



**IN THE GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

.....

DATE

.....

SIGNATURE

CASE NO: 52240/14

In the matter between

**AUTOZONE RETAIL
AND DISTRIBUTION (PTY) LTD
and**

Applicant

**THE NATIONAL COMMISSIONER OF
POLICE N.O.**

1st Respondent

THE MINISTER OF POLICE N.O

2nd Respondent

ALPHEUS THEMBINKOSI NGEMA N.O.

3rd Respondent

ABE MOTOR SPARES CC t/a ABE MIDAS

4th Respondent

PINNACLE AUTO PARTS (PTY) LTD

5th Respondent

JUDGMENT

Summary

Review proceedings – record of proceedings produced by party to be reviewed need not be authenticated – Failure to produce complete record - Applicant not insisting on additional portions of the record being made available - decision maker may be at risk if it fails to produce complete record. Failure of person whose decision is to be reviewed to respond to allegations of irregularity – can be taken to have no answer.

WEPENER J

- [1] The applicant seeks a review of a decision of the third respondent to award a tender for the supply of vehicle parts to the South African Police Service (SAPS), to the fourth and fifth respondents. It also seeks an order replacing the decision of the third respondent with a decision to award the tender to the applicant.
- [2] The applicant is an independent wholesaler and retail distributor of automotive parts and accessories in Southern Africa. It has been the contracted supplier of automotive spare parts to the SAPS garages country wide for the past thirteen years. This supply of spare parts was pursuant to a contract that was awarded to the applicant in 2011 for a period of two years. However, upon the expiration of the contract, it was extended several times until the extensions came to an end on 30 June 2014.
- [3] The first respondent is the National Commissioner of Police who was cited nomine officio as representative of the SAPS. The second respondent is the Minister of Police, also cited nomine officio as the

member of the national executive responsible for the SAPS. The third respondent is brigadier Ngema, cited nomine officio as the chairperson of the bid-evaluation committee of the SAPS.

- [4] The fourth respondent is ABE Motor Spares CC, a Close Corporation trading under the name of ABE Midas who was one of the successful bidders referred to herein in below (ABE Midas). The fifth respondent is Pinnacle Auto Spares (Pty) Ltd who was also a successful bidder in the process referred to below (Pinnacle). It became evident at the outset of the hearing that the fifth respondent was placed under voluntary business rescue a few days prior to the hearing. An application by the business rescue practitioner for a postponement in order “to consider its position” was refused.
- [5] A tender process which commenced during the early part of 2013 became, for reasons unrelated to the present application, a protracted process due to cancellations of the process by the SAPS. Eventually, on 15 November 2013 a notice appeared in the Government Tender Bulletin regarding the tender that forms the subject matter of this litigation, for the supply and delivery of spare parts to the SAPS for a period of two years in accordance with the published specifications published. It is common cause that the notice, the specifications, the bid document, the matters discussed at compulsory briefing sessions, letters written in amplification together with the information contained on a compact disc, all formed part of the bid specifications. Bidders were required to certify that they had taken note and would abide by the general conditions of contract, the special conditions of contract and the specifications.

- [6] The general conditions of contract contain the following relevant provisions. In terms of clause 22 it was stipulated that “The purchaser, without prejudice to any other remedy for breach of contract, by written notice of default sent to the supplier, may terminate this contract in whole or in part-

...

- (c) if the supplier, in the judgment of the purchaser, has engaged in corrupt or fraudulent practices in competing for or in executing the contract.”

In this regard the purchaser is the SAPS and the supplier the bidder. Fraudulent practice is defined in clause 1.13 as “... a representation of such an order to influence a procurement process or the execution of a contract to detriment of any bidder, and includes collusive practice amongst bidders, (prior or after bid submission) designed to establish bid prices at artificial non-competitive levels and deprive the bidder of the benefits of free and open competition”. (This provision led the SAPS respondents to concede that the allocation of a portion of the tender to Pinnacle could not withstand the scrutiny of a review process).

