

SOUTH AFRICA / JUDGMENT

KET Civils CC and Others v MEC: Department of Roads and Public Works, Northern Cape Province and Others (2124/2018) [2020] ZANCHC 18 (26 March 2020)

[2020] ZANCHC 18

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Chwaro

CASE / FILE NUMBER

2124/2018

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IN THE HIGH COURT OF SOUTH
AFRICANORTHERN CAPE DIVISION,
KIMBERLEY

Case

No: 2124/2018
Heardon: 17/02/2020
Available
on: 26/03/2020
Inthe matter between: KET
CIVILS
CC
First Applicant
RAZZMATAZZ
CIVIL (PTY)
LTD
Second Applicant
ASATICO
CIVIL AND CONSTRUCTION (PTY) LTD
Third Applicant
and
THE
MEC: DEPARTMENT OF ROADS AND PUBLIC WORKS,

NORTHERN
CAPE
PROVINCE
First Respondent
DOWN
TOUCH INVESTMENTS (PTY) LTD
Second
Respondent
DEPARTMENT
OF ROADS AND PUBLIC WORKS,
NORTHERN
CAPE PROVINCE
Third Respondent
THE
HEAD OF DEPARTMENT OF ROADS AND PUBLIC
WORKS,
NORTHERN CAPE PROVINCE
Fourth
Respondent

Coram: Mamosebo J et Chwaro AJ

JUDGMENT

MAMOSEBO J

INTRODUCTION

[1] The applicants, KET Civils CC, Razzmatazz Civil (Pty) Ltd and Asatiko Civil and Construction (Pty) Ltd (KRA Joint Venture) (hereinafter

referred to as "the KRA JV"), seek an order reviewing and setting aside the decision to award a tender to the second

respondent, Down Touch Investments (Pty) Ltd ("Down Touch"). The tender was for the rehabilitation of the road MR938 between MR884 (18.37km) and TRS/5 (60.2km) Mamathwane Road.

[2] This case turns on the fairness or otherwise of the process followed by the third and fourth respondents, that is, the Department of Roads and Public Works ("DPW") and the Head of DPW ("HOD"), respectively, jointly referred to as "the Department", which process culminated in the awarding of the impugned tender to Down Touch. Down Touch does not oppose this application and abides this Court's decision.

[3] The determination of the issues in this matter must be done against the following pronouncements made by Harms DP in *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*[1]:

'[2] The award of government tenders is governed by s 217(1) of the Constitution. Awards must be made in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. But a procurement system may provide for categories of preference and for the advancement of categories of persons (s 217(2)). National legislation must prescribe the framework for the implementation of any preferential policy (s 217 (3)). This is done by the Preferential

Procurement Policy Framework Act 5 of

2000. It 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 (s 2(1)(f))."

BACKGROUND

FACTS

- [4] The facts in this matter are largely not in dispute. An invitation to tender was issued by the Department. The tender, DRPW 039/2017, was advertised in the Government Tender Bulletin on 08 December 2017 with the closing date of 02 February 2018 at 11:00. The expiry date was 23 May 2018 and the validity period of the tender was 90 days. The Construction Industry Development Board (CIDB) grading requirement was 9CE. A compulsory briefing session was arranged to take place at Hotazel Recreation, Kuruman, on 17 January 2018.
- [5] A pre-evaluation report was conducted by the Acquisition Management Unit of the Supply Chain Management of the Department. Out of the 21 bids received nine (9) were disqualified for failing to meet the pre-conditions of subcontracting, the KRA JV was among the disqualified tenderers. The effect of this was that the JV did not even make it for consideration by the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) of the Department.
- [6] The appointed consulting engineers for the project, V3 Consulting Engineers (Pty) Ltd, also conducted a final evaluation of the remaining twelve tenderers before the BEC and BAC, following the procedures established in the CIDB[2] Best Practice Guideline #A3 in respect of method 3: Financial Offer and Preferences.

- [7] It is important to note the following remarks by the consulting engineers in their report:

"3.7.3 Points for financial offer

Note: Points for the financial offer scored by each tenderer were not calculated in accordance with the instruction that was received from the Northern Cape Province, Department of Roads and Public Works in this regard.

