IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case No: 374/12

In the matter between:

INDIZA AIRPORT MANAGEMENT (PTY) LTD	Applicant
versus	
MSUNDUZI MUNICIPALITY	Respondent

JUDGMENT

SEEGOBIN J

[1] The applicant, INDIZA AIRPORT MANAGEMENT (PTY) LTD, instituted review proceedings against the respondent, the MSUNDUZI MUNICIPALITY, in which it seeks an order that the respondent's decision not to award specialised contract number SCM 11 of 10/11 ("the 2011 tender") to the applicant, to abandon the 2011 tender, and to proceed with SCM22 of 11/12 ("the 2012 tender") be reviewed and set aside, and directing that the 2011 tender be re-instated and awarded to the applicant. The applicant further seeks an order that the costs of this application be paid by the respondent.

[2] In view of the fact that the applicant seeks final relief in motion proceedings, the rules formulated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd,*[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2] and more recently reaffirmed in the matter of *National Director of Public Prosecutions v Zuma,*[3] are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicant's founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or that the denials in the respondent's version are bald or uncreditworthy, or that the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected on the available evidence.

APPLICABLE LEGISATIVE FRAMEWORK

[3] It is well established that the award of government tenders is governed by section 217(1)[4] of the Constitution of the Republic of South Africa, 1996. The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services must be 'fair, equitable, transparent, competitive and cost-effective'. However, a procurement system may provide for

---

[1] 1957 (4) SA 234(C) at 235 E-G.
[2] 1984 (3) SA623(A) at 634 H – 635C.
[3] 2009 (2) SA 277 (SCA) para 26.
[4] Section 217 provides: "'(1) When an organ of State in the national, provisional 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.'

categories of preference and for the advancement of categories of persons (section 217(2)). National legislation must prescribe the framework for the implementation of any preferential policy (section 217(3)). This is to be achieved by the Preferential Procurement Policy Framework Act 5 of 2000. This Act provides that organs of State must determine their preferential procurement policy based on a points system. The importance of the points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer (section 2(1)(f)).

[4] In order to give effect to government's constitutional imperative as set out above, the respondent has adopted its own Supply Chain Management Policy in terms of section 111 of the Local Government: Municipal Finance Management Act, 2003. This policy is to be read subject to the Municipal Supply Chain Management Regulations.[5]

[5] Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of the Promotion of Administrative Justice Act[6] (PAJA) apply to the process. It is against this broad legislative background that the present matter must be considered.

[6] Before I do so, however, I make the observation that government procurement has become big business for many in this country. While the aim is to obtain goods and services in a transparent, efficient and cost-effective manner, in view of the large amounts of money involved these awards often give rise to public concern. Additionally, as was observed by Harms DP in *Moseme*

---

[5] Published by Government Notice 868 of 2005.
[6] Act 3 of 2000.

Road Construction CC v King Civil Engineering,[7] these awards have become a 'fruitful source of litigation'.

COMMON CAUSE FACTS

[7] The following facts are either common cause or no longer disputed: In December 2010, the respondent put out to tender under specialised contract SCM11 of 10/11 for the 'Provision of Management Services for Pietermaritzburg Airport' ('the 2011 tender'). Of the original six (6) bids received, only two (2) bids qualified for the second stage of evaluation. The two (2) bids were those of the applicant and Joint Venture which comprised Virtual Consulting Engineers and Delta Facilities. Joint Venture was declared to be the preferred bidder. The applicant duly filed an objection and the objection hearing was held on 16 February 2011. At the objection hearing, the applicant's objection was upheld, it being conceded that Joint Venture's bid had been incorrectly scored and that on a proper scoring the applicant should have been declared the preferred bidder. The Minute of the Objection Hearing[8] records 'that the tender must go back to

---

[7] 2010 (3) ALL SA 549 (SCA). It is worth noting the comments made by the learned Judge in paragraph 1 at page 551 where he said the following: 'These awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the successful tenderer is to be blamed for the problem, but then there are cases where he is innocent. Many cases are bedeviled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer, or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract. It is not necessary to adumbrate further. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.'

[8] This minute appears at pages 70-74 of the Indexed papers. This Minute was taken by the Executive secretary at the hearing.

the Bid Evaluation Committee and Bid Adjudication Committee for correcting'. The chairperson of the hearing further 'instructed that the committee must consider all areas that was discussed in this sitting' and 'that the final decision will be made by the Municipal Manager'. The Bid Evaluation Committee then recommended that the tender be awarded to the applicant. Instead, the respondent, through its acting Municipal Manager at the time, took a decision on 7 September 2011 not to award the tender to the applicant but to cancel it and re-advertise a new tender for the same services on 12 January 2012 under specialised contract SCM 22 of 11/12 ('the 2012 tender'). The 2012 tender documents were substantially the same as the 2011 documents. The applicant thereafter sought and was granted an interim interdict preventing the respondent from considering and awarding the 2012 tender pending the final determination of the review application. To date, however, the applicant continues to provide such services to the respondent but does so on a month to month contract basis.

ISSUES FOR DETERMINATION

[8] Broadly speaking, the issues for determination are the following: the first issue is whether the respondent's decision taken on 7 September 2011 to jettison the 2011 tender for the provision of airport management services and to re-advertise for the same services under the 2012 tender rather than awarding the 2011 tender to the applicant, violated the applicant's rights to procedural fairness in terms of PAJA. The second issue, as I see it, relates to the appropriate remedy to be granted in the event of the first issue being decided in favour of the applicant.

