Reportable:	**YES** / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

"IN THE HIGH COURT OF SOUTH AFRICA"

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M489/15

In the matter between:-

UNIPLATE GROUP (PTY) LTD	Applicant
And	
MEC FOR DEPARTMENT OF COMMUNITY SAFETY AND TRANSPORT MANAGEMENT NORTH WEST	1st Respondent
MINISTER OF TRANSPORT	2nd Respondent
RETRONE ROAD AND TRAFFIC SOLUTIONS (PTY) LTD	3RD Respondent
SOUTH AFRICAN NUMBER PLATE ASSOCIATION	4th Respondent
UNIPLATE GROUP (PTY) LTD	5th Respondent
ARGA PLATES & SIGNS (PTY) LTD	6th Respondent

CASE NUMBER: M512/15

In the matter between:-

NEW NUMBER PLATE REQUISITES CC	Applicant
And	
MEC FOR DEPARTMENT OF COMMUNITY SAFETY AND TRANSPORT MANAGEMENT NORTH WEST	1st Respondent
MINISTER OF TRANSPORT	2nd Respondent
RETRONE ROAD AND TRAFFIC SOLUTIONS (PTY) LTD	3RD Respondent
SOUTH AFRICAN NUMBER PLATE ASSOCIATION	4th Respondent
UNIPLATE GROUP (PTY) LTD	5th Respondent

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] Uniplate Group (Pty) Ltd (Uniplate) under case number M489/2015 and New Number Plate Requisites CC (NNPR) under case number M512/2015 applied *inter alia* for the following;

1.1 to review and set aside the determinations made by the first respondent in Provincial Notice 33 as contained in the North West Provincial Gazette No. 7515 dated 11 August 2015.

1.2 Alternatively, Uniplate applied that the determinations made by the first respondent at paragraph 10, 14, Schedule 1, Schedule 2, Schedule 4 and Schedule 5 in Provincial Notice 33 as contained in the North West Provincial Gazette No. 7515 dated 11 August 2015 are reviewed and set aside.

1.3 Further alternatively, Uniplate applied that it is declared that the determinations made by the first respondent in Provincial Notice 33 as contained in the North West Provincial Gazette No. 7515 dated 11 August 2015 are invalid and of no force and effect.

1.4 Further alternatively, Uniplate applied that it is declared that the determinations made by the first respondent at paragraph 10, 14, Schedule 1, Schedule 2, Schedule 4 and Schedule 5 in Provincial Notice 33 as contained in the North West Provincial Gazette No. 7515 dated 11 August 2015 are invalid and of no force and effect.

1.5 Uniplate and NNPR applied to review and set aside the determinations made by the first respondent in Provincial Notice 22 dated 14 February 2017.

1.6 Alternatively to paragraph 1.5 above, Uniplate applied that the determinations made by the first respondent in Provincial Notice 33 of 2015 contained in the North West Provincial Gazette No. 7515 dated 11 August 2015 as amended by Provincial Notice 22 of 2017 of the North West Provincial Gazette No. 7732 dated 14 February 2017 are reviewed and set aside and declared to be of no force or effect.

1.7 In addition, NNPR applied *inter alia* for the review and setting aside of one or more of the following:

a) The invitation to bid dated 24 October 2013 under DPS/15/13/14 ("the Bid");
b) The award of the Bid to the third respondent on or about 18 February 2014;
c) The purported conclusion of any agreement between the first respondent and the third respondent pursuant to the Bid.

B. CHRONOLOGY OF EVENTS

[2] Uniplate and NNPR are manufacturers or suppliers of "blank" number plates. A blank number plate, also known as a 'blanker' is a number plate without any registration letters or figures. The applicants' sell the blank number plates to "embossers". "Embossers" purchase the blank number plates from the "blanker" and place the relevant letters and figures upon the blank number plate. The embosser thereafter sells the finished number plate to the motorist.

[3] The Department of Human Settlements, Public Safety and Liason for the North West Province, as it was then known and now known as the Department of Community Safety and Transport Management, (hereinafter referred to as, 'the first respondent', in October 2013 advertised a tender for the provision of a securitised number plate system for the North West Province for a period of five years. The bid closed on the 22 November 2013 and four companies submitted their proposals, namely:

5.1 Retrone Road Traffic Solution, the third respondent (Retrone);
5.2 Uniplate Group, the applicant, case M489/2015;
5.3 Bafana Security Services; and
5.4 Khabohamo Automotive (Pty) Ltd.

Following the adjudication process the bid was awarded to Retrone on or about the 18 February 2014.

[4] On 11 August 2015, the first respondent published the determinations under Provincial Gazette 33 of 2015 (Notice 33). In November 2015, Uniplate launched its application to review and set aside the determinations made by the first respondent in Notice 33. During December 2015 NNPR launched an application in two parts. In part A of its notice of motion, it sought to interdict the steps taken by the first respondent in respect of the notices and procedures and for consolidation of its and Uniplate's applications and in Part B, NNPR applied to review and set aside the determinations in Notice 33 and also sought the setting aside of the award of the bid to Retrone.

[5] Pursuant thereto the first respondent on the 30 November 2015, published determinations for public comment under Provincial Gazette 144 of 2015 (Notice 144) for the purpose of amending Notice 33. At the hearing, on the 28 January 2016, NNPR did not persist with the interdictory relief sought in Part A as the first respondent did not implement Notice 33 and the parties agreed on consolidation of the two matter and the matter was postponed for hearing of Part B.

[6] On the 14 February 2017, first respondent published amendments to the determinations under Provincial Gazette 22 of 2017 (Notice 22). At the hearing on the 9 March 2017, the parties agreed to postpone the matter for filing of supplementary affidavits addressing the amendments to the determination of the 14 February 2017. Subsequent thereto the applicants amended their relief to include the review and setting aside of Notice 22.

[7] The first respondent raised several points *in limine*, and filed an application to strike out which are dealt with *seriatim* hereinbelow.

C. POINTS IN LIMINE

Premature challenge to the Determinations

[8] Counsel for the first respondent, Mr Mogagabe SC submitted that the applications launched by Uniplate and NNPR fall to be dismissed on the basis of prematurity in that prior to launching the application:

8.1 Uniplate and NNPR as well as other stakeholders were duly informed by Mr Mmono, on 5 November 2015 that the first respondent would not proceed with the implementation of the determinations as contained in Notice 33 pending the receipt of comments by all interested parties, including stakeholders with an intention to amend such determinations

8.2 In keeping with such notification and/or announcement, the first respondent issued a call for comments and inputs regarding issues of concern to stakeholders.

8.3 Both Uniplate and NNPR were aware that their applications were premature as the first respondent was still awaiting the inputs and was yet to make the final amendments to Notice 33.

8.4 The publication of a call for comments by the first respondent was intended to deal with challenges faced with the implementation of Notice 33 as raised by the various stakeholders. Notice 22 published on the 14 February 2017 introduced a number of significant changes.

8.5 Notice 33 could not be enforced as the commencement date namely, 1 December 2016 had come and gone. The applicants

were not *bona fide* as they should have after receiving the answering affidavit, have held the application in abeyance or withdrawn it.

8.6 The principle of ripeness dictates that a party cannot approach a court of law for a remedy prior to having suffered any real threat or prejudice. In ***Dawood v Minister of Home Affairs***[1] the Court held as follows:

> "…..As pointed out by applicants' counsel, under administrative law an application to a court would indeed be premature if the relevant public authority had not yet completed its decision-making processes (see Lawrence Baxter Administrative Law (1984) at 719 – 20). In constitutional matters, on the other hand, the doctrine of ripeness 'prevents a party from approaching a court prematurely at a time when s/he has not yet been subjected to prejudice, or the real threat of prejudice, as a result of the legislation or conduct alleged to be unconstitutional' (Loots (op cit at 8 -12)".