3.7.4 Scoring of preference points

Note: Points for preference points scored by each tenderer were not calculated in accordance with the instruction that was received from the Northern Cape Province, Department of Roads and Public Works in this regard.

3.7.6 Recommendation

Note: No recommendation was made in accordance with the instruction that was received from the Northern Cape Province, Department of Roads and Public Works in this regard."

[8] In their evaluation of the bid submitted by Down Touch, the consulting engineers made the following observations:

8.1. Under the heading "Responsiveness of the tenders at para 5 and subhead compliance 5.1.1" at page 69 of the papers, the consulting engineers provided a summarised table which indicates that Down Touch had partial compliance under Schedule 4.1.1(a) Eligibility - CIDB registration; and

8.2. Under the clause 'Pricing the tender offer' 5.2.4 of the report, the engineers commented that Down Touch complied partially with this clause, because the tender amount was calculated incorrectly. It is apposite at this stage to mention that Down Touch's initial bid amount was R259,930,024.97 and after the corrections which were effected by the Department this figure went up to R282,551,257.74 a figure even much higher than the Department's estimate of R264,844,800.00.

[9] Notwithstanding that the consulting engineers were instructed by the Department not to make any recommendations they, however, recorded in their report that the lowest responsive and realistic tender was submitted by KPMM Roads and Earthworks (Pty) Ltd with a tender price of R234,630,000.00. The JV's estimate was R238,946,666.18 which was not far off from KPMM's bid amount. Three further bidders were found to be non-responsive by the consulting engineers for failing to meet the pre-qualification criteria for preferential procurement of subcontractors and that ended their assessment journey.

[10] The BEC met on 16 April 2018 at 09:00. They considered the remaining 9 bids and found 8 of the 9 bids to be non-responsive except for Down Touch. They found that the tenderers either furnished a false declaration of having been awarded tenders within the past twelve months by the State; or allocated to their sub- contractors amounts that were higher than their CIDB grading; did not disclose their other business interests or the sub-contractors' CIDB grading had expired.

[11] The BEC Committee recorded that the bid of Down Touch was found to be responsive. The following were identified as the risk areas:

11.1. The technical report recorded arithmetic errors with a shortfall of R22,621,232. 77 noticed after a recalculation;

11.2. The subcontractor was allocated amounts higher than the GIDB grading; and

11.3. Sub-contractor, Sesi Q Trading 4GE was allocated an amount R47,109,254.92.

- [12] The BAG met on 19 June 2018 at 09:00. Their findings and remarks are exactly the same as those of the BEG.
- [13] An acceptance of offer typed letter dated 19 June 2018, "KRA 19", signed by the Head of Department, Mr K Nogwili, on 25 June 2018, was addressed to Down Touch on the same day of the BAG sitting, offering the contract to it. In that letter the contract price is recorded as R259,930,024.97 and immediately above the typed amount appears a handwritten inscription of the revised amount to R282,551,257. 74.
- [14] The communication or negotiations between the Department and Down Touch regarding the offer amount and how the contract was accepted by Down Touch does not form part of the record. Down Touch was awarded the tender even though its bid amount was highest.
- [15] The KRA JV was apparently informed on Monday 06 August 2018 that the tender was awarded to Down Touch and that it was eliminated prior to the sitting of the bid evaluation and adjudication committees.
- [16] Following the award of the tender to Down Touch, the KRA JV instituted a review application in two parts: Part A was an urgent application, pending the finalisation of the review, for an interdict restraining the Department from entering into a Service Level Agreement with Down Touch for the performance of any of the terms of the contract advertised under Tender; that the performance of the Service Level Agreement entered into with Down Touch in terms of the tender be suspended; and that the Department be interdicted from performing any construction related activity related to either the decision or the Service Level Agreement applicable to the tender, if already concluded; and costs of suit payable by any respondents opposing this application.
- [17] On 07 September 2018 Pakati J struck the urgent application off the roll with costs for lack of urgency. The review application, Part B, was only heard on 17 February 2020.
- [18] The Department provided part of the record of decision to the KRA JV's attorneys on 06 August 2018. The KRA JV requested the entire record in terms of Rule 53(1) from the Department but received it on a piecemeal basis over a period of four months. A series of correspondence was exchanged between the attorneys over the request for the record.
- [19] On 08 October 2018 the applicants' attorneys wrote to the Judge President of the Northern Cape Division sketching a background to the case and requesting a meeting in October 2018 between the parties and the Judge President with a view to request the Judge President to allow the file to be case managed.
- [20] On 10 October 2018, Sonel Pienaar of Peyper attorneys responded on behalf of the Department alleging that one-sided unsubstantiated facts were placed before the Judge President in an attempt to secure a meeting and secondly, to obtain preferential treatment when the applicants' application has already been found not to be urgent. Duncan and Rothman, for Down Touch, repeated the same sentiment expressed by Peyper Attorneys.