APPLICANT'S CASE

[9] The applicant's founding and replying affidavits were deposed to by one Adriaan Jacobus Cilliers ("Cilliers") an employee of the applicant who was

integrally involved in the bid process and was present at the objection hearing held on 16 February 2012. In order to contextualize the decision of the respondent to cancel the bid and to re-advertise it, it is perhaps necessary to have regard to the background facts as they unfolded. As already mentioned, the respondent's tender was advertised in various newspapers on 2 December 2010, 9 December 2010 and 12 December 2010. The applicant and certain other bidders duly attended a compulsory tender briefing meeting on 15 December 2010 at the Pietermaritzburg Airport boardroom. The applicant submitted its bid in accordance with the terms, procedures and timeframes set out in the tender notice. By notice dated 18 January 2011 the respondent notified the applicant that the applicant's tender was unsuccessful and that the declared bidder was Joint Venture which comprised two (2) entities known as Virtual Consulting Engineers and Delta Facilities. The applicant objected by way of a notice dated 25 January 2011 to the award of the tender to Joint Venture and paid a fee of R20 000 (twenty thousand Rand) within the prescribed time frame in order that an objection hearing be held. In response to the applicant's Notice of Objection the respondent invited the applicant to attend a meeting to discuss the objection notice. The applicant attended a meeting on 3 February 2011, however it is unclear precisely what was discussed at this meeting as the minute provided by the respondent in this regard is completely illegible. What followed, however, was a notice given by the respondent on 14 February 2011 that the objection hearing was to be held on 16 February 2011. Despite the short notice, the applicant confirmed that it would attend the hearing on 16 February 2011. The objection hearing was in fact held on that date and was chaired by one Mr Petros June Madiba who was appointed by the acting Municipal Manager for that purpose.

[10] Cilliers records that Mr Madiba had stated at the objection hearing that the tender had been 'incorrectly awarded' to Joint Venture, that the tender must be reconsidered and corrected with due consideration for the matters that were

discussed during the objection hearing and if the tender had been correctly scored, it would have been awarded to the applicant. The applicant complains that despite repeated requests made by it, the minute of the meeting of 16 February 2011 was never made available to it up until delivery of the respondent's documents in March 2012. It would also appear that for some reason unknown to the applicant the respondent has chosen to black out the words which appear on the second page of the said minute. This is the minute that was taken by the executive secretary who was tasked to perform that function at the objection hearing.

[11] The applicant avers that in spite of the fact that the proceedings at the objection hearing were recorded, no transcripts of such proceedings was made available to it. In November 2011, Cilliers heard that the respondent was about to re-advertise the tender with lower expertise and experience criteria. The applicant prepared papers for an urgent application in which it sought to compel the respondent to deliver the minute of the objection hearing and to act in compliance with such recommendations made by the Chairperson at the time. In response to the applicant's threat, the respondent provided it with a report dated 18 November 2011 which was prepared by Mr Madiba. Applicant contends that if one has regard to these two documents, it is clear that the recommendations contained therein are incorrect: the former reflects that Mr Madiba had stated that the bid must go back to the Bid Evaluation Committee and thereafter to the Bid Adjudication Committee whereas the latter only states that the bid should go back to the Bid Adjudication Committee. According to Cilliers who was present at the objection hearing, these documents are incorrect because neither of them contain the most important recommendation made by Mr Madiba and that is that the bid should be awarded to the applicant.

[12] Upon receipt of Mr Madiba's report of 18 November 2011, the applicant's attorneys immediately called upon the respondent to disclose whether it had complied with the ruling made by Mr Madiba. The respondent failed to address the enquiry but gave an undertaking that it would not re-advertise until 9 December 2011. In the meantime however, the applicant prepared a further application in order to interdict the respondent from re-advertising the bid. The respondent was placed on terms that the application would be brought on the afternoon of 9 December 2011 if no favourable response was received by then. As it turned out, the respondent, through it attorneys, sent a letter, albeit after the deadline, in which it recorded the following: that the tender had been sent to the Bid Evaluation Committee which had recommended that the bid be awarded to the applicant; that the Municipal Manager had declined to follow the recommendation but decided instead to re-advertise because of 'non-compliance with various regulations of the Municipality Chain Management Policy' and also because of non-compliance with Regulation 21(d) relating to transactions having a value in excess of R10 million. An undertaking was however given that the respondent would not re-advertise until 9 December 2011.

[13] In spite of a verbal undertaking given by the respondent's attorney to the applicant's attorney that there would be no re-advertising until late January 2012, the respondent in fact went ahead and advertised a fresh tender for the same contract on 12 January 2012 (the 2012 tender). Once again the respondent was placed on terms to withdraw the said advertisement failing which the applicant would interdict it from doing so. As it turned out, the respondent failed to withdraw the 2012 tender or provide any further undertaking with regard thereto. This resulted in an urgent application being launched interdicting the respondent from proceeding with the 2012 tender pending finalisation of review proceedings.

[14] The applicant contends that until it had sight of the respondent's affidavit opposing the interim relief in the above application, it was unaware that the respondent had sent a letter to the applicant dated 7 September 2011 indicating that the 2011 tender had been cancelled. This letter was sent to the applicant's P.O. Box address and reads as follows:

> 'Please be advised that the specialised contract SCM 11 of 10/11 – proposal call for the management for the Pietermaritzburg Airport advertised in the Natal Witness, Echo and Sunday Times in December 2010 has been cancelled due to unforeseen circumstances.
>
> Please note that the contract will be re-advertised in due course.'[9]

The letter was signed by Mr T Maseko in his capacity as acting Municipal Manager.