[9] Counsel for Uniplate, Mr Saint submitted the following:

9.1 The draft determinations were published for notice and comments on the 30 November 2015, that is after Uniplate had served its application.

9.2 Despite inviting the applicant to withdraw the determinations prior to the launch of this application, the first respondent failed to withdraw the determinations and the determinations remained in full legal force.

9.3 The applicant was left with no choice other than to proceed to Court to have the determinations reviewed and set aside as it believed that the determinations were unlawful.

[1] 2000(1) SA 997 (C) at 1030 H – J; Revenue

[10] I am of the view that the first respondent's assertions are flawed as the determinations made by the first respondent in Notice 33 was valid and binding until set aside by a court of law or amended or removed. The amendments to the determinations through Notice 22 on the 14 February 2017 was only after the applicants launched their application. Notice 144 did not affect the operation of the determination in Notice 33.

[11] The fact that Mr Mmono informed stakeholders on the 5 November 2015 that the first respondent would not proceed with the implementation of determinations contained in Notice 33 pending the receipt of comments or that the applicants were made aware of this fact in the first respondent's answering affidavit or that the commencement date for the determinations in Notice 33, namely 1 December 2016 had passed, does not change the undisputed fact that the determinations contained in Notice 33 remained valid and enforceable and the applicants accordingly had the right to protect itself by applying to review and set it aside[2].

[12] Furthermore as stated *supra*, the first respondent on the 14 February 2017 published determinations, Notice 22 amending Notice 33. The applicants persist in their opposition of both Notice 22 and Notice 33. Accordingly this issue is academic.

NNPR's application for review of the award was out of time

[13] The first respondent contends that:

[2] Oudekraal Estate (Pty) Ltd v City of Cape Town & Others (2004) 3 All SA 1 (SCA) at para 26

13.1 The NNPR application to review and set aside the tender awarded to Retrone on 18 February 2014 was out of time and there was no application for condonation.

13.2 The application by NNPR to review and set aside the tender was only brought on 9 December 2015, almost 22 months (1year and 10 months later) from the 18 February 2014.

13.3 NNPR has not only failed to adhere to the time periods stipulated in section 7(1) of the Promotion of Administrative Justice Act (PAJA) but has failed to launch an application contemplated in section 9(1)(b) of PAJA seeking condonation for its delay for institution the review application timeously.

13.4 Notwithstanding the fact that NNPR was, in the first respondent's answering affidavit, made aware of its failure to apply for condonation, NNPR has failed to so apply and the Court should dismiss the relief sought by NNPR in as far as it relates to the review of the tender awarded to Retrone. The absence of such substantive application for condonation is fatal to the relief sought by NNPR in this regard.

13.5 Neither the relief in prayer 9 of the notice of motion nor in the amended notice of motion constitutes applications for non-compliance. The relief sought is for an extension of time. This is vague and ambigious and no reasons were advanced. There is no factual basis laid as to when they became aware and what steps they took and why they didn't act timeously.

13.6 Mr Mogagabe relied on the case of ***Aurecon South Africa (Pty)Ltd v Cape Town City***[3] where the court held that: "the information furnished by the City for its delay was manifestly inadequate and simply did not provide any basis on which to determine the reasonableness thereof".

[14] Counsel for Uniplate, Mr Botha submitted that:

14.1 the application was brought in November which was within 180 days after the publication of the August notice. The first respondent first proceeded with a tender and then attempted to regulate it. Hence they could only launch the review until the determinations were published. First respondent was not procuring anything. This only became clear at the implementation phase that is the reason why they could not bring the application for review within the 180 days.

14.2 NNPR only learnt that they were affected when Retrone attempted to implement at a meeting in August 2015. Hence the 180 days runs from August 2015. Only seven weeks before the draft determinations did they know about process. The application could not have been brought sooner. Non-compliance with the 180 days should be condoned.

14.3 The Provincial Executive Council ("EXCO") never approved the rollout process and there was never proper consultation.

14.4 On the first respondents' own version the publication of Notice 33 was premature.

14.5 The process was irrational and illogical and the interest of justice must prevail[4].

[3] 2016(2) SA 199(SCA) at para 19

[4] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012(6) SA 223 (CC) (OUTA)

[15] Section 7(1) of the PAJA prescribes the time frames within which judicial review of administrative action may be instituted. It reads:

"Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the actions and the reasons".

[16] The provisions of section 9, of PAJA *inter alia* reads:

"(1) The period of –

a) ….

b) 90 days or 180 days referred to in section 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require".

[17] As stated *supra*, NNPR lauched its application for review approximately 1 year and 10 months after the tender was awarded to Retrone.

[18] NNPR in its notice of motion and its amending notice of motion applied *inter alia* for an extension of time, this can only be interpreted as an application for an extension of time as provided in section 9 PAJA which

reads that the period may be extended if not by agreement then by a court on application. Unfortunately NNPR omitted in its affidavit to make any allegations in support of the prayer for an extension. (Own emphasis).

[19] The impact of delays on the adjudication process of tender cases was aptly described in ***Moseme Road Construction v King Civil Engineering***[5]. The SCA said the following:

> "Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant suCCeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer or both. Conversely, if the works allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract….. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy".

[20] The SCA in ***Millennium Waste Management v Chairperson, Tender Board***[6]**,** recommended that tender cases be given priority and preference on court rolls.

[21] In the case of ***South African National Roads Agency Ltd v Cape Town City***[7] the SCA found that although there was an extensive delay, it was in the interest of justice to condone as there was a flagrant breach and the tender should be set aside.

[22] On reading the affidavit and supplementary affidavit filed in support of the review of the tender awarded to Retrone, I am of the view that, there are clearly grounds for review and setting aside the tender. This issue is

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[5] 2010(4) SA 359
[6] 2008(2) SA 481 (SCA)
[7] 2017(1) SA 468 (SCA) at paras [79] and [107] – [108]

addressed more fully *infra*. The process followed by the first respondent in awarding the tender was irrational and illogical as they first awarded the tender and then attempted to regulate it and in so doing the goal posts kept changing. Furthermore there was no proper consultation prior to awarding the tender. The first respondent only sought to consult with role players and stakeholders after publication of Notice 33. This amounts to a concession that publication of Notice 33 was premature.

[23] Hence when applying the principles outlined in the ***South African National Road Agency Ltd***[8] *supra* and the **OUTA**[9] judgment *supra*, then I am of the view that it is in the interests of justice to condone NNPR late launching of its application to review and set aside the tender awarded to Retrone.

Locus Standi

[24] Mr Mogagabe submitted that:

24.1 It is common cause that NNPR elected not to participate in the tender process which culminated in the award of the tender to Retrone and to the appointment of Retrone.

24.2 Though NNPR might externally be affected by the decision to award the tender to Retrone, it has no substantial and direct legal interest in the process since it elected not to participate in it. Its position is even worsened by the fact that it has failed to join all parties who participated in the tender process. It is manifestly clear in *casu* that NNPR's interests in launching its application is purely a financial one[10].

[8] 2017(1) SA 468 (SCA)
[9] 2012(6) SA 223 (CC)
[10] Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953(2) SA 151 (O); United Watch and Diamond Co v Disa Hotels Ltd and Another 1972(4) SA 409 (C)

Accordingly, NNPR lacks *locus standi* to review and set aside the award of this tender.