[21] In my view, the view held by the Department and Down Touch, to refuse the matter to be case managed as suggested by the applicants, is incomprehensible as this request was aimed at ensuring monitoring and compliance with the court rules in terms of filing and ensuring that the papers are in order for the matter to be heard. It may be unprecedented but the request was, in my view, not unjustified or irrational.

GROUNDS OF REVIEW

[22] It is trite law that public procurement in the provincial sphere of government is highly regulated. The source of this regulation is found in section 217 of the Constitution which provides thus:

"217 Procurement

(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 and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost- effective.

(1) Subsection

(1) does not prevent 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.

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

[23] In *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd*[3] the court held as follows regarding the need for public procurement to adhere to the demands of section 217 and the PPPFA:

"As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated. "

[24] The KRA JV raised six grounds of review in the founding papers and further supplemented in the supplementary affidavit. The grounds essentially attacked the award to Down Touch alleging the Department's failure to act in accordance with PAJA. These are their grounds:

24.1. Elimination of the KRA JV when it not only had the required CIDB grading of 9CE but also the capability and capacity to complete the project was patently unfair and arbitrary, based on an ulterior purpose or motive, or because irrelevant considerations were taken into account or relevant considerations were not taken into account;

24.2. The nomination of Sesi-Q Trading CC as a subcontractor. According to the Preference Point Claim Form, the subcontractor would be awarded 25% of the contract amount which is incorrectly reflected as R 47,109,254.92 instead of R?0,637,814.44. Based on Sesi-Q Trading's CIDB rating of 4CEPE, the allocated amount exceeds the permissible margin of R4,800,000.00. Down Touch, therefore, did not meet the requirement of the pre-qualification of subcontractors. The decision by the Department to disqualify other bidders based on the subcontractor pre-qualification was capricious, arbitrary, taken for an ulterior purpose or motive or because irrelevant considerations were taken into account or relevant considerations were not taken into account;

24.3. Down Touch offered a total price of R259,930,024.97. After various alterations were made on the pricing schedule the total price spiralled to R282,551,257.74, a difference of R22,621,232.77. Despite the marked difference the Department still awarded the tender to Down Touch. The decision to award the tender to Down Touch was unreasonable and that no reasonable person would have exercised such power or performed such a function;

24.4. Para 2.8 of the 'Declaration of interest Form' shows discrepancies in the response furnished by Down Touch which were subsequently corrected, though it is unknown when the correction occurred. First, Down Touch had stated that none of the spouses or any of the company's directors, trustees, shareholders, or members of their spouses conducted business with the state in the previous 12 months. Evidently, other bidders were declared non-responsive for their failure to disclose their interests. It is on this basis that the KRA JV argues preferential treatment was given to Down Touch;

24.5. The tender was adjudicated and awarded after the validity period had lapsed. In the absence of any extension, the tender could not have been awarded and stands to be reviewed and set aside; and

24.6. Notwithstanding the risks identified in Down Touch's bid, and I may add, the partial compliance highlighted by the consulting engineers, the Department still found Down Touch to be responsive. Despite the fact that KPMM Roads and Earth Works (Pty) Ltd.'s bid was found by the consulting engineers to be the lowest responsive and realistic tender but were nevertheless found by the Department to be unresponsive because the tenderer made a false declaration of interest, the nominated subcontractor was allocated amounts higher than their CIDB grading.

[25] Counsel for the KRA JV, Mr Luthuli, argued three grounds in court, 24.1, 24.2 and 24.3 above. What sticks out pertaining to these grounds is that the Department did not even answer to the additional grounds because it failed to file a supplementary answering affidavit. Mr Luthuli urged the court to accept those averments made in the supplementary affidavit as either admitted, not disputed or where the Department has failed to submit a genuine

dispute of fact that the Plascon-Evans rule^[4] applies and to decide the application on that basis.