[15] The applicant accordingly contends that there can be no logical connection between the documents that the acting Municipal Manager is said to have considered and his decision to cancel the 2011 Tender on 7 September 2011. The documents referred to by the applicant are those that arise from the events that followed the objection hearing on 16 February 2011 when the applicant's objection was upheld. The Minute of the Objection Hearing dated 16 February 2011 records that the award to Joint Venture cannot stand on the basis that the scoring was flawed. A Bid Evaluation Team meeting was held on 9 March 2011, the minute[10] of which specifically records that the team had looked at the documentation submitted by Virtual Consulting Engineers and Delta Facilities Management and noted that they had only submitted one SARS tax clearance certificate for Virtual Consulting Engineers. In respect of Delta Facilities Management there was no such certificate, only a VAT registration form, which

---

[9] This letter appears as 'sup 17' at page 141 of the indexed pages.
[10] Pages 76-80 of the indexed papers.

was deemed not to meet the criteria as per paragraph 21 of the conditions of tender for Joint Ventures. They were therefore disqualified from the process. As far as the applicant was concerned, the minute recorded that the points allocated to the applicant totalled 57/70 or 81% which exceeded the 70% threshold for going through to stage 2 of the process. The meeting further noted that the price of applicant's tender was R318 000 (three hundred and eighteen thousand Rand) per month which was considered to be realistic. HDI (Historically Disadvantaged Individual) points were not allocated as they were the sole compliant tender. The meeting accordingly recommended that the contract be awarded to the applicant for a period of three (3) years.

[16] On 11 March 2011 the Economic Development and Growth Business Unit of the respondent prepared a report for the Bid Evaluation Committee.[11] Paragraph 1 records that the purpose of the report was to recommend to the Bid Evaluation Committee that the contract be awarded to the applicant for a period of three (3) years. Once again it was recorded that it was only the applicant that scored over 70% in stage 1 and was eligible to go through to stage 2. Additionally, the price was deemed to be realistic.

[17] On 23 March 2011 the Bid Evaluation Committee of the respondent prepared a report for the Bid Adjudication Committee.[12] The purpose of the report was to recommend to the Bid Adjudication Committee that the contract be awarded to the applicant at the tendered rate of R318 000 (three hundred and eighteen thousand Rand) per month for a period of three (3) years commencing from the date of award. The committee noted that the applicant had complied with the terms and conditions of the proposal and was considered for stage 2 of

---

[11] Pages 81 – 83 of the indexed papers.
[12] Pages 84 – 93 of the indexed papers.

the process in view of the points that were scored. It was further noted that the applicant was the current contract holder and in addition, they currently managed the Richards Bay and Virginia Airports hence having the requisite experience and knowledge of municipal airports.

[18] On 9 May 2011 the Bid Evaluation Committee prepared a report for the acting Municipal Manager in which it recommended that the contract be awarded to the applicant for a period of three (3) years.[13]

[19] In spite of the above recommendations that were made by the various committees, a Bid Adjudication Committee meeting held on 12 May 2011 which was chaired by the acting Municipal Manager, Mr Maseko, resolved that the issue 'be STOOD DOWN to the next meeting in order for the Executive: Supply Chain Management (acting) to verify that the appointment of the valuation team as appointed by the Bid Adjudicator Committee to re-evaluate the tenders received was undertaken in compliance with the Supply Chain Management Policy'.[14] Thereafter it seems that the issue relating to the said tender did not feature in any of the further meetings until the 26 May 2011 when at a meeting of the Bid Adjudicating Committee the Minutes of the meeting of the 12 May 2011 were merely confirmed.

[20] Thereafter and for a period of four (4) months from the end of May 2011 to 7 September 2011 (when the decision to cancel was taken) no documentary evidence exists pertaining to any discussion, verification, re-evaluation or investigation regarding the 2011 tender.

---

[13] Pages 94 – 101 of the indexed papers.
[14] Pages 106 of the indexed papers.

[21] The applicant contends that the first time it became aware of the full reasons why the said tender was cancelled by the then acting Municipal Manager was when it received a document dated 7 September 2011 as part of the documentation provided by the respondent in terms of Rule 53. This occurred in March 2012. This document cites various reasons for cancellation and the need to re-advertise on the basis that there was non-compliance with legislation and a breech of confidentiality, amongst others. I should point out that this document, although dated 7 September 2011, is not the same as the letter dated 7 September 2011 which was sent to the applicant's postal address.

[22] In light of the above, Ms *Lange* who appeared on behalf of the applicant, submitted that the decision of the acting Municipal Manager taken on 7 September 2011 to cancel the 2011 bid, was fatally flawed as it was not rationally connected to the information he had before him when he made the decision. She argued that if one had careful regard to the events that preceded the taking of the decision as well as all the reports that emanated from the meetings that were held by the various committees of the respondent, it is clear that the decision to cancel the tender was arbitrary, unreasonable and smacked of *mala fides*. This decision, so it was submitted, has resulted in grave financial prejudice to the applicant in that although the applicant performs such services for the respondent, it does so at a vastly reduced amount and on a monthly basis. Relying on the provisions of section 8(1)(c)(11)(aa) of PAJA, Ms *Lange* submitted that this was an appropriate matter for this court to find that exceptional circumstances exist which entitle the court to substitute its own decision for that of the decision maker and to award the 2011 tender to the applicant.

RESPONDENT'S CASE

[23] The respondent's answering affidavit herein was deposed to by a Miss Dudu Ntombenhle Ndlovu who describes herself as the Acting Head: Supply Chain Management of the respondent. The deponent has not provided any information to indicate precisely when she assumed this position or how integrally involved she was in the process relating to this tender. To her affidavit is attached a confirmatory affidavit signed by one Thokozani Maseko who is employed by the respondent as a Process Manager: Water and Sanitation. During 2011 he was the acting Municipal Manager of the respondent. Mr Maseko merely confirms the allegations contained in Ms Ndlovu's affidavit without so much as explaining his specific role in the particular procurement process or for that matter attempting to explain precisely what factors influenced his decision to cancel the 2011 tender on 7 September 2011.

