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

CASE NO: 66318/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

28/03/17
DATE

SIGNATURE

3/4/2017

In the matter between:

FARANANI INFORMATION TECHNOLOGY SERVICES (PTY) LIMITED	Applicant
and	
STATE INFORMATION TECHNOLOGY AGENCY (SOC) LIMITED	1st Respondent
GIJIMA HOLDINGS (PTY) LIMITED	2nd Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE MPUMALANGA DEPARTMENT OF HEALTH	3rd Respondent

---

JUDGMENT

Baqwa J

[1] This is a review application in terms of which the applicant seeks to review and set aside the decision of the first respondent to appoint the second respondent as a service provider to the Health Department of Mpumalanga Province.

[2] The application was brought by way of an urgent application on 8 September 2015 before Madame Justice Mngqibisa-Thusi.

[3] The relief sought in the urgent application was captured in two parts, Part A and Part B. The applicant sought an order in the following terms:

"*1. Ordering that the forms and service provided for in the Rules of Court be disposed with and that the matter be heard as an urgent application in terms of Rule 6(12) of the Rules of Court.*

2. Pending the finalisation of the relief sought in Part B, interdicting and restraining the first respondent from taking any steps to implement the appointment of the second respondent as a service provider pursuant to the tender that was advertised described as "RFB 1286/2014: Application support and maintenance of the patient electronic system (PEIS) for the Mpumalanga Department of Health" ("the tender").

3. Ordering the first respondent and any other respondents who oppose the interim relief sought to pay the costs of this application, including the costs of two counsel; alternatively ordering that such costs be reserved for determination in terms of Part B of this application.

4. Further or alternative relief."

[4] In Part B the applicant seeks an order in the following terms:

"*1. Reviewing and setting aside the decision of the first respondent to appoint the second respondent as a service provider pursuant to the tender described as "RFB 1286/2014: Application support and maintenance of the patient electronic system (PEIS) for the Mpumalanga Department of Health" ("the tender");*

2. Substituting the decision of the first respondent to award the tender to the second respondent, and awarding the tender to the applicant;

3. Interdicting and restraining the first and second respondent from concluding a service level agreement pursuant to the award of the tender.

4. Ordering the first respondent, and the second respondent only in the event of it opposing Part B of this application, to pay the applicant's costs including the costs of two counsel, jointly and severally, the one paying the other to be absolved, and

5. Further or alternative relief."

[5] Part A was adjudicated upon and Mngqibisa-Thusi J issued an order dismissing Part A of the application with costs.

[6] Part B was brought in terms of Rule 53 of the Uniform Rules of Court and constitutes the application that this Court is called upon to decide.

[7] At the commencement of these proceedings, the applicant brought an application for orders in the following terms:

"*1. Amending the applicant's notice of motion to Part B of the application by:*

1.1 Inserting the words "for a period of two years from the date of the order" at the end of prayer 2; and

1.2 Deleting prayer 3 and replacing it with the following words: "Setting aside the service level agreement entered into between SITA and Gijima on a November 2015".

2. Ordering that the costs of this application be costs in the cause.

3. For further or alternative relief."

[8] The application for an amendment was not opposed by the respondents and it was granted accordingly.

[9] Both the first and second respondents, namely, State Information Technology Agency (SOC) Limited (SITA) and Gijima oppose this application and they have filed answering affidavits. The third respondent, which is the member of the Executive Council for the Mpumalanga Department of Health ("*MDOH*") does not oppose the application and has not filed any papers.

Background

[10] Faranani is a Black Economic Empowerment Information Technology Services Provider which was responsible for the development and implementation of an IT system known as Patient Administration and Billing System ("*PAAB*") which forms part of the Patient Electronic Information Systems ("*PEIS*").

[11] PEIS is a hospital information system which provides administrative and clinical information to hospitals to enable staff to administer the patient's healthcare needs, bill patients, and collect revenue in all provincial hospitals and public health-care centres. PEIS provides for a master patient index which allows for a single patient view across all hospitals. The system was developed by Faranani to support patient administration (admissions, discharge and transfer) revenue collection, chronic disease management, clinical functionality and management reporting. The flexibility of the systems allows for each visit by a patient to a public hospital to be captured on the database – either on a visit-by-visit basis, or per medical incident.