[26] It is also apposite to deal with the unreported judgment of *Jodan Construction (Pty) Ltd v Premier of the Northern Cape and Others*^[5] on which counsel for the Department relied. Down Touch was the third respondent in the *Jedan Construction* case to whom the tender was awarded. The *Jedan Construction* case is clearly distinguishable from this case. The issue in that case involved the interpretation of clause 2.10 on the NCP 4 form which required the bidder to declare their interest.

[27] Olivier J remarked that the applicant in the *Jedan Construction* case has not dealt with the considerations as espoused by Harms DP at paragraphs 20 and 21 in *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*^[6]. Olivier J added the following pronouncements^[7] :

"[57] Mr Pretorius' response quite clearly did not provide the particulars required, and the fact that those particulars were required at the tender stage seems to militate against the argument advanced by Mr Vlok in this regard. Why require these particulars in the tender documents if the understanding was that they would only be furnished by the successful tenderer upon the award of the contract to it? If Mr Cronje's interpretation is correct, it would mean that the tender documents had not been properly completed.

[58] This has not been raised by the Department as a reason for awarding the contract to the third respondent, but it could in my view have been a relevant consideration in deciding whether the setting aside of the award to the third respondent, at the instance of the applicant, would be just and equitable. In view of the above it is however not necessary to decide this issue."

[28] In an effort to show the disparity that informed the impugned decision to eliminate the KRA JV unfairly and prematurely, Mr Luthuli referred us to the original tender information as well as the amended information to note the difference in the requirement. The original requirement at p43 reads:

"Tenderers must fully complete the schedule titled Schedule of Pre- Qualification Criteria for Subcontractors (Form P) and Subcontractor agreement (Form Q).

Failure to comply with the above-mentioned pre-qualifying criteria stipulated may render the tender as non-responsive."

To the contrary, and in the addendum No.2 at p171, the wording read:

"Tenderers must fully complete the schedule titled Schedule of Pre- Qualification Criteria for Subcontractors (Form PJ and Subcontractors agreement and B-BBEE verification certificate (form QJ for the subcontractors listed in [(iv)(1)] above.

Tenderers are not required to submit a list (Form P), and an agreement and B-BBEE verification certificate (Form QJ for subcontractors in [(iv)(2)] above with their tenders.

After award of the tender the Contractor is required to invite the targeted Enterprise [(iv)(2)] on an open tender as per normal tender procedure.

Failure to comply with the above-mentioned pre-qualifying criteria stipulated may render the tender as non-responsive."

[29] The Acting Head of the Department, Ms Ann Mpotsang, deposed to the answering affidavit, wherein she furnished the reason for the applicants' disqualification as its failure to complete Forms P: Schedule of Prequalification Criteria for subcontractors and Q: Subcontractor Agreement and B-BBEE Verification Certificate. The contention by the KRA JV, as argued by Mr Luthuli, was that the Department seemed to have abandoned the two requirements during the tender process. Essentially the Department argued that the JV's tender was lawfully and properly disqualified.

[30] Despite the persistent averments made by the Department at paragraph 10.3 of its answering affidavit, and in its supplementary answering affidavit at paragraphs 4, 5 and 9 as well as in its heads of argument at paragraph 1.5, that the KRA JV's tender was discarded due to its failure to complete Forms P and Q, the Department's answering affidavit states the following at paragraph 11.2.4:

"Tenderers were further told that it was not a requirement to submit a Form P, an Agreement and BBEE Verification for Subcontractors in (iv)(2)."

[31] Mr Luthuli submitted that notwithstanding the substantiation and motivation by the KRA JV in its supplementary founding affidavit, which is in line with addendum 2, the Department has disputed the practice of inviting potential subcontractors to an open tender only once the contract has been awarded and not at bidding stage. Counsel contended that the Department had no defence for its irregular disqualification of the KRA JV for its alleged failure to comply with the requirements and, on this basis alone, the application stands to succeed. The addendum clearly changed the terms of reference, submitted Mr Luthuli. It is unclear at which point the addendum was issued. However, what is clear is that the KRA JV and other bidders were disqualified based on this pre-qualification.

