISSUES

[18] It is helpful to identify, in broad outline, the principal issues in the matter before addressing the merits of the application and the various other issues raised by the respondents.

[19] It is common cause that the Consortium procured learning materials for the 2026 academic year from suppliers and provided them to the schools in the province, without complying with the legal prescripts governing public-sector procurement.

[20] The applicant contends that the Consortium acted unlawfully because it exercised a public power and performed a public function, and was therefore bound by the legislative public-sector procurement framework. In any event, the Department could not lawfully delegate or abdicate its procurement decision-making power to the Consortium. Its conduct, therefore, falls to be declared unconstitutional and invalid and set aside.

[21] The case of the Consortium and the Department is that the Consortium's conduct was authorized by the Department Tender, which was regularly awarded to it after due compliance with all public-sector procurement prescripts. The tender rendered it the sole supplier of the relevant goods to the Department. This was confirmed by the terms of the SLA. It procured the goods from other suppliers pursuant to the Stationery Tender

³⁴ Para 40 of the Consortium's answering affidavit, CL 003-19. The Department states that the SCM Policy applicable to the tender would have been the Consortium's, CL 005-26, para 114.1. The Consortium, on the other hand, does not say that it acted in terms of any SCM Policy and describes the process it followed as 'purely contractual in nature', CL 003-19 para 40.

while acting in its private capacity in compliance with its contractual obligation to, in turn, supply the goods to the Department. Its acquisition of the goods occurred in the course of normal commercial activity and was not restrained by the public-sector procurement prescripts, which were inapplicable in the circumstances. While they accept the legal position that private entities engaging in public procurement are bound to comply with the applicable public law framework, they contend that, as a matter of fact, and contrary to the applicant's contention, the Consortium was not engaged in public procurement in executing the Stationery Tender. It was not performing a public function or exercising a public power. The applicant accordingly failed to make out a case for the relief it is seeking, and the application falls to be dismissed.

[22] It is readily apparent that the central, crisp issue is the true nature of the Consortium's actions in acquiring the goods. If this were purely a private commercial exercise (and not public procurement) to which the said prescripts did not apply, its conduct is unassailable. *Aliter*, if the prescripts do apply.

[23] A further issue is whether it is competent for the applicant to challenge the Consortium's conduct pursuant to the Stationery Tender without impugning the Department Tender or the SLA; furthermore, whether the Department could lawfully delegate its procurement decision-making to a third party, such as the Consortium.

LEGISLATIVE AND LEGAL FRAMEWORK REGULATING PUBLIC PROCUREMENT

The relevant statutory provisions

[24] To recap, public procurement (procurement by or for Government or the State) is regulated by section 217 of the Constitution, along with several cognate statutes that give effect to it.

[25] Chief among those statutes for present purposes is the Public Finance Management Act, 1 of 1999 ('PFMA'), which is to be read with the Treasury Regulations

made thereunder and promulgated in Government Notice No. GNR 225 published in the Government Gazette No. GG 27388 of 15 March 2005 ('Treasury Regulations')³⁵ and also the Preferential Procurement Policy Framework Act 5 of 2000 ('the Framework Act') and regulations³⁶. These statutory prescripts have a common objective: to promote a 'fair, equitable, transparent, cost-effective and competitive' process for procuring goods or services from service providers.³⁷

[26] Section 38(1)(a)(iii) of the PFMA stipulates that an accounting officer for a Department must ensure that the Department has and maintains 'an appropriate procurement or provisioning system which is fair, equitable, transparent, competitive and cost-effective', thus echoing the provisions of section 217(1) of the Constitution.

[27] These statutory prescripts are aimed at 'ensuring good governance in the field of procurement policies and procedures and the priority accorded to fair dealing and equitable relationships among parties to provincial contracts' and 'to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts'.³⁸

The Legal Framework

(i) Accountability of Private Bodies

³⁵ *TEB Properties CC v The MEC, Department of Health and Social Development, North West* (792/10) [2011] ZASCA 243 (01 December 2011) ('TEB') paras 14-15; *Chief Executive Officer, SA Social Security Agency NO & Others v Cash Paymaster Services (Pty) Ltd* 2012(1) SA 216 (SCA) para 15-17.

³⁶ The Preferential Procurement Regulations were promulgated in Government Notice No. 2721 and published in Government Gazette No. 47452 dated 4 November 2022. Its 2017 predecessor was set aside pursuant to a constitutional challenge. It is not immediately apparent how the 2022 regulations will be affected by the legal challenge to the Public Procurement Act, which the Constitutional Court heard on 18-19 May 2026, when judgment was reserved, cf n1 above.

³⁷ See *TEB* para 7.

³⁸ *Eastern Cape Provincial Government & Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) paras 7-8.

[28] While contracting out state functions is not in itself unlawful,³⁹ the appointee's private nature does not immunize it from scrutiny under constitutional standards. When a private entity performs the work or exercises the powers associated with public entities, it also exercises a public power.

[29] This is a long-established principle in administrative law. In *Dawnlaan Beleggings*⁴⁰, a case decided before the Constitution, the court reviewed the Johannesburg Stock Exchange's ('JSE') failure to comply with its own listing requirements. While the JSE is not a statutory body, the court took into account its important public function and concluded that its decisions are subject to judicial review.⁴¹

[30] The rationale for this approach is self-evident. It would be anomalous if public law applied when a public entity performs a function but not when a third party performs the same function. If it was properly regarded as a public function when performed by the public entity itself, its nature is not changed when the same function is performed by a private body to whom the power might have been outsourced.⁴² Any contrary conclusion would create an 'accountability vacuum' – as the exercise of public power could escape the rigours of public law by formalistic allocation of powers to private parties.⁴³ It is in that context – and to 'fill the accountability vacuum' – that courts apply judicial review standards to private bodies.⁴⁴ As the Constitutional Court indicated, '[o]ur Constitution

³⁹ See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* 2007(1) SA 343 (CC) para 22 ('*AAA Investments*').

⁴⁰ *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & others* 1983 (3) SA 344 (W).

⁴¹ *Ibid* at 365B.

⁴² C Hoexter & G Penfold *Administrative law in South Africa* 3 ed (2021) at 289 ('Hoexter').

⁴³ Hoexter *op cit* at 205.

⁴⁴ See *R v Panel on Take-Overs and Mergers, ex parte Datafin plc and Another (Norton Opax plc and Another Intervening)* [1987] 1 All ER 564 (CA), where the English Court of Appeal had decided that the Panel on Take-Overs & Mergers, a self-regulating unincorporated association operating the City of London Code on Take-Overs & Mergers, having prescribed a code of conduct regulating take-overs, was subject to judicial review when acting in terms of its rules. The court held that not only the source but also the nature of the power exercised by private bodies must be examined. It concluded that the Panel performs a public duty or exercises a public law function, rendering it subject to judicial review; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* [1988] 2 All SA 308 (A), approved a similar approach adopted in *Dawnlaan Beleggings* (n 39 above).

ensures that government cannot be released from its . . . obligations simply because it employs the strategy of delegating its functions to another entity'.⁴⁵

[31] The courts have routinely observed this principle and repeatedly stressed the strict application of public procurement rules and the accountability of private parties performing public functions on behalf of the state. In *Allpay II*,⁴⁶ a private company (Cash Paymaster Services (Pty) Ltd, 'CPS') was held by the Constitutional Court to qualify as an organ of state because it acted in furtherance of the right to social security in section 27 of the Constitution. Froneman J observed that CPS 'plays a unique and central role as the gatekeeper of the right to social security and effectively controls beneficiaries' access to social assistance. For all practical purposes, it is not only the face, but also the operational arm, of the "administration in the national . . . sphere of government", insofar as the payment of social grants is concerned.⁴⁷

[32] The court found that this status had very significant implications, including public scrutiny of the private entity's operations 'dependent on, or derived from, the performance of public functions'.⁴⁸ It is settled law that a private entity exercising public powers or performing public functions is not relieved of the duties that attach to the power or function. The court affirmed this position in several cases.