[12] PEIS has progressed hospital administration to such an extent that it is currently being utilised in most public hospitals in the country.

[13] In 2004, Faranani was appointed to develop and implement PEIS for the MDOH in 33 Mpumalanga public hospitals. Since 2004 and until 2005 Faranani was awarded successive three year period service level agreements for the continued support, maintenance, development and implementation of PEIS and related services.

[14] On 5 December 2014, SITA issued an open invitation to bid for the tendering of PEIS services to the MDOH for a further two year period award of the tender.

[15] Both Faranani and Gijima put in a bid for the tender and on 8 July 2015 Faranani was formally notified by SITA that Faranani's tender had been unsuccessful and that the tender had been awarded to Gijima.

[16] Faranani lodged an objection and also requested reasons for the decision together with an undertaking that the tender would not be implemented pending an internal appeal.

[17] By letter dated 27 July 2015 SITA stated that both bidders had complied with all the technical mandatory requirements in the tender documents and that Gijima had been awarded the tender as they had scored higher than Faranani on price.

[18] SITA, however, would not provide an undertaking that the tender would not be implemented pending the review process.

[19] After a formal request for documents in terms of the Promotion of Access to Information Act 2 of 2000 ("*PAIA*") on 5 August 2015 SITA provided Faranani with copies of the Bid Adjudication Report as well as a copy of the Supply Chain Management Policy of SITA. The present application was thereafter launched by Faranani.

The Review Application

[20] The bid contains a number of mandatory and non-mandatory requirements. Failure to comply with the mandatory requirements leads to a bidder being disqualified.

[21] Faranani contends that Gijima failed to comply with a number of mandatory requirements and ought to have been disqualified from going forward in the selection process.

The Law

[22] Section 217 of the Constitution reads as follows:

> "*(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.*"

[23] The national legislation referred to in section 217 (3) of the Constitution is the Preferential Procurement Policy Framework Act 5 of 2000 ("*the PPPFA*"). 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.*"

[24] In **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC) at para 23 Moseneke DCJ held that:

"*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 section 33 and the basic values governing public administration in section 195 (1).*"

[25] In **Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others** 2008 (2) SA 481 (SCA) at para 4 the Supreme Court of Appeal elaborated on this approach as follows:

"*The…. Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tender (section 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.*"

[26] The Constitutional Court reiterated that the proper starting point regarding the tendering process is section 217 of the Constitution and summarised the Court's approach as an "*evaluation of the approach to the assessment of the Constitutional validity of outcomes under the state procurement process.*"
See **AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others** 214 (1) SA 604 (CC) ("*AllPay Merits Judgement*").

[27] In the AllPay Merits Judgment Froneman J sums up the judicial review enquiry as follows at para 45:

"*Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the Constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.*"

Faranani's Challenge to the Award

[28] It is clear from the abovementioned legal prism that all the relevant factors regarding the award have to be weighed against the main thrust of the challenge by Faranani which is based on the allegation that SITA ought to have disqualified Gijima for non-compliance with the mandatory requirements that the bidder, that is, Gijima, was required to have three years' experience and expertise in the operations of the provincial hospitals and its related healthcare process and that Gijima did not have that experience.

[29] This Court is therefore called upon to determine whether SITA

29.1 failed to comply with a mandatory and material procedure prescribed by an empowering provision (section 6 (2)(b) of PAJA);

29.2 its decision was influenced by an error of law as it was not empowered to take such a decision (section 6 (2)(d) of PAJA);

29.3 its decision was not rationally connected to the information before the BAC (section 6 (2)(f)(ii)(cc) of PAJA);

29.4 it failed to take into consideration relevant considerations, namely, the fact that Gijima did not comply with several mandatory and material conditions (section 6 (2)(e)(iii) of PAJA);

29.5 the BAC's finding that the Gijima bid was compliant was arbitrary and capricious (section 6 (2)(e)(vi) of PAJA).