[32] Mr Grobler, for the Department, submitted that the failure by the KRA JV to submit the Forms P and Q laid the matter to rest because either the bidder followed [(iv)(1)] or [(iv)(2)] a submission vehemently contested by Mr Luthuli. I disagree with Mr Grobler because [(iv)(1)] affords the subcontractor a minimum of 25% of the work while [(iv)(2)] affords the subcontractor a minimum of 5% of the work.

- [33] It is clear from the consulting engineer's report, the BEC and BAC reports, that some of the bidders were disqualified for either failing to allocate the sub-contractors the minimum of 25% or for allocating them more than their CIDB grading. It is sensible that the two must be read in conjunction. In any event, it is not discernible in the papers, and not even Mr Grobler could confirm, whether Down Touch opted for (iv)(1) or for (iv)(2).
- [34] Before the addendum 2 the disqualification of the KRA JV's bid was justified for its failure to complete Forms P and Q. However, after the provision of addendum 2, the disqualification of the initial 9 bidders comes into question because, their assessment stood to have yielded different results.
- [35] In my view, the KRA JV and the other bidders were prejudiced by the disqualification even before the assessment by both the BEC and the BAC Committees.
- [36] In *Steenkamp NO v. Provincial Tender Board, Eastern Cape*[8] the Constitutional Court stated that the tender process compels strict and equal compliance by all competing tenderers on the closing day for submission of the tenders. The Department has failed to apply its tender rules consistently to all bidders and disqualified several bidders whose bids it found to be non-responsive but had the same deficiencies as Down Touch which was found to be responsive. It is on this basis that I find that there is merit in this complaint based on s 6(2)(a)(iii) of PAJA.
- [37] The KRA JV's further contention was that the Department appointed Down Touch even though its sub-contracting requirements were not met. A number of bidders were disqualified for not meeting the sub- contracting requirement. While para 4.1.1(e) of the tender document set out the criteria to be met, particularly the pre-qualification criteria for preferential procurement, Down Touch nominated Sesi-Q Trading (Pty) Ltd as its subcontractor.
- [38] Sesi-Q Trading's CIDB rating stood at 4CE. Therefore, its upper limit per CIDB Regulation 17 is R4 million with an allowable margin of R 4.8 million. An allocation of 25% of work sub-contracted to Sesi Trading by Down Touch would mean that 25% of the revised amount of R282,551,257. 74 would be a total of R70,637,814.44. In the tender document, Sesi Trading was allocated R47,109,254.92.
- [39] In my view, the allocation of the said percentage to Sesi Trading is impermissible for the following reasons: first, sections 16(4) and 18(1) of the CIDB Act[9] read with Regulations 17, 17A and 25(1) of the CIDB Regulations are prescriptive regarding the requirement for consideration of only appropriately registered and qualified subcontractors. The Department's argument emanating from its answering affidavit seems to suggest that it can operate outside the CIDB Act and Regulations when it stated:

"It was not a prequalification criteria that a subcontractor must have a necessary CIDB grading (it must have been registered only) to perform the value of the works subcontracted thus. This interpretation the JV proffers is not borne out of the prequalification requirement. Indeed it is nowhere therein stated."

The aforementioned response by the Department cannot be correct. Not only did this requirement form part of the tender document but it is also part of the CIDB requirements which are mandatory. I therefore find that there is merit in this complaint based on section 6(2)(b) of PAJA.

[40] Mr Luthuli further submitted that Down Touch's tender should have been rejected on the basis of the arithmetic errors. Para 5.9 of the tender rules provides the guideline on what should be done pertaining to arithmetical errors, omissions, discrepancies and imbalanced unit rates. It reads as follows:

"Check responsive tenders for discrepancies between amounts in words and amounts in figures. Where there is a discrepancy between the amounts in figures and the amount in words, the amount appearing in the summary to the Pricing Schedule shall govern.

Check responsive tender offers for:

- (a) The gross misplacement of the decimal point in any unit rate;
- (b) Omissions made in completing the pricing schedule or bills of quantities; or
- (c) Arithmetic errors in:
 - (i) line item totals resulting from the product of a unit rate and a quantity in bills of quantities or schedules of prices; or
 - (ii) the summation of the prices.
- (d) Imbalanced unit rates.