[33] In *Allpay II*⁴⁹, the court stressed, in explaining why CPS's assumption of duties towards social grant beneficiaries did not relieve SASSA of its duties:

... SASSA does not, by the conclusion of the contract, divest itself of its constitutional responsibility and public accountability for rendering the public services. It remains accountable to the people of South Africa for the performance of those functions by Cash Paymaster.

⁴⁵ *AAA Investments* above n 38 para 40.

⁴⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) 2014 (4) SA 179 (CC) ("*Allpay II*").

⁴⁷ Para 55 (footnotes omitted).

⁴⁸ Para 59.

⁴⁹ Above n 46.

. . . When Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs.

. . . The commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects.⁵⁰

[34] The court in *AAA Investments*⁵¹ made this principle clear, where it held: ‘Our Constitution ensures, as in Canada and the United States, that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity’⁵².

[35] The court more recently considered this issue in *Pridwin*⁵³. That case concerned section 29 and arose in the context of access to basic education provided by a private party, in respect of a child’s exclusion from an independent school. The Constitutional Court confirmed the existence of a negative duty on a private (independent) school not to infringe the child’s right to basic education.⁵⁴

[36] Another noteworthy Constitutional Court case that emphasises the above principle is *Grinpal*⁵⁵. It concerned a private entity, City Power (the appellant), which was engaged by the Johannesburg Municipality as an external service provider in respect of the statutory obligation to supply electricity to its residents, thereby performing public functions. Relevant to the present matter, the court characterised *City Power* through its functions as follows (*at para 23*):

⁵⁰ Ibid paras 58-59.

⁵¹ Above n 39.

⁵² Ibid para 40.

⁵³ *AB & Another v Pridwin Preparatory School & Others* 2020(5) SA 327 (CC).

⁵⁴ See also *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC), where Cameron J held: ‘[74] . . . the predominant focus is on the nature of the power that is being exercised. The question is not so much, who exercises the power, nor even, where does the power come from: but what does the power look and feel like? What does it do? Pointers here include: (a) the source of the power; (b) the nature of the power; (c) its subject matter; and (d) whether it involves the exercise of a public duty.’

⁵⁵ *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* 2015 (6) BCLR 660 (CC).

Similarly, City Power, like SASSA, is a private company performing a public function. The fact that it performs a public function bears relevance in its classification and cannot be ignored. As in *AllPay 2*, once City Power concluded the service level agreements, it delegated some of its functions to Grinpal which, as a result, also became a municipal entity for those functions, and only in so far as that section of its business was concerned. For the purposes of the present dispute, Grinpal and City Power are organs of state that perform public functions akin to those of a municipality. The Johannesburg Municipality cannot avoid its constitutional obligations and public accountability for the rendering of public services by forming a municipal entity like City Power. It remains accountable to the people of South Africa for the performance of those functions by City Power. Likewise, City Power cannot avoid its constitutional obligations and public accountability by dedicating its functions to Grinpal.

[37] Most recently, in *Black Sash*⁵⁶ (which is a sequel to *AllPay II*), the Constitutional Court stated (*at para 28*):

It bears emphasis, further, that this Court in *AllPay II* declared CPS to be an organ of state with all the concomitant constitutional duties and obligations. This Court emphasised CPS's constitutional tasks and obligations by virtue of the contract it had concluded with SASSA to handle the administration of social pensions. And pointed out that "[w]hen Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired, and the public function it performed.

[38] The Supreme Court of Appeal ('SCA') also confirmed this principle in several cases. In *Umfolozu Transport*⁵⁷ the court found in the same vein that all steps that formed part of the public procurement process undertaken by a 'private' entity were administrative action. The court rejected an argument that the appellant was acting in a 'private-law' capacity.

⁵⁶ *Black Sash Trust & Another v Minister of Social Development & Others* [2026] ZACC 12 (8 April 2026).

⁵⁷ *Umfolozu Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A).

[39] In *Agribee*⁵⁸ it rejected the contention that, because of the private nature of the relevant entity and the project being pursued (funding for beef farmers), the arrangement was unregulated under section 217. The court found instead that the project 'fell within the core functions of the [State].'⁵⁹

[40] In *NAD Property*⁶⁰, the court indicated that the exercise of the procurement function is typically administrative and a matter of public law, subject to the laws governing the exercise of public power. The court held:

[10] Public entities conduct procurement under exacting laws for reasons of transparency, fairness, competitiveness, accountability, and public service delivery. The procurement laws, binding upon organs of state, flow from s 217(1) of the Constitution.

[11] In this particular case, we are concerned with the constitutional legality of the agreement, based on the non-compliance with s 217 of the Constitution, as well as the provisions of the MFMA. This was at the heart of the dispute that the Arbitrator was required to adjudicate upon. It involved the procurement of services that were unavoidably a matter of public law and could not fall in the domain of issues to be determined other than by a court. The Arbitrator was well aware of the fact that the validity of the construction agreement was challenged on the basis of its constitutional invalidity for lack of compliance with the provisions of s 217 of the Constitution and the provisions of the MFMA, and on no other basis.

[12] Public procurement is subject to laws that concern the exercise of public powers. When the municipality contracted with NAD, it was not merely exercising a private law competence, but its powers as an organ of state. The ground of invalidity pleaded was that the agreement was invalid by virtue of its failure to comply with the duties of the Municipality to adhere to the requirements of lawful procurement as a matter of public law. The question is thus whether the lawful exercise of public powers and the remedies for their unlawful exercise are matters that can be decided by a referral to arbitration. The general answer is no because it is courts that supervise the exercise of public power

⁵⁸ *Eastern Cape Development Agency & Another v Agribee Beef Fund (Pty) Ltd & Others* 2023(5) SA 100 (SCA).

⁵⁹ *Ibid* para 33.

⁶⁰ *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Others* 2026(2) SA 426 (SCA).

and provide remedies under the Constitution, and the scheme of review provided by legality and the Promotion of Administrative Justice Act 3 of 2000.

[41] It is apparent from the court's decision in *SALGA*⁶¹ that the public-law nature of power is not derogated from by the fact that a commercial contractual relationship resulted from the exercise of that power, which remains susceptible to judicial review regardless. The court rejected the Bargaining Council's argument that the collective agreement in issue was a private agreement and held that, by extending the agreement's application, it impermissibly purported to exercise a public power or perform a public function. The court indicated:

[122] There can be no doubt that when a bargaining council arrogates to itself the power to extend the application of a CA [Collective Agreement] to retirees and non-unionised employees in the manner in which the CA does, it impermissibly purports to exercise a public power or perform a public function which may only be performed by a member of the Executive (i.e. the Minister) in terms of legislation (i.e. s 32 of the LRA), thereby making the CA susceptible to judicial review.

[42] Any competence enjoyed by a private entity 'to secure public goods that reaches beyond mere private advancement' amounts to discharging a public power or function and 'attracts the supervisory discipline of public law.'⁶² As the Constitutional Court explained in *AAA Investments*, an entity 'does not have to be part of government or the government itself to be bound by the Constitution as a whole'.⁶³

[43] The Constitutional Court in *SARFU*⁶⁴ pointed out that it is the nature of the power that must be considered to determine if it is public. A purely institutional test is insufficient. Accordingly, it is not the functionary (or its private-law nature) but the

⁶¹ *South African Local Government Bargaining Council and Others v Municipal Workers Retirement Fund and Others* (770/2023) [2025] ZASCA 120; 2026(1) SA 477 (SCA) (21 August 2025).

