

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 3159/2013

In the matter between:

ASLA CONSTRUCTION (PTY) LTD

First Applicant

JV 3A

Second Applicant

JV 3B

Third Applicant

and

**MINISTER OF HUMAN SETTLEMENTS
WESTERN CAPE GOVERNMENT**

First Respondent

**HEAD OF THE DEPARTMENT OF HUMAN
SETTLEMENTS WESTERN CAPE
GOVERNMENT**

Second Respondent

GROUPFIVE / MOTLEKAR CAPE JV

Third Respondent

Heard: 22 May 2013

JUDGMENT

DELIVERED: 20 JUNE 2013

SAVAGE AJ:

Introduction

[1] This is an application for the review and setting aside of three tenders awarded on 14 December 2012 by the second respondent (“the Department”) to the third respondent (“G5M”) for the construction of housing units at Delft Precincts 3A, 3B and 5; the review and setting aside of the decision taken on 10 December 2012 to disqualify the applicants’ bids in respect of the tenders as non-responsive; and the setting aside of the contracts concluded on 14 February 2013 between the Department and Group 5. The applicants, Asla Construction (Pty) Ltd and two joint venture companies, seek that the tender bids be remitted to the Department for reconsideration.

[2] The applicants did not persist with their initial application for interdictory relief to restrain G5M from executing any further works on the project pending the outcome of the current application, following agreement reached regarding a timetable for the filing of the papers in this application.

The facts

[3] On 27 July 2012 the Department invited three tenders for the construction of housing units at Delft Precincts 3A, 3B and 5:

3.1 in Precinct 5 for the development and construction of 890 Breaking New Ground (MNG) residential units comprising 146 single storey units (40 m²) and 744 double storey units (42 m²) incorporating non-standardised

construction and 40 FLISP single storey residential units (minimum 40 m²) incorporating non-standardised construction;

3.2 in Precinct 3A for the development and construction of 620 BNG residential units comprising 24 single storey units (40 m²) and 596 double storey units (42 m²) incorporating non-standardised construction; and

3.3 in Precinct 3B for the development and construction of 587 BNG residential units comprising 38 single storey units (40 m²) and 559 double storey units (42 m²) incorporating non-standardised construction.

[4] The purpose of the tender was to assess more environmentally friendly and alternative building technologies in the state-funded housing environment to test the durability, cost effectiveness, environmental impact, appeal and acceptance of such technologies. Non-standardised construction was defined in paragraph C3.1.1 of the tender specifications as –

‘any form of home construction which utilises sub-structure, superstructure, roof assembly and/or building systems which are not fully covered by SANS 10400 building standards and specification or codes of practice and/or which are not described or referred to in the deemed-to-satisfy rules of the National Building Regulations’.

[5] The material tender requirements were *inter alia*:

5.1 that the housing be built using non-standardised construction methods. Paragraph 3.4.3.1 of the published tender specifications expressly required *“non-standardised building systems/constructions and material”*; and

5.2 that in respect of the non-standardised building systems there must exist Agrément South Africa approval or National Home Builders Registration Council (“NHBRC”) approved rational design. Para 3.4.3.1 provided that *“(a) Alternative building systems being considered must be approved by the Agrément South Africa, NHBRC, City of Cape Towns, PDHS and SABS. In this regard, any unconventional system shall have an Agrément Certification”*.

[6] At the same time, paragraph C3.2.2.1.1 of the tender specifications required:

‘All construction methods, materials and workmanship [are] to comply with the relevant SABS/SANS Codes of Practice and NBR – these specifications must be seen as the Department’s requirements to the above.’

[7] The National Building Regulations and Building Standards Act 103 of 1977 (“the Building Act”) provide *“for the promotion of uniformity in the law relating to the erection of building in the areas of jurisdiction of local authorities; for the prescribing of building standards”*. The National Building Regulations (“NBR”) specify building standards with Codes of Practice promulgated in terms

of the NBR to facilitate proper implementation of these requirements. Regulation AZ4(1)(b)(i) of the NBR refers to compliance with SANS 10400 which stipulates specifications relating to every aspect of a building, based on conventional methods and products. This regulation also provides for circumstances under which aspects of a building system comply with “deemed to satisfy” provisions.