[25] Mr Botha submitted *inter alia* that:

25.1 NNPR has *locus standi* and that it was not necessary for NNPR to have participated in the tender process for it to have a direct and substantial interest. It has a direct and substantial interest because of the manner in which the tender process and the tender awarded to Retrone has been dealt with and implemented which clearly infringes upon NNPR's right.

25.2 NNPR is also acting in the public interest in terms of section 38 of the Constitution of the Republic of South Africa 1996 to set aside the tender.

[26] Any party who has an interest may bring an application to review and set aside a tender[11]. Cameron JA (as he then was) in ***Logbro Properties CC v Beddenson No and Others[12],*** said the following:

"The starting point must be that the tender process constituted action under the Constitution. This entitled the applicant to a lawful and procedurally fair process, where its rights were affected or threatened, judicially in relation to the reasons given for it ….."

[27] I am of the view that NNPR, as the blankers in the number plate industry have *locus standi* to apply for the setting aside of the tender, as they have a direct and substantial interest in the award of the tender to Retrone and the implementation thereof. NNPR hold 30% of the market and will be

[11] Grant Concerts CC v Minister of Local Government Housing and Traditional Affairs, Kevazulur. Natal and Others 2011(4) SA 164 (KZP)
[12] 2003(2) SA 460 (SCA) para 5 at 465

directly affected by the tender awarded to Retrone. This fact was conceded by the first respondent. NNPR's interest is set out more fully when the merits are fully canvassed hereinbelow:

[28] Furthermore, the fact that NNPR did not participate in the tender does not exclude it from challenging the tender as NNPR only realised that they are affected by the tender awarded to Retrone after Retrone attempted to implement the determinations. This point relates to issue of prematurity referred to *supra*. Furthermore the award of this tender is of public interest as the public in the North West will be affected when Retrone implements the determinations. Mr Botha is correct in his submission that NNPR is acting in the public interest in terms of section 35 of the Constitution.

[29] Accordingly I am of the view that there no merits in this point.

Non-Joinder

[30] Mr Mogagabe submitted that:

30.1 In seeking to launch its own application, NNPR omitted and/or failed to join Bafana Security and Kabomo Automotive as parties to the application seeking the review and setting aside of the tender awarded to Retrone. These two entities were participants, together with Uniplate, in the tender process which is the subject of the attack by NNPR and they were both unsuccessful.

30.2 Both Bafana Security and Kabohamo Automative, as participants in the tender process, have a direct and substantial interest in the relief sought by NNPR.

30.3 Joinder is not dependent on the subject matter of the case before a court of law but is more concerned with the manner and extent to which the court's order is going to affect the third party who is not joined in the proceedings.

[31] The case of ***Amalgamated Engineering Union v Minister of Labour***[13] clearly defines what a direct and substantial interest is namely, "The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined".

[32] I agree with NNPR contention that the unsuccessful tenderers, namely Bafana Security and Kabohamo Automotive do not have a direct and substantial interest in the setting aside of the tender. I am of the view that they will not be prejudiced if the court sets aside the tender as the first respondent will re-advertise the tender and they may again submit their bids. Accordingly there is no merit in the contention that the unsuccessful tenderers should have been joined as interested parties in the review application.

Failure to adhere to Rule 6

[33] Mr Mogagabe submitted the following:

33.1 The manner in which NNPR has launched its application by using one affidavit as an answering affidavit under case no: M489/15 and as a founding affidavit under case no: M512/15 is invalid, improper, impermissible and an abuse of the process of the law.

[13] 1949(3) SA 637(A), Gordon v Department of Health, KwaZulu Natal 2008(6) SA 522 (SCA) para 9 at 659

33.2 In the present matter, NNPR has joined issue with Uniplate in a separate case and places reliance on the evidence contained in Uniplate's founding affidavit to buttress its case. Such a practice is not provided for anywhere in our procedural law and cannot be countenanced.

33.3 NNPR should have launched its own application supported by a founding affidavit in seeking to challenge the tender award and the determinations.

[34] Mr Botha on behalf of NNPR submitted *inter alia* the following:

34.1 The purpose of a consolidation of applications under the said Rules is in broad terms to have issues which are substantially similar tried at a single hearing so as to avoid the disadvantages attendant upon a multiplicity of applications.

34.2 NNPR was obliged to institute its own separate application for relief sought, whether it supported the grounds raised by Uniplate or not. As it supported the grounds raised by Uniplate, it therefore served no purpose to repeat those grounds where they were only to be amplified. It was contemplated that the two applications would be consolidated and proceed together and such relief was duly sought and granted. The affidavit provided evidence and supports the legal conclusion[14].

[35] Rule 6(1) of the Uniform Rules of this Court governs motion proceedings and states clearly that an application should be supported by a notice of

[14] Mogame City v Fidelity 2015(5) SCA 590

motion and a founding affidavit. It is further instructive that such affidavits must contain essential averments in support of the relief sought.

[36] Rule 30 of the Uniform Rules of court prescribes that:

> "(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside".

[37] The first respondent did not initially object in terms of Rule 30 to the manner in which NNPR filed its affidavits but took a further step and filed its replying affidavit. Furthermore the parties later agreed on the consolidation of NNPR and Uniplates matters. In terms of Rule 11 once the applications are consolidated they proceed as one. As both applications proceeded as one and the parties filed several affidavits pursuant to consolidation, it serves no purpose to lodge objection to the unconventional manner in which NNPR filed its application.

D. STRIKING OUT

[38] The first respondent applied to strike out certain allegations in NNPR supplementary affidavit on the grounds that it constitutes irrelevant, argumentative and repetitive matter as well as the introduction of new matter. The striking out application pertains to NNPR's application to review and set aside the tender awarded to the third respondent.

[39] Mr Botha submitted that as the first respondent filed a supplementary affidavit and NNPR replied and filed a supplementary answering affidavit to which the first respondent filed a supplementary replying affidavit, it was hence anticipated that NNPR would raise new matter in its answering affidavit. He said the first respondent was not prejudiced as it was afforded the right to reply. Mr Botha further submitted that the allegations which the

first respondent contend are new or irrelevant were raised in their founding affidavit.

[40] It is telling that the first respondent objects to new matter being raised by NNPR in its supplementary answering affidavit when the first respondent raised an entirely new issue in their replying affidavit, namely the amendments of Notice 33 through the publication of Notice 22 which by its own admission brought about significant changes.

[41] I am in agreement with Mr Botha that as the respondent filed a supplementary affidavit wherein fresh issues were raised, NNPR had the right to reply to the said allegations in the supplementary answering affidavit and the first respondent in turn had an opportunity to reply to the said allegations in its replying supplementary affidavit. Accordingly there was no prejudice suffered by the first respondent.

[42] I will consider the striking out allegations *seriatim* hereinbelow:

42.1 In paragraph 1 of the application to strike out, first respondent seeks to strike out the allegations contained in paragraphs 12.14, 12.14.1 to 12.14.12 inclusive on the basis that same constitutes the introduction of new matter, alternatively constitutes irrelevant, immaterial or argumentative matter for purposes of determining the validity of the determinations contained in Notice 33 as amended by Notice 22. In paragraph 12.14.1 to 12.14.12, NNPR highlights the fact that a new number plate system could not be implemented and refers to the issues that still need to be resolved, NNPR had in its founding affidavit alluded to this issue and it is not in my view irrelevant, immaterial or argumentative.