Notify shortlisted tenderers of all errors, omissions or imbalanced rates that are identified in their tender offers.

Where the tenderer elects to confirm the errors, omissions or imbalanced rates that are identified in their tender offer shall be corrected as follows:

- (a) If bills of quantities or pricing schedules apply and there is an erroring the line item total resulting from the product of the unit rate and the quantity, the unit rate shall govern and the line item total shall be corrected. Where there is an obviously gross misplacement of the decimal point in the unit rate, the line item total as quoted and the unit rate shall be corrected.

- (b) Where there is an error in the total of the prices either as a result of other corrections required by this checking process or in the tenderers addition of prices the total of the prices shall be corrected.
- (c) Where the unit rates are imbalanced adjust such rates by increasing or decreasing them and selected others while retaining the total of the prices derived after any other corrections made under (a) and (b) above.

Where there is an omission of a line item, no correction is possible and the offer may be declared non-responsive.

Declare as non-responsive and reject any offer from a tenderer who elects not to accept the corrections proposed and subject the tenderer to the sanction under 4.16.2.

The tenderer is required to submit balanced unit rates for rate only items in that pricing schedule. The rates submitted for these items will be taken into account in the evaluation of tenders."

- [41] Para 4.2 of the Tender Evaluation Report (TER) records that G4 Civils (Pty) Ltd was disqualified for proposing to sub-contract only 3.65% instead of 25%; Haw & Inglis Civil Engineering was disqualified for proposing to sub-contract 22.5% and Umso Construction was disqualified for naming a proposed sub-contractor in respect of 18.9% and stating that two other contractors are yet to be appointed to make up the percentage difference. The submission by the Department that the amount allocated to the subcontractor was not a prequalification criteria, but that the agreements and sub- contractors' names were, cannot be correct having regard to the fact that the aforementioned bidders were disqualified due to their failure to meet this prequalification criteria.
- [42] It is common cause that the initial tender amount by Down Touch was R259,930,024.97 and was later allegedly adjusted and it escalated to R282,551,257.74. What seems blatant from this adjustment on the Summary of the Pricing Schedule is evidently not that it was an arithmetical error, as argued by the Mr Luthuli, but more likely a summation error. What further exacerbates this situation is that after the 'so-called' correction the tender was not subjected to an evaluation together with the others on the basis of this revised and increased amount.
- [43] It is unclear whether, Down Touch accepted the revised amount of R282,551,257.74 or its original amount of R259,930,024.97. In the Department's answering affidavit to the review application it is stated that Down Touch was appointed for the actual tendered amount but this averment is not supported by any documentation nor could Mr Grabler provide any explanation in this regard during argument before us.

- [44] There was a clear discrepancy of R22,621,232.77 in Down Touch's tendered amount. It was submitted by Mr Luthuli that either the Department opted to deliberately ignore the errors raised by its technical advisor or despite the advice remained adamant or indifferent by appointing Down Touch.
- [45] It may also be, argued Mr Luthuli, that the Department may have allowed Down Touch to change its pricing in line with the so-called arithmetic errors but discounting the revised amount to what was recorded in the tender. What is clear though, is that the tender did not provide for the bidders to negotiate prices. Mr Luthuli submitted that the Department's failure to correctly apply its mind when considering this aspect was clearly irrational.
- [46] It is inexplicable how the Department could not have evaluated Down Touch at its adjusted price of R282,551,257.74 in accordance with the tender rules. It is also baffling how the Department could offer Down Touch the opportunity to discount its tendered price when no other tenderer was offered the same opportunity.
- [47] The disqualification of the other bidders was discriminatory and unlawful and was arguably done with an ulterior purpose or motive to eliminate competition and thus constitutes a ground of review as provided for in section 6(2)(e)(ii) of PAJA. It can also be said that the decision was taken because irrelevant considerations were taken into account and/or relevant considerations were not considered and thus a ground of review in terms of section 6(2)(e)(iii) of PAJA or simply that the Department took the decision in bad faith as espouse in section 6(2)(e)(v) of PAJA.
- [48] The following pronouncements were made by the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO and Others*[10]:
- "Tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender or not."
- [49] In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works*[11] the court elaborated on the concept of fairness in the following manner:
- "[F]airness is inherent in the tender procedure. Its very essence is to ensure that before government, national or provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in s 217 permeate the procedure for awarding or refusing tenders."
- [50] I have not dealt with all the grounds raised by the KRA JV. What is patent is that the KRA JV stands to succeed on more than one ground and the ones dealt with above are sufficient to show that the KRA JV has established a cause of action under PAJA. I hold that the process followed was flawed, unfair and unconstitutional.