[24] The case made out by the respondent in the answering affidavit is the following: It avers that at the meeting of the Bid Adjudication Committee on 12 May 2011, the matter stood down for verification of the evaluation team. After the matter stood down, an investigation was conducted to determine 'whether the special committee led by Dr Dyer had been mandated by the Municipal Manager'. It was established that the committee (it is not clear which committee is referred to), was not mandated by the Municipal Manager and he then requested the supply chain to investigate the whole process. This investigation was headed by Miss Ndlovu, the deponent to the answering affidavit. A report was thereafter prepared by her in which she listed the various ways in which the legislation was not complied with. This report was then signed on 7 September 2011 by Mr Maseko, as well as by a Mr Sithole, the administrator. It is this report which essentially contained the reasons for the decision to cancel the tender and to re-advertise it.

[25] The reasons advanced by the respondent for cancelling the tender were the following: it was reported to the Municipal Manager that the Supply Chain Policy had not been complied with in that regulation 27 of the Regulations to the Preferential Procurement Policy Framework Act, 2000, prescribed that the bid specifications must be approved by the Accounting Officer and this was not done. A further reason advanced was that since the tender amount had exceeded the sum of R10 million inclusive of VAT, the final award could not be sub-delegated by the Accounting Officer. An additional reason was that Section 29(6) of the respondent's Supply Chain Policy authorises the Accounting Officer, at any stage of the bidding process, to refer any recommendation made by the Bid Evaluation Committee or Bid Adjudication Committee back to that committee for reconsideration. The respondent averred that in terms of regulation 10(4)(C) an award or bid could be cancelled if no acceptable bids were received.

[26] Against the backdrop of the reasons provided by the respondent in its answering affidavit as well as those contained in the 'report' of 7 September 2011 which constituted the decision to cancel the 2011 tender, Mr *Bezuidenhout* SC, on behalf of the respondent, submitted that the acting Municipal Manager was justified in cancelling the tender. This was due mainly to the fact that the bid specifications were not approved by the Municipal Manager before the tender was advertised. He further submitted that since no work was performed in terms of the tender, there could be no prejudice to the applicant. It was contended that the decision to re-advertise the tender due to deficiencies in the process will afford the respondent an opportunity to review its documentation and ensure that its house is in order. It was further argued that even if it was found that the decision was flawed, there is nothing exceptional in the matter that would allow the Court to award the tender to the applicant.

[27] The judicial review of an administrative action is governed by the provisions of section 6[15] of PAJA. In order to determine whether the respondents

---

[15] The section provides as follows: ' Section 6 Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it-

(i) was not authorized to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorized by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error or law;

(e) the action was taken –

(i) for a reason not authorized by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorized by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is other wise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where –

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision, institute proceedings in a court proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

conduct violated the applicant's right to fair administrative action in terms of PAJA, it is necessary to examine the reasons that formed the basis of the decision as set out in the report[16] that was placed before the acting Municipal Manager by Ms Ndlovu and which he and the administrator signed on 7 September 2011. The full text of this report which appears under the letterhead of the respondent reads as follows:

> '**CANCELLATION AND RE-ADVERTISEMENT OF SPECIALISED CONTRACT No.SCM 11 OF 10/11 MANAGEMENT CONTRACT OF PMB AIRPORT**
>
> The abovementioned contract has been cancelled in terms of the Preferential Procurement Regulation No. 10(4)(c) which states that, "*an organ of the state may, prior to the award of a bid, cancel a bid if… (c) no acceptable bids are received."*
>
> It was noted that the bid specifications for this contract were not presented to the Bid Specification Committee for compilation and were also not presented to the Municipal Manager for approval as per the MFMA SCM Regulations 27(1) and 27(2) respectively before they were publicized, therefore these specifications are considered to be invalid.
>
> Furthermore MFMA regulation 21(d), which states the following, was not complied with, hence the tender documentation used was incomplete and did not meet the required bid documentation for a contract value exceeding R10m:
>
> > "*If the value of the transaction is expected to exceed R10 million (VAT included), require bidders to furnish-*

> institute proceedings in a court or tribunal for judicial review of the failure to take the decision notwithstanding the expiration of that period.'

[16] Both, in the respondent's answering affidavit and in argument, this was referred to as a report that was prepared by Ms Ndlovu.

(i) If the bidder is required by law to prepare annual financial statements for auditing, their audited annual financial statements –

(aa) for the past three years; or

(bb) since their establishment if established during the past three years;

(ii) A certificate signed by the bidder certifying that the bidder has no undisputed commitments for municipal services towards a municipality or other service provider in respect of which payment is overdue for more than 30 days;

(iii) Particulars of any contracts awarded to the bidder by an organ of state during the past five years, including particulars of any material non-compliance or dispute concerning the execution of such contract;

(iv) A statement indicating whether any portion of the goods or services are expected to be sourced from outside the Republic, and, if so, what portion and whether any portion of payment of the municipality or municipal entity is expected to be transferred out of the Republic".

Consequently all bids that were received in response to the advert were not acceptable.

Furthermore there was misconduct by certain members of the BEC and BAC where information of the bid proceedings was disclosed to the bidders informally (see the attached communication), hence MFMA SCM Regulations 46(6)(a) and (b) were not complied with:

(6) Confidentiality

(a) Any information that is the property of the municipality or its providers should be protected at all times. No information regarding any bid/contract/bidder/contractor may be revealed if such an

(b) Matters of confidential nature in the possession of officials and other role players involved in SCM should be kept confidential unless legislation, the performance of duty or the provisions of law requires otherwise. Such restrictions also apply to officials and other role players involved in SCM after separation from service.

