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

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: UM 57/2017

In the matter between:

UMSO CONSTRUCTION (PTY) LTD	1st Applicant
CROWN BAY CONSTRUCTION (PTY) LTD	2nd Applicant
and	
MAGALIES WATER SOC LIMITED	1st Respondent
MURRAY & DICKSON CONSTRUCTION (PTY) LTD	2nd Respondent
WBHO CONSTRUCTION (PTY) LTD	3rd Respondent
WK CONSTRUCTION (PTY) LTD	4th Respondent
ESOR CONSTRUCTION (PTY) LTD	5th Respondent
CERIMELE CONSTRUCTION (PTY) LTD	6th Respondent

STEFANUTTI JOINT VENTURE	7th Respondent
BOPELONG/ICON JOINT VENTURE	8th Respondent
RAUBEX CONSTRUCTION (PTY) LTD	9th Respondent
BOFEPI PROJECT MANAGEMENT (PTY) LTD	10th Respondent
KING CIVIL/LUDONGA JOINT VENTURE	11th Respondent
SEDTRADE (PTY) LTD	12th Respondent
MIVAMI CONSTRUCTION (PTY) LTD	13th Respondent
BASIL READ LIMITED	14th Respondent
RUWACON (PTY) LTD	15th Respondent
GOROGANG PLANT HIRE (PTY) LTD	16th Respondent
MECSA (PTY) LTD	17th Respondent
MADULIDI/NKOLELE JV	18th Respondent
VHARANANI PROPERTIES (PTY) LTD	19th Respondent

UNIQUE HOLDINGS (PTY) LTD		20th Respondent
UDOMO TRADING 26 (PTY) LTD		21st Respondent
QUEBEC JOINT VENTURE		22nd Respondent
DATE OF HEARING	:	03 AUGUST 2018
DATE OF JUDGMENT	:	06 SEPTEMBER 2018
COUNSEL FOR THE APPLICANTS	:	ADV.TSATSAWANE SC With ADV. LITHOLE
COUNSEL FOR THE 1st RESPONDENT	:	ADV. PUTTER SC
COUNSEL FOR THE 2nd RESPONDENT	:	ADV. T PRINSLOO

JUDGMENT ON LEAVE TO APPEAL

HENDRICKS J

Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal (SCA) against "*the whole of the judgment and order*" granted

by this Court on 12th April 2018 dismissing the applicant's application with costs. As basis for the application for leave to appeal it is contended by the applicant that there are reasonable prospects of success on appeal and that there are compelling reasons why the appeal should be heard by the SCA in terms of the provisions of Section 17 of the Superior Courts Act 10 of 2013. Nine (9) grounds of appeal are listed in the Notice of Application for Leave to Appeal.

[2] The Notice of Appeal states in paragraph 1 that there are reasonable prospects of success on appeal. In paragraph 2 thereof it is stated that this Court erred in the following respects and then deals with the following headings nl: reasons, advertisement, Proplan, local content, scoring, tax clearance certificate, discount letter, extension of the tender validity period and remedy. In paragraph 3 it is stated that there are compelling reasons why an appeal should be heard by the SCA.

[3] The nine grounds of appeal are extended to twenty six (26) in the heads of argument filed. In terms of Rule 49 (1) of the Rules of Court, it is peremptory that the grounds of appeal be furnished by way of notice and not in heads of argument. These grounds are not succinctly set out but contain caselaw which is extensively quoted and amounts to argument. Grounds of appeal must be succinctly set out in clear and unambiguous terms. Some of the grounds are vague to the extent that it is of no assistance in defining the real issues.