42.2 In paragraph 2, of the striking out application, the first respondent seeks to strike out the allegations contained in paragraphs 14.5, 14.5.1 to 14.5.1.9 inclusive and 14.5.2, 14.5.21 up to and including 14.5.28 as constituting the introduction of new matter, alternatively as constituting irrelevant, immaterial or argumentative or vexatious matter, on operational matters which are regulated by virtue of a contract between the first respondent and Retrone, which are not relevant or material or germane for purposes of determining the validity of the determinations contained in Notice 33 as amended by Notice 22 of 2017.

42.3 NNPR in paragraph 14.5 addressed the issue that neither Notice 33 nor Notice 22 cured the problems identified in its founding affidavit. These issues are in my view relevant and the first respondent was not prejudiced as it was afforded an opportunity to reply. There is in my view no merit in striking out these allegations. The first respondent objects to NNPR referring to the service level agreement but it is the first respondent who referred to the service level agreement in their supplementary affidavit. Hence NNPR had a right to respond to the allegations pertaining to the service level agreement.

42.4 In paragraph 4, 5, 6, 7, 8 and 9 of the striking out application, first respondent avers that the following paragraphs 18.11, 18.11.1 to 18.11.3, paragraphs 18.14, 18.15, 18.16, 18.17 to 18.21, and 18.22, 18.22.1 to 18.22.15 and 18.23 should be struck out as constituting the introduction of new matter, alternatively as constituting irrelevant, immaterial or argumentative matter, which are not relevant or material or germane for purposes of determining the validity of Notice 33 as amended by Notice 22.

42.5 NNPR in paragraph 18 of its answering affidavit expresses its rights in terms of the Constitution and there is in my view no basis for striking out the said allegations. The remaining sub-paragraphs under paragraph 18 are in reply to allegations raised in the first respondents affidavit and raise pertinent issues, namely:

1) that the proposed legislations gives no indication how Retrone is going to implement a secure distribution of number plate value claim system or how Retrone is to be regulated.

2) the issue of the service level agreement was dealt with *infra*.

3) the service level agreement refers to an authorised blank provider which is no longer applicable as Notice 22 refers to a registered manufacture. Hence there are several contradictions between the proposed amendments and the service level agreement.

42.6 In respect of paragraphs 21.3, 22.3, 22.4, 22.5, 22.9, 22.11, 23.1 to 23.4, 24.2 to 24.5 and 24.6 to 24.9, the first respondent raised the same grounds for striking out, namely that the averments or allegations contained in the paragraphs constitute the introduction of new matter, alternatively irrelevant, immaterial or argumentative or vexatious matter, which are not relevant or material or germane for purposes of determining the validity of Notice 33 as amended by Notice 22.

42.7 Paragraphs 21.3 raised issues pertaining to the service level agreement which has been dealt with *supra*. Paragraph 22.3 refers to the National Securitisation program which is relevant and is referred to *supra*. In paragraph 22.4 and 22.5 NNPR responds to the minutes of the MINMEC meeting which make reference to the e-NATIS

configuration. Hence it was in reply to first respondent's allegations to which NNPR is afforded an opportunity to reply. Paragraph 22.9 and 22.11 are relevant as it relates to the rationality of the securitisation that is not linked to e-NATIS or will be suspended by the national system and the ulterior motive and advantage to Retrone and Arga which is not in the national interest. NNPR questions the motive for introducing securitisation in the North West Province that is not aligned with the national program and e-NATIS.

42.8 In paragraph 23, NNPR replies to the allegation in first respondent's supplementary affidavit pertaining to its support of the securitisation of number plates and that NNPR's letter of support was written before all the facts were disclosed and before the program changed to suit the Retrone and Arga. NNPR alleged that when the letter was written, it was under the impression that it was lawful, and legitimate and that it would continue to operate without losing any market share. Paragraphs 24.2 to 24.9 are relevant to the national number plate project and the submission that the securitisation is irrational and amounts to wasteful expenditure and questions the ulterior purpose behind the system.

[43] Rule 6(15) of the Uniform Rules of Court reads:

"The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted".

[44] The test for striking out is whether the material is relevant to raise an issue on the pleadings[15]. In determining an application to strike out the existence of prejudice as required by Rule 6(15) must not be lost sight of. In ***Sufrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd***[16] the court held that "the court will not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted".

[45] I am of the view when considering the grounds for striking out *supra*, that there is no merit in the application to strike out. The allegations are neither scandalous, irrelevant or vexatious and there is no prejudice suffered by the first respondent in admitting the allegations. Accordingly the application is dismissed.

E. MERITS – THE DETERMINATIONS

[46] It is common cause that the making of the determinations by the first respondent constitute administrative action within the meaning of PAJA and is thus reviewable under PAJA. In ***Minister of Health v New Clicks SA (Pty) Ltd and others***[17] the Constitutional Court (CC) held that "If the making of regulations constitute administrative action, it is submitted that the making of the 'determinations' constitute 'administrative action'.

[47] In essence Uniplate and NNPR contend that the determinations in Notice 33 and Notice 22 are reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and the principles of legality and are *ultra vires* as enshrined in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The first respondent maintains that the determinations

[15] Swissborough Diamond Mines (Pty) Ltd 1999(2) SA 279 – 337C
[16] 1991(3) SA 276 (SE) at 282 H – 283C
[17] 2006(2) SA 311 CC at paragraph D

are lawful, unimpeachable and not susceptible to being reviewed and set aside.

[48] The applicant submit *inter alia* that:

48.1 the determinations have introduced crippling changes to the number plate industry in the North West which drastically affect the business of the applicants and a number of other role players in the number plate industry as a whole in the North West province.

48.2 the cumulative effect of the determinations is that the applicants would not be able to sell blank number plates to embossers in the North West. This will erode the applicant's market share and have disastrous financial implications for the applicant.

48.3 the determinations have been motivated by ulterior motives by the first respondent in order to strip the number plate distribution market out of the hands of the "blankers" and bestow the market upon the third respondent. This will add an additional layer of cost for all participants in the industry to the ultimate detriment of consumers who will have to carry the ultimate financial burden. This seems to suggest that there is an ulterior purpose not related to the desire for securitisation of number plates.

48.4 The first respondent is introducing number plate securitisation system in the North West Province through a so-called distributor in a manner that is irrational, illegal, in bad faith, arbitrarily and in circumstances where there is a reasonable suspicion of bias.

48.5 The entire model is being put forward in circumstances not only where there was no proper consultation prior to the publication of the notice, and still has not been, but also in circumstances where

the alleged model to implement the securitisation will not achieve its purpose and will in any event be redundant in the light of a national number plate securitisation process which is to be under way.

48.6 The determinations are unconstitutional and unlawful.

[49] The applicants submit that the powers of the first respondent are contained in the Regulations of the National Road Traffic Act 93 of 1996. The determinations of the first respondent fall to be reviewed and set aside in terms of Section 6 of PAJA in that the first respondent was not authorised by the empowering provisions to determine and introduce the following:

49.1 The 'Type' of number plate;
49.2 Expiry Decal;
49.3 Expiry Date;
49.4 Security Features;
49.5 Compulsion of Reflective Sheeting suppliers to register and imposition of conditions of registration;
49.6 Compulsion of number plate blankers to register and imposition of conditions of registration;
49.7 Compulsion of manufacturers of number plates (Embossers) to register and imposition of conditions of registration;
49.8 Landscape - Logo

LACK OF CONSULTATION

[50] Both Uniplate and NNPR submit that there was no consultation prior to the publication of Notice 33. NNPR and Uniplate contend *inter alia* that:

50.1 The determinations, purporting to make provision for the involvement of a distributor of securitised number plates, Retrone, are unlawful, *ultra vires* the powers of the first respondent, illegal and generally fall to be reviewed and set aside in terms of PAJA and the Constitution.

