

SOUTH AFRICA / JUDGMENT

Mapitsi Civil Works (Pty) Limited and Another v MEC for Roads and Transport for the Gauteng Provincial Government and Others (28418/22) [2023] ZAGPPHC 2067 (2 November 2023)

[2023] ZAGPPHC 2067

COURT

North Gauteng High Court, Pretoria

BEFORE

MPN Mbongwe

CASE / FILE NUMBER

28418/22

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 28418/22

(1) REPORTABLE:

Yes/No

(2)

OF INTEREST TO OTHER JUDGES: Yes/No

(3)

REVISED.

SIGNATURE:

DATE:

02 Nov. 2023

In the matter between: MAPITSI CIVIL WORKS
 (PTY) LIMITED
 First
 Applicant
 MECSA CONSTRUCTION
 (PTY) LIMITED
 Second
 Applicant
 and
 MEC FOR ROADS AND
 TRANSPORT FOR
 THE GAUTENG
 PROVINCIAL GOVERNMENT
 First
 Respondent
 DITSHIMEGA
 PROJECTS & TRAINING (PTY) LTD
 Second
 Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This application for the review and setting aside of the decision of the first respondent to award a tender to the second respondent forms Part B of a two-part application and is a sequel to an earlier urgent court application, Part A, the applicant had instituted against the respondents. In Part A, the applicants had sought seeking the following interdictory orders:

1.1 Interdicting, prohibiting and restraining the first and second respondents from:

- a. finalising and signing the formal agreement, to the extent that such formal agreement had not been finalised and signed; and/or;
- b. implementing a formal agreement, to the extent that such formal agreement had not been finalised and signed, including commencing site establishment and/or commencing construction or continuing with construction work in respect of the tender, pending the final determination of an application the applicants were to launch, Part B, against the respondents and wherein the applicants would seek an order in terms of which the impugned decision of the first respondent to award the tender concerned to the second respondent is reviewed and set aside.

BACKGROUND FACTS

[2] On or about the 23 April 2021 the first respondent published an invitation to bid for a tender to wit, DRT03/09/2020, for the construction of Vaal River City Interchange (K174/R42 with Vaal River City link road measuring 1.37 kilometres and the upgrading and construction of intersections on Ascot on Vaal Road (“the tender”).

[3] The invitation to tender contained terms and conditions, the fulfilment of which would qualify a bidder to be awarded the tender. The published terms and conditions were, inter alia, that:

3.1 the first respondent would apply the 90/10 preference point system in terms of the Preferential Procurement Regulations of 2017. Bidders who did not meet the pre-qualifying criteria would be disqualified and would not be considered in the further stages of the evaluation process;

3.2 It is important to note that the pre-qualifying criteria referred to were contained in the Minister’s Regulations of 2017 made under the PPPFA and have since been declared unconstitutional by the SCA in *Afribusiness CIP v Minister of Finance* (1050/2019)

[2020] ZASCA 140; a decision that was confirmed by the Constitutional Court in an appeal against the decision of the SCA in *Minister of Finance v Afribusiness NPC* (CCT 279/20) [2022] ZACC 4 2022.

3.3 functionality would be scored out of 100 (one hundred) points and the attainment of the minimum threshold of 70 points was a necessary qualification for further consideration of the bid in the evaluation process. It was recorded that the evaluation for functionality included the assessment of the company’s experience in rehabilitation/ road construction category;

3.4 the bidder who obtained the highest number of points, including in the price and preference evaluation, will be the one recommended to be awarded the tender.

CERTIFICATION

[4] The published invitation to bid required that bidders attach, inter alia, to the returnable bid documents the following certificates of completion:

4.1 certificates of completion of relevant and similar projects to the tender project as per the tender specifications;

4.2 where functionality points were claimed, the bidders were required to attach certificates of completion of prior relevant and similar projects signed by all relevant parties, that is, the employers and the bidder: -

4.2.1 Certificates that were not signed by all relevant parties will result in the bidder forfeiting points.

4.2.2 The evaluation of functionality shall include the assessment of the company’s experience and in the Rehabilitation/ Road Construction category.

4.2.3 A bidder who failed to submit the required completion certificate(s) would get zero points.

4.3 A certificate of completion certifying the completion of a project(s) that are relevant and similar to the tender project concerned herein.