[8] Agrément South Africa approval is granted in the form of an Agrément certificate confirming *“fitness-for-purpose of a non-standardised product, material or component or the acceptability of the related non-standardised design and the conditions pertaining thereto (or both) issued by Agrément South Africa”* (in accordance with Regulation AZ2 of the NBR). Rational design approval is obtained from the NHBRC.

Applicants' bids

[9] The applicants' bids were submitted in respect of the Asla reinforced concrete frame system with three options for wall infill panel materials: hollow 125mm cement blocks, which is a patented, non-standardised system with NHBRC rational design approval; magnesium boards; or a 2mm PVC skin with a sand cement core. The foundations are non-standard with a design that is not in accordance with s6 of the SAICE Code of Good Practice.

[10] The bids included a NHBRC rational design approval, which recorded that the Asla building system conformed to the criterion for structural integrity and that a rational design had been submitted, scrutinised and accepted for enrolment by the NHBRC. This approval had been obtained on 16 February 2004, in response to the submission on 17 September 2002 by Asla and its

consulting engineer of a NHBRC questionnaire in relation to the system's rational design. This NHBRC approval was re-submitted by the applicants on 8 October 2012 at the request of the Department's consultant, Mr Flanagan.

[11] The applicants contend that their Asla frame system constitutes non-standardised construction in that –

11.1 as a whole it is non-standard in that the result is non-load bearing walls while conforming to the rational design criteria for structural integrity;

11.2 its integrated concrete frame as a whole is not fully covered by existing SANS10400 building standards, specifications or codes of practice, is not contained in the deemed-to-satisfy rules of the National Building Regulations ("NBR") and it is an alternative building technology; and

11.3 its foundations are non-standard as they comprise of an integrated beam and/or slab system functioning as a unit with the concrete superstructure and block work infill.

[12] The applicants accept that the individual substructure and superstructure elements of the Asla system are partially covered by SANS10400 building standards and specifications and the deemed-to-satisfy rules of the NBR, but argue that a non-standardised system does not consist exclusively of non-standard components but requires that material elements be non-standard components. Furthermore, a standard method or building system

would be impossible to patent in that a standard method would not require a rational design as it would fall within the SANS10400 “deemed-to-comply” requirements. The applicants dispute that the tender specifications require Agrément certification when a NHBRC approved rational design has been provided.

[13] The Department argues that the NHBRC approval submitted in respect of the Asla system did not indicate whether the system was classified as a non-standardised building system for a single project or all future projects and that in the absence of the letter dated 30 January 2004 referred to in the NHBRC approval, it appears that the approval granted related to the structural integrity of the 125 mm block used and insulation. The bids made no reference to double-storey units, the rational design did not meet the minimum m² sizes for both single and double-storey units and the first applicant’s patent relates to single-storey structures only. Furthermore, the fact that 40 000 units using the same system have been constructed to date and inspected and approved by the NHBRC and local authorities does not make it a non-standardised system but one well known in the construction industry. In addition, the patent obtained relates to the use of conventional building materials and methods and does not meet the requirements of non-standardised construction.

[14] G5M does not dispute that the applicants have NHBRC approval certifying conformity to the NHBRC criteria for a rational design for structural integrity. This approval does not however address whether the system is non-standardised, alternative or unconventional, nor could the NHBRC competently do so given that its purpose is to certify the structural integrity of a building

system. It would be equally incompetent for Agrément South Africa, as a private body, to address whether a building system is alternative. Furthermore, the fact that 40 000 houses have been built using the Asla system justifies asking why the system would be used when new and innovative design technologies are sought.

G5M's bids

[15] G5M submitted bids in respect of its Vela steel building system which it submits is compliant in that:

- 15.1 a light-weight steel frame is used in accordance with SANS 517, being the South African standard for light steel framed building which obviates the need for Agrément certification. The system uses composite wall panels comprising of 10 mm autoclaved boards and a polyurethane core or 9mm Nutek cellulose fibreboard with the same core;
- 15.2 the system is non-standard and was not created under the purview of SANS10400 or the deemed to satisfy rules of the NBR;
- 15.3 the requirement that Agrément certification or rational design approval from the NHBRC be obtained is only triggered when the proposed building system is patently idiosyncratic or does not comply with any relevant SABS/SANS standard;

15.4 the double-storey buildings comply with the SANS517, save for the use of magnesium oxide boards for interior wall panels which are resistant to decomposition in rain and can be stored on-site, and are unquestionably non-standard with suitable structural integrity; and

15.5 the single-storey system deviates from SANS517 and requires Agrément certification, which was provided. The first deviation relates to the removal of a central vertical support or “stud” in the infill panels which in single-storey buildings has a cost-saving benefit. The second deviation relates to the alteration of the infill boards to fit the adjusted framing.