- [7] There were a number of special conditions of contract and mandatory requirements. I will refer to the specific bid conditions that are relevant when dealing with the specific grounds of review.
- [8] By 10 April 2014 the applicant, ABE Midas and Pinnacle were informed at a meeting that they were the only bidders remaining in the bid process. Apparent from this is that after the completion of the first

phase of the evaluation process, the applicant and the two other bidders had all been found to have complied with the mandatory requirements of the tender. The three remaining bidders were required to submit further information and on 30 June 2014 the applicant was advised that a new contract had been signed on that day. At the same time an instruction was issued to all SAPS garages not to place any orders with the applicant “as the contract has been closed.”

- [9] It then transpired that the SAPS respondents awarded a tender in respect of fifty six of the SAPS garages in eight provinces to Pinnacle and the tender in respect of the remaining 41 garages, to the ABE Midas.
- [10] Since then, it is common cause that the garages were not able to obtain parts expeditiously and were directed to work on a three quote system by obtaining quotes from three different sources where after approval had to be obtained to accept any of the three quotes.
- [11] This system is in stark contrast to the requirements that the successful bidder should be able to supply spares parts within a period of two to three hours from the time of its request. It also became apparent from the SAPS respondents notes that ABE Midas and Pinnacle would not deliver spare parts “at all garages at the moment.” The garage commanders were further advised that the “two suppliers awarded the contract will only be ready to supply parts from 1 August 2014”. The applicant’s investigations at the various SAPS garages then showed that the successful tenderers were evidently not during July

2014 in a position to meet the obligations in terms of the provisions of the tenders that they had been awarded. The ability of the SAPS garages to operate was seriously hampered. The three quote procurement system was not successfully implemented, in some instances due to the fact that accounts had not been opened with the potential suppliers. Further complaints of the applicant regarding non-compliance with the tender process will become apparent when I deal with the specific grounds of review.

Record of Proceedings

[12] The applicant launched the application at a time when the record of proceedings was not available to it. In those circumstances it made certain allegations regarding the tender procedure whilst relying on hearsay evidence and the number of suppositions. However, since the filing of the record, the facts which have emerged prompted the applicant to amend or supplement the allegations contained in the founding affidavit. It was not disputed that the applicant was entitled to so supplement its grounds of review.¹ The respondents decided not to respond to these allegations and the inference is that they are unable to gainsay it.²

[13] It was submitted on behalf ABE Midas that the application for review cannot be properly heard by virtue of the fact that firstly, the record of proceedings provided by the SAPS is incomplete and secondly, it has not been verified or authenticated and thirdly, that it does not contain permissible evidence upon which a party may rely. For this

¹ Strydom v Engen Petroleum Ltd 2013(2) SA 187(SCA) para 19.

proposition counsel for the ABE Midas relied on *I O Tech Manufacturing (Pty) Ltd vs Nemtek (Pty) Ltd*.³

- [14] There are four reasons why this submission cannot be upheld. Firstly, the applicant is prepared to present its case based on the record which the SAPS respondents made available. It waived the right to compel those respondents to disclose such portions of the record which clearly were not made available. In my view the applicant is entitled to waive the benefit of receiving the whole or part of the record to be reviewed and is entitled to make its case on the information that is made available. *In Motaung vs Mothiba N.O.*⁴ MT Steyn J (as he then was) said as follows:⁵ - “To my mind Rule 53(1)(b) is primarily intended to operate in favour and to the benefit of an applicant in a review proceedings, who may be, or who is in fact, unaware of the full or true reasons for the decisions he seeks to have corrected or set aside and who may, after a perusal of the record of the proceedings in question and for the reasons, if any, for the decision in issue, decide to amend, add or to vary the terms of the notice of motion and to supplement his supporting affidavit, in order to formulate his application in such manner as he deems necessary to properly set out there in the true facts and their legal effect and consequences.

The provisions of Rule 53(4,) in my view, indicate clearly such is indeed the intended effect of Rule 53(1) (b). Should the respondent in an application for review, brought in terms of Rule of Court 53, be permitted to delay the hearing of such application by his refusal of

³ [2014] 2 All SA 134 (SCA) para 9.

⁴ 1975 (1) SA 618(O).