50.2 Notice 33 was published without proper consultation with persons who have special knowledge of the industry. The determinations in Notice 33 purported to make drastic changes to the number plate industry in the North West Province.

50.3 The first respondent recognised inadequate consultation prior to the publication of Notice 33. Mr Mmono of the first respondent conceded that representation from stakeholders was only sought after publication of Notice 33 through the publication of Notice 44.

50.4 Notice 144 only called for comments and did not propose to introduce amendments.

50.5 The amendments, Notice 22 have not rectified the determinations nor do the amendments serve to accommodate the applicant's concerns. The amendments fail to rescue the determinations since the determinations remain reviewable and legally incompetent even in its amended form.

[51] Mr Mogagabe submitted that although consultation is relevant it cannot result in legislation being set aside. Mr Mogagabe relied on a CC case of ***Electronic Media Network Ltd and and others v ETV (Pty) Ltd and others***[18] to submit that in that case one of the parties complained that they were not consulted. The CC ruled that consultation cannot be used 'willy nilly', that consultation is not a consensus seeking exercise and that there was a

[18] 2017 ZASC 17 CC delivered on 8 June 2017

genuine and objectively satisfactory effort made to solicit view of all stakeholders, that the applicants had an opportunity to express itself. Mr Mogagabe submitted that in *casu*, there was consultation from the onset.

[52] The court questioned Mr Mogagabe regarding the consultative process and he provided a chronological sequence of events commencing from the date the tenders were advertised. He submitted that consultation oCCurred after the tender was awarded to Retrone as follows:

a) In April 2014, there were draft determinations published for public comment.
b) Again on the 18 August 2014, draft determinations of the type of number plate was published for public comment. Comments were received by Uniplate and the fourth respondent.
c) On the 11 August 2015 the first respondent issued Notice 33.
d) On the 20 November 2015 an invitation for public comment was published, namely Notice 144.
e) On the 14 February 2017, Notice 22 was issued.

[53] Mr Mogagabe submitted that the aforesaid constituted consultation with the public and stakeholders. Further there was also engagements with the stakeholders for example on the 5 November 2015 the consultation with Mr Mmono. Mr Mogagabe submitted that there was also consultation before Notice 22, the 2017 determination was issued.

[54] Counsel for NNPR submitted that the first respondent in reply to an allegation that there was a lack of consultation and failure to consult, said that the first respondent was under no obligation to engage Uniplate. Now the first respondent alleges that there was consultation and that they consulted through publication. He submitted that there is no demonstration

of consultation and that recent authority points towards transparency and hearing the other side and that rights should not be eroded.

Evaulation

[55] Section 6(2)(c) of PAJA provides *inter alia* that an action is procedurally unfair if there was no proper consultation.

[56] A case that is apposite and provides guidance on the purpose of consultation and how best to achieve it, is the Constitutional Court (CC) case of ***Electronic Media***[19] *supra*. The respondent in the ***Electronic Media*** case *supra* contended that they were not consulted when the Minister published an amendment to the pre-existing policy which rules out decryption capabilities. One of the issues considered was whether the Minister was required and did consult in terms of section 3(5) of the Electronic Communications Act. The CC said the following:

> "37 Given the prominent role of consultation in the determination of this matter, it behoves this court to remind itself and the public of the rationale behind any consultative process. Consultation, as distinct from negotiations geared at reaching an agreement, is not consensus-seeking exercise. Within the context of national policy development it must mean that a genuine effort is being made to obtain views of industry or sector roleplayers and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must thus be allowed to reach a policymaker. But consultation fulfils a role that is fundamentally different from negotiation. (Own emphasis)
>
> 38 Generally speaking, where there are two opposing positions and a party aggrieved by the ultimate policy-determination has had the opportunity to express itself properly in favour of each of the diametrically opposed possibilities, another round

[19] 2017(9) BCLR 1108 (CC) (8 June 2017)

of consultation on the ultimate policy standpoint can hardly ever serve any legitimate purpose. If it is the first policy "direction" it prefers, then it is covered. If it is the second, it would also have been appropriately accommodated in terms of process. Consultation is not an inconsequential process or a sheer formality, particularly in relation to national policy development. It exists to facilitate a festival of ideas that would hopefully provide some enlightenment on the stakeholders' major perspectives so that policy-formulation is as informed as possible for the good of all, not some". (own emphasis)

[57] In ***Minister of Health v New Clicks SA (Pty) Ltd and Another***[20] *supra*, the CC in discussing procedural fairness said the following:

"[151] What section 3 of PAJA requires is that administrative action must be procedurally fair. It refers specifically to the giving of adequate notice and providing a reasonable opportunity to make representations, and makes it clear that what is necessary for this purpose will depend on the circumstances of each case. 97 see paras 136 – 141 above. 98 see para 130[130] above for the text of section 4. 99 Id. CHASKALSON CJ 87.

[152] In Du Preez and Another v Truth and Reconciliation Commission 100 Corbett CJ sought guidance from the remarks of Lord Mustill in Doody v Secretary of State for the Home Department and other appeals 101 as to what is required of a public official or body who has to meet the requirements of procedural fairness.

[154] When it comes to the making of regulations the context is different. Regulations affect the general public and that means that diverse and often conflicting interests have to be taken into account in deciding what the laws will be. The decision of the law-maker on how to resolve these conflicting interests is ultimately a question of policy.

[155] As Lord Mustill points out "the principles of fairness are not to be applied by rote identically in every situation". It cannot be expected of the law-maker that a personal hearing will be given to every individual who claims to be affected by

[20] 2006(2) SA 311 CC

regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations. (own emphasis)"

[58] Also in the case of ***Minister of Home Affairs and Others v Somali Associations of South Africa and Another***[21], the court said the following:

"[14] The broad thrust of the respondents' case is that the decision of the DG fell short of constitutional legality for want of: (a) consultation with interested parties; and, (b) rationality. Each of those contentions will be considered in turn.

[17] In the event, counsel for the relevant authorities was driven to contend that the DG (Mr Apleni) was not obliged to consult with interested parties. In that regard, not entirely consistent with what had elsewhere been stated by him, Mr Apleni asserted:

'99.1 I deny that there was a legal obligation to consult with affected parties or their known representatives prior to taking the decision to close the PERRO to new applicants for asylum.

. . .

102.1 I have stated earlier in this affidavit that there was no obligation arising from section 8(1) of the Refugees Act for me to consult interested parties about the decision that I had taken.

102.2 I also pointed out that in any event those who had submitted applications for asylum before the decision was taken had no cause to complain as the decision taken did not affect those applications.

102.3 . . . I could hardly be expected to consult with unknown future new applicants regarding their access to the PERRO.'