[16] The applicants take issue with the following aspects of the G5M system in support of their contention that G5M's bid should properly have been found non-compliant by the Department:

16.1 the foundation and floor slab are standardised, as is the roof which is constructed of standard lightweight steel trusses clad with metal sheeting, concrete roof tiles or Agrément approved cladding;

16.2 no Agrément certificate or NHBRC approved rational design exists for the double-storey units when the bulk of the units to be constructed in Precincts 3A and 3B are double-storey units and no provision is made for dispensing with the requirement of Agrément

or NHBRC approval, whether part of the system complies with a SANS standard or not. Yet, the only Agrément certificate provided by G5M relates to the erection of single-storey buildings; and

- 16.3 the magnesium oxide Vela panels are not listed as permissible walling materials in SANS517, nor has G5M put up proof that they meet the requirements of the NBR and Building Standards Act in all respects when the tender requires that all construction methods, materials and workmanship must comply with the relevant SABS/SANS Codes of Practice and the NBR.

[17] G5M argues in support of its system that there is no reason to speculate that the double-storey dwellings will not be enrolled by the NHBRC and that an external independent structural engineer, who is a competent person as defined, has certified the Vela system for use in double-storey buildings. However, given that the structural integrity of the building has not been placed in issue by the applicants, requiring an idiosyncratic NHBRC approved design would thus not serve any demonstrable purpose.

[18] SANS 517 is a “relevant SABS/SANS Code of Practice” published by the SABS in terms of its powers under the Standards Act 8 of 2008 “*to establish a standard for light steel framing*”. It covers all the major components of light steel framed building, including foundations, structural design aspects, material specifications as well as general requirements for thermal and acoustic insulation and allows for the use of different infill materials but does not contain

a provision relating to variations to the structural elements as a result of which Agrément certification was required for the single-storey system.

[19] The Department argues that the use of the SABS approved SANS517 national standard has resulted in the simplification of the submission of rational design. If a building conforms to the deemed-to-satisfy rules provided in this standard, the NHBRC does not require a rational design and this obviates the need for Agrément certification. However, the applicants point out that s14(2)(c) of the Housing Consumers Protection Measures Act 95 of 1998 stipulates that the construction of a home, the acquisition of which will be financed solely by a state subsidy, shall not commence unless the NHBRC has issued a certificate of proof of enrolment.

Reasons for disqualification of applicants' bids

[20] The Department's Bid Evaluation Committee ("BEC") disqualified the applicants' bidson 10 December 2012. The reason for disqualification appears from the minutes:

'No Agreement (sic) Certificate provided for combined Vela panel system and Concrete Framed System. This information was requested on 17 October 2012, prior to Limited Bid. Rational design submitted has no reference.'

[21] On31 January 2013 the reasons for disqualification was recorded as being due to the applicants not having submitted an Agrément certificate and the rational design having no reference. The applicants' contend that this is a material mistake in that either an Agrément certificate or a NHBRC approved

rational design was required and a rational design approved by the NHBRC was provided.

[22] On 6 February 2013, in a meeting with the Department, the applicants were informed that the Department disregarded any tenders that proposed the use of hollow cement blocks because they were considered conventional materials. The applicants contend that this is a material mistake in that the test imposed by the tender specifications is not whether the system incorporates standardised elements, but whether the system as a whole is fully covered by the SANS10400 building standards and specifications or is referred to in the deemed-to-satisfy rules of the NBR.

[23] In its answering affidavit dated 26 April 2013 the Department raised two additional grounds of alleged non-compliance with the bid. The first was that the NHBRC approval for the Asla building system refers to 36m² and 30m² houses, although the NHBRC approved the rational design of the system and not houses per se. The applicant's deny that the reference to 30m² and 36m² houses is a limitation on the rational design approval by the NHBRC.