⁶² *Ndoro and Another v South African Football Association and Others* 2018(5) SA 630 (GJ) para 23.

⁶³ Above n 39 para 41.

⁶⁴ *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 141.

function that is critical.⁶⁵ The mere fact that the power is exercised by a private entity does not mean that it is inexorably private in nature.

[44] Based on the above principles, it follows that if it exercised a public power or performed a public function in procuring LTSM under the Stationery Tender, the Consortium cannot escape scrutiny under the public procurement legal framework merely by virtue of its private status.

[45] The preceding question, however, is whether the Consortium can exercise the Department's procurement decision-making power at all. Is it competent to empower a private party to assume the power and responsibility of an organ of state in respect of deciding the award of tenders for the procurement of public goods and services? It is to that question that I now turn.

(ii) Principles of Delegation

[46] It is generally accepted that the State may delegate its regulatory powers or use private entities to perform its duties and functions. The Supreme Court of Appeal ('SCA') has referred to '*the increasing use by the State of private law institutions, notably contract, to perform its duties. This takes place by privatization, delegation, outsourcing, etc.*'⁶⁶ South Africa, following the lead of other countries, has privatized or contracted out some functions traditionally performed or provided by the government, from maintaining roads and running prisons to providing water and electricity.⁶⁷

[47] The delegation of public procurement decision-making (especially awarding tenders), however, cannot be equated to the commonplace outsourcing of the

⁶⁵ *Minister of Defence and Military Veterans v Motau and Others* 2014(5) SA 69 (CC) para 36 ('Motau').

⁶⁶ *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) ('Goodman Brothers') para 31.

⁶⁷ Hoexter *op cit* n 42 at 202.

responsibility to perform state functions, such as distributing electricity⁶⁸, or security services⁶⁹, or administering social grants.⁷⁰

[48] No decided case came to my attention holding that the core constitutional function of public procurement decision-making may be lawfully outsourced to a third party pursuant to an agreement to that effect. Where procurement functions have been delegated at all, that has arisen from a legislative enactment, not by ad hoc delegation or contracting. One such example was in *Steenkamp*⁷¹, where the Constitutional Court explained the role of the provincial tender board in these terms:

It will be remembered that the provincial tender board is the successor in title to the State Tender Board within its province. It owes its establishment to provincial legislation. It exercises exclusive power to procure supplies and services for the province, to enter into or terminate procurement agreements on its behalf, and could claim damages presumably for breach of a supply contract to which it is a party. It is duty-bound to exercise its powers fairly, impartially, and independently, although, in the main, it acts as a procuring agent for the provincial government.

[49] The delegation of powers and duties by accounting officers of a department is regulated by section 44 of the PFMA.⁷²

⁶⁸ For example, in *Grinpal* above n 55, where City Power performed a public function by providing electricity to the local community.

⁶⁹ *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others* (590/2024) [2025] ZASCA 179 (28 November 2025) (“*Mafoko*”).

⁷⁰ Such as in *Allpay II*.

⁷¹ 2007(3) SA 121 (CC) para 34.

⁷² Section 44 provides:

- (1) The accounting officer for a department, trading entity, or constitutional institution may-
- (a) in writing, delegate any of the powers entrusted or delegated to the accounting officer in terms of this Act, to an official in that department, trading entity, or constitutional institution; or
 - (b) instruct any official in that department, trading entity, or constitutional institution to perform any of the duties assigned to the accounting officer in terms of this Act.
- (2) A delegation or instruction to an official in terms of subsection (1)-
- (a) is subject to any limitations and conditions prescribed in terms of this Act or as the relevant treasury may impose;
 - (b) is subject to any limitations and conditions the accounting officer may impose;
 - (c) may either be to a specific individual or to the holder of a specific post in the relevant department, trading entity, or constitutional institution; and

[50] The PFMA does not empower an accounting officer to delegate any power or function (which includes the procuring function) to a private entity. In terms of section 44(1), it may only be delegated to 'an official in that department, trading entity or constitutional institution'.

[51] Under the PFMA, a department means 'a national or provincial department or a national or provincial government component.'⁷³ A trading entity 'means an entity operating within the administration of a department for the provision or sale of goods or services, and established (a) in the case of a national department, with the approval of the National Treasury; or (b) in the case of a provincial department, with the approval of the relevant provincial treasury acting within a prescribed framework.'⁷⁴ A constitutional institution 'means an institution listed in Schedule 1'. It is not in contention that none of these includes the Consortium or any other such private party.⁷⁵

[52] The prescriptions of section 44 of the PFMA are clear and permit the delegation of public procurement decisions only to particular public officials, not to a private party.

[53] This is so for good reason. Public procurement is a core government function assigned to the accounting officer/accounting authority, who may delegate it to designated public officials who remain under the accounting officer's control. Section 44(2)(d) of the PFMA provides that such a delegation 'does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.'

(d) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The accounting officer may confirm, vary, or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision.'

⁷³ Cf s1, *Definitions*.

⁷⁴ *Ibid*.

⁷⁵ Under the PFMA, Schedule 1 lists the following as "constitutional institutions": 1. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; 2. The Commission on Gender Equality; 3. The Financial and Fiscal Commission; 4. The Independent Communications Authority of South Africa; 5. The Independent Electoral Commission; 6. The Municipal Demarcation Board; 7. The Pan South African Language Board; 8. The Public Protector of South Africa; 9. The South African Human Rights Commission.

[54] In *AAA Investments*, the Constitutional Court addressed the same issue of delegation and its lawful ambit in the context of rule-making.⁷⁶ The late Chief Justice Langa, in his separate judgment, was not prepared to accept that the power to make rules for the microfinance industry (which was assigned to the relevant Minister) could be transferred to a private party.⁷⁷ He reached this conclusion by having regard to the following considerations:

The powers given to the Minister in section 15A relate to the determination of policy. They are given to him because of his position as an accountable member of government. It seems to me that they should, to the extent that they involve the determination of policy, be exercised by him.

[55] The Learned Chief Justice proceeded to identify the following factors in determining whether a lawful delegation could take place:

(a) Firstly, 'in general, powers that have far-reaching impact or that involve the exercise of a large degree of discretion or are legislative in nature are less likely to allow for sub-delegation than less important administrative or executive powers that can be mechanically applied'. It follows that the important constitutional function served by public procurement, coupled with the court-recognised and disconcerting potential for widespread abuse of public funds⁷⁸, supports the conclusion that no delegation is possible.⁷⁹

(b) Secondly, even where delegation was possible, 'the total delegation of a power is less likely to be permitted than its partial delegation'. Where partial delegation

⁷⁶ Above n 39.

⁷⁷ *Ibid* para 84.

⁷⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) ('*Allpay I*'), para 27: 'deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may be deliberately skewed. Hence, insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'

⁷⁹ *AAA Investments* above n 39 para 86.

occurs, ‘the level of control maintained by the original functionary over the delegated power is very important’.⁸⁰ The delegation of less important administrative tasks (short of the actual award of a tender) is thus more likely to pass muster.

(c) Thirdly, the nature and importance of the delegator and that of the delegee are also relevant, as well as the maintenance of accountability. It was noted ‘that accountability is a central value of our Constitution. This means our law must be developed and interpreted to ensure that all bodies exercising public power are held accountable. However, to my mind, it also means that courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes.’ The Consortium naturally falls in the latter category.