[30] In the AllPay Merits Judgment the Constitutional Court held that "*[t]he materiality of irregularities is determined by assessing whether the purposes the tender requirements serve have been substantively achieved.*"

[31] It is evident from the record of the bid assessment process that the so called mandatory requirements are indicated by the bidders through what could be described as a "*tick box*" form filling exercise in which a bidder has to make a tick against a "*compliance*" or "*non-compliance*" box. Below the said boxes it is specified in black and white that there is "*no substantiation required*". In other words, where "*experience*" of whatever nature is required, a bidder may tick against the "*comply*" box to indicate that he/it has the necessary experience. It would seem therefore that the totalling up of the "*comply*" ticks against a set threshold results in a bidder passing the initial stage of assessment to the second stage which then drills down into a more detailed examination of the bid documents and an assessment in qualitative and quantitative terms of what each bidder has to offer.

[32] A comparison is then made of the points scored against each category of the bid specifications. The process involves a pooling of the points scored by each member of the BAC for each bidder and this finally produces the winning bidder.

[33] Even a perfunctory examination of the mandatory requirements "*tick box*" form suggests logically that whilst it may enable a bidder to go past the initial bidding phase, it puts him nowhere near becoming a winning bidder. Where he indicates being compliant with the experience requirement, the BAC still has to logically drill down to what that experience comprises. In my view, it can only be after that drill down process that it can be alternatively contended that a particular bidder complied or not with a particular mandatory requirement.

[34] SITA confirms that it is not required to take any steps to verify the information and that it will not disqualify a bidder, simply because a bidder has ticked a box which indicates compliance. Faranani contends that such an approach is both legally untenable and that SITA's conduct does not meet the standards of a reasonable organ of State, exercising public power.

[35] It does indeed seem that in the absence of substantiation, the initial process lends itself to potential abuse and that it might require to be tightened up, but, as things presently stand, that is the gate through which all the bidders have to go through. I agree that were the process to end or be subject only to the initial stage described above, it would certainly not be said to meet standards of a reasonable organ of State. The fact is however in the present case that copious documentation evidencing the capacity and capability of a bidder to execute the tender is required and is painstakingly analysed by the BAC.

[36] **In casu**, it is common cause that with regard to the experience referred to experience required in paragraph 2.16.1; 2.16.2 and 2.16.3 of the mandatory requirements and 3.2.1 of the non-mandatory requirements, Gijima relied on the experience of one Dr Pino Mavengere who was not an employee or subcontractor of Gijima at the time the bid was submitted. Gijima submitted a comprehensive curriculum vitae of Mavengere and submitted that he had been engaged to join the Gijima team in the event of it winning the bid. Counsel for Gijima have submitted that the bid process was not premised on existing staff or on the need to submit completed employment contracts for every resource that Gijima would utilise in the execution of the contract.

[37] In support of this submission counsel for Gijima even referred the Court to a ramping up clause in the bid specification which enabled a winning bidder to ramp up the resource capacity within certain specified periods. It was therefore submitted that this is the category in which Mavengere would fall.

[38] Under the past projects heading of the bid, the bidders were required to list three projects in which they were previously involved. In its bid response Gijima indicated involvement in a project involving SAMA Electronic Health Record Project: Ujambi Medical Services. This project involves the design, development and implementation of an Electronic Health Record System ("*HERS*") to include 17 000 doctors and practices. Those records would contain personal information, diagnostics treatments, treatments, pharmaceuticals etc. The scope of the project also included interlinking with smartcards, smartcards architecture, switch design and billing information. This clearly demonstrated that Gijima had the technical ability to meet the mandatory requirements in paragraphs 2.16.1 to 2.16.3 and 2.16.8.

[39] Counsel for Faranani submitted that Gijima had made a fraudulent misrepresentation with regard to experience in the healthcare systems sphere. A critical factor in deciding whether such a misrepresentation was made was the submission by SITA which strenuously denied that it had been misled in any way by the information provided by Gijima.