[24] The second additional ground of alleged non-compliance is that the applicants' system relates to single and not double-storey units, whereas the tender specifications required a minimum of 40m² for single-storey units and 42m² for double-storey units. The applicants deny that this is relevant in that it was not necessary to register a patent for a double or multi-storey system in that the system used was the same and they deny that there was insufficient information to satisfy the bid requirements.

[25] The applicants argue that the Department's decision that G5M's Vela system was compliant is vitiated by material mistake of law and/or a material mistake of fact and the Department failed properly to apply its mind to the matter given that the Vela system does not have an Agrément certificate or a NHBRC-approved rational design for double-storey buildings, which comprise the overwhelming majority of houses to be constructed. The decision accordingly falls to be reviewed and set aside in terms of sections 6(2)(d) and (i) of PAJA given the existence of a material mistake of law and/or of fact and the Department's failure properly to apply its mind to the matter.

Remedy

[26] The applicants argued that the starting point for the enquiry is that if successful, they are entitled to effective relief and may only be denied any and all relief if exceptional circumstances exist to warrant this. *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC) at para 84; *Mvumvu and others v Minister of Transport and another* 2011 (2) SA 473 (CC) at para 46. The applicants seek an order reviewing and setting aside the Department's decisions *ex nunc* and not *ex tunc*, and a referral of the tenders back to the Department for reconsideration. They concede that G5M should be permitted to complete the construction of as yet unfinished Vela houses. Consequently, the relief sought by the applicants will not have disastrous consequences in that relatively little work has been done to date, with approximately 11% of all construction work on all three precincts having been completed as at 31 May 2013 and that it has not been established on the facts that significant disruption would occur.

[27] The Department denies that an order setting aside the award of the tender would be just and equitable in that the housing project forms part of the larger N2 Gateway development that will create in excess of 20 000 houses. The aim of the project is to eradicate informal settlements by 2014 and the Department has contractual obligations towards G5M. For each day that the works on all three sites is stopped, the Department is faced with a potential claim for some R265 000 excluding costs and claims which may arise if the contract is terminated such as loss of profit and de-establishment costs.

[28] The three housing projects are being financed through the Department of human settlements provincial housing subsidy scheme and the housing units are expected to be completed by 31 March 2014. Beneficiaries will suffer in the event of a delay in that families have been placed in temporary relocation areas in Philippi and Delft to allow for formal development.

[29] As at 18 April 2013, 18% of civil works have been completed, 1.2% of the scheduled value of the works have been certified and over R8.5 million paid out, with more than R9 million owed and further monies due thereafter.

[30] The Department argues that in the event that the Court was to conclude that the decision-maker had committed reviewable irregularities, an order that is just and equitable should be granted, balancing the interests of the parties considering the potential “*catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large*” (*Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board Limpopo Province and others* 2008 (2) SA 481 (SCA) at para 23).

[31] G5M argues that the department made a technical value judgment within its competence, using specialist expertise, in a matter imbued with policy considerations and that the Court should exercise the appropriate degree of deference to such decision which not reviewable if no demonstrable factual or legal error, or irrational or unreasonable action, exists. The grant of just and equitable relief is discretionary and requires a balance to be struck between legality and certainty. Setting aside the tender awarded would be impractical in that it will cause delays which will translate directly into delays in the provision of housing to the poorest of people, in circumstances in which the state bears an obligation to provide access to housing.

[32] In addition, G5M would face enormous claims from subcontractors with whom it has made long lead time arrangements and who are innocent third parties. Two thirds of the foundations will have been cast by time judgment is delivered and all are specific to Vela system in that another contractor would be unable to use such foundations, resulting in irrecoverable losses should the tender be set aside. The total estimated costs of the project to date are R70 million with the anticipated amount to be spent in May 2013 alone being R20 million. Accordingly, the degree of irregularity must be considered against the unravelling of a highly complex, costly and important project. Legality must in such circumstances yield to certainty.

Discussion

[33] The applicants seek the review and setting aside of the decisions taken by the Department on the basis of material mistakes of law and/or fact and on

grounds of the failure by the Department to properly to apply its mind to the matter under s6(2)(d) and (i) of PAJA. The procedural fairness of the Department's decisions is not attacked.