⁵ At 625E – 626A.

failure to perform the duties imposed upon him by Rule 53(1)(b), even where the applicant is willing to proceed with his application despite such refusal or failure, the particular Rule of Court would thereby be rendered ineffective and a premium would then be placed on disobedience of the Rules of Court, whilst the party relying on those Rules would thereby be penalised. The existence of such a state of affairs cannot be tolerated. It is clear, furthermore, that the party may waive a stipulation intended for this benefit. Cf. *Hilsage Investments (Pty) Ltd vs National Exposition (Pty) Ltd and others* 1974(3) SA 346(W) at p354A-C. The applicant is, therefore, in my opinion entitled to waive the rights and benefits conferred upon him by Rule 53(1) (b) and to have both applications heard and adjudicated upon despite the failure of the respondents to comply with the requirements of that Rule. Cf. *Wacks vs Goldman* 1965 (4) SA 386(W) at pp388-389.”

- [15] Secondly, there is no requirement in Rule 53 that the record which the SAPS respondents are required to furnish should be authenticated or verified. Not only is this so, the documents before this court were supplied by the decision maker in compliance with Rule 53 as constituting the relevant record of proceedings. In addition, the particular document which ABE Midas complains of forms part of the record produced by the SAPS respondents and is referred to by its deponent as follows: “Annexed hereto marked “SAP3” is a copy of the BEC’s submission to the BAC for purposes of adjudicating upon the tenders concerned.” Insofar as verification might have been required, the document has been disclosed under oath as being the relevant document which was the subject of consideration by the SAPS.

- [16] Thirdly, as between the applicant and the decision maker, and in fact all of the first three respondents, the record produced and relied upon by the parties is the record which this court should take into account for purposes of considering the application. ABE Midas being an outsider⁶ in the review application brought by the applicant against a public authority, cannot be heard to say that that which is common cause between the applicant and the SAPS respondents is not the record upon which the applicant and all those respondents may rely because of some omission to authenticate the record.
- [17] Fourthly, the *I O Tech Manufacturing* matter dealt with the well-known principle that where a witness, such as an expert witness, relies on facts which he obtained from another party which is not the opposing party, such facts must be independently proved. The reference in *I O Tech Manufacturing*⁷ to authentication of the record, in my view, is nothing other than a duty to prove the underlying facts as was explained by Meyer AJ (as then was) in *Mathebula vs Road Accident Fund* (05967/08)[2006] ZAGPHC 261(8 November 2006) at para 13: “An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence. (See: *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976(3) SA 352 (A) at p 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307

⁶ See *Dr JS Moroka Municipality vs Betram (Pty) Ltd* 2013 JDR 2728(SCA) para 18

⁷ At para 9

(A) at p315E; Lornadawn Investments (Pty) Ltd v Minister van Landbou 1977 (3) 618 (T) at p 623; and Holtzhauzen v Roodt 1997 (4) SA 766 (W) at 772I).”

- [18] The rule against allowing inadmissible evidence referred to in the *I O Tech Manufacturing* was based on the fact that there was no proof that the documents used to base evidence on, originated from the opposing party.⁸ The rule is no different from the rule that the facts upon which an expert bases his or her opinion need to be proved as was held in *Mathebula*.
- [19] The record in this matter contains common cause facts which have been admitted by the SAPS respondents as being the correct facts. It is distinguishable from the *I O Tech Manufacturing* matter where the underlying facts, namely the contents of the document relied upon by a party, were not proved to be a document emanating from the opposing party nor was the document admitted by the opposing party as containing the correct facts.
- [20] I am not concerned with witnesses who base their evidence on such facts which would be hearsay and inadmissible for want of proof. In the circumstances, reliance on *IO Tech Manufacturing* is, in my view, misplaced and the technical defense that there is no permissible record before the court, cannot be upheld.

Final Relief

⁸ See *I O Tech Manufacturing* para 9.

- [21] The applicant initially sought relief in two stages. Part A of the Notice of Motion sought an interim interdict suspending the award of a tender to ABE Midas and Pinnacle, pending a review of the award. A review was sought in the second part of the Notice of Motion. During the hearing before me it became common cause that the matter has been fully dealt with in the affidavits and there is no reason why I should not deal with the review application on its merits resulting in an interim interdict not being necessary to adjudicate upon.
- [22] The applicant bases its case on the fact that the tender award challenged in these proceedings, constitutes administrative action within the meaning of that term in s1 of PAJA.⁹ There is no dispute that the actions of the SAPS in considering and awarding the tender do indeed fall within the provisions of s 6 of PAJA.¹⁰ The SAPS respondents are organs of state which are bound by the basic values and principles governing public administration set out in s 195 of the