[4] In **Phiri v Phiri and Others** (39223/2011) [2016] ZAGPPHC 341 (14 March 2016) the following is stated in paragraphs [9] and [10]:

> *"[9] An application for leave to appeal is in terms of Rule 49 of the Uniform Court. Rule 49(l)(b) of the Uniform Court Rules provide as follows: "When leave to appeal is required... application for such leave shall be made and the grounds thereof shall be furnished..." The use of the word "shall" denote that this sub rule is peremptory. The applicant must set out the grounds upon which he seeks to appeal. In the matter of Sogono v Minister of Law Order* ***1996 (4) SA 384*** *(ECD) the Court held at 3851—386A that: "... the grounds of appeal required under Rule 49(l)(b) must ...be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. .. Rule 49(l)(b)must also be regarded as being peremptory"*
>
> *[10] In casu, the grounds tabulated in paragraph [2] supra, can hardly qualify to be grounds. In this regard the notice for leave to appeal is fatally defective and on this ground alone the application for leave to appeal should be dismissed. It does not help the applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice of leave to appeal, no matter how meritorious these might be, which is not the case in my view, otherwise, there is no need for the Rules; vide Xayimpi v Chairman Judge White Commission (formerly*

known as Browde Commission ***[2006] 2 ALL SA 442*** *E at 446i-j."*

I find the aforementioned *dicta* quite apposite in this case.

[5] I do not intend to deal with each and every ground of appeal (whether mentioned in the Notice of Application for Leave to Appeal or in applicants heads of argument) in any detail. Suffice to state that all the grounds of appeal were indeed considered in arriving at a conclusion. The nine grounds of appeal listed in the Notice of Application for Leave to Appeal were comprehensively dealt with in the main judgment and need not be rehashed in this judgment. I will deal succinctly with the main contentions and submissions made by counsel. To reiterate, all the grounds were indeed considered.

Reasons

[6] This aspect was dealt with in the main judgment and need not be repeated herein. The first three grounds of appeal in the heads of argument of the applicant deals with the reasons provided. In the first ground it is contended that this Court erred in concluding that the fact that the application to strike out was not persisted with put paid to the applicant's complaint that reasons were not supplied as requested and that the contention that section 5 (3) of PAJA finds application, is misplaced.

[7] The applicants contended that the correct position is that

> *"3.3.1 the application to strike out had nothing to do with the contention that the first respondent failed to provide adequate reasons for its decision to award the tender to the second respondent;*
>
> *3.3.2 the first respondent's obligation to furnish reasons for its decision arose before the application was filed and the first respondent provided inadequate reasons before the application was launched.*
>
> *3.33 the applicants were entitled to be furnished with adequate reasons before they filed their application and the first respondent failed to do so, which failure is evidenced by its attempt to remedy the failure in its answering affidavits which is not even permissible;*
>
> *3.3.4 it is wrong in law for an organ of the State such as the first respondent to rely on new reasons for the first time in an answering affidavit. In* ***National Lotteries Board v South African Education and Environment Project*** *2012 (4) SA 504 (SCA) where the following was said about the duty of an organ of the State to give reasons):*
>
> > *"[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons,-*

should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. -Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.

[28] In the present matter the refusal of a funding application involves the exercise of a discretion. This means that the board could have exercised its discretion by waiving the requirement for signed statements in the guideline, or simply condoning the failure to comply strictly with it. It failed to exercise its discretion properly by applying the guideline dogmatically. The fact that it may have had other reasons for having come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision. In fact, it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right. 2"

(Own emphasis).

It was submitted that it was wrong in law for the Court to allow the first and second respondents to rely on reasons which were not given

to the applicants when the applicants requested reasons before launching the application.

[8] As the second ground of appeal it is contend that the Court erred in ignoring the fact that the applicant's Notice of Motion and Rule 53 (1) required the first respondent to file the record of the decision sought to be reviewed and set aside together with such reasons as it is by law required or desired to give or make and that the first respondent did not comply therewith. The first respondent ought not to have been allowed to rely on new reasons for the first time in its answering affidavits. This argument is based on what is contended in the cases of **Jicama 17 (Pty) Ltd v West Coast District Municipality** 2006 (1) SA 116 (C) and **National Lotteries Board v South African Educational and Environmental Projects** 2012 (4) SA 504 (SCA). The Court ought to have found that there were no good reasons to award the tender to the second respondent and not to award it to the applicants.