I accept, as Nugent JA did (*Scalabrini* para 72), that a duty to consult will arise only in circumstances where it would be irrational to take a decision without such

[21] 2015(3) SA 545 (SCA) at paragraph 14 and 17

consultation, because of the special knowledge of the person or organisation to be consulted. The relevant authorities were aware that the respondents had close links to refugee communities and experience and expertise in dealing, not just with asylum seekers in Port Elizabeth, but also with the challenges that confronted them. That was acknowledged, implicitly at least, when they were invited to a stakeholders meeting during June 2011. But that meeting was a charade and positively misleading as to the intentions of the relevant authorities. What is worse, is that after having lulled the respondents into a false sense of security as to the continued operation of the PE RRO, it was suddenly sprung on them on 20 October 2011 that a decision had already been taken by Mr Apleni on 9 October 2011 to close the PE RRO to new applications with effect from 21 October 2011. That was, to borrow from Nugent JA (*Scalabrini* para 70), 'inconsistent with the responsiveness, participation and transparency that must govern public administration'. In *Scalabrini* (para 71), Nugent JA endorsed what Rogers J had to say, namely:

'In assessing the rationality of the process followed by the DG, it is important to remind oneself that consultation with the NGOs would not have been a new or alien process for the DG. He recognised them as stakeholders and apparently did in general consult with them on important developments. At the meeting of 7 May 2012 the [DHA] said that there would be further consultation with stakeholders if efforts to remain at the Maitland premises failed. This renders all the more inexplicable the DG's failure to do so.'

It must follow that Mr Apleni's failure to consult with the respondents when deciding whether to close the PE RRO was not founded on reason and was arbitrary and thus unlawful. (own emphasis).

[59] What can be gleaned from the aforegoing paragraphs is that a genuine effort had to be made to obtain the views of the industry or stakeholders, especially in light of the drastic changes the determinations were introducing. Draft determinations for public comment was insufficient. The consultation process was not an inconsequential process or a sheer formality particularly when changing the face of the control and distribution of number plates. The first respondent failed to provide details

of where, when and how the alleged consultation took place. Furthermore the draft determination for public comment, was after Notice 33 was law and binding on all the stakeholders.

[60] On perusal of the affidavits filed on record it is apparent that the first respondent failed to show that there was proper consultation with the relevant stakeholders prior to the publication of Notice 33. The first respondent failed prior to publication of the determination to obtain the views of all the stakeholders. First respondent only sought to consult and obtain comment by publishing Notice 144 after the applicants launched their review application. Thus the first respondent by seeking comment in Notice 144 conceded that it had not consulted when Notice 33 was law and legally enforceable[22]. Further Mr Mmono acknowledged that there was never any proper consultation prior to the publication of the notice, when he said that "Uniplate and NNPR have "jumped the gun so to speak" by bringing this application when there are going to be changes pursuant to consultation that ensued subsequent to publication of the notice". It is common cause that Retrone was appointed before the alleged consultation process and that the first respondent was contractually bound to Retrone. Hence the question arises what was there to consult on as the stakeholders were excluded and were prejudiced as matters were already predecided. This is analogous to no proper or meaningful consultation. Even after objections were received pursuant to Notice 33, the new determination namely Notice 22 did not address the objections raised.

[61] In view of the drastic and far reaching changes introduced by the determinations to the number plate industry, it was in my view irrational of the first respondent to publish the determination in Notice 33 without consulting with the stakeholders. The first respondent failed to consult all the

[22] Minister of Home Affairs and Others v Somali Association of South Africa and Another 2015(3) SA 454 (SCA) para [14] and [17] at 555H – I and 558G – 559E

role players and to deal with the issues pertinently. The procedure is accordingly flawed. Furthermore the entire model was also being put forward in circumstances not only where there was no proper consultation prior to the publication of the Notice, and still has not been, but also in circumstances where the alleged model to implement the securitisation will not achieve its purpose and may become redundant in the light of a national number plate securitisation process which is to be under way. The implementation of a provincial system without having regard to the soon to be implemented national system, is itself irrational as the provincial system will soon be redundant. In this regard, the first respondent has not been frank with this court and has not even attempted to address these allegations.

[62] Hence the next question for consideration is whether the amendments to Notice 33 through the determinations in Notice 22 cured the inadequate consultation prior to publication of Notice 33. No evidence was produced that all the relevant stakeholders were consulted after publication of Notice 144. Furthermore I am of the view that if Notice 33 was unlawful, it follows that Notice 22 is also unlawful, as the whole process was flawed from the onset. If no proper consultation had taken place prior to Notice 33, then both the notice 33 and 22 falls to be set aside and the first respondent must start again. It cannot under guise of running amendments seek to rectify a fatally defective process.

[63] The CC in **Pharmaceutical Manufacturers of South Africa: In re exparte President of RSA** held that**:** "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control". In terms of section 172 of the Constitution, a court is obliged to declare any conduct that is inconsistent with the Constitution to be invalid. Thus once a ground of review under PAJA has been established by the applicant, the court must

declare the impugned decision to be invalid[23]. Discretion is conferred in respect of an order additional to the declaration order which must be just and equitable and may include limiting the retrospective effect of the declaration of invalidity or suspending the declaration of invalidity for a specified period[24]. This is not applicable in *casu*. As the process was flawed from the onset the determinations fall to be set aside. In the circumstances it is not necessary to consider all the remaining grounds of review raised by Uniplate and NNPR.

F. THE TENDER

[64] During or about October 2013, the Department of Community Safety and Transport Management for the North West issued a bid titled PROPOSALS FOR THE PROVISION OF A SECURE DISTRIBUTION OF SECURITIZED NUMBER PLATES FOR THE NORTH WEST PROVINCE FOR A PERIOD OF FIVE YEARS: DPS 15/13/14 (the "Bid") which invited companies to submit proposals for the "Provision of Secure distribution of Securitised Number Plates for the North West Province for a period of five years".

[65] Under the Terms of Reference the Bid was for "SECURE NUMBER PLATE BLANK CONTROL AND DISTRIBUTION". The purpose and scope of the Bid as stated in the '*project brief*" is as follows:

"This is an invitation to appoint a local distributor to ensure the secure control and distribution of SECURITISED NUMBER PLATES for the North West Province for a period of 5 years. The Public Safety and Liaison, wishes to appoint a company or individuals who are based in the North West with the capacity, competence and expertise particularly in Authentication and Track and Trace and Distribution to submit

[23] Pharmaceutical Manufacturers of South Africa: in re exparte President of RSA 2000(2) SA 674 CC
[24] All Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014(4) SA 179 (CC)

comprehensive strategy proposals for the sourcing and distribution of Securitized Number Plate Blanks".

[66] The objectives and requirements of the successful tenderer under the Terms of Reference was *inter alia*:

- "To present submissions in writing on how you would undertake to set up a procurement policy and strategy to obtain and distribute blank number plates;
- Ensure that Blank Number Plates are accessible to all embossers in the North West;
- To undertake that you would procure and distribute Blank Number Plates in accordance with government regulations;
- Place a percentage mark up or fixed price mark up on the price provided by the supplier of the number plate blanks;

[67] Subsequent thereto Uniplate, Bafana Security, Retrone and Kabomo Automotive submitted their bids and were invited to make presentations before the Department Bid Evaluation Committee and Bid Adjudication Evaluation Committee. This process culminated in the award of the tender to Retrone.

[68] NNPR contends that their procedural rights in terms of Section 6 of PAJA and the Constitution were not given effect and the determinations fall to be reviewed and set aside for the following reasons:

68.1 Section 6(2)(b), a mandatory and material procedure or condition prescribed by an empowering provision was not complied with in that no proper consultation took place either prior to calling for proposals or publishing the Bid.

68.2 Section 6(2)(c), the action was procedurally unfair for numerous reasons including that:

a) There was no proper consultation;

b) Once the bid was awarded to Retrone there has been a constant shifting of the goal posts with what is to be implemented now being very different to what was put forward in their proposal – thus had other potential bidders, including NNPR, known the position they may have participated in the bid or objected thereto sooner.