[34] The exercise of public power is constrained by the principle of legality (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2)SA 311 (CC) at para 144). The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") gives effect to this principle of legality *inter alia* in codifying grounds for the judicial review of administrative action in s6. These grounds include the power to review if the action was materially influenced by an error of law (s6(2)(d)); the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered (s6(2)(e)(iii)); and the action is otherwise unconstitutional or unlawful (s6(2)(i)).

[35] In performing its task a review Court must not lose sight of the distinction between appeal and review. '*Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality...*' *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at 402. In *Liberty Life Association of Africa v Kachelhoffer* 2001 (3) SA 1094 (C) at 1110-1111 the Court stated:

'Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness or otherwise of the decision that is being assailed on appeal (see Davies v Chairman, Committee of the Johannesburg Stock

Exchange 1991 (4) SA 43 (W) at 46H, 48E). Because of this fundamental difference between review and appeal, they are inconsistent remedies in the sense that, if both are available, an appeal can be considered only once the review proceedings have been finalised as a decision in respect of the appeal would preclude the granting of relief by way of review...Similarly a successful review obviates the need to consider the merits of an appeal...'

Material mistakes of fact or law

[36] In *Pepcor Retirement Fund and another v Financial Services Board and another* 2003 (6) SA 38 (SCA) at para 47 Cloete JA held:

*'In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, inter alios, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*, *Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised*

properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires.'

[37] It was argued for G5M that a review based on mistake of fact more correctly flows from s6(2)(e)(iii) of PAJA which provides for review where "irrelevant considerations were taken into account or relevant considerations were not considered". However, in *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and others* [2012] 2 All SA 111 (SCA) Plasket AJA stated at para 34 that:

'It is now well established in South Africa (and in some other common law jurisdictions) that a material error of fact is a ground of review. This is so even though it is not one of the grounds specifically listed in section 6(2) of the PAJA. It has been held that it falls within the ground specified in section 6(2)(e)(iii) – the taking into account of irrelevant considerations and the ignoring of relevant considerations – but it may just as easily be accommodated in section 6(2)(i), the catch-all provision that allows for the development of new grounds of review. This section provides that administrative action may be reviewed and set aside on the basis of it being "otherwise unconstitutional or unlawful'.

[38] At para 40, the learned judge continued:

'In order to be rational, the decision must be "based on accurate findings of fact and a correct application of the law". That being so, no rational basis existed for the STB's conclusions: the administrative action that it took was not

rationally connected to the information before it, as required by section 6(2)(f)(ii)(cc) of the PAJA.'

[39] While errors of law can lead to gross irregularities in proceedings, a mistake on a point of law in relation to the merits does not always amount to a gross irregularity. *Telcordia Technologies Ltd v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 69.

Reasons for disqualification of applicants' bids

[40] Section 5 of PAJA provides for reasons to be furnished by the administrator and the adequacy of reasons will depend on a variety of factors, such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action, and the nature of the functionary taking the action. The reasons must from the outset be intelligible and informative to the reasonable reader of them who has knowledge of the context of the administrative action. If the reasons refer to an extraneous source, that extraneous source must be identifiable to the reasonable reader. *Commissioner, SA Police Service v Maimela* 2003 3 All SA 298 (T)301303; 2003 5 SA 480 (T) 484 485–486.

[41] It was argued by the Department that it is appropriate for a government authority to raise reasons after the fact, provided these elaborate on the reasons given contemporaneously. However, in *National Lotteries Board and others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at paras 9, 11 and 28 it was stated that a decision maker who unlawfully

restricts or aggregates his discretion cannot remedy the situation are substituting different reasons after the fact.

[42] The reasons for the disqualification of the applicants' bids recorded in the minutes of the BEC were that no Agreement certificate had been obtained and the rational design submitted had "no reference". The lack of the Agrément certificate was repeated on 31 January 2013 as the reason for disqualification. On 6 February 2013 in a meeting with the Department the applicants were informed that the Department had disregarded any tenders that proposed the use of hollow cement blocks because they were considered conventional materials. In its answering papers the Department raised additional grounds of non-compliance, namely the square meterage of the houses tendered and the fact that the applicants' system relates to single and not double-storey units.