⁹ Promotion of Administrative Justice Act 3 of 2000; See Millenium Waste Management (Pty) Ltd vs Chairperson, Tender Board: Limpopo Province 2008(2)SA481(SCA) para 21

¹⁰ S 6. "Judicial Review of Administrative Action. –

- (1) Any person may institute proceedings in a court of a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicial review and administrative action if –
 - (a) the administrator will took it –
 - (i) (ii) (a)....
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) ...
 - (e) the action taken – (i) ... (ii) ... (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; (iv) ... (v) ... (vi) arbitrarily or capriciously;
 - (f) the action itself –
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) it 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)
 - (h) ...
 - (i) the action is otherwise unconstitutional or unlawful"

Constitution.¹¹ This fact was unreservedly accepted by counsel for the SAPS respondents.

Legal Position

- [23] Before analysing the facts it is necessary to set out the legal principles applicable to a review of tender awards.
- [24] Decisions to award tenders such as those challenged in these proceedings must not only to be taken pursuant to a process that is “fair, equitable, transparent, competitive and cost-effective”¹² but also according to the prescripts of administrative justice set out in s 6 of PAJA.^{13 14}
- [25] Tender processes and decisions must also comply with the legislation adopted in terms of s 217 (3) of the Constitution, namely the Preferential Procurement Policy Framework Act, 5 of 2000 (the PPPFA), which 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.”
- [26] In *Steenkamp*¹⁵, the Constitutional Court stated that tender processes require “strict equal compliance by all competing tenderers, on the closing day for submission of tenders.”

¹¹ Allpay Consolidated Investment vs CEO, SA Social Security Agency 2014(4) SA 179 CC para 73. (Allpay (1)).

¹² Constitution, S217(1).

¹³ Footnote 7 above.

¹⁴ Allpay (1) para 41

¹⁵ Steenkamp NO vs Provincial Tender Board, Eastern Cape 2007(3) SA 121 (CC) para 60, confirmed in Allpay (1) para 39.

[27] The proper legal approach was set out in Allpay (1) para 22.¹⁶

[28] When considering the fairness and lawfulness of the administrative action (independent from the result) the following approach is to be followed: “Once the ground of review under PAJA has been established there is no room for shying away from it. Section 172(2) (a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under Section 172(1) (b). Section 8 of PAJA gives detailed legislative content to the Constitution’s “just and equitable” remedy.” (Footnotes omitted).

[29] The Constitutional Court further considered that¹⁷ “... deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the

¹⁶ This judgment holds that:

- (a) The suggestions that “inconsequential irregularities” are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness lawfulness of the procurement process must be independent of the outcome of the tender process.
- (b) The materiality of compliance with legal requirements depends on the extent to which the purpose of requirements is attained.)
- (c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.
- (d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).
- (e) Black economic empowerment generally requires substantive participation in the management and the running of any enterprise.
- (f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.”

¹⁷ Allpay(1) para 27

likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.”¹⁸

- [30] The procurement framework legality was set out by Froneman J in *Allpay(1)* paras 31-37:

‘[31] In *Steenkamp Moseneke* DCJ stated:-

“Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in section 195(1). [Footnotes omitted.]

In *Millennium Waste* the Supreme Court of Appeal (per Jafta JA) elaborated:

“The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s 217). 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". Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of [PAJA] apply to the process. (footnotes omitted).

¹⁸ *Allpay (1)* at para 27

[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus s 217 of the Constitution:

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

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

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

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

[33] The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act 31 (Procurement Act). The Public Finance Management Act 32 is also relevant.

[34] An “acceptable tender” under the Procurement Act is any “tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document;”The Preferential Procurement Regulations 34 (Procurement Regulations) define a tender as —

“a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or

goods, through price quotations, advertised competitive tendering processes or proposals;”

[35] An organ of state must indicate in the invitation to submit a tender —

- (a) if that tender will be evaluated on functionality;
- (b) that the evaluation criteria for measuring functionality are objective;
- (c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;
- (d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and
- (e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems.