[40] SITA contends that "*the bid evaluation is a holistic process and all the requirements are taken into account to determine whether a bidder is disqualified or not.*"

[41] It is important to note that the thrust of the challenge against the award is against the evidence or information provided by Gijima into the tender process and not that SITA operated outside the tender framework.

[42] In **Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another** 2016 (3) SA 1 (SCA) ("*Westinghouse*") para 43 the Court emphasising the decision in Allpay Merits Judgment held that a:

"*.... tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions.*"

[43] In Westinghouse, the Supreme Court of Appeal considered the effect of non-compliance with tender requirements in which Eskom (the first respondent) issued an invitation for tenders for the replacement of six steam generators at a nuclear power station. Westinghouse (the appellant) was one of the bidders. The other bidder was Areva, a French company.

[44] Eskom awarded the contract to Areva and Westinghouse sought to review the decision to award the tender to Areva. The questions before the Court of appeal were whether the award had followed an unlawful tender process and, if so, whether the Court should substitute Westinghouse for Areva as the successful bidder. More specifically, the Court had to consider whether Eskom had been entitled to take into account certain previously undisclosed "*strategic considerations*", which Westinghouse contended did not form part of the original bid evaluation criteria. In other words, if Eskom had taken additional criteria into account. Westinghouse alleged that Eskom had acted beyond its powers and thus unfairly. Westinghouse further argued that the whole process of the award of the tender was unlawful, because there wasn't proper compliance with the tender requirements.

[45] The Supreme Court of Appeal agreed and found that the award had followed an unlawful tender process and that Eskom, in taking into account considerations not included in the bid evaluation criteria, had made its decision unlawfully, thus making the whole process irrational and unlawful. The Court referred the award back to Eskom for reconsideration.

[46] In the present case it would seem that the tipping point regarding the legality or otherwise of the actions of the BAC was dependent on whether Gijima failed to supply relevant information regarding the experience required or alternatively, had supplied information which was false in that the Mavengere resource was either non-existent or unavailable to Gijima as a bidder in which case that would have constituted what is commonly referred to as "*fronting*".

[47] Besides the information regarding Mavengere it was part of Gijima's submission that it had rendered services to the KwaZulu Natal (KZN) Department of Health and that it possessed the relevant experience.

47.1 Over and above that Mavengere was identified as a Project Team Member and his expertise in the health sector is extensively set out in the documents submitted. He is a medical doctor who is familiar with the operation and and process of provincial hospitals, was a coordinator for IDC 10 codes and the UPFS and implemented and reviewed a number of pharmaceutical systems or solutions for the public and private sector. SITA and/or the BAC seem to have been satisfied that the expertise proffered in Gijima's bid satisfied the requirements as specified in the tender. Faranani seems to have misconstrued the mandatory requirement to refer to three (3) years' experience in PEIS whereas the experience required was that of operations in provincial hospitals.

[48] It is common cause that the contract that was awarded to Gijima has not only been duly executed but that it is now nearing completion in a few months' time. Even though the further evidence tendered by Gijima regarding Mavengere's current employment position has not been relevant for determination of this review application, I have taken judicial notice of the fact that Mavengere is currently part of the execution of the contract by Gijima.

Price Comparison

[49] The second thematic ground of review relates to SITA's failure to engage in a proper price comparison of the bid price of Faranani and Gijima. The criticism levelled was that Gijima had not priced for the Electronic Data Interchange ("*the EDI*") and that there are other hidden costs or that the bid was under-inclusive.

[50] EDI is an acronym for Electronic Data Interchange. The EDI allows for the electronic submission of documents and data to a medical switch, which then allows for the exchange of data and documents with the 92 medical aids in South Africa. This allows the provincial hospitals to keep up to date with all detailed rules of the 92 medical aids and enables them to know whether a patient's bill will be paid by a medical aid or not. The medical switch also allows the hospital to submit the hospital bill electronically to the medical aid. The medical switch then bills the hospital, via the IT service provider, on a per transaction basis for every transaction it submits on behalf of the hospital.