[5] The applicants have annexed to their founding affidavit a portion of the extract of the invitation to tender (Part T1.2) which clarifies the requirements in respect of the first certificate and sets out the consequence(s) of non-compliance as follows;

Key Personnel

(Max 30 points)

Bidders must complete T2.3 (forms B1 and B2) and attach to the bid documents the key personnel that will be involved with the project and must clearly indicate the personnel's road construction experience, project description, duration and contactable references.

NB: Failure to complete T2.3 and submit certified qualifications will result in the bidder getting zero points

Company Experience in Rehabilitation / Road Construction

(Max 25 points)

(Failure to submit the required Completion certificates will result in the bidder getting zero points)

NB: Completion certificates must be signed by all relevant parties

[Certificate that is not signed by all relevant parties will result in the bidder forfeiting points]

NB: Practical completion certificate will not be accepted."

LEGISLATIVE FRAMEWORK

[6] Prior to considering the impugned evaluation process of submitted bids, I deem it necessary to traverse the applicable legislative framework and the open tender framework.

THE CONSTITUTION

[7] In terms of section 217 of the Constitution of the Republic of South Africa: -

"(1) when an organ of state in the national, provincial or local sphere of government or any other institution identified in national

legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent,

competitive and cost effective".

THE PUBLIC FINANCE MANAGEMENT ACT 1 OF 1999 ("PFMA")

- [8] The Public Finance Management Act 1 of 1999 (“PFMA”) provides the framework within which the executive authority must maintain the applicable procurement system. Section 38 of the PFMA sets out the general responsibilities of an accounting officer and provides that an accounting officer for a department must adopt and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

THE SUPPLY CHAIN MANAGEMENT POLICY

- [9] The Supply Chain Management Policy is a policy the first respondent has adopted in compliance with legislative instruments applicable in the procurement of services or goods by organs of state (SCM). The SCM recognises that the Public Finance Management Act requires that the first respondent maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

- [10] The SCM policy also sets out the procurement principles the first respondent has adopted and is bound to adhere to. The principles include;

10.1 open and effective communication, being;

10.1.1 the presence of and accessibility to the framework of procurement policies, rules and procedures that are transparent and accessible to all parties;

10.1.2 openness and fairness in the procurement process;

10.1.3 integrity in the procurement process and;

10.1.4 the elimination of bias and favouritism;

10.1.5 that the first respondent be; -

10.1.6 ethical and fair in its dealings and;

10.1.7 conducts its business in a fair, transparent and reasonable manner;

10.1.8 ensures that its procurement processes are conducted with integrity;

10.1.9 is fair and impartial when performing bid specifications and evaluations;

10.1.10 ensures proper assessment and adjudication procedures and that approval procedures are adhered to at all times to ensure the highest quality and cost effectiveness in the procurement of goods and appointment of service providers;

10.1.11 ensure that the assessment of all open tender projects is audited by independent quality auditors prior to approval of the specifications and terms of reference and the adjudication of the tender bids. The audit constitutes part of a quality assurance process to certify that a fair and transparent process was followed leading to the final award of the tender.

THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT (“PPFPA”)

- [11] The Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) is the legislative instrument created in terms of the PFMA to give effect to the fundamental objective set out in the provisions of section 217(2) and (3) of the Constitution Act. The relevant objectives are the facilitation of the participation of previously disfranchised persons mentioned in section 2(d) of the PPPFA in economic activities in the country. The provisions of section 2(d) make it mandatory for government service providers to contract with one or more of the previously disfranchised category or categories of persons and, for the purpose mentioned therein, to qualify for consideration and selection as such. The only exceptions section 3 of the PPPFA recognises are in respect of instances where the tenderer is a foreign entity or where it is in the interest of national security or public interest to deviate from the mandatory provisions of section 2(d).
- [12] The PPPFA defines an acceptable tender as;
- “Any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.”*
- [13] In terms of the Minister’s Preferential Procurement Regulations of 2017 made under the PPPFA, GN R32 of 20 January 2017, where tenders are to be evaluated on functionality in terms of Regulation 5 –
- “(1) An organ of state must state in the tender documents if the tender will be evaluated on functionality”*
- (2)
- (3) The tender document must specify –
- (a) the evaluation criteria for measuring functionality;
- (b) the points for each criteria and, if any, each sub- criterion; and
- (c) the minimum qualifying score for functionality.
- (4) ...
- (5) ...
- (6) A tender that fails to obtain a minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.”
- [14] It is to be noted that the Regulations of 2017 have since been declared unconstitutional by the Supreme Court of Appeal; a decision that was confirmed by the Constitutional Court in *Minister of Finance v Afribusiness NPC* (CCT 279/20) [2022] ZACC 4 2022 in a judgment dated 16 February 2022. It is further to be borne in mind that the tender process in the present matter was commenced prior to the declaration of invalidity of the Regulations of 2017 which means that the provisions of the regulations played a role in particularly the eliminations of a vast majority of the 23 initial bidders for the tender concerned in these

proceedings.