[9] As the third ground of appeal it was contended that the Court erred in relying on the fact that there was no application by the applicants in order to compel the first respondent to file further and / or better reasons when the first respondent was in fact called upon to file such further reasons in the applicants' Notice of Motion. This, so it was submitted, is wrong in law in that the applicant's entitlement to full reasons does not in law depend on the applicants first having compelled the first respondent to provide reasons. It was sufficient

that the Notice of Motion called upon the first respondent to give such reasons.

[10] The starting point is that reasons as requested were indeed provided. The letter dated 17 October 2017 dealt with the reasons why the applicants failed to meet the minimum score for functionality and why their tender was disqualified from further evaluation. At the hearing of the application, this Court was urged to conclude that the decision was not taken for good reason. The applicants also contended that the first respondent could not supplement the reasons given to the applicants in the letter of 17 October 2017, in the answering affidavit. The applicant's contended that new reasons were given for its decision in the answering affidavit.

[11] This case at hand is clearly distinguishable from the cases of **Jicama** and **National Lotteries Board,** *supra,* in that no new reasons were advanced *ex post facto*. The reasons for the decision not to award the tender to the applicants are borne out by the record filed. The reasons provided in the answering affidavit were not an *ex post facto* explanation in order to create reasons afterwards as an afterthought, or the rationalization of a bad decision.

[12] As correctly submitted by Adv. Putter SC on behalf of the first respondent, the **Jicama** and **National Lotteries Board** cases deal with the central element of the constitutional duty of an administrator

to give reasons. This aspect was not challenged. Reasons were given and those reasons comply with all the formalities of the reasons for the decision taken. The applicants were informed of the reasons why they were unsuccessful with their tender. In my view, the adequacies of the reasons complained of do not justify a ground for review. As stated in the main judgment, the applicants could have asked for further and / or better reasons. There is therefore no merit in the first three grounds of appeal which deals with the reasons or rather the inadequacy thereof. The application for leave to appeal in these grounds should be refused.

Advertisement

[13] The applicants complaint in grounds four (4) to nine (9) is mainly that the first respondent failed to advertise the tender on the e-Tender Portal Publication website. It was an instruction contained in National Treasure Instruction 1 of 2015/2016. It was contended that the failure to comply with this mandatory requirement is fatal to this tender. The failure to upload the tender on the e-Tender Portal Website was comprehensively dealt with in the main judgment and need not be repeated herein. Each case must be decided on its own merits to determine whether under the circumstances, a fair administrative process was conducted. Section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives an administrator the power to deviate from the requirement of adequate notice only if it is reasonable and justifiable in the circumstance. Adequate notice was

given about the tender in other media as required by Section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[14] The fact that sixty-seven (67) prospective bidders tendered in response to the advertisement clearly indicates to the advertisement process followed had the desired effect. The public was informed about this tender. The deviation from filing on the e-Tender Portal website was justifiable in the circumstances. This decision is based on the judgment of the Constitutional Court in matter of **Allpay Consolidated Investment Holdings (Pty) Ltd v CEO South African Social Security Agency and others** 2014 (1) SA 604 (CC) (**Allpay)**. In my view, there is no reasonable prospects of success on appeal that the advertisement process followed, was irregular or unfair.

The Proplan Report

[15] The applicants' grounds of appeal in this regard are contained in grounds ten (10) and eleven (11) of their heads of argument. The crux of their contention was that there was no justification for the appointment of Proplan as consultants to evaluate the tenders. Proplan did the technical evaluation of the tender. Price Waterhouse Coopers reviewed the evaluation. The Bid Adjudication Committee and the Bid Evaluation Committee considered these reports, took a decision and made recommendations. The purpose of the appointment of Proplan was to assist these committees to make an

informed decision. Proplan did not adjudicate the tender. The National Treasury Practice Note SCN 3 of 2003 issued by National Treasury in terms of Section 76 of the Public Finance Management Act makes provision for the appointment of consultants to assist public entities with a wide range of activities including procurement services.