[36] The object of the Public Finance Management Act is to 'secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions "to which it applies, SASSA being one of them. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;”

[37] The Treasury Regulations issued pursuant to s 76 of the Public Finance Management Act require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that

must be fair, equitable, transparent, competitive and cost-effective. In the case of procurement through a bidding process, the supply chain management system must provide for the adjudication of bids through a bid adjudication committee; the establishment, composition and functioning of bid specification, evaluation and adjudication committees; the selection of bid adjudication members; bidding procedures; and the approval of bid evaluation and/or adjudication committee recommendations. The accounting officer or accounting authority must ensure that the bid documentation and the general conditions of contract are in accordance with the instructions of the National Treasury, and that the bid documentation includes H evaluation and adjudication criteria, including criteria prescribed by the Procurement Act and the Broad-Based Black Economic Empowerment Act 40 (Empowerment Act).

- [31] It is only after applying the proper principles that consideration to a remedy, if applicable, should be given. In this regard Froneman J said in *Allpay (1)*¹⁹ as follows:

“

Irregularities

- [32] Although the applicant relies on nine grounds of irregular conduct in the award of the tender, the ninth ground was not pursued during argument before me and the eighth ground only sought to impugn the tender award to Pinnacle.

¹⁹ *Allpay (1)* para 56.

[33] I can shortly deal with the position as far as Pinnacle is concerned. Counsel for the SAPS respondents argued that Pinnacle did not respond to serious allegations against it which, inter alia, includes a supply of a false B-BBEE certification.²⁰ According to the special requirements and conditions of contract, the calculation of points in accordance to the PPFA and Regulations²¹ was set out in the bid document. The calculation is not relevant to these proceedings. The certificate submitted by Pinnacle was false as it was not issued by the entity which purported to have issued it and in any event, no entity by that name had been accredited as a BEE verification agency according to the record keepers of all accredited verification agencies, the South African National Accreditation System. The irregularities, as far as Pinnacle is concerned, are so serious that Pinnacle's opposition to a review process could not be justified on any basis. Later, during argument, counsel for the SAPS respondents conceded without hesitation that the award of the tender to Pinnacle was so irregular that it had to be set aside. It is not necessary for me to set out the full grounds of review individually and to analyze each of them. In addition to the review grounds advanced in relation to ABE Midas, which are also applicable to Pinnacle, the review grounds in relation to it exhibit additional serious and fatal irregularities to those referred to below in relation to ABE Midas. Having regard thereto it became common cause between the applicant and the SAPS respondents that the award of the tender to Pinnacle should be reviewed and set aside. ABE Midas did not argue differently.

²⁰ Broad-Based Black Economic Empowerment

²¹ Preferential Procurement Finance Act

I deal with the remaining irregularities which, although also applicable to Pinnacle, in the main, are applicable to ABE Midas.

First irregularity – Pricing in absence of volumes.

[34] It was submitted that the bidders' respective comparative prices were determined on the basis of prices²² they submitted in respect of twenty three categories of parts identified in sample spreadsheets. The applicant's ability to determine prices that it is able to offer for the parts in question would depend on the number of each part that it would be required to supply as volumes materially affect prices.²³

[35] The SAPS respondents boldly confirm that there was intentionally no indication of the expected volumes of the parts contained on the compact disc. The approach, in my view, is irrational and the irrationality that this approach imported into the tender process is confirmed by the common cause fact that when the bidders' pricing was compared, the evaluation committee did indeed apply a multiplication factor to the unit prices supplied by the bidders in order to reach a total price. This was compounded by the fact that the multiplication factor was not applied uniformly to each of the bidders, resulting in skewed results being attained.²⁴ The process attained the result which the Constitutional Court warned against.

²² Which accounted for 90 percent of the preference points to be allocated.

²³ The applicant argued that this is impliedly conceded by the SAPS respondents in that the respondents said that the applicant knew how many vehicles were involved and had a thirteen year history to work on. I agree with the applicant's counsel's submission that the SAPS respondents, at least impliedly, admitted that the number of parts would be important. The answer that the applicant had substantial experience may very well be true but it misses the point which is that the envisaged volumes were required in order for the bidders to rationally determine their best offers for inclusion in their bids.

²⁴ Allpay(1) para 27.