[43] It is not disputed that the tender sought to assess more environmentally friendly and alternative building technologies in the state-funded housing environment to test the durability, cost effectiveness, environmental impact, appeal and acceptance of such technologies. In doing so, it sought bids for the construction of housing using non-standardised building systems, construction methods and materials (paragraph 3.4.3.1). In this regard, the tender requirements were that *"(a)lternative building systems being considered must be approved by the Agreement South Africa, NHBRC, City of Cape Towns, PDHS and SABS. In this regard, any unconventional system shall have an Agreement Certification"* (paragraph 3.4.3.1)

[44] Paragraph C3.1.1 of the tender specifications sought '*home construction which utilises sub-structure, superstructure, roof assembly and/or building systems which are not fully covered by SANS 10400 building standards and specification or codes of practice and/or which are not described or referred to in the deemed-to-satisfy rules of the National Building Regulations*'. At the same time, paragraph C3.2.2.1.1 required that all construction methods, materials and workmanship comply with the relevant SABS/SANS Codes of Practice and NBR.

[45] The interpretation of the document is a matter of law whether it is a statute, a contract or a tender specification. *KPMG Chartered Accountants (SA) v Securefin Ltd and another* 2009 (4) SA 399 (SCA) at para 39. The tender specification clearly sought bids in respect of alternative, unconventional, non-standard systems not covered by conventional building standards or codes and not falling within the "deemed-to-satisfy" provisions of the NBR. The applicants' system on their version was "not fully covered", or put differently was partially covered by these standards or codes, or the NBR, but was nevertheless alternative with non-standard foundations. It is the applicants' case that its bids were compliant in that a non-standardised system does not consist exclusively of non-standard components but requires that material elements be non-standard components.

[46] The tender document was not a model of clarity in providing that alternative systems had to be approved by the "Agreement South Africa, NHBRC, City of Cape Town, PDHS and SABS" while "any unconventional system" required Agrément certification. There was no suggestion made by the

Department that Agreement South Africa, NHBRC, City of Cape Town, PDHS and SABS approval had to be obtained and I tend to agree with the applicants in the circumstances that their submission of a NHBRC approved rational design in respect of an alternative system was compliant. I am not persuaded that the fact that NHBRC approval does not address whether the system is non-standardised, alternative or unconventional goes to compliance with the tender specifications which do not require that such approval determine a system to constitute an alternative one.

[47] G5M's system was argued not to have been created under the purview of SANS10400 or the deemed to satisfy rules of the NBR, according rather with SANS 517 for double-storey buildings, save in one respect. However, no Agrément certificate or NHBRC approved rational design exists for the double-storey system, which accounts for the bulk of the units to be constructed in Precincts 3A and 3B. I accept that no provision is made in the tender specifications for dispensing with the requirement of Agrément or NHBRC approval, whether part of the system complies with a SANS standard or not, and that while the tender requires that all construction methods, materials and workmanship must comply with the relevant SABS/SANS Codes of Practice and the NBR, there is no confirmation that G5M's double-storey system does. The fact that the system may at a later date be enrolled by the NHBRC and that an external independent structural engineer, who is a competent person as defined, has certified the system for use in double-storey buildings does not lead to a conclusion that the tender specifications have been complied in the manner required.

[48] The suggestion by G5M that the structural integrity of the building has not been placed in issue by the applicants and that requiring an idiosyncratic NHBRC approved design would thus not serve any demonstrable purpose, does not address the real issue, being the failure to comply with the requirements of the tender, and I do not agree that the requirement for Agrément certification or rational design approval from the NHBRC is only triggered when the proposed building system is patently idiosyncratic or does not comply with any relevant SABS/SANS standard. Agrément certification or NHBRC approval is required to establish structural integrity in systems such as those contained in the bids submitted.

[49] Furthermore, the fact that G5M obtained Agrément certification for its single-storey system which deviates from SANS 517, does not resolve the difficulties that emerge in terms of compliance with the tender requirements for the double-storey system.

[50] The Department argued that the use of the SANS 517 national standard resulted in the simplification of the submission of rational design. If a building conforms to the deemed-to-satisfy rules provided in this standard, the NHBRC does not require a rational design and obviates the need for Agrément certification. The difficulty with this argument is that the tender requirements do not state this to be the case. Furthermore, SANS 517 does not cover variations to the structural elements which appears to be the reason why Agrément certification was required in such circumstances.