[16] The applicant contend that there was no evidence placed before this Court to justify the delegation of evaluation and adjudication functions to Proplan in circumstances where no case was made out that the first respondent did not have the necessary capacity in-house. This contention is without any merit. As concluded in the main judgment, consultants such as Proplan can be appointed to assist public entities with procurement of services. To reiterate what is contained in the main judgment, I can find no fault with the involvement of Proplan consultants in the tender evaluation process. Their role is stipulated in their report. Unlike in the **Trencon** case referred to in paragraph [23] of the main judgment, Proplan did not adjudicate finally on the awarding of the tender. I am of the view that there are no reasonable prospects of success on appeal in this regard. A court of appeal will not find that Proplan's participation in the tender evaluation process was irregular. Consequently, these grounds of appeal should also fail.

Local Content

[17] Grounds of appeal twelve (12), thirteen (13) and fourteen (14) deals with local contend. Although Adv. Tsatsamane SC did not place much emphasis on these grounds of appeal during his address, they were not abandoned and must therefore be considered. They are contained in grounds twelve to fourteen in the applicant's heads of argument. The applicants contend that it was wrong that only three bids were evaluated on local content. All bids had to be assessed. A fair tender process requires that all bidders be treated fairly and equally. There is no room to subject some bidders to an assessment and to exclude others from the same assessment. The first respondent did not provide any explanation for this differential treatment of bidders.

[18] Proplan evaluated the three highest ranking bidders in respect of their local production and content. This was done after evaluation on functionality and scoring of all qualifying bidders on price and preferences. This was in compliance with Regulation 9 (5) of the Preferential Procurement Policy Regulations R502 in GN 34350, which stipulates that a two-stage approach may be followed in evaluation of the tenders. The first stage involve functionality and minimum threshold for local production and content and the second stage price and B – BBEE with the possibility of price negotiations only with short listed tenders. It is not peremptory to do the evaluation of local content and production in accordance with this two-stage approach. From the Proplan report it is apparent that a two-stage approach has not been followed. Furthermore, tenders have not been

disqualified in terms of the local content criteria. It was therefore not peremptory that all bidders be evaluated for local content and production as part of the first stage of the tender evaluation process.

[19] Unlike Proplan, Price Waterhouse Coopers in their report, referred to the two-stage evaluation process and evaluated all the bids for local production and content. The minimum requirement was 70%. The applicant scored 65.8 and therefore did not make the threshold. Local content was therefore assessed by Price Waterhouse Coopers. The scoring by Proplan was rectified as is apparent from the Price Waterhouse Cooper's report, which indicate that the applicant failed to meet the minimum requirements. I am of the view that there are no reasonable prospects of success in respect of these grounds of appeal.

Scoring

[20] In the heads of argument filed on behalf of the applicants, grounds fifteen (15) to twenty –two (22) comprises the grounds of appeal under this heading. The aspect of scoring was comprehensively dealt with in the main judgment and need not be repeated herein. The applicants allege that certain irregularities were committed when their tender was scored. The complaints had been considered by this Court in the main judgment. I do not agree that the functionality criteria was unclear. This aspect was comprehensively dealt with in

paragraphs [25] to [30] of the main judgment. There was nothing unclear about the functionality criteria and the returnable schedules. The breakdown of the scores under each sub-paragraph was set out in the tender.

[21] The applicants also allege that they were unlawfully denied points which they should have been awarded. Pro Plan scored the applicants at (63) whilst Price Waterhouse Coopers scored them at (59) for functionality. With regard to relevant past experience both Pro Plan and Price Waterhouse Coopers scored the applicants at (5) out of (20). The applicants allege that they should have been scored at (20). This Court cannot take over the scoring and award scoring points to the applicants. This Court does not have the same experience as both ProPlan and Waterhouse Coopers in awarding scores.