POSSIBLE REMEDY

- [51] The KRA JV seeks an order to review and set aside the Department's decision to award the tender to Down Touch. The Department counters this sought relief by contending that by the time the matter reaches court on review Down Touch would have completed 60% of the work under this contract and therefore in excess of R150 million of the work meaning that the Department will be liable to Down Touch for that amount.
- [52] The Department also raised the following practical challenges if the tender process is to start afresh: to assess the work already completed by Down Touch and issue a new scope of work for the outstanding work; appoint new consulting engineers at 6% or 7% of the contract value which may be in excess of R15 million; the Department will have to rewrite the Tender Data and Tender Requirements and the delay in the completion of the contract will adversely affect the safety of the road users.
- [53] The Department added as part of the remedy that should the court incline that the Department's decision be reviewed and set aside it should be afforded the opportunity to file a supplementary affidavit indicating the stage of completion of the road (the consummation) as well as costs incurred; and further that it would be just and equitable to allow Down Touch to remain on site attending to safety concerns until the appointment of a new contractor. The Department will then pay Down Touch for services rendered in terms of clause 10 of the General Conditions of Contract (GCC).
- [54] The parties obtained an order by agreement on 21 October 2019 in terms of which the first respondent, the MEC, was ordered to file an affidavit on progress (the status) of the works by 15 January 2020. The MEC defaulted. Instead of filing a substantive affidavit on the progress done the Department submitted a single page showing a table under the head Summary of Progress, "SUP 2", presumably completed by the consulting engineer during December 2019 but withholding the entire report. This single pager does not bear any reference to this specific tender and could arguably be an extract of any other tender. It does not specify who its author is and the specific date when it was compiled. Such lackadaisical attitude from a government Department and/or Senior State functionary is strongly deprecated.
- [55] The Department filed a confirmatory affidavit of Mr Gabi Thupe, its employee, who stated that he is the project leader who drafted the single sheet report "SUP2" whose profession or qualification is not disclosed. The unhelpful and unacceptable status report gives the overall progress of the project as 26.97% with sixteen (16) of the project's projected 30 months contract period having lapsed.
- [56] The KRA JV avers that even though the Department has not furnished the exact date when Down Touch commenced with the project the indications are it probably commenced in September 2018. Some 50% of the time has lapsed with the completion of about 27% of the works. In the Department's supplementary answering affidavit It is claimed that it can be estimated that the Department will be liable to Down Touch in the amount of R 81million of the R259,930,024.97 for work done. The project is currently halted by public protests in the area.

[57] It now boils down to the appropriate remedy that will be just and equitable. S 8(1) of PAJA provides:

"(1) The court or tribunal, in proceedings for judicial review in terms of s 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

(ii) in exceptional cases -

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;

(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 temporary interdict or other temporary relief, or

(f) as to costs."

[58] The Supreme Court of Appeal has pointed out the difficulties presented by invalid administrative acts in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*[12] and said:

"[46] One of those consequences is that the invalid approval is liable to be set aside in proceedings properly brought for judicial review. It is not open to us to stifle the right that any person might have to bring such proceedings, or to pre-empt the decision that a court might make if it is called upon to exercise its discretion in that regard. That is not a remote and academic prospect, bearing in mind that the approval was invalid. No doubt a court that might be called upon to exercise its discretion will take account of the long period that has elapsed since the approval was granted, but the lapse of time in itself will not necessarily be decisive: much will depend upon a balancing of all the relevant circumstances, including the need for finality, but also the consequences for the public at large, and, indeed for future generations, of allowing the invalid decision to stand. In weighing the question whether the lapse of time should preclude a court from setting aside the invalid administrative act in

question an important - perhaps even decisive - consideration is the extent to which the appellant or third parties might have acted in reliance upon it. On the material that is before us it is by no means clear that the appellant - or any third party for that matter - has in fact acted in reliance on the approval notwithstanding the elapsing of some forty years."