(d) Finally, the Learned Chief Justice noted that the Minister is a very important member of the government, who is directly accountable. Needless to say, so is the MEC and the Department in this case.

[60] It should be added that the latter consideration applies equally to the accounting officer or accounting authority of institutions regulated by the PFMA, such as the Department. The accounting officer is responsible for developing supply chain management systems, ensuring legal compliance, and maintaining budgets.⁸¹ By virtue of section 32 of the PFMA, the accounting officer can be held personally liable for the intentional or negligent incurrence of irregular expenditure, thus ensuring sound and sustainable management of the fiscal and financial affairs of public institutions, accountability, and lawful expenditure of public funds.⁸² It is to be noted that none of these provisions (which are safeguards regarding the conduct of accounting officers) is intended to bind private parties. Delegating the accounting officer's procurement decisions to a private party would thus *prima facie* circumvent these statutory requirements.

PRELIMINARY ISSUES

⁸⁰ *Ibid* para 87.

⁸¹ *Zeal Health Innovations (Pty) Ltd v Minister of Defence and Military Veterans and Another* (967/2023) [2024] ZASCA 183 (27 December 2024) para 12 (“*Zeal*”).

⁸² *Ibid* para 56.

[56] The respondents raised various preliminary issues that require attention before proceeding to the merits of the matter. These issues will be dealt with and assessed in turn.

Urgency

[57] The respondents contend that no true urgency exists. They submit with reference to *Caledon Street Restaurants*⁸³ that the applicant failed 'to demonstrate sufficient real loss or damage were [it] to be compelled to rely solely or substantially on the normal procedure', primarily because it does not seek any consequential relief pursuant to the declaratory orders being pursued. There has furthermore been a material delay in launching the proceedings in that the Department Tender was awarded to the Consortium in July 2023, while the application was only launched some two years and three months later in October 2025. In addition, this was four months after the Stationery Tender was issued. The contracts concluded with suppliers under the Stationery Tender were fully performed and expired on 31 March 2026. The Consortium's appointment under the Department Tender will expire on 19 July 2026, subject to a possible two-year extension. Moreover, the issues in the matter have no practical consequence, and the relief is academic in substance. It should not be entertained by the court on the authority of *Eagles Landing Body Corporate*.⁸⁴ The respondents accordingly contend that any urgency was self-created and that the applicant has failed to show any prejudice that would result from not being able to obtain substantial redress at a hearing in due course. They rely in this regard on *Mogalakwena Local Municipality*.⁸⁵ Finally, it was submitted that the applicant seeks to secure an advisory opinion on abstract issues, which is impermissible and should be disallowed in the interests of justice and the matter struck from the roll.

⁸³ *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE) pp. 7–9.

⁸⁴ *Eagles Landing Body Corporate v Molewa NO & Others* 2003(1) SA 412 (T).

⁸⁵ *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo & Others* [2014] 4 All SA 67 (GP) at para 64.

[58] The applicant retorts that the respondents' argument of delay is based on a misapprehension of the applicant's case, which does not involve a complaint regarding the Department Tender or its award to the Consortium. The complaint relates to the Consortium's conduct in July 2025 in procuring public goods under the Stationery Tender without complying with the rules governing public procurement. The application was launched after reasonable investigations to clarify the Consortium's conduct, rather than rushing into legal proceedings that might prove unnecessary, an approach sanctioned by *Centre for Child Law*.⁸⁶ The prejudice flowing from following the normal procedure is that the impugned conduct will be repeated in the next round of procurement set to commence no later than June 2026 for the 2027 academic year and even beyond, while litigation remains pending. The matter importantly concerns a serious violation of the rule of law and involves constitutional issues for determination. In any event, the matter has been postponed to the opposed court on full papers, which militates against the urgency complaint.

[59] In my view, there is merit in the applicant's contention that the respondents mischaracterised its case as directed at the Department Tender, rather than at the conduct of the Consortium, which manifested only in July 2025. On this basis, there has clearly been no unreasonable delay in launching these proceedings. The applicant has adequately explained the steps it took, without receiving much cooperation from the respondents, to obtain the information required to decide whether to launch proceedings, urgently or otherwise. It cannot be justifiably criticised in this regard.

[60] It is also so that should the issues raised herein not be resolved before the next round of procurement, the applicant stands to be prejudiced by the conduct it complained about being continued into the 2027 academic year and beyond, while litigation in the normal course plays out through the hierarchy of courts.

[61] I agree that any prejudice or inconvenience occasioned to the respondents by any abridgment of the time periods in the rules of court has been adequately mitigated by the fact that the matter was enrolled for a two-day hearing and fully argued before the

⁸⁶ *Centre for Child Law & Others v South African Council for Educators* 2024(4) SA 473 (SCA).

opposed court. Full papers and heads of argument, as well as supplementary heads of argument and a post-argument note from the Consortium, together with the applicant's response, were available to the court. The following dicta in *Mogalakwena*⁸⁷ are apposite:

[64] These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant, and any delay by the applicant in asserting its rights.

. . .

[68] In addition, the respondents have put what they wanted to before the court. This Division has a proud tradition of making judges available at short notice for cases which deserve prompt attention. This is such a case. There was no prejudice to the administration of justice: this case alone was assigned to me for hearing on the day it came before me. So, no other litigants were prejudiced by the applicant's effort to promote itself in the queue of pending cases.

[69]. Weighing all this, I hold that the matter is urgent and permit it to remain on the roll for hearing.

[62] In any event, the important constitutional issues raised in the matter, which are not academic, require determination sooner rather than later in the public interest, relating as they do to the provision of learning materials to all schools in the Eastern Cape Province. I am accordingly satisfied that the matter is sufficiently urgent and that it should remain on the roll and be determined on its merits.

Mootness

[63] The respondents submitted that the matter is moot, in that the Department Tender will expire on 19 July 2026 and that the procurement under the tender is complete. Accordingly, the outcome of the case would have no practical effect and is of academic

⁸⁷ Above n 85.

interest only. There is also no basis for the court to exercise its discretion to hear the matter in the interests of justice, despite it being moot.

[64] The applicant accepts that mootness is relevant to the non-award decision, which relates to a process that has been finalised, but not to the declaratory relief, which does not pertain only to past conduct or events. It contended that, according to their respective versions, the Department and the Consortium intend to continue engaging in such conduct, which they do not regard as unlawful. The impugned conduct is accordingly ongoing, and in the context of the present matter, none of the issues is moot.

[65] In *National Coalition for Gay and Lesbian Equality and Others*⁸⁸ the Constitutional Court said: 'A case is moot and therefore not justiciable, if it no longer presents an existing live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law'.

[66] I am not persuaded that any of the issues in this matter are moot. In my view, there is a reasonable possibility that the appointment of the Consortium under the Department Tender will be extended for a further two years, as provided. The applicant has invited the respondents in its papers to deal directly with the issue of the extension, which they declined to do. Counsel for the Department made the remarkable submission that because this invitation was contained in the reply to the Consortium's answering affidavit, the Department did not need to respond to, or even read, the reply. This attitude is to be lamented and is not in line with the Department's responsibility for openness, which rests on organs of state when preparing court papers or in their dealings with the court. In *Public Protector*,⁸⁹ the Constitutional Court explained that:

⁸⁸ *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000(2) SA 1(CC) at para 21.

⁸⁹ *Public Protector v South African Reserve Bank* 2019(6) SA 53 para 152. See also *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus Curiae)* 2018(10) BCLR 1291 (CC para 38; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014(5) BCLR 547 (CC) para 82.

The constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right, and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.

[67] In my view, it is justified to approach the case on the basis that the reasonable possibility of a two-year extension is not excluded.

[68] Insofar as the non-award decision is concerned, there is accordingly a reasonable likelihood that the Consortium would in future repeat the impugned process which it followed in relation to the Stationery Tender. Given the importance of the issue, it is in the interests of justice and the public interest also to determine the issues relevant to the non-award decision.

[69] It follows that there is no merit in the contention that the matter is moot.

Peremption

[70] This doctrine has been described as follows in *South African Revenue Service*:⁹⁰ 'Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's, self-resignation to the unfavourable order that could otherwise be appealed against'. The underlying principle is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approbate and reprobate'.⁹¹

[71] The Department raised this issue in its heads of argument where it was submitted that by participating in the Stationery Tender, the applicant 'communicated to the world that it had no problem with the Consortium's exercise of its powers in terms of its

⁹⁰ *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017(1) SA 549 (CC) at para 26 ('*South African Revenue Service*').

⁹¹ *Hlatshwayo v Mare & Deas* 1912 AD 242 at 259.

contractual arrangement with the Department'.⁹² It, however, accepted that some flexibility applies to the enforcement of the doctrine where policy considerations militate against it. It contended that no such considerations have been shown to apply in this matter. I should add that the issue of pre-emption has not been raised in oral argument by counsel for the Department and was not raised at all by the Consortium.

[72] The applicant contended in its heads of argument that the Department's reliance on the doctrine of pre-emption must fail on both the facts and the law. The unlawful conduct was revealed only much later, after inquiries into the adjudication of the Stationery Tender exposed what had transpired, and the full extent of the conduct was confirmed only in the affidavits in this matter. The applicant could thus, as a matter of fact, not have acquiesced. The Constitutional Court in *South African Revenue Service*⁹³ stressed that peremption is never lightly presumed. The test is not met, and in any event, the impugned conduct is unlawful, a legal conclusion that arises despite the applicant's participation in the tender. The Department's argument amounts to a claim of estoppel, which has been rejected as a legal defence to a claim of unlawfulness.⁹⁴ Prior participation in the Stationery Tender cannot extinguish the applicant's right to approach the court or the court's constitutional obligation to deal with the matter.

[73] I agree with the applicant's submissions that no case has been made out for sustaining a defence of peremption in the circumstances.

Joinder

[74] The Consortium contends in its heads of argument that the proceedings should be stayed pending the joinder of some 189 suppliers and distributors participating in the tenders, or that the application be dismissed, since each has a direct and substantial legal interest in the declaratory relief sought. It argued that the matter cannot be properly adjudicated in the absence of these parties, nor can an effective order be

⁹² Department's heads of argument para 30.

⁹³ Above n 90 para 26.

⁹⁴ *Trust Bank van Afrika Bpk v Eksteen 1964(3) SA 402 (A) at 411H-412B; City of Tswane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008(3) SA 1 (SCA).*

granted. This issue was, however, not seriously pressed in argument by the Consortium's counsel.

[75] The applicant addresses this issue in its heads of argument and in the note in support of its oral reply. It contends that all interested parties have been joined, and that the complaint of non-joinder of the Consortium's suppliers and all the competitors for the Department Tender is based on a misapprehension of the declaratory relief sought. The focus of such relief is to clarify the confines of the Consortium's appointment and constitutionally impugn the Department's abdication of its functions and duties. No consequential relief is sought. In any event, parties with only a financial or commercial interest have no direct legal interest that requires joinder.

[76] I agree with the applicant's submission that there is no need to join the 189 parties referred to by the Consortium. The declaratory relief in respect of the Consortium relates to its conduct in failing to comply with the public procurement legal framework. Insofar as the Department is concerned, the declaratory relief relates to the averred abdication of its functions and duties. The suppliers and distributors have no direct legal interest in such relief. There is accordingly no merit in this issue.

Standing

[77] The Consortium advanced the argument in its supplementary heads of argument that the applicant lacks standing and has no remedy at its disposal, given that it fails to challenge the Department Tender, which is the source of the Consortium's impugned conduct. Further, the applicant's failure to participate in the Department Tender deprives it of standing to challenge that tender.

[78] The applicant indicated that it does not challenge the Department Tender. Its standing arises in its own right, directly as a participant in the impugned process conducted by the Consortium, and in the public interest regarding the unlawful abdication of power, which manifested from 2025 onwards in the implementation of the

Department Tender. As a party affected by the impugned conduct of the Consortium, the applicant's rights are affected, and its interest in the lawfulness of the Consortium's procurement conduct is not collateral but immediate and personal. It 'self-evidently' has standing by virtue of the public power challenge in issue.

[79] I cannot agree with the Consortium that the applicant lacks standing because it does not challenge the Department Tender. In my view, it has standing to pursue the relief in issue as a direct participant in the Stationery Tender and in the public interest, so far as the declaratory relief involving the Department is concerned. A broad approach to standing is taken in challenges to the exercise of public power. The Constitutional Court in *Municipal Employees Pension Fund*⁹⁵ held as follows:

In addressing Mr. Swanepoel's standing, as executor, to bring the application, this Court said: 'Section 38 of the Constitution provides a broad scope for legal standing. Mr. Swanepoel seeks to act on behalf of the late Ms. Steyn in a review application in which he alleges that a right in the Bill of Rights has been infringed. He plainly falls within the purview of section 38. Further, given that the review of public power is a constitutional matter, a broad approach to standing must be taken. As stated, this is a PAJA review, which seeks to determine whether administrative action is lawful or not, the outcome of which binds not only litigating parties, but everyone else. The review of administrative action therefore attaches not to the party bringing the review (the applicant), but to the exercise of public power itself. These rights are thus not of a "purely personal nature". Therefore, self-evidently, Mr. Swanepoel has standing to be substituted in the review application. (emphasis supplied)

[80] I should add that the Consortium's counsel also did not press this issue of standing during argument. In any event, it lacks merit.

Subsidiarity

⁹⁵ *Municipal Employees Pension Fund v City of Johannesburg Metropolitan Municipality & Others* 2026(2) SA 345 (CC) para 43.

[81] The Consortium belatedly raised the issue of subsidiarity in its supplementary heads of argument. The issue was addressed only in passing during oral argument by its counsel and does not require extensive attention. The argument appears to be that the applicant's complaint is based on a statutory illegality that required the applicant to ground its attack on the statute and that the applicant was precluded from relying on the Constitution as it is doing.

[82] The applicant contended in its heads of argument that the Consortium's position is based on a misapprehension of the pleadings and the legal position concerning this principle. It explained that the pleadings set out the statutory framework comprehensively to demonstrate that the respondents conducted themselves in violation thereof, thus impelling a finding of constitutional inconsistency and a declaration in terms of section 172(1)(a) of the Constitution. The applicant seeks a constitutional remedy – not the direct enforcement of a constitutional right. The subsidiarity principle is directed at the latter class of relief and does not bar relief under section 172(1)(a). It further submitted that, in any event, no legislation fully covers this aspect, thereby precluding recourse to the constitution rather than the legislation as provided by the principle.

[83] The subsidiarity principle, as formulated in *My Vote Counts*⁹⁶ operates to prevent a litigant from bypassing legislation enacted to give effect to a constitutional right to enforce that right directly under the Constitution.