Also, as the Accounting Officer of the Council, in response to the MFMA SCM Regulations 38(1)(a) and (b) I have taken the decision to cancel the bid.

"Combating of abuse of supply chain management system

(1) The accounting officer must-

(a) Take all reasonable steps to prevent abuse of the supply chain management system;

(b) Investigate any allegations against an official or other role player of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with this Policy, and when justified –

(i) Take appropriate steps against such official or other role player; or

(ii) Report any alleged criminal conduct to the South African Police Service".

Based on the above non-compliance issues with the legislation, the specialised contract No. SCM 11 of 10/11 PMB Management Contract will be re-advertised.'

[28] The above reasons can be dealt with as follows:

[28.1] The reason that the bid was cancelled in terms of the Preferential Procurement Regulation 10(4)(C) as no acceptable bids were received.

[28.1.1] First, it should be noted that Regulation 10(4)(C) of the 2001 regulations has now been repealed and replaced with regulation 4(C) of 2011 which has the same wording as the old regulation 10(4).[17] Preferential Procurement Regulation 4, 2011 provides:

> '(4) An organ of state may, prior to the award of a tender, cancel a tender if –
>
> (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
>
> (b) funds are no longer available to cover the total envisaged expenditure; or
>
> (c) no acceptable tenders are received.'

[28.1.2] Second, it should be noted that the Preferential Procurement Policy Framework Act defines 'acceptable tender' as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. In *Millennium Waste Management v Chairperson, Tender Board,*[18] Jafta JA recognised that when Parliament enacted the Preferential Procurement act it was complying with the obligation imposed by s 217(3) of the Constitution which required that legislation be passed in order to give effect to the implementation of a procurement policy referred to in s 217(2). The learned Judge said the following in this regard:

> 'Therefore the definition in the statue must be construed within the context of the entire s 217 while striving for an interpretation which promotes "the spirit, purport and objects of the Bill of Rights" as required by s 39(2) of the Constitution. In *Chairperson: Standing Tender*

[17] Published under GN R502 in GG34250 of 8 June 2011 (with effect from 7 December 2011).
[18] 2008 (2) SA 481 (SCA) at page 488 paragraph 18.

Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others Scott JA said (para 14):

> "The definition of "'acceptable tender" in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values."'

[28.1.3] The respondent's contention that the applicant's bid was not an acceptable one is farcical if one considers that of the six (6) bids received, the applicant's was the only one that was fully compliant. This was more so after the objection hearing when Joint Venture was disqualified completely from the tender process. The various reports[19] from the respondent's own committee's between February 2011 – May 2011 consistently and expressly rated the applicant's bid to be one that was the most compliant. For the acting Municipal Manager to cancel the bid on the basis that 'no acceptable tenders' were received, indicates, in my view, that all the relevant documents were either not placed before him or if they were, he failed to properly apply his mind to them.

[28.2] The reason that the bid specifications were not presented to the bid specification committee for compilation and not presented to the Municipal Manager for approval before publication

---

[19] These are the reports dated 9/03/2011, 11/03/2011, 23/03/2011 and 9/05/2011 already referred to.

[28.2.1] There is no dispute about the fact that the 2011 tender specification was issued under the name of the respondent and was advertised on its official website and in various newspapers.

[28.2.2] It is a known fact that tenderers expend huge amounts of money in preparing their tender proposals and in making presentations, if required to do so. Tenderers are accordingly entitled to expect that all internal processes have been complied with. For the respondent to now claim, as justification for cancelling the 2011 tender, that the said tender was specified without being 'presented to the Bid Specification Committee for compilation', and that it was not approved by its Municipal Manager before publication, is at best, in my view, disingenuous and at worst, dishonest.

[28.2.3] Bearing in mind that the tender process had reached such an advanced stage and at one point was in fact awarded to Joint Venture, there is nothing in the evidence to suggest, even remotely, that the tender was vitiated by an irregularity from the outset. If anything, the clear impression created by the respondent, is that all the formalities were fully complied with. In the circumstances, this reason advanced by the respondent as a basis for cancelling the 2011 tender, cannot be sustained.

[28.3] The reason that the cancellation was justified because the bid specification was deficient in that it did not comply with regulation 21[20]

---

[20] Regulation 21(d) of the Municipal Finance Management Regulations (MFMA) read as follows:

[28.3.1] The applicant correctly points out both in its answering affidavit and in argument, that if indeed this was a true reason for cancellation of the 2011 tender then one would have expected the 2012 specifications to contain these provisions. In fact, the 2012 tender is worded in identical terms as the 2011 tender.

[28.3.2] In my view, no defect arises in the 2011 tender in that regulation 21(d) only applies when the 'value of the transaction is expected to exceed ten million rand'. The respondent would not have entertained such an expectation with regard to the 2011 tender because as the 2011 process revealed, three of the six bids received were below R10 million and three were above. Having experienced this with the 2011, one would have expected that the respondent would alter the terms of the 2012 bid in this regard but it has not. I accordingly do not consider this to be a material basis for cancelling the 2011 tender.

'(d) if the value of the transaction is expected to exceed R10 million (VAT included), require bidders to furnish –

(i) if the bidder is required by law to prepare annual financial statements for auditing, their audited annual financial statements -

(aa) for the past three years; or

(bb) since their establishment if established during the past three years;

(ii) a certificate signed by the bidder certifying that the bidder has no undisputed commitments for municipal services towards a municipality or other service provider in respect of which payment is overdue for more than 30 days;

(iii) particulars of any contracts awarded to the bidder by an organ of state during the past five years, including particulars of any material non-compliance or dispute concerning the execution of such contract;

(iv) a statement indicating whether any portion of the goods or services are expected to be sourced from outside the Republic, and, if so, what portion and whether any portion of payment from the municipality or municipal entity is expected to be transferred out of the Republic; and

(e) stipulate that disputes must be settled by means of mutual consultation, mediation (with or without legal representation), or, when unsuccessful, in a South African court of law.'