OPEN TENDER FRAMEWORK

- [15] The Gauteng Finance Management Supplementary Amendment Act (“GFMSAA”) was enacted to promote and enforce transparency and effective management in order to eliminate corruption, unethical practices, prevention of irregular expenditure and to restore confidence in public procurement in respect of revenue, expenditure, assets and liabilities for provincial departments and provincial entities. It was also enacted to give effect to certain provisions of the Public Finance Management Act, 1999 (“the PFMA”) in the Gauteng Province.
- [16] Hereunder is a discussion of bodies/ formations created in terms of the Gauteng Finance Management Supplementary Amendment Act that are tasked with different yet intrinsic responsibilities in the process of the evaluation of bids leading to the awards of tenders in the Gauteng Province and to do so in a manner that is compliant with the provisions of applicable legislative measures and other relevant prescripts.

THE BID EVALUATION COMMITTEE (“BEC”)

- [17] The Bid Evaluation Committee (BEC) is a body established in terms of the Public Finance Management Act 1 of 1999, read with the Treasury Regulations issued thereunder and whose function is to evaluate the bids submitted, through all stages of the evaluation process, with a view to identifying and recommending the qualifying successful bidder to whom a tender may be awarded.
- [18] According to the applicants the BEC assessed a total of twenty-three (23) bids submitted for the tender. This number was reduced to five (5) consequent to eighteen (18) bidders being disqualified for failure to meet pre-requisites ostensibly in terms of applicable laws and regulations. The number of bids was further reduced to four (4) owing to one bid being disqualified for failure to comply with further mandatory requirements.
- [19] The four bidders who had up to this stage of assessments complied and, therefore, qualified for the next stages of evaluation and consideration, were the applicants who had submitted two bids – one each in individual capacities and the second as a joint venture. They made it to the final four in their capacity as a joint venture. The other three remaining bidders were Ditshimega

Projects & Training (PTY) Ltd (the second respondent), T c T Civil and Construction and King Civil Engineering Contractors. The four bidders were found to have scored above the prescribed minimum 70 points for functionality and qualified for further consideration

for Price and Preference Points Evaluation. Two of these bidders were also eliminated living the applicants and the second respondent as the ultimate contestants for the tender and were asked to individually confirm in writing that they would be able to carry out

the project within their respective tendered amounts.

[20] In February 2022 the first respondent awarded the tender to the second respondent for an amount of R316 305 434.32, including VAT.

THE BID SPECIFICATIONS COMMITTEE AND THE PROBITY AUDITOR

[21] GFMSA provides for the auditing of bid specifications prior to publication of the invitation to tender when contracting for goods or services. It provides also that the accounting officer of the department concerned must ensure that meetings of the Bid Specification Committee (“the BSC”) and the BEC are attended by probity auditors (“PA”) designated by the Provincial Treasury. The PA is tasked with probing the bid specifications and bid evaluation process to ensure equitable and fair treatment of all bidders and compliance with legislation and other relevant prescripts.

PROBITY AUDITORS’ REPORT AND THE BID ADJUDICATION COMMITTEE (BAC)

[22] The PA must provide a report to the accounting officer or accounting authority concerned giving an assurance that the process of evaluation was compliant with the relevant laws prior to the BAC considering the recommendation of the BEC.

[23] The report of the PA must, inter alia, also give assurance that the evaluation process was free of corruption and unethical practices.

REJECTION OF PA REPORT

[24] Where an accounting officer or authority rejects the report of the probity auditor, he or she must report the rejection, giving reasons therefor, to the provincial treasury before a decision to award the tender is made by the accounting authority.

[25] Upon considering the accounting authority’s rejection of the probity auditor, the provincial treasury must investigate the matter and advise the accounting authority of its findings and recommend a manner the authority should deal with the matter before a tender is awarded.