[84] The Constitutional Court indicated that the principle is not a hard and fast rule and typically applies only where both the following prerequisites are met: (i) the Constitution imposes a specific obligation on the legislature to pass legislation to give effect to a constitutional right, such as the provisions of sections 32 and 33 of the Constitution; and (ii) the legislature passed legislation it intended to completely and comprehensively give effect to a constitutional right (i.e. to 'cover the entire field.').⁹⁷ It applies where a litigant

⁹⁶ *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 31 at para 50.

⁹⁷ *Pretorius and another v Transport Pension Fund and another* 2019(2) SA 37 (CC) at paras 50-52.

seeks to enforce a constitutional right by resorting to the Constitution while bypassing extant legislation that gives effect to that right. None of these prerequisites applies in this case.

[85] It follows that the principle of subsidiarity is neither relevant to the case nor prohibits these proceedings.

[86] I turn next to the merits.

THE MERITS

[87] As indicated, the issues for determination are, briefly, whether the Consortium was obliged to comply with section 217 of the Constitution and the associated statutes when undertaking the Stationery Tender, and whether the Department was also so obliged if it delegated or assigned its procurement decision-making power to the Consortium. Further, whether the Consortium's non-award decision was valid. I proceed to set out and, where necessary, evaluate the arguments of the parties on the merits.

The Applicant's Argument

[88] The applicant contends that, in view of the uncontested, clear legal position, the Consortium was obliged to comply with the Department's procurement obligations under section 217 of the Constitution and the associated statutes when undertaking the Stationery Tender to procure learning materials. As such, it fulfilled the Department's constitutional obligations regarding the functional area of education and the fundamental right of learners in the province to basic education under section 29 of the Bill of Rights. It was at all material times exercising a public power and performing a public function.

[89] Furthermore, even if the Department Tender purported to delegate or assign the Department's decision-making power (vested in its accounting officer) regarding the

procurement of learning materials to the Consortium (which it does not), such delegation or assignment would be proscribed, *inter alia*, by the PFMA and the Treasury Regulations. The applicant's case is that there has been no lawful delegation, but rather a purported one under the SLA. This is because the Department had wholly abdicated its responsibilities, specifically in respect of procurement, to the Consortium, as appears from the respondents' papers. The respondents' contention that the onus rests on the applicant to establish a valid delegation is therefore misguided. The applicant has established that there is no evidence of compliance with the requirements for a lawful delegation. It was then for the respondents to prove a valid delegation authorising the Consortium's procurement conduct, which they failed to do. They, in fact, deny any delegation. The Consortium's conduct in purporting to exercise the Department's decision-making power in respect of procurement is accordingly unconstitutional and invalid and falls to be set aside.

[90] In any event, (so it contended), the explicit purpose of the Department Tender was to appoint a Project Management Agency to provide services to the Department in connection with various functions, including procurement. The tender was for the provision of services, not for the acquisition of goods. It does not appoint the Consortium as the sole supplier of learning materials to the Department or the schools in the province. Furthermore, the respondents have failed to establish that the strict requirements for appointing a sole supplier have been satisfied. The tender also did not vest the Consortium with the Department's decision-making power regarding procurement.

The Respondents' Argument

[91] The cases advanced by the Department and the Consortium largely coincide, and it is convenient to address them simultaneously and, where appropriate, deal with the applicant's relevant response.

(a) Public sector procurement law is inapplicable

[92] The principal argument advanced by the respondents is that in issuing the Stationery Tender, the Consortium was not acting as an agent of the Department but in its private capacity, implementing the terms of the Department Tender, which was awarded to it after the public procurement legal framework was duly complied with. Pursuant to the conclusion of the SLA on 20 July 2023, the Consortium has been discharging its contractual responsibilities thereunder. If the SLA is read as a whole and proper regard is had to its text, context, and purpose, it is apparent that it contemplates that the Consortium undertakes 'procurement' as part of an end-to-end supply obligation. The Consortium acted as a principal in a centralised supply model procuring goods in its own name, assuming commercial risk, and supplying the Department in discharge of its contractual obligations. Contrary to the applicant's contention, this does not entail performing a public function or exercising the Department's public procurement power. On the facts of the matter, it thus falls outside the ambit of regulatory control under constitutional and public law.

[93] Furthermore, on the strength of the decision in *Famous Idea*⁹⁸ the applicant has failed to establish that the non-award decision under the Stationery Tender entails the exercise of public power, or constitutes administrative action in that: (i) the process was commercial in nature; (ii) the decision is not sourced in statute, or constrained by a public law framework of the kind contemplated in section 217 of the Constitution; (iii) it does not have the hallmarks of public power because it is not regulatory, arises in a commercial setting, and results in a contract; and (iv) the use of tender terminology and the appearance of a tender-like process do not make it a public law decision.

⁹⁸ *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Clear Pharmacy v Government Employees Medical Scheme & Others* [2026] the said ACC 5 at paras 66 – 73 ('*Famous Idea*').

[94] The applicant submitted specifically in response to the legal nature of the non-award decision that the Consortium's argument fails to engage with the true inquiry into whether the conduct is administrative in nature. The Constitutional Court in *Motau*⁹⁹ set out that test in these terms:

[34] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that inquiry. But the requirement has two important functions. First, it obliges courts to make a 'positive decision in each case whether a particular exercise of public power ... is of an administrative character'. Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a court to undertake a close analysis of the nature of the power under consideration.

[95] The applicant submitted that each of the factors relied upon by the Consortium indubitably points against the exercise of the power being a private procurement activity:

- (a) First, the function being performed (procurement) is typically administrative. The SCA has confirmed that again in *NAD Property*¹⁰⁰. The commercial contractual relationship resulting from the award does not derogate from the public law nature of the power exercised.
- (b) Second, the fact that the Consortium's conduct is unrestrained by procurement statutes is because the Consortium acted contrary to the law by failing to comply with the legal framework. Put differently, the fact that it was illegal procurement does not mean it was not procurement.

⁹⁹*Motau* above n 65; see also *Mzanzi Fire and Security (Pty) Ltd v Durban University of Technology and others* (D1464/2020) [2022] ZAKZDHC 20 (3 March 2022) paras 19-22 & 48.

¹⁰⁰ *NAD Property* above n 60 paras 10 – 12.

- (c) Third, the fact that the decision results in a contract for commercial purposes is irrelevant – all procurement has this feature.
- (d) Fourth, while the ‘tender-like’ nature of the Stationery Tender does not determine the nature of the power exercised, it is nonetheless revealing because the Consortium had at all times portrayed that it acted in accordance with the Framework Act obligations and assessed the Stationery Tender as a public tender. It was only when challenged by the applicant that it changed its stance and contended that it did not need to comply with the applicable public legal framework. This is an opportunistic stance prompted by its inability to satisfy the court that it had conducted the process in accordance with the requirements of section 217 of the Constitution.

[96] The applicant further submitted that the real issue is whether the power being exercised (the procurement of public school stationery to discharge the Department’s obligations) relates to a core constitutional function (which it clearly does on the established facts), a point the Consortium’s analysis totally ignores. Also, the Consortium’s reliance on *Famous Idea* is misguided. The Constitutional Court found in that case that GEMS (the first respondent) is not an organ of state, whereas the Department is. The factors identified in that case point to the power in the present matter being public, in particular the expenditure of public money for public purposes, which is not only ‘linked to the functions and powers of government’, but where the Consortium is ‘taking the place of [the Department]’.