- [36] To this allegation the SAPS respondents responded that although the criticisms raised by the applicant are valid, the irregularity is not material. ABE Midas associated itself with the SAPS respondents' argument and relied on the failure of the SAPS to confirm the authenticity of the record of proceedings, the latter argument which I have already shown to be unsustainable.
- [37] The Constitutional Court made it clear in *Allpay (1)* that the suggestion that inconsequential irregularities are of no moment conflates the test for their irregularities and their impact.²⁵
- [38] After an analysis of the relevant documents it became common cause between the applicant and the SAPS respondents that the discrepancies contained in the evaluation document regarding the comparison of prices of the bidders were obvious but unexplained. In the specific context of judicial review of tender awards the Supreme Court of Appeal said that "One of the requirements of... (a tender) procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing."²⁶
- [39] It is consequently clear that the decisions to award the tenders were arbitrarily reached²⁷ and not rationally connected to the purpose for which they were made, namely to achieve the purpose of the process which is the most competitive contract pricing for parts (with due

²⁵ *Allpay (1)* para 22

²⁶ *Premier, Free State vs Firechem Free State (Pty) Ltd* 2000(4) SA 413 (SCA) para 30; *Allpay (1)* para 39.

²⁷ Section 6(2)(vi) of PAJA

regard to the points system). That being so, the failure to apply the constitutional prescripts by failing to follow a process that was equitable, transparent or cost-effective as required by s 217(1) of the Constitution, renders the process unlawful. As such the purpose for which the requirements are in place,²⁸ was not attained. The argument that the irregularity was not material can consequently not be upheld.

Second irregularity – Failure to exclude buy-out prices.

[40] Included in the bid was a requirement to tender for buy-out parts. These are vehicle parts that are not available in the open market generally and which had to be purchased from the manufacturers' dealer networks. The applicant complained that the evaluation committee of the SAPS did not compare apples with apples when it dealt with these buy-out parts. In response to the allegation that it would not have been possible to meaningfully compare the prices of parts in the sample spreadsheet where one bidder quoted on the basis on a buy-out price, and one or more of the others included aftermarket prices, the SAPS responded that in such case the parts concerned were not taken into consideration in order to evaluate the tenders. However, this answer must fail because there are a number of instances where the buy-out prices were indeed included in the calculation of the applicants bid but not in any instance was any other price of the applicant excluded from the total price in any of the part categories. The approach advocated by the SAPS respondents was consequently not applied at all or not applied in a uniform manner to

²⁸ "The SAPS respondents were in agreement that the purpose of the procurement legislation was to achieve a "proper price comparison and an award of a cost-effective tender... ." SAPS heads para 2.3. Indeed ABE Midas was similarly in agreement. ABE Midas heads para 47.

the detriment of the applicant. The award was based on skewed calculations and the final decision was not rationally connected with the information before the decision maker. Again, the purpose of the regulated tender process is to attain that which is set out in s 217 of the Constitution and the process violated the critical prescripts and was unlawful. The process was neither fair nor equitable and could not have resulted in a competitive and cost-effective procurement.²⁹ The purpose of the compliance provisions has thus been undermined.

Third irregularity - Price amendment after closing date.

[41] ABE Midas and Pinnacle were allowed to amend their pricing although there were instances where the only adjustment was occasioned to allow for the inclusion of Value Added Tax which had been omitted. There is indeed an instance where Pinnacle's final total price for oil filters was reduced to half its original price. Because Pinnacle plays no further role as a result of the concession by the SAPS respondents that its award of the tender should be set aside, I need not consider this aspect further. The applicant, however, submitted that the existence of this material anomaly in relation to the amendment of Pinnacle's bid pricing gives rise to valid concerns about the overall integrity of the bidding process. Such concerns, in my view, would not be sufficient to find any irregularity in so far as the bid of ABE Midas is concerned.