[51] While the applicant argued that G5M's system is not non-standard in that the foundation and floor slab and roof are standardised, on its own version the applicants' system also contains standardised aspects. I accept that a non-standardised system does not consist exclusively of non-standard components but requires that material elements be non-standard components and that the test imposed by the tender specifications is not whether the system incorporates standardised elements, but whether the system as a whole is fully covered by the SANS10400 building standards and specifications or is referred to in the deemed-to-satisfy rules of the NBR.

[52] An assessment as to what constitutes an unconventional, alternative or non-standard building system requires a thorough understanding and analysis of the various systems available using expert knowledge as to their similarities and differences, the standardised and non-standardised features of the systems and their usefulness and impact in the context of the overarching tender requirements. I accept that the test must be one of materiality. However, given the technical nature of the subject-matter, the exercise of the discretion as to what system best meets the requirements of the tender is one that is properly vested in the administrative decision-maker. In this regard the case of *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) is on point, in which it was stated at para 52 that –

'(j)udicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency'.

[53] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (7) BCLR 687 (CC) at paragraph 44 O'Regan J emphasised that:

'... a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend on the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the court. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker.'

[54] The applicants seek the review and setting aside of the decision taken on 10 December 2012 to disqualify their bids in respect of the tenders as non-responsive. The reasons given for the disqualification of the applicants' bids were initially that an Agrément certificate had not been provided and that the rational design has no reference but were later expanded to include that the system was conventional, the square meterage contained in the bid documents differed to what was required and difficulties identified with the system in covering both double and single-storey buildings.

[55] Given that the Agrément certificate was not required where NHBRC approval had been submitted, as the applicants had done, this reason reflected an error of law insofar as the tender requirements did not require an Agrément certificate to be furnished by the applicants. It is however material in that the Agrément certificate confirms a system's "*fitness-for-purpose of a non-standardised product, material or component or the acceptability of the related non-standardised design and the conditions pertaining thereto (or both) issued by Agrément South Africa*" (in accordance with Regulation AZ2 of the NBR). Furthermore, the fact that the NHBRC rational design was determined not to have reference, indicates that it was considered. The reason provided that the applicants' bids were non-compliant due to the lack of submission of the Agrément certificate must therefore, in my mind, have the necessary consequence that the bids were determined non-compliant in that fitness-for-purpose of a non-standardised system has not been provided.

[56] Thus while the Agrément certificate was not required, a conclusion that the rational design had no reference is material in that it was a non-standardised construction system that formed the subject matter of the bids being considered by the BEC. I accept that it is permissible for an administrative functionary to provide further reasons for a decision after the fact, even in answering papers placed before the review Court, provided these elaborate on the reasons provided contemporaneously. In this regard it must be noted that the functionary is often an expert in his or field but not necessarily a lawyer involved in crafting a careful defence to any later legal action that may ensue. While this does not however insulate a functionary from the requirement that different and unrelated reasons cannot be substituted after the fact in order to

cure a defect, I am satisfied in this case that the BEC did consider the bids' compliance with tender requirements and that its reasons provided bear this conclusion out.

[57] The degree of irregularity is therefore limited to the statement that the Agrément certificate was required in circumstances in which it was not and when it was apparent that the NHBRC rational design had been considered. The degree of irregularity is required to be weighed in balance. In *Moseme Road Construction CC and others v King Civil Engineering Contractors (Pty) Ltd and another* 2010 (2) SA 359 (SCA) at para 21 the Court held that '(n)ot every slip in the administration of tenders is necessarily to be visited with judicial sanction.' Accordingly, while I accept that the decisions taken by the Department to disqualify the applicants due to no Agrément certificate having been provided was not in compliance with the tender requirements, the conclusion that the rational design approval did not have reference indicated that it had been considered by the BEC. I am not persuaded that a material mistake of law accordingly arose in relation to the apparent reason that there was a lack of the Agrément certificate when considered in the context of the substantive content of the bids considered, or that it is illustrative unlawfulness in a material respect.

[58] With regards to the conclusion as to whether the bids were unconventional, non-standard or alternative, given the technical nature of the subject matter of the bids and the assessment and consideration of these individual bids against the bid requirements, I am of the view judicial deference should be given to the administrative functionary to determine such substantive compliance with the bid requirements.

[59] I am accordingly not persuaded that the decision to reject the applicants' bids constituted a material error of law or was unlawful within the meaning of s6(2)(d) or (i).