[97] Insofar as the issue of delegation is concerned, the respondents point out that the SLA provides that the Consortium does not have the power to bind the Department or enter into agreements on its behalf. This fact, in their view, is decisive of the issue whether the Consortium wields delegated power of the Department or acts as its agent. The Consortium, in fact, contracts in its own name with third parties, independently of the Department, as a private commercial enterprise, similar to any successful bidder acquiring the goods to be supplied under the tender. It is impermissible to stretch the

meaning of section 217 to apply also to successful bidders and require them to comply with the public procurement legal framework when acquiring goods to be supplied in compliance with the terms of the relevant tender. This is the effect of the applicant's argument. Accordingly, 'procurement' in the context of the SLA does not bear the narrow, technical meaning derived from public procurement legislation as the applicant contends, but the ordinary commercial sense of a function which is part of a continuous supply process. The respondents contend that the Consortium was not exercising a public power or performing a public function and was therefore not bound by the public procurement legislative framework.

[98] I disagree with the respondents' contention. In my view, it is readily apparent from its terms that the Department Tender was not one for the procurement of goods. It was patently issued to appoint a Project Manager to provide services related, *inter alia*, to the procurement of learning materials by the Department, not to supply such materials to the Department as a sole supplier. Such support from third parties is not unusual, given the resource and capacity constraints of organs of state and public entities. The text of the tender bears out this conclusion. The requisite service provider is referred to as a Project Management Agency.¹⁰¹ The respondents' averment that this was merely a term of convenience without any legal significance is not supported by the text. Significantly, the Consortium refers repeatedly to itself in the Stationery Tender as the 'Agency'. The title of the latter tender makes it plain that the procurement was 'for the Eastern Cape Department of Education'.¹⁰² There is also no reference in the text of the Department Tender to the terms 'sole supplier' or 'centralised supplier'. The preamble to the SLA indicates that the Department requires a 'service provider for the provision of project management services', that the Department issued the bid for 'a Supplier to assist the ECDoE in achieving the above objectives', and that the Supplier [Consortium] 'has confirmed that it is able and willing to carry out the service'.¹⁰³ The contemporaneous conduct of the relevant parties contradicted the respondents'

¹⁰¹CL 001-171 clause 2.1.

¹⁰² CL 008-18 and 008-19 'Project Brief'.

¹⁰³CL 003-130, 'Preamble': clauses A, B, and F.

interpretation that the Consortium was appointed as a sole or centralised supplier. The Department continued to procure learning materials up to the 2025 academic year directly from the applicant and other suppliers under the 2022 tender, despite the SLA's conclusion on 20 July 2023.

[99] There is also no evidence of compliance with the peremptory requirements for appointing a 'sole supplier'.¹⁰⁴ Furthermore, if the tender were for the procurement of goods, it would be expected to, for example, identify the goods, stipulate functional criteria, require bidders to indicate a bid price for such goods, and the like. None of this appears in the tender. The reason is self-evident that the tender was not for the procurement of goods. It was a tender for the services of an agent and not of a principal.

[100] As such, the Consortium was clearly acting at all material times on behalf of the Department. The Stationery Tender makes it plain, as indicated above, that the learning materials in question were procured for the Department and thus not for the private purposes of the Consortium. It is, in any event, difficult to conceive what private purpose the Consortium might have had to acquire large quantities of school learning materials. The undoubted ultimate purpose was to supply the needs of learners in the province for the 2026 academic year. This, in turn, fulfills the Department's constitutional duty. It was obviously not just a private commercial engagement undertaken by the Consortium purchasing goods for private use, thereby rendering the public law procurement principles inapplicable. Its appointment was to provide services as a Project Manager to

¹⁰⁴ *Special Investigating Unit v Kwane Capital & Others* (CA 106/2023) [2024] ZAECMKHC 118 (22 October 2024): '[43] Mr Socikwa said that he relied on the sole supplier provision, but there was no evidence of any market analysis undertaken; [44] I revert to sole supplier procurement. In SASSA, it was emphasised that the reason for deviation must be rational and objectively verifiable, and not based on what an official subjectively regarded as impractical; [45] sole supplier procurement contemplates a situation where there is only one supplier capable of providing the goods procured. It has been described as "the most exclusionary form of deviation" and "the least transparent of all award procedures." *Volmink*, in a very instructive article, noted that the abuse of sole supplier procurement is well documented and has received much criticism. The State Capture Report described it as "poorly conceived", "particularly troubling" and "open to abuse". The report recommended that it should be abolished and that it could not be defended on the basis of impracticality of the tender procedures.'

manage the department's project of providing learning materials to schools. This is undoubtedly performing a paragon public function which is subject to the relevant legal prescripts.

[101] It is clear that the Department's procurement decision-making power, exercised through its accounting officer, cannot be lawfully delegated or assigned to a private party, such as the Consortium. This is limited by the PFMA and the Treasury Regulations to delegates internal to the Department, as set out above. The respondents rely on the SLA to justify the Consortium's conduct in procuring learning materials under the Stationery Tender. The Department confirms in its answering affidavit that the Department Tender had 'in it, an element of delegation of functions to the chosen contractor, the Consortium, in this case' and that the delegation was not unlawful.¹⁰⁵ Any purported delegation would in any event be unlawful. As indicated, the respondents' contention must be rejected that, on the facts, the Consortium was engaging in a private commercial activity when it procured the learning materials under the Stationery Tender to fulfill its own contractual obligation to supply the same to the Department. The applicant correctly submitted that the Consortium's position is akin to what had obtained in *Grinpal*, where the court held that, in the present circumstances, the private entity steps into the shoes of and is bound by the obligations of the organ of state.¹⁰⁶

[102] In my view (as the parties appeared to have also accepted), the power exercised in procuring learning materials for schools in the province relates to a core constitutional function, i.e., education. It thus amounts to public procurement. As the court pointed out in *NAD Property*, public procurement is 'unavoidably a matter of public law'¹⁰⁷ and is 'subject to laws that concern the exercise of public powers'.¹⁰⁸ It follows from the undisputed legal position set out above that the procurement undertaken by

¹⁰⁵ CL 005-21 para 88; at para 92 it is stated that 'there was no illegal delegation', thus accepting that a delegation had occurred.

¹⁰⁶ Above para [36] n 55.

¹⁰⁷ Above n 60 para 11.

¹⁰⁸ *Ibid* para 12.

the Consortium under the Stationery Tender is a public function subject to the public-sector procurement legal framework. The respondents' contention to the contrary is unfounded. To the extent that the Consortium was taking procurement decisions under the Stationery Tender, it was purporting to exercise a public power. In these circumstances, its status as a private entity did not immunise the Consortium from the duty to comply with the public-sector procurement legal framework that binds the Department when the Consortium performed the public function and purported to exercise the public power under the Stationery Tender as aforesaid. It is common cause that the Consortium did not so comply. Its conduct is unconstitutional and falls to be set aside.

(b) Failure to impugn the Department Tender

[103] The Consortium set great store by the argument that it is not competent for the applicant to impugn its conduct under the Stationery Tender without challenging the validity of the Department Tender or the SLA, which are the sources of such conduct. Reliance was placed in this regard on *Democratic Party*¹⁰⁹ as authority for the proposition that 'the applicant is not entitled to any relief that effectively flows from the unconstitutionality of the award of a tender, which has not been so declared by a court.'

[104] The reliance on *Democratic Party* is misplaced. That matter is distinguishable because the applicant there sought to impugn a decision on the basis that the statute authorising the conduct was unconstitutional without formally challenging the validity of the statute. The court understandably ruled that it was not competent to impugn the decision on the assumption that the authorising statute was unconstitutional without a formal challenge.¹¹⁰ The situation is completely different in the present matter, where the applicant expressly disavows any challenge to the Department Tender or the SLA. It

¹⁰⁹ *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998(4) SA 1157 (CC).