Fourth irregularity - Outlets in Municipal areas – the question of subcontracting

²⁹ See Allpay (1) at para 92

- [42] The tender document required in its special requirements and conditions that a bid should fully comply with the specifications, a failure whereof which could result in disqualification.
- [43] One such requirement was that “in the case of urban areas the bidder needs to be situated within the same municipal boundaries as the SAPS garage.” This requirement is understandable because the mobility of the SAPS vehicles should be a primary concern of the SAPS in order to attend to their important public functions. It is understandable that there is a provision for a two to three hour turn-around time from the time of order to the time of supply of parts. A speedy and efficient delivery of parts to the SAPS garages is vital for the latter’s ability to ensure an affective police service. It is not disputed that ABE Midas consists of a single store situated in Pretoria (Pinnacle suffered a similar disability). In these circumstances the ABE Midas bid could not have complied with requirement unless it involved sub-contracting with other parties who are within the municipal boundaries of the SAPS garages outside of Pretoria. Such sub-contracting would be permissible on certain conditions.
- [44] It was argued by the applicant that the award of the tender to ABE Midas occurred in circumstances where it had not complied with that which is described in the tender document as a mandatory condition. Indeed it goes further. The bid document of ABE Midas specifically records that no portion of the contract will be subcontracted – the relevance whereof needs some elaboration. The specification provides that in the event of a bidder intending to utilise the services of sub-contractors, certain information is required to be furnished regarding sub-contractors. That information was not furnished by ABE

Midas. Being unable to have a presence in the municipal areas, as required, will seriously hamper the ability of ABE Midas to deliver spares to the SAPS garages within the fairly demanding timeframes.

- [45] In the circumstances both bidders were either awarded their tenders despite not having complied with a mandatory or material condition prescribed by the bid conditions or awarded their tenders on the basis of sub-contracting in circumstances where ABE Midas specifically represented in its bid that no portion of the contract will be sub-contracted. In the first instance it was submitted that the mandatory and material condition was not complied with and in the latter instance that relevant circumstance namely, that the bidder had made a misrepresentation in the bid document, were not taken into account.
- [46] It is, however, clear on the evidence that ABE Midas based its bid on extensive sub-contracting contrary to the declaration which it made in the bid document. The SAPS respondents said that in evaluating the bid documents submitted by tenderers, the SAPS did not investigate the veracity of the statements made by the various bidders but accepted the truthfulness and correctness thereof. Such an investigation should have been done.³⁰ The failure to investigate flies in the face of the assurance given by the chair of the adjudication committee to the national commissioner of police that the evaluation process "... included the verification of the capability of bidders to render a satisfactory service to ninety five garages countrywide."

³⁰ Allpay (1) para's 21, 52, 53, 54, 69, 70 and 72

[47] The evidence further shows that the SAPS respondents were aware of the fact that ABE Midas intended to utilise the services of other franchisees in the Midas Group in the performance of its obligations under the tender despite its assertions to the contrary. An opinion by the SAPS Legal Services advised the relevant officials that it would appear that ABE Midas were sub-contracting. The opinion was, in my view, correct and the contrary view expressed by a Treasury official cannot detract from the facts.

[48] I agree with the submission by counsel for the applicant that the SAPS respondents failed to take into account this relevant information. In considering a similar situation, the Supreme Court of Appeal concluded that “In the words of (PAJA), Eskom, in awarding the tender to Kwanda took into account irrelevant considerations (the financial ability of Rappa Group to perform the contract) and it did not consider relevant considerations (the financial ability of Kwanda to perform the contract); and the award of the tender was not rationally connected to the information before Eskom.”³¹

The fifth irregularity - Failure to supply proof of supplier relations.

[49] The complaint regarding this ground of review only applies to Pinnacle and as a result of what has already been said in this judgment, I do not consider this ground of review.

The sixth ground –absence of established distribution networks

³¹ Eskom Holdings Ltd vs New Reclamation Group (Pty) Ltd 2009 (4) SA 628(SCA) para 6.

[50] The specification document requires mandatory and full compliance with its conditions. Paragraph 3 of the specification stipulates, inter alia, that:-

“3.1 It is required for the contractor to supply and deliver the full range of spare parts to all SAPS Garages as and when required by the individual garages in order to enhance service delivery. This service will be rendered by a single contractor per garage within 2-3 hours after receipt of order.

3.2 It is ... imperative that bidders who did Nationally must have well established infrastructure in place by rendering a service through the utilization of an existing dealership-network / agent per garage for which he/she applied to render the service.

Taking the provisions of par 3.1 above into account it is not imperative that bidders, who bid per garage, must be in a close proximity of the street address of the SAPS Garage as per annexure “A” i.e. in the case of urban areas the bidder needs to be situated within the same municipality boundaries as the SAPS garage. This is required to ensure compliance with the provisions of par 3.1 above. ...