[59] As stated by Froneman J in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and*

Others[13]:

"[45] The lens for judicial review of these actions, as with other administrative action, is found in PAJA."

The learned Judge went on to state[14]:

"[88] There is another, related concern with the clarity of administrative action: vagueness can render a procurement process, or an administrative action, procedurally unfair under s 6(2)(c) of PAJA.[15]

[60] It was submitted on behalf of the Department that the applicants' case has transmuted as the process went along and they have assumed the role of a 'public do-gooder' nit-picking and looking for every conceivable ground to sustain a claim. I hold a different view because the application serves a good cause. In the current economic climate that our country finds itself in, it is meritorious to stand against such conduct and to expose its wrongfulness. In a unanimous judgment by Khampepe J in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[16] the following enunciation was made:

"[1] In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive

public power when choosing to award a tender. It is for this reason that the constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process is shown not to be so, courts have the power to intervene."

We are certainly constrained to intervene in this unsavoury procurement matter.

[61] What remains is the consideration of a just and equitable remedy. KRA JV has been substantially successful in having the tender declared invalid and set aside. It does not matter what remedy eventually follows, it is entitled to costs on a punitive scale. The interests of justice dictate that organs of state are no ordinary litigants. In *Matatiele Municipality and Others v President of the Republic of South Africa and Others*[17] the Constitutional Court said:

"[107] In this respect the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires. In the present matter the courts should not find themselves disempowered by lack of information from making a determination, if needs be, as to whether the provincial relocation of Matatiele Municipality is rationally sustainable."

[62] The conduct of the Department, through its relevant functionaries, falls short of what is required of a model litigant in its position. The applicants were almost frustrated by the nonchalant and dismissive stance taken by the Department in delaying to file a record to ensure that the issues in this matter are ventilated to the fullest.

[63] This conduct is further exacerbated by the Department's decision to describe the applicants as "public do-gooders" who were looking for any conceivable reason to challenge the award of the tender to Down Touch. The applicants were entitled to approach this Court to adjudicate upon what they considered an unlawful and unconstitutional conduct by an organ of state in the award of a tender. A punitive costs order is justified under the circumstances.

ORDER

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

1. The Department's decision to award Tender Number DRPW039/2017 for the rehabilitation of Road MR938 between MR884 and TRS/5 to Down Touch Investments (Pty) Ltd, and the contract concluded between the Department and Down Touch pursuant thereto are reviewed and set aside.
2. The Department is directed to commence a fresh tender process in respect of Tender DRPW039/2017 for the rehabilitation of Road MR938 between MR884 and TRS/5.
3. The Department is ordered to pay the costs of this review application on the punitive scale as between attorney and client.
4. The Registrar of this Court is directed to furnish a copy of this judgment to the National Minister of Public Works and to the Premier

of the Northern Cape to look into the questionable conduct of those functionaries that led to this result.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I agree and it is so ordered

OK CHWARO

ACTING JUDGE OF THE HIGH COURT

For the Applicants:

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Instructed by

Webber Wentzel Attorneys

c/o Althea Le Roux Attorneys

For the 1st & 3rd Respondents: Adv S Grabler SC

Instructed by:

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c/o Van de Wall Inc

[1] 2010(4) SA 359 (SCA) 359 at 361F - H

[2] Construction Industry Development Board Act 38 of 2000

[3] 2001 (4) SA 142 (SCA) at para 8

[4] Plascon-Evans Paints Ltd Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - 635D

[5] (898/2016) [2016] ZANCHC 72 (19 December 2016)

[6] 2010 (4) SA 359 (SCA) para 20 and 21

[7] At para 57

[8] 2007 (3) SA 121 (CC) at para 60

[9] 38 of 2000

[10] 2003 (2) SA 460 (SCA) at para 20

[11] 2008 (1) SA 438 (SCA) at para 9

[12] 2004 (6) SA 222(SCA); [2004] 3 All SA 1 at para 46

[13] 2014 (1) SA 604 (CC) at 622 para 45

[14] At para 88

[15] Section 6(2)(c) of PAJA provides: "A court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair."

[16] 2015 (5) SA 245 (CCO at 248 para 1

[17] 2006 (5) SA 47 (CC) para 107

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