68.3 Section 6(2)(f), the Bid:

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

(ii) is not rationally connected to:-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(CC) the information before the MEC; or

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

68.4 Section 6(2)(h), it is so unreasonable that no reasonable person could have so exercised the power or performed the function by requesting the bids in the manner that it was requested and implementing the response to the Bid in the manner that has been done; and/or

68.5 Section 6(2)(i), the action is otherwise unconstitutional or unlawful.

[69] In NNPR's supplementary affidavit in terms of rule 53(4), NNPR raised a further ground of review that the invitation to bid fall under a request for a bid as part of a procurement process but that the North West Province is not procuring anything. They submitted that this could best be considered a Public Private Partnership (PPP), having regard to the definition of a PPP. NNPR submitted further that the first respondent failed to comply with the treasury regulations for a PPP.

[70] NNPR submits that the procurement process was tainted from the beginning for the following reasons:

70.1 Prior to advertising the tender, during or about August 2013, Mr Derik Williams ("Williams") advised Michiel Steenekamp and Johannes Marthinus Steenkamp (Steenkamp) that there was going to be a tender and he was going to be involved in the party that would tender. He said if the company in which he was involved won, the tender industry was going to change dramatically. He said they shouldn't be concerned and that NNPR's existing market share would not be affected. He also indicated that Mr Tshumu Gap John Maloka ("Maloka") was also part of the new entity.

70.2 Williams also told them not be concerned further because the implementation of their system would mean an increase in the number of vehicles that would have to obtain new number plates and would therefore generate significant income. He advised them that this programme in the North West Province was intended to be a pilot to be launched throughout the country.

70.3 Williams is involved in Retrone. Some potential bidders had pre-knowledge of the tender and therefore could prepare for it in

advance. No fair procurement process was being followed in that advanced notice of what was being required was provided to Retrone.

[71] NNPR contented further that:

71.1 It was not necessary to set up a procurement policy and strategy to obtain and distribute blank number plates. There is no need to do so as the North West Province itself, does not require blank number plates. Embossers require blank number plates. There is also no need to distribute blank number plates because the blankers already undertake the distribution task. All that was required was that a method of securitisation be implemented. There is no need for a distribution element at all. However the requirements in the Bid are so vague in this regard that they are difficult to understand, unless one understands the model proposed by Retrone, which is now proposed to be implemented.

71.2 In regard to the requirement that this new distributor procure and distribute blank number plates in accordance with government regulations; the government regulations are already in place and regulate the entire relationship between blankers, embossers and the public. Retrone has failed to comply with government regulations. This only became clear at the implementation stage.

71.3 The Bid is so vaguely worded and open ended that it is clear from the ultimate implementation of the plan, that the first respondent is seeking to impose on the existing number plate industry an additional layer, the costs of which are to be carried by the participants in the number plate industry and ultimately the consumer. The proposed model which was accepted does not

require any payment to be made by the North West Province but intends for the other participants in the industry to make payment for the purported services.

71.4 Retrone would not have won the tender without giving a specific response to the procurement policy and strategy it had intended to use. Yet, the implementation process, is one that has changed at every meeting and the current suggestions for implementations are completely different to what was originally proposed.

71.5 The introduction to the invitation suggests that the Public Safety and Liaison was to appoint a company or individuals based in the North West. Neither Retrone, Arga, Williams or Maloka, the sole director of Retrone are based in the North West. Retrone's registered address is 1st Floor Unit 5, 299 Pendoring Street, Blackheath Ext 6. Its business address is 3 Amorosa Office Estate, Flora Haase Road, Ruimsig, which is where the last meeting with blankers was held on 5 November 2015.

71.6 The introduction suggests that this party should have the capacity, competence and expertise, "particularly in Authentication and Track and Trace and Distribution to submit comprehensive strategy proposals for the sourcing and distribution of Securitised Number Plate Blanks". NNPR denied that Retrone has the capacity, competence or expertise in any of the authentication, track and trace or distribution. None of these abilities have been demonstrated.

71.7 The requirement of the tender was that there should be a percentage mark-up or fixed price mark-up on the price provided by the supplier of the number plate blanks. As at August 2015 there was no costing available. The costing was only declared on 5 November 2015, after the gazetted implementation date of 1 November 2015.

The proposed price for the securitisation and distribution is the sum or R57.70 per number plate (excluding the cost of a decal that has not yet been confirmed but is estimated at between R5 and R7). This exceeds the price of the blank number plate itself. All that is to be added to the securitised number plate is a 2D barcode. The price cannot be justified when the price of a blank aluminium number plate is sold for approximately R50 to the North West service providers including delivery.

[72] Uniplate alleged that the implementation of new system by Retrone would have the following effect:

72.1 Uniplate has been competing in the number plate industry for over 50 years. With the new system, Retrone would only procure 33% of its requirement of number plate blanks from Uniplate and thereby impoverish Uniplate who held 70% of the market. Uniplate alleged that it has invested sums running into millions into number plate infrastructure in the North West and has manufactured and provided embossers with embossing equipment. Uniplate has, as a result of its investments, entered into exclusive supply agreements with many embosser in the North West whereby Uniplate would provide the embossers with embossing systems manufactured and developed by Uniplate and in exchange, the embossers would purchase all its number plate blanks solely and exclusively from the applicant. The program has consequences that will, affect Uniplate's profitability, if not its existence. The market share that Retrone in its sole and absolute discretion will be entitled to dispense under the program will be insufficient to compensate for the loss of market share under the program.

72.2 Arga Plates (Pty) Ltd has a 0% percent market share, Retrone would nonetheless procure 33% of its requirements from Arga Plates (Pty) Ltd and thereby enriching Arga Plates (Pty);

72.3 NNPR has a market share of 30%, Retrone would procure 33% of its requirements from NNPR and thereby enrich NNPR;

72.4 The first respondent, in "cutting the link between blanker and the embosser" has stripped Uniplate of its market share in the province and has effectively given Uniplate's market share to Retrone;

[73] First respondent in its answering affidavit alleged that this was not a procurement process where the points were scored on a 90/10 or 80/20 basis. It was a request for proposal in terms of which the first respondent was going to assess the best solution for the securitisation of number plates and on the basis of the solution then grant the tender to the successful bidder. Such process culminated in the award of the tender to Retrone. The first respondent denied the grounds for review and alleged further that NNPR has simply "lost its plot" to attack the determinations made by the MEC as well as to attack the appointment of Retrone as a successful bidder to provide securitised number plates to the North West Province on the misconceived and misguided basis that the MEC, and the Department were pursuing a "public private partnership agreement" and not a bid or procurement process. The first respondent further stated that as appears from the invitation to bid, at no stage was there any intention to enter into a "private public partnership agreement".

Evaluation

[74] The manufacturers of blank number plates or "blankers" in the North West Province are: Uniplate, NNPR and the sixth respondent, Arga Plates (Pty)

Ltd. Uniplate holds approximately 70% of the market in North West and NNPR holds the remaining 30% of the market and Arga Plates a fraction of a percentage.

[75] The effect of the bid, as stated *supra*, was that Retrone would purchase blank number plates from the blanker. Retrone would thereafter add certain "security features" to the blank number plate and sell the number plates to the embossers at a profit. Thus the blanker would no longer be entitled to sell blank number plates to the embosser. The blanker would only be entitled to sell number plates to Retrone who would sell the blank number plates to the embosser. In the words of the first respondent the new program entailed a "cutting the link between the blanker and the embosser". What is clear is that 'the cutting of the link between the blanker and the embosser', was not apparent from the original invitation to bid. This only became apparent at a later stage. This issue will be addressed more fully hereinbelow.