3.3 Spare parts must be delivered directly to a SAPS Garage through an existing dealership / agent outlet network which must already be established. ...

3.4 All deliveries from an existing outlet, for spare parts carried in stock [on the shelf at the time of ordering] must take place within 2-3 hours from time of ordering during normal working hours.

3.5 In cases where spare parts are not carried in stock or where spare parts are out of stock [on the shelf at the time of ordering] or spare parts which have been ordered from manufacturers, the necessary spare parts must be delivered within 48 hours from the date of the

order from the existing dealership / agent / business address where such part is in stock” ... (emphasis supplied).

- [51] Despite this requirement, it was clearly established on the papers that neither ABE Midas nor Pinnacle had any existing and already established dealership or agent outlet networks in place at the time they were awarded the tenders (let alone on the closing day for submission of tenders³²).
- [52] After the allocation of the tender, ABE Midas was attempting to put in place a distribution network “to assist with the delivery of the contract.” A letter was sent to other franchisees to “request” them to “participate in the tender.” ABE Midas did clearly not fulfill the requirement at the time when its tender was considered. Ignoring this inability, was unfair vis-à-vis the applicant. It also impacts upon its ability to deliver parts within the timeframe stipulated in the conditions of tender.
- [53] This irregularity is highly material as the purpose of the requirement in question was to ensure that the bidders were capable of performing the obligations under the contract should the tender be awarded to it. The inability of the successful bidders to perform has been referred to earlier in this judgment. The award of the tender to ABE Midas, who is incapable to perform its obligations, cannot be in the public interest.
- [54] As with the previous irregularity, it is apparent that the applicant has clearly established that the tenders were awarded to ABE Midas and Pinnacle despite the fact that the mandatory requirement in question

³² See para 26 above.

was not met by either of them. The decisions to award the tenders are therefore reviewable under section 6(2)(b) on the basis that a mandatory condition of the tender was not complied with, or under section 6(2)(e)(iii) on the basis that a material consideration (i.e. the fact that the successful bidder did not demonstrate the presence of existing distribution networks) was not taken into account.

The seventh irregularity – Tax Certificates of Sub-contractors not provided.

[55] It has been shown that ABE Midas' bid involved extensive sub-contracting of its obligations to other franchisees in the Midas Group. In addition, it was a mandatory requirement of the tender that "... in bids where Consortia / Joint Ventures / Sub-contractors are involved, each party must submit a separate Tax Clearance Certificate." (emphasis supplied).

[56] It is common cause that no tax certificates were submitted in respect of ABE Midas' proposed sub-contractors. As such the non-submission is a fatal irregularity.³³

[57] The importance of the policy reasons behind the imposition of this mandatory condition of the tender is referred to in *Dr JS Moroka Municipality*. The award of the tenders to ABE Midas and Pinnacle despite the clear evidence of their non-compliance constitutes a serious irregularity that is reviewable in term of section 6(2)(b) of PAJA on the basis that a mandatory condition of the tender was not complied with, or under section 6(2)(e)(iii) thereof on the basis that a material consideration (namely, the fact that ABE Midas and Pinnacle

³³ See *Dr JS Moroka Municipality* para 16.

had not submitted the required tax certificates) was not taken into account.

Conclusion

[58] Having regarded to the foregoing irregularities in the bid process, the decision to award the tender to ABE Midas and Pinnacle was unlawful and invalid. I have indicated in the analysis of the various grounds why each of those grounds is indeed material. The award of the tenders consequently falls to be reviewed and set aside.

Relief

[59] This conclusion, in turn, requires that a just and equitable order under s 172(1)(b) of the Constitution be issued.³⁴ The remedy lies in s 8 of PAJA³⁵.

[59] The unfair advantage afforded the successful bidders should, in my view, be removed from the equation in order to allow for bidders to be evaluated in an equal footing.

[60]

APPEARANCES:

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³⁴ AllPay (1) para 25

³⁵ Consolidated Investment Holdings (Pty) Ltd and another v Chief Executive Officer, South African Social Security Agency and others (2014 (4) SA 179 (CC) (Allpay (2) para 29 – 32.

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Date of Hearing: 9 September 2014

Judgment delivered on: 25 September 2014