[22] Adv. Prinsloo on behalf of the second respondent submitted that the applicants failed to identify how each of the so-called irregularities amounts to a ground of review under PAJA. Even with regard to scoring, they failed. I am in full agreement with this submission. This Court must determine whether any ground of review listed in section 6 of PAJA have been established. I could not find any. No irregularity was committed in the scoring of the applicant's tender. There is therefore no reasonable prospect of success on appeal in this regard.

The Tax Clearance Certificate

[23] As the twenty-third ground of appeal, it is contended on behalf of the applicants that this Court erred in not finding that there was no evidence contained in the record of the decision sought to be reviewed and set aside to show that the first respondent did in fact confirm that the second respondent's tax affairs were in order before awarding the tender it and entering into an agreement with it. This issue was addressed in the main judgment at paragraph [35] and need not be rehashed. Suffice to state that nothing really turns on this and it is definitely not a ground of appeal which will cause a court of appeal to disagree with the finding of this Court. There is no reasonable prospect of success on appeal on this ground.

The Discount Letter

The same applies to the issue of the discount letter, which are raised as grounds of appeals twenty – four (24) and twenty-five (25) in applicant's heads of argument. The contention is that there are different amounts mentioned as tender prices. The second respondent submitted its tender document with a prize and then wrote a cover letter in which it made an unconditional offer of a discount of 5% on the tender prize. This aspect was comprehensively set out in paragraph [36] of the main judgment. The actual tender price include the 5% discount. There is nothing wrong with the

acceptance of an unconditional discount. There is no reasonable prospect of success in appeal in this regard.

The Extension of the Tender Validity Period, the CIBD grading, the risk analysis and remedy.

[24] The extension of the tender validity period, the CIBD grading as well as the risk analysis and the remedy were all comprehensively addressed in the main judgment. There is no need to repeat what is contained in the main judgment under these respective headings, in this judgment. I did take everything into account when deciding this application and conclude that there are no reasonable prospect of success on appeal with regard to these grounds of appeal listed and addressed under these headings in the heads of argument filed on behalf of the applicants.

Compelling Reasons for the Appeal

[25] It was submitted on behalf of the applicants that there are compelling reasons as contemplated in Section 17 of the Superior Courts Act 10 of 2013, why an appeal should be heard by the Supreme Court of Appeal (SCA). The following was listed as compelling reasons:

"(i) There is a need for the Supreme Court of Appeal to resolve the conflict between Justice Hendricks and Justice Plasker's interpretation of paragraph [40] of the ***Allpay*** *judgment.*

(ii) There is a need for the Supreme Court of Appeal to authoritatively resolve the question whether an organ of the State is in law entitled to rely on new reasons for its decision for the first time in answering affidavits opposing a review application.

(iii) The errors committed by Justice Hendricks listed above relate to important issues in the adjudication of tenders and review applications to review and set aside decisions to award tenders and it is necessary that a final determination be made on such issues by another court."

[26] In so far as it concerns the allege conflict between the main judgment in this case and that of Plasket J, paragraph [40] of the **Allpay** judgment echoe the requirements set out in Section 3 of PAJA. It states:

"[40] Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will

necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair."

[27] Adv. Putter SC and Adv. Prinsloo on behalf of the first and second respondents respectively, submitted that the contention of the applicants that there are two different interpretations by this Court and Plasket J. in the judgment of **Joubert Galpin Searle Inc and Others v Road Accident Fund and Others** 2014 (4) SA 148 (ECP), with regard to paragraph [40] of the **Allpay** judgment is incorrect. I am in full agreement with that submission.

In **Joubert Galpin Searle** Judge Plasket was dealing with a case where the facts were distinguishable from the facts of this case. In that case the Road Accident Fund attempted to revive a tender after the tender validity period of 90 days had already expired. In doing so, it requested only those bidders that had not been eliminated prior to the expiry of the tender validity period to extend their bids to reflect one year. The question was whether the Road Accident Fund (RAF) had the lawful authority to revive the tender after it had expired.