THE BID APPEALS TRIBUNAL

[26] The GFMSA also provides for the establishment of the Gauteng Bid Appeals Tribunal [“the Appeals Tribunal”] which is an independent and impartial tribunal consisting of not less than three and not more than five members appointed by the MEC on a

part time basis. One member must be a legal practitioner in practice, one member must have extensive knowledge, experience and

qualification in the field of economics and finance, and one member who has extensive knowledge and suitable qualifications in the practice of supply chain management, including related legislation and processes.

INTERNAL DISPUTE RESOLUTION

[27] Any bidder who is aggrieved by or dissatisfied with a procedural aspect in the evaluation process resulting in an impugned decision of the Bid Adjudication Committee of a Provincial Department of Provincial Entity when contracting for goods or services must, within ten (10) days after the decision has been made;

28.1 file a notice of its intention to appeal with the designated office at the Department or Public Entity;

28.2 The Department or Public Entity concerned must upon receipt of the notice of intention to appeal and within ten (10) days furnish the bidder, the Provincial Treasury and any interested party with a transcript of the evaluation processes which has been certified as accurate regarding the proceedings before the Bid Adjudication Committee; and

28.3 in a prescribed form and manner and within thirty

(30) days of the date of the decision, appeal such decision to the Appeals Tribunal.

28.4 The Tribunal must make a finding on the appeal within sixty (60) days from the date of lodgement of the appeal and may confirm the decision of the BAC or the appeal against the decision.

NATURE OF FIRST RESPONDENT'S POWERS

[28] In carrying out his/her duties and engaging with service providers in the procurement of goods or services for the provincial organ of state, the first respondent performs administrative action which includes the exercise of discretionary powers in making a decision.

[29] Section 217 of the Constitution requires that administrative action and the exercise of discretionary powers be lawful, procedurally fair and equitable, inter alia, to ensure utmost compliance with these constitutional imperatives and to protect members of the public, the PFMA provides for a procedure by which members of the public whose rights have been materially and adversely affected and are aggrieved by an administrative decision may lawfully challenge same in review proceedings in terms of the legislative provisions of PAJA dealt with hereunder. Review proceedings may also be instituted in terms of the common law grounds of legality and /or irrationality.

REVIEW

THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (PAJA)

[30] The Promotion of Administrative Justice Act (PAJA) is the legislative instrument that lays the procedure(s) to be followed in the challenge of administrative actions and the exercise

of discretionary powers. Important in the proceedings in terms of PAJA is the caveat in the provisions of section 7(2)(a) read with section 7(2)(c). The relevant provisions of section 7(2) read thus:

“7(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has been exhausted.”

It is necessary to state that sub- paragraph 7(2)(c) referred in section 7(2)(a) provides for a direct approach to the court or any appropriate tribunal for the review of an administrative action only in exceptional circumstances.

THE APPLICANTS' APPROACH

A. THE URGENT APPLICATION

- [31] Aggrieved by the decision of the first respondent, the applicants engaged the services of attorneys who wrote to the first respondent requesting a transcript of the evaluation processes. The first respondent delayed in providing the applicants with the requested transcript resulting in the applicants' attorneys sending another communication to the demanding that they be given an undertaking by 10 May 2022 that the first respondent's decision to award the tender to the second respondent will not be acted upon pending the determination of the review proceedings the applicants intended to launch against the first and second respondents.
- [32] The first respondent communicated the award of the tender to the second respondent on 18 February 2022 despite the failure to provide the applicants with he requested undertaking. This resulted in the applicants launching an urgent application under case number 32776/22 against the first and second respondents seeking the orders stated in para 1, above.
- [33] The first respondent did provide the applicants with the transcript in two parts, in June 2022 and the second in August 2022, but after the applicants had launched the urgent application on 17 June 2022.
- [34] The applicants' urgent application was motivated by the insinuation in the report of the probity auditors that the first respondent ought not to have awarded the tender to the second respondent and that the decision to make the award resulted in:

35.1 the PA's reluctance to give the assurance that the bids evaluation process had been compliant with the provisions of applicable legislation and the supply chain management policy which the first respondent had adopted and was bound to adhere to. The said assurance is a required verification of scrutiny of the bid evaluation processes in terms of the GFMSA. In particular, the PA reported that the second respondent:

35.1.1 failed to submit certificates of completion of projects that were relevant and similar to the tender specifications as per the invitation to tender concerned herein;

35.1.2 submitted uncertified completion certificates, despite Part T2.3 of the published tender invitation making it mandatory for bidders to attach certified completion certificates signed by all relevant parties if functionality points were to be claimed.