[60] The applicants seek, in addition, the review and setting aside of three tenders awarded on 14 December 2012 by the second respondent ("the Department") to the third respondent ("G5M") for the construction of housing units at Delft Precincts 3A, 3B and 5 and the setting aside of the contracts concluded on 14 February 2013 between the Department and G5M. I accept that G5M's non-compliance with the requirement that an Agrément certificate or NHBRC approval be provided for its double-storey system was overlooked by the BEC which was not in compliance with the bid requirements. I am not persuaded however that this failure constituted a material mistake of law justifying the review and setting aside of the award of the tenders, nor I am persuaded that it follows that it was sufficiently material to justify a finding of unlawfulness. Given the complexity of the subject matter concerned, a determination regarding the substantive content of the bids and their respective compliance with the overarching tender requirements, is not in my view a matter for this Court but is one in respect of which judicial deference should properly be exercised. The fact that the applicants have previously been awarded contracts to build 40 000 houses using the same Vela system, simply confirms the complexities involved in a determination as to whether its bid contained sufficient non-standard, unconventional and alternative components such as to justify the award of the tender to it above another. This is not a task that this Court is in a position to undertake in the absence of expert knowledge or detailed

expert evidence tendered during the course of a trial relating to the material issues in dispute between the parties.

[61] It follows that the applicants' application accordingly must fail.

[62] For the sake of completeness I consider it appropriate to record that even if I am wrong that the decisions taken do not fall to be reviewed and set aside, s8 permits an order that is "just and equitable" and a decision on remedy must be made within the context of a housing project underway in circumstances in which there is dire social need for the new housing under construction, a constitutional right of access to adequate housing and an obligation upon the state in terms of s26(2) of the Constitution to *'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'*.

[63] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at para 46 it was stated with regards to remedy that –

'much will depend upon a balancing of all the relevant circumstances including the need for finality, but also the consequences for the public at large, and, indeed for future generations, of allowing the invalid decision to stand.'

[64] In *Millenium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA) Japhta JA at para 23:

'The difficulty that is presented by invalid administrative acts, as pointed out by this court in Oudekraal Estates (at para 36) is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

[65] I am satisfied that on the facts before this Court, as was stated in *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA) an order to set aside, if implemented, would be disruptive but would give rise to a host of problems not only in relation to a new tender process but also in relation to the work performed.

[66] The impact upon the public purse, while sometimes a matter for speculation, is relevant (*Millennium Waste Management (supra)* at paras 29-30). Furthermore, where third parties have based their affairs, or altered their positions on the lawfulness of the decision and would be prejudiced if it would be set aside (*Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4)

SA 628 (SCA) at para 9), or where there would be a disastrous domino effect on subsequent decisions (*Searle v Van Rooyen NO and others; Provincial Government, North West Province v Van Rooyen NO and others* 2008 (4) SA 43 (SCA) at para 13) it would not be just and equitable to set aside a tender. A network of contractors and subcontractors have commenced work, significant costs have been incurred in the initial phase of construction, sunk costs would not be able to be reclaimed given that they are recouped in a proportion to the works completed over the life of a contract and work undertaken on one tenderer's system does not easily translate to work on another, in the event that another tenderer were to be successful.

[67] Consequently, even if I had reached the conclusion that that the award of the tenders fell to be set aside, a decision to set aside the tenders and refer the bids back to the BEC for reconsideration would in my mind not be just and equitable.

Costs

[68] There exists no reason as to why costs should not follow the result, including the first and second respondents' costs of two counsel. I was asked to make an order as to wasted costs arising from the applicants' delay in filing their affidavits in accordance with the timetable agreed. I am not persuaded that given the complexity of the matter and the voluminous papers filed, that such an order is appropriate.

Order

[69] In the result, the following order is made:

1. The application is dismissed.
2. The applicants are to pay the respondents' costs, inclusive of the costs of two counsel briefed by the first and second respondent.

KM SAVAGE
ACTING JUDGE OF THE HIGH
COURT

Appearances:

For applicants: A M Breitenbach SC and M Schreuder

Instructed by Werksmans Inc.

For first and second respondents: W R E Duminy SC and R Jaga

Instructed by the State Attorney

For third respondent: D Borgström

Instructed by Baker & McKenzie