[28.4] The reason that the cancellation was justified because of a breach of confidentiality

[28.4.1] The report dated 7 September 2011 referred to above, alludes to certain 'attached communication'. However, no such communication has been attached to the said report. If by this the respondent intends placing reliance on an email,[21] dated 1 November 2010, from one Hennie Erasmus, who was employed as the applicant's airport manager and who is now deceased, addressed to one Rakesh Singh, who is employed by the respondent, it seems that this was a response to a request for suggestions as to what should be included in the tender documents. It was merely a list of suggested specifications which were sent by the late Erasmus to Singh in an open and co-operative manner.

[28.4.2] It seems to me that the respondent, through lack of experience in dealing with tenders of this nature, was merely seeking advice and guidance from the late Erasmus on what could be included in the specifications. For the respondent to now claim that this amounted to a breach of confidentiality on the part of some of its own members justifying its cancellation of the tender is, in my view, rather disingenuous, to say the least. None of this was drawn to the attention of the applicant or for that mater to any of the other bidders during the tender process.

[29] As I have endeavoured to show above, the reasons advanced by the respondent for cancelling the 2011 tender and its decision to re-advertise it, cannot be justified in light of all the information that was before it at the time. The reasons put forward by Ms Ndlovu in her report to the acting Municipal Manager and to the administrator, Mr Sithole, at the time, are, in my view, without any

[21] Annexed as "sup 24" to the applicant's founding affidavit.

substance whatsoever and are not rationally connected to all the information that was at the disposal of the respondent when the decision was taken. It seems that both the Municipal Manager and the administrator, merely appended their signatures to the report prepared by Ms Ndlovu without themselves applying their minds fully to everything that transpired during the tender process. A fundamental difficulty that I have with the reasons contained in this report, is that none of these issues served before any of the respondent's committees at any stage. None of the committees or the applicant were afforded an opportunity of addressing any of the concerns raised for the first time in this report.

[30] Quite apart from the matters dealt with above there is, in my view, a more fundamental reason why the decision of the respondent to cancel the 2011 tender and to re-advertise it, cannot stand. This relates to a material error of fact that occurred when the scoring was initially done. Had the applicant been properly scored in respect of its HDI status, the applicant would have scored the highest points, making it the preferred bidder. This issue was pertinently dealt with by Mr Rakesh Singh, who is employed in the respondent's Supply Chain Management. Mr Singh was present at and participated in the Objection Hearing chaired by Mr Madiba on 16 February 2011. The typed record of the transcript of those proceedings reflects the following at pages 211-212 of the indexed papers:

> 'MR SINGH Yes, Chair, I am actually thankful that these are pointed out – these anomalies, and I can confirm it because I have the very same report in front of me and it is actually very concerning that a report that is so poor can come to the Evaluation Committee. I am just hoping that they vetted it in a correct manner and awarded the points.
>
> But, I just want to state for the record that bids are evaluated in two stages, as per the directive of the Provincial …(indistinct) where a threshold is set, in this case a threshold is set at seventy percent. And, anybody who passes that

threshold moves to the next stage, which is Stage 2 and at Stage 2 everything starts – everything is evened out and you basically work on the ninety-ten principle in this…(indistinct)

MR ASMAL Sure.

MR SINGH All right. But, in going through the documents when the objection came in and after I met Indiza, I was asked by the administrator's office to come through and explain what is going on here because obviously our municipal manager had reported the same to them. But, just going through the document here, I picked up on our matrix to the Bid Adjudication Committee that we had not awarded points to Indiza for HDI. That then prompted me to go back to the tender document, which I did, and noticed that they had indeed filled out …(indistinct) of the document …(intervention)

[my emphasis]

MR MADIBA …(indistinct)

MR SINGH Okay. Then it led me to say it is ninety percent owned by these three individuals, two of them qualify for HDI and the one would not. Obviously I had to break down ninety percent …(indistinct) percentages. I then went through to the BEE verification certificate, which we do not really use.

MR ASMAL Sure.

MR SINGH But it has given me a clear indication of the BEE …(indistinct) which we should have, and I am saying it was an error on the Supply Chain Management that it should have been awarded points. Now, I work out the points at 1.6 if I take the percentages, and if I work out ninety percent of the shareholders it works out to about 1.4 … (indistinct) points, which Chairperson, to me, should have been added to this schedule and if I had added that – had that been done then the results would have been different. Now, I am submitting this information and I have got to be truthful and upfront here – we have, as a Supply Chain Unit – my office has made a big, big mistake here. I have highlighted this

> to the administrator and I would like you to take this into consideration when you make your decision.'
>
> [my emphasis]

[31] Following upon this issue, it seems that Mr Madiba was of the view that it was a simple matter for Bid Adjudication Committee to effect the necessary correction. This is evident from what he goes on to state at page 213 of the papers:

> 'MR MADIBA Thank you very much. I think we have come to the end of our objection hearing. Thanks for allowing me to chair the sitting. What I would propose as a way forward in trying to resolve this matter and what I will put forward before the office of the municipal manager will be that this matter should be referred back to the Bid Adjudication Committee for corrections.'
>
> [my emphasis]

[32] It further seems that Mr Madiba was clearly of the view that the respondent's committees acted incorrectly when they took the decision to award the tender. In this regard, he says the following at page 214 of the papers:

> 'MR MADIBA To me, I have reasons to believe that when they took the decisions pertaining to all the – the award of this tender, they have misdirected themselves.'
>
> [my emphasis]

[33] Following upon Mr Singh's disclosures at the Objection Hearing and Mr Madiba's finding that the committee's had misdirected themselves, particularly with regard to how the applicant had been scored, the subsequent meetings of

the various committees held between March 2011 – May 2011 all recommended that the tender be awarded to the applicant. Had the true facts as presented at Objection Hearing been placed before the acting municipal manager when he took the decision, he would not have concluded that the applicant's tender was not an 'acceptable tender' justifying a cancellation thereof. He would have found that the applicant's was the only fully compliant tender and he would have awarded the tender to it. His decision, in my view, was clearly misplaced and based upon the taking of irrelevant considerations and the ignoring of highly relevant and material considerations.[22]

[34] Additionally, I consider that the decision to cancel the 2011 tender and to re-advertise it in the face of compelling evidence that it should have been awarded to the applicant, offends the doctrine of legality and accordingly falls to be set aside. In *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd & Others*[23] the following was said at paragraphs 34 and 35:

> '[34] 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 s 6(2) of the PAJA. It has been held that it falls within the ground specified in s 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 s 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".
>
> '[35] In *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003 (6) SA 38 (SCA) paragraph 47] Cloete JA held:

---

[22] Section 6(2)(e)(lll) of PAJA.
[23] [2012] 2 All SA 111 (SCA).

> ”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, ie 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*.”’

[35] It follows from all that I have stated that the decision by the respondent to cancel the 2011 tender and to re-advertise it in the circumstances in which this was done, was procedurally unfair,[24] arbitrary[25] and materially influenced by an error of fact.[26] The decision was irrational[27] and not remotely connected to all the information that existed at the time. What is even more surprising is that the decision to cancel and re-advertise was taken even before the findings of Mr Madiba were made known. It will be recalled that his report was signed on 18 November 2011 whereas the decision to cancel was already taken on 7 September 2011. To add insult to injury, the respondent failed to inform the applicant timeously of the full reasons for the cancellation. It seems that it was

---

[24] Section 6(2)(c) of PAJA.
[25] Section 6(2)(e)(vi) of PAJA.
[26] Section 6(2)(d) of PAJA.
[27] Section 6(2)(f)(ii) of PAJA.

content to play a guessing game thereby forcing the applicant to seek a protection and enforcement of its rights through litigation. It seems highly probable, in my view, that the reasons that appear in the report of 7 September 2011, never existed at the time the decision was taken. It seems that these reasons were an afterthought, crafted to challenge the review application. Had the reasons existed at the time, they could have been included in the letter of 7 September 2011 which merely records that the tender was cancelled due to 'unforeseen circumstances'.

[36] In my view, an organ of State charged with a public function and utilising public funds, is required to act in a responsible, fair and transparent manner at all times. The respondent has clearly failed to do so in this instance. For all these reasons the decision to cancel the 2011 tender and to re-advertise it is reviewed and set aside.

[37] Having found in favour of the applicant on the first issue, the second issue to be decided is what appropriate remedy should be granted in the circumstances. Is this an appropriate case entitling me to make the decision for the respondent and award the 2011 tender to the applicant or should the matter be remitted to the respondent for reconsideration in light of the findings contained herein? The remedies that a court or tribunal may grant in proceedings for judicial review are set out in section 8 of PAJA.[28] Courts have thus retained a

---

[28] Section 8 of PAJA reads as follows: 'Section 8 Remedies in proceedings for judicial review
(1) The court or tribunal, in proceeding s for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –
(a) directing the administrator –
(i) to give reasons; or
(ii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the administrative action and –
(i) remitting the matter for reconsideration by the administrator, with or without directions; or

wide discretion when deciding whether to remit decisions that have been set aside or to substitute, vary or correct the defect. However, the sole statutory limitation is that the court can only substitute, vary or correct the defect upon a determination that a case is 'exceptional' (s8(1)(c)(ii)(aa) of PAJA). In *Gauteng Gambling Board v Silverstar Development Ltd and Others*,[29] Heher JA stated the position as follows:

> 'The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depended upon a determination that a case is "exceptional" as intended in s 8(1)*(c)*(ii)*(aa)* of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA):

(ii) in exceptional cases –
(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
(bb) directing the administrator or any other party to the proceedings to pay compensation;
(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(e) granting a temporary interdict or other temporary relief; or
(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders –
(a) directing the taking of the decision;
(b) declaring the rights of the parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs'

[29] 2005(4) SA 67 (SCA) paras [28] and [29].

> "[14] (T)he remark in *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76D-E that "the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G
>
> "… the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and … although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides".

[See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999 (1) SA 104 (SCA) at 109F-G.]

"[15] I do not accept a submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter *Administrative Law* at 682-4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:

> "The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers …; sometimes, however, fairness to the applicant may demand that the Court should take such a view."

> This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so."
>
> '[29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by its experience, and by its access to sources of relevant information and expertise to make the right decision. The Court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA): at paras [47]-[50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46]-[49]. That is why remittal is almost always the prudent and proper course.'

[38] In the *Silverstar* case (above), the first respondent had approached a Provincial Division for an order reviewing the appellant Board's decision under section 31 of the Gauteng Gambling Act 4 of 1995 to refuse it a casino licence. The court *a quo* upheld the first respondent's contentions, set aside the refusal by the appellant and directed the Board to grant the licence. The court *a quo* refused leave to appeal to the SCA but it was granted by the SCA itself. The Board later abandoned its challenge to the setting aside of its decision. The dispute between the parties was then confined to whether the court *a quo* had been correct in assuming the decision-making function. It appeared that the appellant had always been set against granting the first respondent a licence, and had favoured another prospective licensee over the first respondent on several grounds. The other prospective licensee's plan were, however, scuppered when it failed to obtain environmental approval for its project, with the result that the first respondent was, at the time of the application before the court *a quo*, the only remaining applicant for a casino licence for the area in question.