¹¹⁰ *Ibid* paras 61 and 62.

is the Consortium's conduct in 2025 in ostensibly implementing the Department Tender that is challenged.

[105] This stance is not anomalous, as it is a *non sequitur* to claim that, because the Consortium's conduct in implementing the Department Tender is unconstitutional, the Department Tender perforce must also be unconstitutional. It is not inconceivable that unconstitutional conduct can occur in the implementation of a constitutionally valid instrument. The facts of this case illustrate this. The Consortium appears to have provided project management services during 2023 and 2024 (the first two years of the tender's existence). There is no challenge to this conduct. In 2025, it started procuring learning materials itself, which was done by the Department up to that stage, and exercising the decision-making power to award tenders. This conduct is challenged. Its unlawful conduct does not mean that the instrument appointing the Consortium as a service provider must be unconstitutional, but rather that its conduct in 2025 is *pro tanto* unconstitutional and invalid.

[106] The Consortium has made common cause with the Department in this regard. It contended that it would be both paradoxical and incompetent for the court to issue an order declaring conduct implementing the Department Tender unconstitutional, while the tender is held to be constitutional. It submitted that such relief is not viable without challenging the tender itself, which the applicant is expressly not doing. For the reasons set out in dealing with the Consortium's argument above, this contention is equally bereft of merit.

(c) Budgetary control

[107] The Department relies on its control of the budget in response to the applicant's case regarding the unlawful delegation or abdication of its powers and functions in favour of the Consortium.¹¹¹

¹¹¹ Para 17.4-5 of reply to the Department, CL 006-13.

[108] However, the Department confirms in its papers that it was not involved in the remaining decision-making relevant to the procurement process – whether in determining specifications, evaluating and adjudicating bids, or determining the award. These are critical features of lawful and accountable procurement, which Treasury Regulation 16A places within the exclusive purview of the accounting officer and prescribes in detail how organs of state are to undertake procurement.¹¹² It is undisputed that these functions were performed exclusively by the Consortium.

¹¹² The Treasury Regulations stipulate how procurement of goods and services should take place. It states:

¹16A.6 Procurement of goods and services

- 16A.6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.
- 16A.6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for-
- (a) the adjudication of bids through a bid adjudication committee;
 - (b) the establishment, composition, and functioning of bid specification, evaluation, and adjudication committees;
 - (c) the selection of bid adjudication committee members;
 - (d) bidding procedures; and (e) the approval of bid evaluation and/or adjudication committee recommendations.
- 16A.6.3 The accounting officer or accounting authority must ensure that-
- (a) bid documentation and the general conditions of a contract are in accordance with-
 - (i) the instructions of the National Treasury; or
 - (ii) the prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;
 - (b) bid documentation includes evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000) and the Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003);
 - (c) bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine;
 - (d) awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised;
 - (e) contracts relating to information technology are prepared in accordance with the State Information Technology Act, 1998 (Act 88 of 1998), and any regulations made in terms of that Act;
 - (f) Treasury Regulation 16 is complied with when goods or services are procured through public-private partnerships or as part of a public-private partnership; and
 - (g) instructions issued by the National Treasury in respect of the appointment of consultants are complied with.
- 16A.6.4 If, in a specific case, it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.
- 16A.6.5 The accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority

[109] The Department entirely abdicated these key procurement functions and decision-making processes, thereby undermining the legislative scheme for accountability. This is not ameliorated by its budget control, which is only one aspect of procurement decision-making.

CONCLUSION

[110] It follows from what is set out above that the undisputed failure by the Consortium to comply with the public procurement legal framework when procuring learning materials under the Stationery Tender is unconstitutional and falls to be set aside. Similarly, the purported delegation or abdication of the Department's procurement decision-making powers in favour of the consortium, is unconstitutional and lawful.

[111] The respondents contended that the declaratory relief sought is incompetent in the absence of a concomitant prayer for consequential relief. The applicant pointed to the obligation in section 172(1)(a) of the Constitution to declare any conduct inconsistent with the Constitution to be unconstitutional and the accompanying discretion given to the court to grant any consequential just and equitable relief. The applicant's position is that any relief should not disrupt the provision of learning material to learners. The respondents share this concern. While the applicant asked for the obligatory declaratory relief in terms of section 172(1)(a), it left any relief in terms of section 172(1)(b) in the court's hands. It is the latter stance that the respondent criticised.

[112] In view of the above conclusion on the merits, the declaration of unconstitutionality sought by the applicant is warranted and mandatory. I agree that the supply of learning materials should not be interrupted by interfering with the implementation of the

opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.

16A.6.6 The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors.'

Stationery Tender. The supply for the 2026 academic year has been completed. It is in the interests of justice and the public interest that this should not be undone and should be allowed to stand. However, the acquisition of any further rights under the invalid tender should be proscribed. The relief indicated, therefore, is to undo the tender but not the supply of learning materials already effected thereunder. This can be achieved by a declarator *per se*, as illustrated by the relief granted, *inter alia*, in *Agribee*¹¹³, where the court held as follows:

[38] Mr. Rorke, who appeared for the appellants, no longer sought the review and setting aside of the agreement, but, rather, a declaratory order to the effect that it was invalid. He submitted that this was the appropriate remedy in the light of the Constitutional Court's finding as to the effect of such an order in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*. In that case, Theron J held that the effect of a declarator, rather than an order setting aside the agreement, was to preserve the accrued rights of the parties, but not 'further rights under the invalid agreement'.

[113] I intend to grant similar relief herein.

[114] Insofar as the non-award decision is concerned, it falls to be set aside for all the reasons set out above. The performance already rendered by suppliers under the Stationery Tender should not be disturbed and should be allowed to stand. The applicant has therefore made out a case for the relief in paragraph 4 of the notice of motion.

[115] In the event the application succeeds, the applicant seeks a punitive costs order against the respondents. It also seeks the costs occasioned by the postponement of the matter on 24 March 2026.

[116] In my view, it is not justified to award a punitive costs order against the respondents. Costs should follow the result and be awarded on the party-party scale,

¹¹³ Above in 58.

including the costs of two counsel determined on scale C in respect of senior counsel and scale B in respect of junior counsel. It is just to direct the respondents to pay the costs of the postponement of the matter on 24 March 2026.

ORDER

[117] In the result, the following order shall issue:

(a) It is declared that the second, third, and fourth respondents' (Consortium) and the first respondent's (Department) purported delegation, to the Consortium, of the powers to make procurement decisions on behalf of or in the place of the Department, or to act as the Accounting Officer of the Department, is unconstitutional and unlawful.

(b) It is declared that the Consortium and Department's abdication of and failure to comply with the procurement obligations under section 217 of the Constitution and all of the legal and constitutional obligations of the Department, including those contained in the Department's Supply Chain Management Policy and the duties of the Accounting Officer, is unconstitutional and unlawful.

(c) It is declared that the decision of the Consortium not to award the Stationery Tender to the applicant or not to appoint the applicant as one of the successful suppliers, conveyed on or about 19 July 2025, is unconstitutional and unlawful, and is reviewed and set aside.

(d) The costs of this application and the wasted costs of 24 March 2026, including the costs of two counsel, shall be paid by the Department and the Consortium jointly and severally, on scale C in respect of senior counsel and Scale B in respect of junior counsel.

D.O. POTGIETER
JUDGE OF THE HIGH COURT

This judgment is handed down electronically by circulation to the parties or their legal representatives by email. The date for hand-down is deemed to be 19 June 2026.

APPEARANCE

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Date of hearing: 4 May 2026 & 5 May 2026

Date of delivery of judgment: 19 June 2026