[51] Both SITA and Gijima submit that the criticisms are unwarranted as Gijima had indicated that Faranani had misunderstood its bid in relation to EDI. Gijima had not included pricing for the EDI and simply indicated that there was no additional cost for the maintenance and support of the EDI. Gijima had quoted fully for the services to be rendered in terms of the tender and confirmed this on affidavit. The question of hidden costs did not therefore, arise.

[52] Counsel for Faranani contends that SITA did not compare '*apples with apples*' in comparing a pricing structure which contained a pricing for EDI (Faranani's) with one which did not (Gijima's). The fact of the matter is, it could hardly have been expected of the BAC to take out the EDI pricing out of Faranani's bid in order to make it similar to Gijima's before reaching its final decision. To use counsel's analogy, that could have been changing an orange to an apple which would have been inappropriate interference with bidder's offering.

[53] Quite clearly, as is obvious also from the bid specification documents, pricing was a critical element of the bid process that the parties herein were involved in. Closely aligned to the price consideration issue was also the budget available to the MDOH to implement the project. The pricing decision could not, therefore be reached in an arbitrary or capricious manner. There was a financial ceiling beyond which the implementation of the project would be impossible to execute. To put it differently, the tender process was price sensitive hence the decision that was reached to accept the bid with a lower price with a concomitant certainty that the project would be successfully executed. I therefore do not find that SITA took the wrong decision even in this regard.

Team Scoring

[54] Faranani also complains that the team score at the functional/technical evaluation stage is irrational and arbitrary in that the team score is not an average score determined by the individual scores. What appears to have happened is that the evaluation team members scored the bidders separately and thereafter, they convened and re-evaluated the scores on a consensual basis. Logic dictates that the evaluators could not have all arrived at the same score even though they acted individually and independently of each other. The tender was ultimately awarded on the basis of the collective views of the team and not on individual scores. It was in that nature of the process that it was a team score that was sought and not an individual score. This in my view can hardly be dubbed arbitrary or capricious.

[55] At the evaluation stage, the bidders had to achieve a 70% threshold in order to qualify to proceed to the next stage. Both bidders achieved the 70% threshold and Faranani did not therefore suffer any prejudice in that allocation of the scores did not negatively impact both bidders.

The Bid Adjudication Report

[56] The following is evident from the Bid Adjudication Report: MDOH required the continued application support of the existing PEIS at the current hospitals and roll out of additional modules, if any. The evaluation process was divided into the following phases:

56.1 Phase 1 was the initial screening of the RFB (Request for bid) responses received;

56.2 Phase 2 was the evaluation of the RFB technical mandatory requirements;

56.3 Phase 3 was the evaluation of RFB non-mandatory requirements using the evaluation criteria;

56.4 Phase 4 was the price and participation goal evaluation.

[57] The bid stipulated that the responses were to be evaluated using 90/10 preference point system in accordance with the Preferential Procurement Policy Framework Act 5 of 2000 ("*PPPFA*") guidelines and based on the system that the points allocated were 90 for price and 10 for participation goals and the total being 100.

[58] Both Gijima and Faranani passed the initial screening process.

[59] As far as phase 2 being the evaluation of the technical mandatory requirements both bidders were evaluated and qualified.

[60] The first phase of the technical evaluation was to confirm full compliance with all technical mandatory requirements as specified in the bid document and for that purpose, any bidder that failed to comply with any of the requirements listed in the bid was disqualified.

[61] The technical mandatory requirements are not subjected to any scoring as these are absolute minimum requirements.

[62] No bid responses were eliminated for non-compliance with mandatory technical criteria as they all complied.

[63] The technical evaluation committee endorsed the technical evaluation report.

[64] The next phase was the evaluation; the Bid Evaluation Committee ("*BEC*") members individually scored each qualifying bid submission using the scoring matrix for the non-mandatory requirements.

[65] An average score was then calculated for each qualifying bid response.

[66] A functional/technical evaluation report was written which summarises the evaluation process.

[67] Both bidders met the mandatory requirements.

[68] The rating scale was shown for evaluating each qualifying bid response against the functionality requirements and the rating scale ranged from 0 for non-compliance to 5 for fully compliant and meeting all the requirements.

[69] Bidders who scored less than 70% would be disqualified and would not be evaluated further for price and participation evaluation.

[70] According to the individual and team scores for non-mandatory requirements Gijima scored 94% while Faranani scored 100%. Both sides therefore scored more than 70% and qualified to be evaluated in the next phase of price and participation goal evaluation.

[71] The formula applied to calculate price based on the 90% preference point system and the lowest acceptable offer under consideration was R16 624 798.56.

[72] The price evaluation report was prepared by a different team from the BEC. Based on the evaluations Gijima scored the highest points for price.

[73] A cost comparison table was compiled which was in line with the casting module as set out in the tender documents.

[74] Faranani offered a price of R17 971 144.16 excluding value added tax (VAT).

[75] The last stage of evaluation was Broad-based Economic Empowerment which is set out in a separate report.

[76] The amount budgeted for the project was the sum of R15 091 706.00 exclusive of VAT and R17 204 545.00 inclusive of VAT.

[77] An internal audit report review was concluded into the procurement process of the tender. Based on the examination of the document analysed it was concluded that the procurement processes followed were in line with the Supply Chain Management Policy of SITA except for a minor issue that the BEC Chairperson did not sign the function/technical evaluation report which he subsequently signed.

[78] The audit report notes that the evaluation scores were incorrectly consolidated, however this did not have any impact on the evaluation process as the bidders scored above 70%.

[79] In the circumstances it appears that the evaluation process was conducted fairly, in a transparent and open fashion as prescribed by section 217 of the Constitution of the Republic of South Africa, the PPPFA, the SITA Supply Chain Management Policy and the general dictates of lawful action as required from an organ of State.

[80] The BEC was satisfied that a proper evaluation process had been followed and recommended that Gijima be appointed as a successful bidder.

[81] The individual scores of the BEC members are part of the record. The individual scores of the evaluators were consolidated into a report which the members signed and endorsed.

[82] It would also seem therefore, that there is no proper basis to challenge the outcome of the bid evaluation.

General Tender Objectives

[83] It is common cause that the BEC comprised technically qualified persons who were able to evaluate the tender and in their expert opinion concluded that both Faranani and Gijima met the mandatory and non-mandatory requirements. It is trite that judicial deference is appropriate where the subject matter of an administrative action is technical or of a kind in which the Court has no particular proficiency. See **Ekurhuleni Metropolitan Municipality v Dada N. O.** 2009 (4) SA 463 at P468 G – I 469 A.

[84] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 CC, the Constitutional Court said:

"*[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts.*"

[85] It bears to be mentioned that even if there was some merit to the complaints by Faranani they are of a technical nature which must be seen in the context of the dictum in Westinghouse (**supra**) in which the Court held as follows:

"*[36] That is doubtless still good law. In Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & Others 2013 (4) SA 557 (SCA) (Allpay SCA) para 96 this court said:*

"There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinized intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal."

It is, of course, only immaterial flaws (termed 'inconsequential' by that court) that may be overlooked."

[86] I have considered the BAC report and various submissions by counsel for both Faranani and Gijima and I have come to the conclusion that the SITA decision was neither arbitrary nor capricious.

[87] Counsel have also addressed me on the issue of this Court substituting its decision for that of the expert decision maker. In light of the conclusion I have just expressed that issue does not arise.

[88] In the result, I make the following order:

The application for review is dismissed with costs.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of Hearing:	6 March 2017
Date of Judgment:	3 April 2017
For the Applicant:	Advocate C. E. Watt-Pringle SC Advocate K. S. McLean
Instructed by:	Mervyn Taback Incororated
For the First Respondent:	Advocate F. J. Nalane
Instructed by:	Diale Mogashoa Attorneys
For the Second Respondent:	Advocate M. A. Chohan SC Advocate A. Govender
Instructed by:	Weber Wentzel Attorneys