- [35] The PA report stated, in respect of the BEC's points allocation, that the BEC has incorrectly allocated 87 points to the second respondent in respect of the functionality assessment despite the second respondent's failures stated in paras 28, above and the explicit warning in the published invitation to tender that 'failure to attach the required certificates will result in the bidder getting zero points.'

ANALYSIS

- [36] The first misstep in the applicants' approach was their failure to follow and adhere to the process discussed under the heading "BID APPEALS TRIBUNAL", an internal dispute resolution formation created for the resolution of disputes emanating from the evaluation of open tender bids. Upon the first respondent's communication of his/her decision to award the tender to the second respondent, the applicants ought to have followed the procedure set out in para 27, above. That procedure is prescribed in the open tender framework to quickly and inexpensively resolve tender disputes internally. By following the prescribed procedure in para 27 it will not have been necessary for the applicants to bring the urgent court application. The applicants' deviation formed one of the basis for the first respondent's prayer for the dismissal of the urgent application: - the second being the applicants' seeking of the interdict without having simultaneously launched a review application and secured a return

date.

- [37] The applicants' procedural misstep resulted in the urgent court issuing an order for the applicants to bring this review application as Part B, Part A being the urgent application and setting out time frames for the parties' exchange of papers and reserving costs.

B. THE REVIEW PROCEEDINGS

- [38] Armed with the record of the evaluation process and particularly relying on the report of the probity auditors stating the deficiencies in paras 34 and 35, supra, the applicants brought this review application on 24 May 2022 seeking first, in terms of section 6 of PAJA, an order reviewing and setting aside the first respondent's decision to award Tender DRT03/09/2020 to the second respondent and, second, in terms of section 8 of PAJA, an order directing the first respondent to award the tender to them (applicants).
- [39] Once again the applicants, in bringing the review application without first exhausting internal dispute resolution procedures, had unwarrantedly overlooked and disregarded a prescribed procedure and approached the court without regard to the provisions of section 7(2)(a) read with section 7(2)(c) of PAJA.

MERITS OF APPLICANTS' CASE

[40] The applicant, relying on the final report of the probity auditors, contends that the award of 87 points to the second respondent for functionality was irregular and so was the BEC's acceptance of the second respondent's alleged non – compliant certificates of completion. The conduct of the BEC, the applicants surmise, resulted in it improperly recommending that the tender be awarded to the second respondent and ultimately in the first respondent's impugned decision to award the tender to the

second respondent. The applicants contend that the alleged failures of the second respondent effectively disqualified it, in terms of the published invitation, from claiming an award of functionality points and, ultimately, of the tender.

APPLICANTS' CASE ON SECOND RESPONDENT'S CERTIFICATES OF COMPLETION

A. REQUISITE EXPERIENCE AND TECHNICAL EXPERTISE

[41] The applicants have contended that by the failure to provide the certified certificate of completion required in T2.3, the second respondent had deprived the BEC of a fair evaluation of the second respondent's experience and possession of technical expertise to execute the tender project. It is noted that the applicants have given detailed information, mostly technical, necessary for the execution of the tender project.

B. FUNCTIONALITY

[42] The second respondent, the applicant's surmised, ought not have been considered in the evaluation stage(s) beyond functionality evaluation or, put differently, the second respondent should have been disqualified and not progressed to the stage of evaluation for Price, for example, for failure to submit certified copies of completion certificates of current and previously completed project(s) that were relevant and similar to the tender project. The achievement of a minimum of 70 points was set for functionality with a condition that failure to submit the relevant certificate(s) will result in the bidder getting zero points (disqualified). The applicants argued that the BEC's allocation of 87 functionality points to the second respondent in the circumstances was in conflict with the explicit conditions in the published invitation to tender and devoid of any justification.

[43] The disqualification of the second respondent at the stage of functionality evaluation would have left the applicants as the only bidders for evaluation for price and preference points.

C. CONSIDERATION OF RELEVANT AND SIMILAR CURRENT AND PREVIOUSLY COMPLETED PROJECTS (VALIDITY)

[44] The applicants alleged that the certificate of completion that was submitted by the second respondent was uncertified, not for a project that was relevant and similar to the tender project and bore an adverse qualification in respect of both the quality of the work and delayed completion requiring the extension of time.