[39] Based on considerations of fairness and after having looked at all the facts before it, the SCA agreed with the court *a quo* that the matter was an extraordinary one and that the court *a quo* had not erred when it decided against a remittal to the Board. The SCA reasoned that the court *a quo* was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter.

[40] The applicant has strongly urged that just as in the *Silverstar* case, in the present matter, exceptional circumstances exist which justify the court substituting its own decision for that of the respondent in terms of section 8(1)(a)(ii)(aa) of PAJA. On behalf of the respondent it was argued that 'due to the deficiencies in the process and to ensure that procedural and substantive irregularities are avoided and that there is transparency'[30] the decision to re-advertise was correct. It was further submitted that the decision to re-advertise due to the deficiencies will afford the respondent an opportunity 'to review its documentation and ensure that its house is in order'.[31] Apart from these submissions and the spurious nature of the reasons contained in the report of 7 September 2011, the respondent has not put up any countervailing or additional objections to the applicant's 2011 tender.

[41] While a functionary in the position of the respondent as decision-maker often enjoys greater advantages, as compared to a court, the particular facts of

---

[30] Respondent's heads of argument and relying on the decision in *Sanyathi Civil Engineering v eThekwini Municipality & Others : Group Five Construction (Pty) Ltd v eThekwini &* Others (2012) 1 All SA 200 (KZP) para 9.

[31] *GVK Siyazama Building Contractors v Minister of Public Works & Others* 2007(4) All SA 992 (D) para 9.1; also: *Moseme Road Construction CC & Others v King Civil Engineering Contractors (Pty) Ltd & Another* [2010] 3 All SA 549 (SCA) at paras 15 – 23.

the present matter adequately demonstrate that there would be no point in remitting the matter back to the respondent for reconsideration. For the reasons that follow I consider that this court is in as good a position as the respondent to take the decision for it:

> [41.1] Throughout the tender process, the applicant was the most compliant tenderer and its tender was the only one that could truly be regarded as an 'acceptable tender' within the provisions of the Preferential Procurement Policy Framework Act and its Regulations.
>
> [41.2] The applicant had scored the highest total number of points[32] and had it not been for the apparent errors committed during the initial evaluation and adjudication processes as alluded to by Mr Singh at the Objection Hearing, in all probability the tender would have been awarded to it in preference to Joint Venture. Had a material error of fact not occurred during the scoring process we would not be faced with this problem now.
>
> [41.3] After the objection hearing in February 2011 and between the period March 2011 – May 2011, the evidence reveals that every committee that dealt with this matter, recommended that the tender be awarded to the applicant. By 9 May 2012 Joint Venture had been completely disqualified from the process, once again leaving the applicant as the most compliant tenderer or with the most compliant tender.

---

[32] Regulation 5 provides that subject to Regulation 7, the contract must be awarded to the tender who scores the highest total number of points.

[41.4] In addition to all the relevant documents that served before the respondent, this court has had the benefit of the Record of the objection hearing supplied by the respondent, from which the errors in the scoring are clearly evident. With no other tenderers contending for this tender, it follows logically that once Joint Venture ought not to have been awarded the tender in the first place, then the tender ought to have been awarded to the applicant.

[41.5] An overriding consideration is that the applicant continues to provide management services to the respondent's airport, albeit that it does so on a month to month basis and at a drastically reduced price. That the applicant has the necessary experience, skill and expertise to provide such services is evident from the fact that it provides similar services at the Richards Bay and Virginia Airports.

[42] Taking all the matters that I have enumerated above into consideration, the court would be faced with the inevitability of a particular outcome if the respondent was once again called upon to decide the matter fairly.

[43] I further consider that nothing is to be gained by a remittal is also relevant to the issue of fairness.[33] There can, in my view, not be any prejudice to any other tenderer (as no contract has yet been concluded) or to the public at this stage. If anything, it would be in the public's interest to bring finality to this issue for the sake of effective service delivery and to avoid a wasteful and fruitless expenditure. On the papers before me a lack of fairness to the respondent or the

[33] See the *Silverstar* case above para [40]; also: Section 8(2) of PAJA.

reasonable possibility of prejudice to the public were not cited as probable consequences of non-remittal.[34]

CONCLUSION

[44] I accordingly conclude that this is an exceptional case in which the requirements of fairness, justice and equity, as well as considerations of pragmatism and practicality, strongly militate against a remittal to the respondent.

ORDER

[45] For the reasons set out herein, I grant the following order:

1. The decision taken by the respondent on 7 September 2011 not to award SPECIALISED CONTRACT No. SCM11 of 10/11 to the applicant, to cancel the said tender and to re-advertise it, is reviewed and set aside.

2. The respondent is directed, within one (1) month from date of this judgment, to award the 2011 tender to the applicant and to conclude a contract with the applicant either on the same terms and conditions contained in the 2011 tender or on such terms and conditions as the parties may agree upon.

3. The respondent is directed to pay the applicant's costs including all reserved costs, if any.

---

[34] See the *Silverstar* case para [40].

Date of Hearing	:	19 October 2012
Date of Delivery	:	16 November 2012
Counsel for Applicant	:	Adv. N Lange
Instructed by	:	Mdlulwa Nkuhlu Attorneys c/o Ngcobo Poyo & Diedricks Inc.
Counsel for Respondent	:	Adv. PC Bezuidenhout SC
Instructed by	:	Keshav & Associates