[76] It is not disputed that prior to the bid being awarded, there was at no stage any consultation with the stakeholders as to the far-reaching changes and implication to the number plate industry. The first time Uniplate became aware of the proposed change to the number plate industry was in October 2013 when the first respondent issued and advertised the Bid. Shortly after advertising, the first respondent held a customary first briefing session in order to brief bidders. At these blankers meetings it was, in the main, explained by Mr Mmono on behalf of the first respondent to the applicant and the blankers that in the new program;-

a) The Department would be introducing a new number plate with a new layout and with added security features;

b) The Department would be taking control of the entire number plate supply chain;

c) The adding or placement of the 'security features" on the blank number plate would be performed by Retrone;

d) Retrone would, in addition to adding the "security features" also supplant the role of the blankers and the third respondent would, in terms of the new program, also attend to the 'selling and distribution" of the blank number plates to the embossers;

e) The supply chain in the number plate industry would be as follows:-

Blanker→ Retrone → Embosser → Motorists/End User

f) In the words of the Department the time had come to "cut the link" between the blanker and the embosser.

g) Retrone would purchase blank number plates from the blankers on an equal basis, i.e one third would be allocated to each of the three blankers (Uniplate, NNPR and Arga). The Department and the third respondent would not respect the market shares built up by the blankers over the period of 50 years.

[77] The first respondent had effectively taken a decision to divest the sale and distribution market out of the hands of the blankers in favour of a third party without any consultation with the blankers. Various briefing sessions were held between the period 2013 – 2015 between the first respondent, Retrone, number plate blankers and number plate embossers and other role players. The meetings were held separately by the first respondent in groups comprising the role players of each segment in the supply-chain, that is separate meetings were held between the blankers, the manufacturers of reflective sheeting present and the embossers. These "briefing sessions" were in the nature of meetings to advise how Retrone was going to implement the new system and not meetings where proper consultation was taking place as is required for just administrative action as provided for in PAJA. The notice of comment procedure in respect of Notice 33 was after Retrone had already been appointed.

[78] The fact that the Bid was advertised by the first respondent stating that the Department is seeking a third party to perform the distribution and sale of

blank plates in the province before any engagement with the applicants, constitutes sufficient evidence that the decision taken to appoint Retrone was made without any consultation, let alone, meaningful or adequate consultation. The applicants, under the circumstances had a legitimate expectation of liaison and consultation. The applicants' interests were not taken into account prior to the bid being advertised and when the tender was awarded to Retrone[25].

[79] Consultation with all relevant stakeholders prior to publishing the bid was in my view necessary as the first respondent intended as was apparent subsequent to the appointment of Retrone, to make radical changed to the number plate industry in the North West Province through the introduction of a distributor. What was essentially a private industry regulated by law in terms of specifications and standards was to be transformed which ultimately would affect the NNPR and Uniplate market share and its business. The first respondent acknowledges that the determinations constitute a transformation of the number plate industry which would affect the applicant's business and profits. What the first respondent with its tender and the first determination sought to do was to take the applicants' market and confer it upon Retrone as the successful bidder. For the first respondent to contemplate such a transformation in the industry, there should have been proper consultation. The action was in my view taken arbitrary and in bad faith as proper consultation should have taken place with the relevant stakeholders.

[80] NNPR alleged that it is in support of the securitisation of number plate and signed a letter of support at a time when NNPR was not aware of the true facts and anticipated that there would be full consultation and that a model including the financial model would be introduced which would not

[25] Phumelela Gaming and Leisure Ltd v Grundlingh and Others 2007(6) SA 350 (CC) at paragraphs [34], [35] and [37]

interfere with its business. At the time of writing the letter NNPR was under the impression that it's lawful and it had a legitimate expectation that it will be able to continue to operate without losing its market share. This is not the case since the writing of the letter the programme has changed several times ultimately to suit primarily Retrone and Arga.

[81] NNPR challenged Retrone and the first respondent to place before this court the Bid response as presented by Retrone and its proposal and costing. NNPR contended that when same is analysed it will be apparent that it is not the same as what is now proposed to be implemented. The first respondent failed to take up the challenge.

[82] Although Retrone has made no significant investment in the industry and comparatively has little experience in the number plate industry, it was given the power to control the number plate industry in the North West Province. From the affidavits and evidence on record what emerges is a picture of Retrone being given the opportunity to tailor its proposals to control the market as it deems fit. This is apparent from the most recent proposal and description pursuant to the objections to the proposed process raised by the embossers and blankers and after the gazetted intended implementation date. After receipt of the letters of demand from both NNPR and Uniplate, Retrone has now sought to change the process by purporting to suggest that it will not interfere with the relationships between blankers and embossers. However, even the process, as now proposed, still cuts the relationship between the blanker and the embosser. It is clear that the new process requires ordering still to take place through Retrone. Thereafter distribution takes place through Retrone. As stated *supra*, this interference only benefits and advances Retrone and Arga's interests to the detriment of Uniplate and NNPR. What is clear and is common cause is that the first respondent has after the first determination

introduced several charges into the final determinations. In other words what they are seeking Retrone to implement in the final determination is very different to what Retrone put forward in their proposal for which they were awarded the bid. Had other potential bidders known the position they may have participated in the bid or objected thereto sooner.

[83] It appears as if the action was taken arbitrarily and capriciously as it is difficult to understand the process followed by the first respondent in that the bid was awarded before legislation was in place to implement it and the first respondent amended the legislation after receiving public input, which in essence altered the role and function of the successful bidder which thus taints the entire process. Furthermore the tender was in my view advertised and awarded to Retrone for an ulterior purpose or motive as it is clearly designed to advantage only Retrone and Arga to the detriment of other participants and to control the number plate industry in a fashion not contemplated by the legislation at the time. The fact that Retrone had preknowledge of the tender through Williams who was the managing director of Arga and a representative of Retrone, lends support to the finding of ulterior purpose.

[84] The process followed is in the circumstances irregular, unfair and offensive to the Constitutional rights of not only the bankers but the number plate industry at large. The number plate industry is no different from any other private industry and the first respondent did not have the right to simply introduce a distributor in a private sector industry and usurp the economic market without following due process. Accordingly, the bid and awarding of the tender to Retrone falls to be set aside under section 6 of PAJA.

CONCLUSION

[85] In the result,

1. The determinations made by the first respondent in Provincial Notice 33 as contained in the North West Provincial Gazette No. 7515 dated 11 August 2015 are hereby reviewed and set aside.

2. The determinations made by the first respondent in Provincial Notice 22 of 2017 as contained in the North West Provincial Gazette No. 7732 dated 14 February 2017 are hereby reviewed and set aside.

3. The invitation to bid dated 24 October 2013 under DPS/15/13/14; and the award of the Bid to the third respondent on or about 18 February 2014 is hereby reviewed and set aside.

4. The first respondent to pay the costs of the applications including the costs of NNPR's two counsel.

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N. GUTTA
JUDGE OF THE HIGH COURT

APEARANCES

DATE OF HEARING	: 23 JUNE 2017
DATE OF JUDGMENT	: 19 OCTOBER 2017
ADVOCATE FOR APPLICANTS – UNIPLATE	: ADV SAINTS (SC)
	ADV SAINTS
ADV FOR APPLICANTS - NNPR	: ADV BOTHA
ADVOCATE FOR RESPONDENTS FOR	
1ST RESPONDENT	: ADV MOGAGABE (SC)
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