ENCHORE OF APPLICANTS' SOUGHT REMEDY

[45] The applicants' case and contention is that the first respondent's decision to award the tender to the second respondent in circumstances where the latter had not complied with the mandatory requirements was a deviation from the published conditions for bids and, consequently not authorised by the applicable enabling statutory provisions and thus rendering the decision susceptible to be reviewed in terms of section 6(2) of PAJA. The applicants have amplified their contention by further stating that the first respondent's decision was, in terms of section 6(2): -

· biased or suspected of bias in terms of section 6(2)(a)(i) and (iii); · procedurally unfair and/or materially influenced by an error of law (section 6(2)(c) and (d)); · was taken for reasons not authorised by the empowering provisions (section 6(2)(e)(i)); · was taken because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e)(iii)); · was not rationally connected to the purpose of the empowering provisions and/or the information at the disposal of the first respondent, and/or, the reasons provided by the first respondent (section 6(2)(f)(ii) (bb), (cc) and (dd) of PAJA).

[46] The applicants impugned the first respondent's decision to award the tender to the second respondent alleging that the decision was a deviation from the published requirements and, therefore, a violation of enabling legislative measures and the supply chain management policy referred to above. In particular, the decision of the first respondent constituted and unwarranted disregard of the report of the independent Probity Auditors.

[47] Based on the above grievances the applicants, in addition to the prayer for the review and setting aside of the first respondent's decision, seek an order directing the first respondent to award the tender concerned to the applicants in terms of section 8(2) of PAJA.

[48] In their amended notice of motion, the applicants also seek an order that the first respondent pays the costs, including the costs of the urgent application.

THE FIRST RESPONDENT'S DEFENCES AND CASE

POINT IN LIMINE

[49] The first respondent has raised the point in limine that the applicants are not entitled to the relief sought in terms of the provisions of PAJA for two reasons, namely; that the applicants have approached the court prematurely without first exhausting the established internal dispute resolution procedures as required in section 7(2)(a) read with section 7(2)(c) of PAJA and, secondly, for failure to demonstrate, in an application for the indulgence of the court, exceptional circumstances in terms of section 7(2)(c) justifying the granting of exemption from the operation of the provisions of section 7(2)(a). The provisions of the latter section preclude the court or other tribunal from entertaining the review of a decision in a dispute in respect of which another law applies and provides for the resolution of a dispute within established internal structures prior to a party approaching the courts. In casu, the Bid Appeals Tribunal is such structure or formation.

[50] It is noted that the applicants have made a bold assertion in their heads of arguments that the internal dispute resolution forum that ought to have been established in the Gauteng Province was never established. Even if this contention was correct and to the extent that the applicants rely thereon, the applicants have not brought an application to this court, as required by the law, demonstrating this allegation and seeking an order invoking the application of the provisions of section 7(2)(c) of PAJA (see *Gavric v Refugee Status Determination Officer & Others* 2019

(1) SA 21 (CC).

[51] The first respondent, at Paras 8 and 21 of its heads of argument states in the above regard;

“The Gauteng Finance Management Supplementary Amendment Act (GFMSA) was enacted to promote and enforce transparency and affective management in order to eliminate corruption, unethical practices, prevention of irregular expenditure and to restore confidence in the public procurement in respect of revenue, expenditure, asset and liability for provincial departments and provincial entities. It was also enacted to give effect to certain provisions of the Public Finance Management Act 1999 (“the PFMA”) in the Gauteng Province,” and;

at para 21:

“The GFMSA establishes a Bid Appeals Tribunal (“the Appeal Tribunal”). The Appeal Tribunal consists of no less than three (3) and no more than five (5) members appointed by the Member of the Executive on a part – time basis and who must, inter alia, include a legal practitioner practicing administrative, a member knowledgeable in economics and finance and, lastly, a supply chain management practitioner.” (own emphasis)

[52] In the matter of *Koyabe and others v Minister of Home Affairs and others* 2010

(4) SA 327 (CC) (25 August 2009) the Constitutional Court said the following regarding the role of internal remedies:

“Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and costs –effective remedies cannot be gainsaid.

[36] ... approaching a court before the higher administrative body is given an opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive roll and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a ‘fair’ procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus the need to allow executive agencies to utilise their own fair procedures is crucial in

administrative action....

- [37] ... Once an administrative action is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional or other legal standards.

“Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.” (paras

[35] to [37])

- [53] The Constitutional Court in the matter of Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) BCLR 1 (CC) found, in relation to open tenders, that;

54.1 the role of procedural requirements was to ensure even treatment of all bidders and the purpose of a fair process is to ensure the best outcome (para 24).

54.2 Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. The central element is to link the question of compliance to the purpose of the provision by asking whether what the bidder did constituted compliance with the statutory provision viewed in light of its purpose. This is not the same as

asking whether compliance with the provisions will lead to a different result (para 30) and, at para 43;

54.3 The facts of each case will determine whether any shortfall in the requirements of the procurement system, be it unfairness, inequality, lack of transparency, lack of competitiveness or cost-inefficiency, may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA and that;

54.4 The judicial task is to assess whether the evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

- [54] The court emphasised that the duty to exhaust internal remedies is a necessary requirement in our law.

- [55] The court further stated, however, that the requirement to exhaust internal remedies should not be rigidly imposed and that it should not be used to frustrate the efforts of an aggrieved person, or to shield the administrative process from judicial scrutiny – hence the provision for the courts to condone non-exhaustion of internal remedies in exceptional circumstances [own emphasis].

- [56] As pointed out earlier, the applicants' launching of the urgent application was an unwarranted deviation from the prescribed procedure stated earlier to challenge the decision of the first respondent and the judicial review application demonstrate a lack of appreciation of the purpose for which the dispute resolution procedure was put in place or an oblivion to the existence thereof. I cannot, but agree with the first respondent's contention that the applicants' failure to comply with the prescribed procedures can only result from their failure to attend indicated mandatory meetings wherein pertinent aspects of the tender were explained to prospective bidders, including the resolution of disputes emanating from the bid evaluation process and decisions.
- [57] In my view, nothing in both instances of the applicants' failures constitutes warrants an exemption of the applicants' application for review from the application of the provisions of section 7(2)(a) and, furthermore, the applicant has not demonstrated the existence of exceptional circumstances justify the entertainment of this application by the court in terms of section 7(2)(c) of PAJA. The applicants' unwarranted deviation from prescribed procedures is, in my view, fatal to the present review application.
- [58] While it is not necessary to consider the merits in this case in light of the findings on the first respondent's point in limine, I deem it necessary to state that it is not in dispute that the adverse findings in the report of the probity auditors on which the applicants' case is founded were legitimately rejected by the first respondent, as he/ she was entitled to do and having followed due process set out in para 27, above, and on the grounds of confirmation by the Construction Industry Development Board (CIDB) that the impugned first and third certificates of completion that were submitted by the second respondent were, contrary to the applicants' assertions, in fact relevant and similar to the tender project and, therefore, compliant with the tender

specifications (see paras 24 and 25, supra). It is also necessary to state that it is not in dispute that the probity auditors were involved together with the BEC in the discussions with the CIDB that informed the first respondent's decision to reject the PA's findings. It is worth of note that the CIDB is a creature of statute charged with the responsibility to lead the development of and advised government and/or stakeholders on best practice and the implementation of a uniform strategy within the construction industry.

CONCLUSION

- [59] It follows from the afore-stated that the applicants' jurisdictional grounding for this review application crumbled into dissipation in the face of the advice of the CIDB leading to the decision of the first respondent. On the basis of this finding and that in respect of the point in limine, this review application stands to be dismissed.

COSTS

[60] It is a general principle that costs follow the result. However, it has to be noted that despite its unwarranted deviation from prescribed procedures, the applicants' decision to engage in this litigation was informed by the report of a legislatively engaged independent probity auditor. It will consequently not accord with justice to mulct the applicants with the costs of the ill-advised review application.

ORDER

[61] Resulting from the findings and conclusion in this judgment, the following order is made:

1. The application for the review of the first respondent's decision is dismissed with no order as to costs.
2. The applicant is ordered to pay the costs of the urgent application under case number 32776/22 which costs shall include the costs consequent upon the first respondent's employment of two counsel.

MPN MBONGWE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

APPEARANCES For the applicants Adv S Strydom Instructed by Botha Attorneys For the first respondent Adv JA Motepe SC; Adv S Manganye Instructed by Malatji & Co. Attorneys

THIS JUDGMENT WAS HANDED DOWN ELECTRONICALLY BY EMAILING TO THE PARTIES' ATTORNEYS AND UPLOADING ONTO CASELINES ON 02 NOVEMBER 2023.

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