[28] Counsel for the RAF in that case argued with reference to para [40] of **AllPay,** that the RAF could deviate from the prescribed procedure,

stipulated in the tender itself, as long as the deviation was reasonable and justifiable. Judge Plasket held in paragraph [74] of that judgment that once the tender validity period had expired, the RAF had no authority to award the tender or extend the period as it purported to do. In the alternative, Plasket J held, that the RAF had not made out exceptional circumstances, as contemplated in Treasury Regulation 16A6.4, for a deviation from an open and public tender process. The RAF therefore had no authority to follow a closed bid process.

[29] Counsel for the RAF sought to argue that paragraph [40] of **AllPay** "watered down the principle of legality by freeing administrators from their duty to adhere to procedures that have been prescribed by empowering provisions". Plasket J disagreed in paragraph [88] with this proposition. In analysing paragraph [40] of **Allpay**, Plasket J came to the conclusion in paragraph [87] that what Froneman J had in mind was deviations from the requirements of section 3(2) of PAJA for example where the requirements of procedural fairness would frustrate the purpose for which the power was given.

[30] The mandatory prescribed procedure in the **Joubert Galpin Searle** case was a 90-day tender validity period. The administrator could only deviate from this requirement if the tender had been extended before the expiry of the period or in terms of Treasury Regulation 16A6.4. The mandatory requirement in issue in the **Joubert Galpin Searle** case had nothing to do with the norms or requirements of

procedural fairness referred to in Section 3(2) read with Section 3(4) of PAJA.

[31] This case and **Joubert Galpin Searle** case are not at odds with one another. The requirement of advertisement in terms of the National Treasury Instruction was aimed at ensuring that there was adequate notice and that the tender was conducted in a procedurally fair manner. Any deviation from the National Treasury Instruction had to be viewed against the norms in Section 3 of PAJA. This Court concluded that there was adequate notice and that the deviation from the National Treasury Instruction was reasonable and justifiable in light of the reasons given for it.

[32] Furthermore, am I of the view that the main judgment of this Court is not at all in conflict with the judgment of **Allpay**. The principle of departing from a prescribed advertisement procedure is allowed provided that it is fair, reasonable and justifiable. There is therefore no need for the SCA to resolve, (as it was termed by the applicant) "the conflict" between the main judgment of this Court and that of Plasket J. To reiterate, these judgments are not at odds with one another. This Court is bound to follow the **Allpay** judgment. In my view, there is nothing unclear or ambiguous about paragraph [40] of the **Allpay** judgment.

[33] With regard to the second aspect relating to the question whether new reasons can be advanced for the first time in answering affidavits, the following. This aspect has been comprehensively dealt with by this Court in the main judgment. It was agreed amongst counsel that all the affidavits should be considered by this Court in order to arrive at a just decision. It is not that new reasons were advanced for the first time in the answering affidavits. Reasons were advanced in a letter dated 17 October 2017 in which it was stated why the applicants failed to meet the minimum score for functionality and why their tender was disqualified from further evaluation. The supplementing of reasons does not mean that new reasons were formulated *ex post facto* in the answering affidavit in an attempt to rationalize the decision. There is therefore no need for the SCA *to "authoritatively resolve the question whether an organ of State is in law entitled to rely on new reasons for its decision for the first time in answering affidavits opposing a review application,"*as contended by the applicants.

Conclusion

[34] I am of the view that there are no reasonable prospects of success on appeal with regard to any of the grounds of appeal listed both in the Notice of Appeal and the applicants Heads of Argument. There are also no compelling reasons why the SCA, as court of appeal, should hear this appeal.

Order

[35] Consequently the following order is made:

(i) Leave to appeal to the Supreme Court of Appeal against the judgment and order of this Court dated 12 April 2018 is refused.

(ii) The applicants are ordered to pay the costs of the application for leave to appeal jointly and severally, the one paying the other to be absolved.

(iii) Such costs to include the costs consequently upon the employment of two counsel (senior and junior), if applicable.

R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG