REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 2275/2014

In the matter between:

STIEGELMEYER AFRICA (PTY) LTD **Applicant**

And

THE NATIONAL TREASURY OF SOUTH AFRICA **1st Respondent**
THE CHAIRPERSON OF THE SUPPLY MANAGEMENT BID ADJUDICATION COMMITTEE OF THE NATIONAL TREASURY **2nd Respondent**
HOSPI-FURN (PTY) LTD **3rd Respondent**
ARJO HUNTELIGH SOUTH AFRICA (PTY) LTD **4th Respondent**
HOSPITAL EQUIPMENT MANUFACTURERS (PTY) LTD **5th Respondent**

Coram: **BOZALEK J**

Heard: **13 NOVEMBER 2014**

Delivered: **9 FEBRUARY 2015**

JUDGMENT

BOZALEK J:

[1] This is an application in which an unsuccessful bidder for a state tender seeks to review part of the award made and in which the principal dispute relates to the scoring system adopted in evaluating the competing bids.

THE PARTIES

[2] The applicant, Stiegelmeyer Africa (Pty) Ltd (‘*Stiegelmeyer*’), is a local subsidiary of a German multinational corporation specialising in the manufacture and distribution of

hospital beds, patient trolleys and similar equipment used in the public and private health care markets. It was an unsuccessful bidder in a hospital tender (RT24-2013ME) which was first published in April 2013. The tender was for the conclusion of so-called transversal term contracts relating to the procurement of goods for more than one government or provincial department and which invited bids on a per item or unit basis. The successful bidders would thereafter contract with those government or provincial departments which opted to participate in the transversal contract and which required the hospital, ward and theatre furniture and equipment forming part of the tender. The duration of the tender was from 1 October 2013 to 30 September 2015.

[3] The tender was advertised, administered and awarded by the first respondent, the National Treasury ('*the Treasury*'). The chairperson of the Treasury's Bid Adjudication Committee (*'the BAC'*) was cited as second respondent and the three successful bidders involved, Hospi-Furn (Pty) Ltd (*'Hospi-Furn'*), Arjo Huntleigh South Africa (Pty) Ltd (*'Arjo Huntleigh'*) and Hospital Equipment Manufacturers (Pty) Ltd (*'HEM'*), were cited as third, fourth and fifth respondents respectively.

[4] The relief initially sought by Stiegelmeyer was a declarator that the award of certain disputed items to Hospi-Furn, Arjo Huntleigh and HEM was invalid and reviewing and setting aside the decisions to that extent. The items were a particular hospital bed (item RT24-02-008ME), which was awarded to Hospi-Furn, as well as the mattress (item RT24-02-014ME) and mattress cover (item RT24-02-015ME) for the bed, which were awarded jointly to Hospi-Furn, Arjo Huntleigh and HEM. The further relief sought by Stiegelmeyer was an order awarding the tenders for the hospital bed to itself, rather than Hospi-Furn, and the mattress and mattress cover items to itself, Arjo Huntleigh and HEM, thereby excluding Hospi-Furn. In the alternative, Stiegelmeyer sought an order directing the BAC to reconsider the award of the disputed items having regard to the

recommendation of the Bid Evaluation Committee (‘*the BEC*’) concerning the scoring system applicable to the bids.

BACKGROUND

[5] The tender was published on 16 April 2013 and its conditions provided that the 90/10 preference point system would be applicable to all bidders. In terms thereof points would be awarded to bidders on the basis of their bid price (a maximum of 90 points) and the B-BBEEE status level of the bidder i.e. a maximum of 10 points. The bidder obtaining the highest number of points would be awarded the contract.

[6] The tender in question and all bids submitted thereunder were made subject to the *‘Government Procurement: General Conditions of Contract’* of July 2010 (*‘the GCC’*) as well as to the *‘Special Conditions of Contract RT24-2013ME: Supply and Delivery of Hospital Ward and Theatre Furniture and Ward Requirements to the State for the period 1 October 2013 to 30 September 2015’* (*‘the SCC’*). Both the bid documentation and the GCC specify that where the SCC is in conflict with the GCC, the SCC will prevail. The SCC reserved to the Treasury the right to award contracts to more than one contractor for the same item. Significantly, they also provided, in clause 16.4, that items grouped as a series in specification would be regarded as a group series and would be evaluated and awarded accordingly.

[7] The results of the tender were published in a contract circular by the Treasury on 30 August 2013 from which it appeared that Hospi-Furn was the successful bidder in respect of the bed whilst it, Arjo Huntleigh and HEM were declared the successful bidders in respect of the mattress and mattress cover items. The joint award of these two items also to Arjo Huntleigh and HEM were made on the basis that they had successfully bid for other beds with which the mattress and mattress covers were compatible.

[8] That same day Stiegelmeyer addressed correspondence to the Treasury in respect of the outcome of the tender process, at that stage focussing on its B-BBEEE status. Although it had been verified and evaluated as a level 4 contributor for the purposes of the tender, a day after submitting its bid it had been verified by its auditor as a level 3 contributor and, on this basis, would have been awarded eight (8) rather than five (5) points for its B-BBEEE status. Stiegelmeyer sought a meeting with the Treasury with a view to its bid being evaluated on the more favourable basis. On 20 September 2013 the Treasury responded by pointing out that the SCC precluded the evaluation of Stiegelmeyer's bid on anything but its B-BBEEE status at the time it submitted its bid. However, the Treasury also sought to explain the basis upon which Stiegelmeyer's bid for the three (3) items had been unsuccessful, in the following terms:

> *'The bid price offered by your company for item RT24-02-008ME (the bed) is higher than the awarded price. Also note that the following items were grouped as a series and have been evaluated and awarded as such RT24-02-008ME, RT24-02-014ME, RT24-02-015ME. Your company did not score the highest points on the series award.'* **[emphasis added]**

[9] It is necessary to note, however, that the bid documents did not appear to indicate, either generally or specifically, that the three items would be grouped, scored or considered as a series or group. What they did stipulate was that the mattress and its cover had to be compatible with a number of beds including the bed in dispute.

[10] Annexure A to the Treasury's letter, entitled *'Reasons for non-award',* was a table purporting to explain, in terms of price, why Stiegelmeyer had not been awarded the tender for the three items. It set out the awarded price in respect of the three items as well as Stiegelmeyer's price, all under the heading '*Items grouped as a series'*. However, although it correctly reflected Stiegelmeyer's bid prices for the three items, the prices attributed to those items in respect of the successful bidder did not tally with those of Hospi-Furn as reflected in the contract circular. It incorrectly used Arjo

Huntleigh's prices as a group as those of the successful bidder in respect of the three items rather than those of Hospi-Furn's. In fact, Arjo Huntleigh's bid for the bed had been unresponsive to the tender specifications and thus could not be considered.

[11] Stiegelmeyer then sought clarification as to why it had not been awarded the series of three items and, in particular, the bed since, when its prices for the three items were taken together it scored the highest number of points, marginally more than the points scored by Hospi-Furn. On this basis, therefore, it should have been the successful bidder. It should also be mentioned that when regard is had to the relevant annexure in the contract circular and the unresponsive bids are eliminated, Hospi-Furn scored the highest points in respect of the bed item considered alone i.e. as not part of a series.

[12] Stiegelmeyer received no substantive response to its queries from the Treasury other than several indications that an appeal process was *'ongoing'* and that the BAC was reviewing the matter. The BAC did in fact meet to consider the award in respect of the disputed items on 3 October and 21 November 2013. Ultimately, however, it took no decision reviewing or correcting its award in respect of the disputed items.

[13] Furthermore, no formal appeal or review process was ever underway or even available. What had transpired was that the chairperson of the BEC, Ms B Ngalo, had reconsidered the matter in the light of Stiegelmeyer's submissions and come to the view that it had indeed incorrectly not been awarded the bid in respect of the three items. She addressed two separate memoranda to the BAC. In the first, which served before the BAC at its 3 October 2013 meeting, Ms Ngalo recommended that approval be granted for the correction of the award of the three disputed items *'to be a multiple award and include(s) Stiegelmeyer as the second company complying with the series and specification requirements'*. This recommendation was made on the basis that the

series '*had been'* awarded to Hospi-Furn and *'erroneously excluded the award of Stiegelmeyer … with a pass over reason that the bidder is not recommended on the main item'*. The memorandum recorded further that Stiegelmeyer had in fact scored the highest total points for the series.

[14] At its meeting on 3 October 2013 the BAC debated the issue briefly but did not approve or adopt the recommendation in question. A perusal of the transcript of this meeting indicates that the BAC did not take issue with the reasoning underlying the recommendation contained in the memorandum i.e. it appeared to accept that the award had been incorrect, but was wary of correcting the award without first obtaining Hospi-Furn's consent to taking such a step. The suggestion which came from the BAC was that Hospi-Furn should be approached to advise it of the error and to negotiate the cancellation of the award made to it in order to clear the way to making the award to Stiegelmeyer.

[15] The BAC met again on 21 November 2013 when a further memorandum from Ms Ngalo served before it. The proclaimed purpose of the memorandum was to obtain the BAC's approval to correct the award in respect of the three items which, it stated, had been *'erroneously awarded to Hospi-Furn (Pty) Ltd as a group for compatibility purposes'*. It recorded that clause 16.4 of the SCC made provision for a group award and that, after receiving an inquiry from Stiegelmeyer, the Treasury had reviewed the matter and realised that an error had occurred in that *'Stiegelmeyer … should not have been passed over and the items (had) been erroneously awarded to Hospi-Furn (Pty) Ltd which did not score the highest total points for the group'*. In other words it adopted Stiegelmeyer's reasoning for the correction of the award.

[16] The memorandum proceeded that a meeting had been convened between Hospi-Furn and the Treasury's legal department to discuss its intention of *'re-awarding'*

the items to Stiegelmeyer. However, Hospi-Furn had not responded despite having been made aware of the oversight and the intention to correct the award which had also been conveyed to it in a letter. The memorandum recorded that the BEC regretted the error and recommended that approval be granted to correcting the award of the three items to Hospi-Furn and awarding them to Stiegelmeyer as the bidder which had scored the highest total points for the group.

[17] In the result, the BAC did not accept the recommendation at its meeting on 21 November 2013. Instead, it decided that the Treasury should again communicate in writing with Hospi-Furn to remind it to respond and then take action. That letter, the BEC decided, should be drafted in consultation with the Treasury's legal department and indicate that if Hospi-Furn did not respond within a certain period they would be taken to have acceded to the contents of the letter. All this is to be divined from the minutes and transcript of the meeting which also reflect that the BAC was once again preoccupied with how to correct the award without making a further error and facing litigation either from Hospi-Furn or from Stiegelmeyer.

[18] It is not clear what came of any further correspondence but ultimately the BAC never *'corrected'* its award. In the result Stiegelmeyer approached its attorneys and these review proceedings were commenced in February 2014.

THE APPLICANT'S CASE

[19] In essence Stiegelmeyer's case is that, pursuant to a recommendation by the BEC, the BAC had intended to award the disputed items grouped as a series but had erroneously made the award to Hospi-Furn in respect of the bed and to Hospi-Furn, HEM and Arjo Huntleigh in respect of the mattress and the mattress cover. Its case is further that had the bids in respect of three items been correctly scored i.e. as a group, it had scored the highest total points and should have been awarded the tender in

respect of the bed, the mattress and mattress cover, albeit jointly with HEM and Arjo Huntleigh in respect of the latter two items.

[20] In support of its case Stiegelmeyer relied not only on the two memoranda referred to above but on the BEC's original memorandum of 16 August containing its recommendation for the award of the tender which was approved by the BAC on 22 August 2013 and which, it was submitted, constituted the basis upon which the BAC had made its award. That memorandum recommended, in accordance with clause 16.4 of the SCC, that the three disputed items be awarded *'in groups'* … *'for compatibility purposes'* and the formal minute of the BAC's meeting on 22 August 2013 reflected that the BEC's memorandum in relation to that tender had been *'approved'*. In other words, it was contended, there had been no deviation from the BEC's recommendation. The transcript of that meeting confirmed that, for all intents and purposes, the recommendation of the BEC had been accepted by the BAC without demur and the award was seemingly made in line with such recommendation.

[21] The recommendation by the BEC referred to an annexure K which dealt with group awards and which confirms that the three items i.e. the bed, the mattress and the mattress cover, were indeed scored on a group basis. Having regard to this annexure it was common cause that, when non-responsive bidders were excluded, Stiegelmeyer emerged as the bidder scoring the highest points for the three items on a group basis, marginally more than Hospi-Furn.

[22] Stiegelmeyer's case is, further, that the BEC's recommendation and the BAC's acceptance thereof was ultimately not given effect. Instead the BEC's memorandum or its various annexures appeared to have been misread and the award for the bed was made scoring it as an individual item and not as part of a group. Therefore, proceeded Stiegelmeyer's case, the award to the successful bidders was not authorised by the

empowering provision, was made contrary to a mandatory and material procedure or condition prescribed by an empowering provision, was made for reasons not authorised by the empowering provision and because irrelevant considerations were taken into account, and was also made arbitrarily or capriciously. These grounds were enumerated under the various provisions of sec 6(2) of the Promotion of Administrative Justice Act (PAJA).

[23] Although Mr Fagan, who appeared together with Ms O'Sullivan for Stiegelmeyer, initially contended that the award in respect of the disputed items, and in particular the bed, had in fact been made to Stiegelmeyer, he ultimately conceded that the award had been made to Hospi-Furn in respect of the bed and to it, Arjo Huntleigh and HEM in respect of the mattress and mattress cover. Having regard to the contract circular, which declared Hospi-Furn, HEM and Arjo Huntleigh to be the successful tenderers in the formula described above, (whether correctly or incorrectly scored) this concession was, in my view, correctly made.

THE RESPONDENTS' CASE

[24] The Treasury's case, (with which the Chairperson of the BAC made common cause, and to whom I shall refer collectively as *'the Treasury'*) is that the award of the tender to Hospi-Furn was correct and that the disputed items were scored and awarded by the BAC as individual items and not as a group. Its case is further that, scored on an individual basis, Stiegelmeyer had not received the highest points in respect of its tender for any of the beds contained in the specifications and therefor could not, for compatibility reasons, be awarded a mattress or a mattress cover i.e. because it was not awarded any bed. It sought to explain the various internal approaches by Ms Ngalo to the BAC seeking a correction of the original award on the basis of confusion on her part regarding the terms *'series'* and *'compatibility'*.

THE ISSUES

[25] Against this background the primary issue for determination must be whether the bids for the disputed items should have been scored as a group and, if so, what the appropriate remedy should be. However, a related antecedent issue which came to the fore during argument was whether the tender conditions allowed of scoring the three items on a group or series basis. Since this question enjoyed only limited attention during the hearing the parties were, subsequent to argument, afforded an opportunity to submit written argument on the following three questions:

> *'1. Given that:*
>
> *1.1 Clause 16.4 of the SCC provides inter alia that "(a)ll items that are grouped as a series **in specification** shall be regarded as a group series and be evaluated and awarded accordingly";*
>
> *1.2 Items RT24-02-008 ME, 014 ME and 015 ME were not grouped as a series in specification,*
>
> *could it ever have been competent for the BEC to have recommended (and/or for the BAC to have accepted such recommendation) that the abovementioned items "be awarded (in groups) as per paragraph 16.4 of the Special Conditions of Contract for compatibility purposes" (Annexure TB23)?*
>
> *2. Whether the First and Second Respondent's failure to pertinently raise this issue on the papers precludes them from relying thereon?*
>
> *3. Assuming that the aforesaid items could not be evaluated on a group basis, the implications thereof for the review application?'*

[26] Full written argument was subsequently delivered by both parties on these questions, much of it concerning whether the respondents could even rely on the argument that the terms of the tender precluded the three items being scored on a group basis.

DISCUSSION

[27] Turning to the question of the basis upon which the bids for the three items were scored, it is in effect common cause that, in relation to the award as announced, the

exercise was done on an individual item and not on a group basis. Stiegelmeyer's case is, of course, that this was mistakenly done, in conflict with the BEC's recommendation and the BAC's own acceptance of that recommendation whilst the Treasury contends that Hospi-Furn was deliberately awarded the hospital bed item because it had obtained the highest points for that item and that for compatibility purposes, it and the other two successful tenderers were awarded the mattress and mattress cover items as a multiple award.

[28] The Treasury's explanation does not tally with the document trail, however. It is contradicted by the original recommendation of the BEC, by the minutes and transcript of the BAC meeting on 22 August 2013 when the recommendation was seemingly accepted and adopted, by the two memoranda which served before the BAC at subsequent meetings on 3 October and 21 November 2013 and the transcripts of those meetings and by contemporaneous correspondence between the Treasury and Hospi-Furn.

[29] Faced with this documentation, the Treasury either failed to deal with its contents and the implications thereof or, in some cases, furnished explanations which are inherently improbable. By way of example, Ms Ngalo, the author of the two memoranda submitted to the post-award BAC meetings, claimed that she had been pressurised by Stiegelmeyer into accepting that Treasury had erred. This explanation can safely be rejected notwithstanding that the factual dispute arises in motion proceedings. Not only is it inherently improbable given Ms Ngalo's seniority and apparent experience but it is unsupported by the record or by any details she gives. A review of the correspondence from Stiegelmeyer to her and/or other Treasury officials reveals that it was limited and invariably of a polite and patient tone. The description of it as amounting to *'intolerable pressure'* is far-fetched.

[30] If Stiegelmeyer's version of events regarding how its bid failed were to be accepted then the BAC's decision would, in my view, prima facie fall to be reviewed. This would be so because, in failing to heed the BEC's recommendation, despite its undoubted intention to do so, the BAC failed to take into account relevant considerations (the BEC's recommendation), made the decision arbitrarily and capriciously or took a decision which was not rationally connected to the information before it.

[31] Before any such conclusion can be reached, however, the question arises as to whether the terms and conditions of the tender (and notably clause 16.4 of the SCC) permitted the BEC or the BAC to evaluate and award the items grouped a series. In answering this question regard may first be had to the proper approach to the review of tender irregularities and the framework relating to the consideration of tenders such as the present. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC) the Constitutional Court described that the proper approach to the review of tender irregularities as follows:

> *'…[T]o establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.'*

[32] The question of whether the BAC's flawed handling of the three disputed items was an irregularity which amounted to a sustainable ground of review must of course be examined in the light of the argument that it was precluded from scoring, as earlier indicated, the disputed items as a group or series.

[33] Clause 16.4 of the SCC reads in full:

> *'16.4 Items Grouped as Series*
>
> *16.4.1 All items that are grouped as a series in specification shall be regarded as a group series and be evaluated and awarded accordingly;*
>
> *16.4.2 Bidders are required to offer prices for all items specified with the series. Non-compliance with the abovementioned special conditions will invalidate the bid for the items/s concerned;*
>
> *16.4.3 Bidders must take note that the allocation of points will be per category (group award).'*

[34] The term *'in specification'* is nowhere defined in the tender documents but each item for which bids were sought has detailed specifications which any responsive bid had to meet. Significantly, the specifications for the three disputed items do not stipulate they would be grouped as a series or would be evaluated and awarded accordingly. Nor was any party able to point to any other provision in the tender documentation advising potential bidders that the items would be treated in this manner. Although Stiegelmeyer only annexed the specifications relating to the three disputed items to its founding affidavit, obviously the entire tender document was available to it from the outset.

[35] The point that there was no prior notification of the special scoring basis was first made by Hospi-Furn's managing director, Mr S Cliffe (*'Cliffe'*), in correspondence addressed to the Treasury officials, presumably after they advised Hospi-Furn that it had incorrectly been awarded the tender for the three disputed items. His initial email read as follows:

> *'I sent an email earlier today to Balekile asking of her to show us where it states that items RT24-02-08ME, RT24-02-014ME and RT24-02-015ME form part of a series.*
>
> *I have been through all the tender documents I cannot see where it states that these items, or any of the beds and cots, form part of a series.*
>
> *The tender documents show very clearly that there are many items that are part of a series (like the Patient Trolley and Emergency Trolley) but nowhere can I see that the above mentioned items form of a series.*

You say that the award will be reversed because the series items were erroneously awarded to us although we did not score the highest total points for the series according to the evaluation criteria.

If the tender documents do not mention that the items form part of a series then, surely, there was no error and the original award should stand.

However, if I am mistaken please can you show me where it states that the above mentioned items form part of a series.

Can I suggest we meet again as soon as possible to discuss this matter further.'

[36] In response Cliffe received a reply which failed to deal with the issues which he raised. In turn he responded by repeating his point and detailing examples of items in the tender where it was clearly stated, in the specifications for such items, that it would be treated as a series with other identified items. He concluded *'There is no such statement in the specification for the ICU bed (RT24-02-008ME), nor the Mattress (RT24-02-014ME) or the Mattress Cover (RT24-02-015ME) so I cannot understand how they can be evaluated as such.*'

[37] This correspondence was first referred to in Stiegelmeyer's replying affidavits as not forming part of the record initially delivered by the Treasury and having only come to light after further discovery of relevant documents was sought from the Treasury. Stiegelmeyer annexed the correspondence to its replying affidavit and dealt with it in some detail but not with the substance of the point repeatedly raised by Cliffe. Furthermore, both in its founding and in its supplementary founding affidavits, Stiegelmeyer's managing director made explicit reference to clause 16.4 of the SCC with its stipulation that *'all items that are grouped as series in specification shall be regarded as a series and be awarded and evaluated accordingly.'* (my emphasis). On neither occasion, however, did it grapple with the implications of this clause taken together with the fact that the tender documentation appeared to have made no mention that the disputed items were to be grouped as a series.

[38] It is important to note in this regard that it was never Stiegelmeyer's case that its bid for the three items was made on the basis that they were to be grouped as a series. Indeed, its case was that it was only when it sought to have its bid re-evaluated on the basis of a more favourable B-BBEEE rating that it had become aware this scoring system had been used.

[39] As Cliffe stated in his correspondence with the Treasury the specifications for certain other items made it clear that they were to be grouped and evaluated as a series. One example will suffice. The item for bassinets states in the last line of the specifications that they are to be considered as a series with certain other items. This example and several others formed part of annexure WM1 to the Treasury's answering affidavit, the relevant part being *'Annexure B: Highest Points to specification'* which appears to reproduce the advertised specifications for each item. In the same document those pages dealing with the three disputed items noticeably do not contain the stipulation that they are to be grouped as a series.

[40] However, it is also clear that the Treasury did not state in terms in its opposing affidavits that, in the absence of a prior notice to potential bidders that the three disputed items were to be grouped and evaluated as a series, the BAC was precluded by the terms of the tender from doing so. Even in argument the point was raised late and almost in passing. A critical question is, therefore, whether, by reason of its failure to pertinently state that it relied upon clause 16.4 of the SCC, the Treasury is precluded from relying on its provisions to defeat Stiegelmeyer's review application.

[41] On behalf of Stiegelmeyer, Mr Fagan submitted that the Treasury could place no reliance on the point for a number of reasons, the first being that not only did it fail to squarely rely on the point or make the argument in its papers, it also failed to do so when it was first raised in the correspondence by Hospi-Furn. Counsel went on to

speculate as to possible reasons why the words *'in specification'* in clause 16.4 were not raised as a defence by the Treasury, whether by oversight, because the grouping of the items was already made clear by the tender document or because the SCC do not specifically require prior notification to bidders of grouping as a series. His argument proceeded that since the Treasury had failed to raise the defence there were no facts pertaining to these issues in the papers and thus the Court was in no position to know what meaning or weight to attribute to the words *'in specification'*.

[42] Mr Fagan argued further that as a result of the Treasury's omission Stiegelmeyer had not been afforded an opportunity to advance reasons why clause 16.4 was inapplicable or had been fulfilled. For this reason, he submitted, any finding based on clause 16.4 would be unfair to Stiegelmeyer. His argument concluded that Stiegelmeyer had been entitled to proceed to Court on the assumption that it was common cause between the parties that the BAC was not precluded by any provision of the SCC from evaluating the items as a group and awarding them as a series.

[43] As far as the query raised by the Court regarding the implications for the review if the BAC indeed lacked the power to evaluate and award the items on a group basis, Mr Fagan submitted that in view of the complexity of questions raised and implications of scoring the items on an individual basis, the Court would not be able to substitute its own decision for that of the BAC and the matter would have to be remitted back for a fresh recommendation by the BEC.

[44] In the further written submissions on behalf of the Treasury, Ms Norman, who appeared together with Mr Lecoge, clung to their primary defence that the disputed items had been awarded on an individual basis, again ignoring the implications of all the documentation indicating that this had never been the BAC's intent. Be that as it may, it was also contended on behalf of the Treasury that it would not have been competent for

the BAC to have accepted a recommendation from the BEC that evaluation and scoring of the disputed items take place on a group or series basis. This, it was submitted, would have amounted to *'manipulation of the evaluation process'* because the tender specifications could not be changed during the evaluation or scoring process.

[45] Dealing with the point that they did not properly or timeously raise what can be termed the *ultra vires* defence, it was contended on behalf of the Treasury that the applicability of the SCC in general formed part of its case. Furthermore, it was submitted, all the relevant facts were before the Court and Stiegelmeyer would suffer no prejudice if the point were dealt with. In conclusion, it was contended, in the event of the Court finding that the BAC was precluded from evaluating the bids for the items as a series, the application could not succeed.

[46] Whether all the documentation comprising the tender was initially put before the Court by Stiegelmeyer or not, there can be no doubt that the full terms and conditions of the tender were, at all material times, known to the parties. In my view no material term of the tender can be disregarded by the Court in circumstances such as these save where the party objecting to its use has been unfairly prejudiced in the presentation of its case.

[47] Clause 16.4 of the SCC featured prominently in the tender documents and when the record of the decision was made available (whether initially or as supplemented through discovery procedures) its centrality was brought prominently to the fore, and to the attention of Stiegelmeyer, by the Treasury's correspondence with Hospi-Furn. It is indeed so that although Hospi-Furn initially opposed these review proceedings it subsequently withdrew its opposition. Nonetheless Stiegelmeyer was made aware of the basis upon which Hospi-Furn maintained that the BAC could not have scored the items as a series. In my view, Stiegelmeyer cannot ask the Court to turn a blind eye to

this point simply because the remaining respondents did not pertinently raise or rely on the point in their opposing affidavits.

[48] There are in my view at least three main reasons why the application cannot be determined without squarely dealing with the implications of clause 16.4. Firstly, notwithstanding Stiegelmeyer's submissions regarding the lack of any evidence regarding the term *'in specification',* the overall point remains one of law, namely, the interpretation of the terms of the contract, more particularly clause 16.4 of the SCC, within the context of the tender's terms and conditions as a whole. Factual evidence would have, at best, a very limited role in this question. In these circumstances the principle approved of in *Cabinet for the Territory of South West Africa v Chikane*[1] finds application: *'…a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers provided they arise from the facts alleged*'.

[49] In *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at para [28] the Court, quoting with approval the dicta of Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F – 324C, stated that it is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties and that this dictum applied not only to constitutional issues but to all issues and applied equally to answering affidavits and replying affidavits. The Court added, however, that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers, provided that all relevant facts are before the court, and no prejudice is caused to the other party.

[1] 1989 (1) SA 349 (A) at page 360 para F - G

[50] Similar principles apply in regard to the raising of a legal issue for the first time on appeal, namely, it must involve no unfairness to the other party and raise no new factual issues. In *Paddock Motors (Pty) Ltd v Igesund*[2], Jansen JA stated:

> *'… it would create an intolerable situation if a court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result as an error of law on his part …'*

[51] The Court in *Naude and Another v Fraser* [1998] 3 All SA 239 (A) at page 255F specifically found that the same principles applied to review proceedings, and stated:

> *'There appears to me to be no sound reason why the aforesaid principles should not apply to review proceedings. Difference considerations arise where a party, whether on review or appeal, raises a point for the first time which is dependent upon factual considerations that were not fully explored in the court of first instance.'*

[52] The kind of considerations a court will take into account in deciding whether there would be prejudice or unfairness to an opposing party should a court take into account a belated argument were set out in *Paddock Motors* (supra) at 23 D – F, quoting the case of *Cole v Government of the Union of SA* 1910 AD 263 at page 272:

> *'If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.'*

[53] One of the cases referred to by the Court in *Chikane* as laying down the principle earlier referred to therein was *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) where the Court was required to construe the meaning of a Rule of Court requiring affidavits in application proceedings to contain *'the facts and circumstances*

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[2] 1976 (3) SA 16 (A) at 23F-G

upon which the party relies'. In opting for a more restricted meaning the Court stated as follows:

> *'In iedere geval meen ek dat 'n uitleg van die Hofreël wat die Hof sou verhinder om 'n aansoek op 'n regspunt uit te wys wat uit die beweerde feite ontstaan, slegs omdat die aansoekdoener nie in sy aansoek uitdruklik daarop gesteun het nie, vermy kan en moet word, anders sou dit kon lei tot die onhoudbare posisie dat die Hof deur 'n regsdwaling aan die kant van die aansoekdoener gebonde kan wees'.*

In my view this reasoning applies squarely to the present position.

[54] A second and related reason is that the point regarding clause 16.4 was not sprung upon Stiegelmeyer unexpectedly. Not only does it emerge from a reading of the SCC, but it was pertinently raised and highlighted by Hospi-Furn in correspondence with the Treasury which was seen by the applicant. Although the correspondence may not have been available when it filed its founding affidavits, but only after its subsequent discovery, Stiegelmeyer would have been entitled to seek leave to deal with the point at that stage, had it wished to do so. Since the point goes to the very heart of the lawfulness of the review and involved a question of law, the applicant was not, in my view, entitled to ignore it and then rely upon it being declared out of bounds.

[55] The third reason is the centrality of the point to the lawfulness of the award made by the Treasury and the relief now claimed by Stiegelmeyer. It would, in my view, be untenable for a Court to ignore the importance of a material term of a condition of a tender which directly affects the lawfulness of both the award and the relief sought simply because one or more parties may have failed to appreciate its significance at an early stage. This would in effect require the Court to make an award which, if made by the party administering the tender, would have been unlawful.

[56] Accordingly I hold that the Treasury is ultimately entitled to rely on the point although not squarely raised in its opposing affidavits.

[57] This brings me to the implications of clause 16.4 to the review application. In my view the meaning and importance of clause 16.4 of the SCC which forms a primary term of the tender, is clear: where the Treasury or its constituent committees proposed to group items as a series for the purposes of evaluation and scoring it was required to inform bidders of this fact prior to them submitting their bids. Not only does this interpretation square with the language used and its clear implications, it is entirely congruent with the legal and constitutional requirements for a lawful tender process viz fairness, transparency, competitiveness and cost-effectiveness[3].

[58] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*[4] the Court observed:

> *'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in sec33 and the basic values governing public administration in s 195(1).'*

[59] In *Allpay*[5] the Constitutional Court stated:

> *'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. 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.'*

[60] The Court also quoted with approval the following passage from *Premier, Free State and Others v Firechem, Free State (Pty) Ltd*[6] where the Supreme Court of Appeal was dealing with the award of tender which fell outside the applicable legal framework:

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[3] sec 217of the Constitution of South Africa Act, No 108 of 1996
[4] 2007 (3) SA 121 (CC), at para [33]
[5] (supra)
[6] 2000 (4) SA 413 (SCA)

> *'One of the requirements … is that the body adjudging tenders had to be presented with comparable offers in order that its members should be able to compare. Another was that a tender had to speak for itself. Its real import could not be tucked away, apart from its terms. Yet another requirement was that competitors had to be treated equally, in the sense that they should all be entitled to tender for the same thing.'*

To these requirements can be added a further one: that competitors are entitled to know beforehand on what basis their tenders are to be evaluated.

[61] Apart from these general considerations, the necessity of prior notification to bidders of the grouping of items as a series is highlighted by the provisions of clause 16.4.2 with its adverse implications for bidders who fail to offer a price on all items grouped as a series, namely the invalidation of their bid. Seen in this context the words *'in specification'* in clause 16.4 can only mean specifications which have been furnished to interested parties prior to bidding.

CONCLUSION

[62] Given the applicability and clear meaning of clause 16.4 of the SCC, coupled with the Treasury's failure to notify of bidders beforehand that the disputed items were to be grouped as a series, it inevitably follows that the evaluation of bids on this basis would have exceeded the powers of the BAC and been unlawful. Ironically, therefore, the BAC's apparently inadvertent failure to follow the BEC's recommendation in regard to the disputed items saved its award from illegality. It follows, furthermore, that in scoring the bed item on an individual basis, albeit unintentionally, the Treasury committed no irregularity.

[63] The bedrock of Stiegelmeyer's review of the award related to the score that it achieved for the bed item. In respect of that item it conceded that Hospi-Furn scored higher than it and there remains no free-standing challenge to the balance of the BAC's award. There is no justification for the remittal of the matter back to the BAC for re-consideration of the award in the light of the BEC's initial recommendation since that

itself was unlawful for the reasons given. As a result the review of the award must fail in its entirety.

COSTS

[64] In the ordinary course, the application having failed, the Treasury would be entitled to their costs. There are, however, special factors relating to the way in which they dealt with Stiegelmeyer's tender and their conduct in the subsequent litigation which would appear to justify a different order.

[65] In the first place the Treasury officials misled Stiegelmeyer into believing that an appeal process was underway when, at best, the BAC was considering whether it could persuade Hospi-Furn to accede to the withdrawal of the award. As a result Stiegelmeyer delayed the institution of legal action until it became clear that no internal relief would be forthcoming. Secondly, the manner in which the Treasury conducted the litigation leaves much to be desired. Important and relevant documents were, for flimsy reasons, not initially disclosed as part of the record. Significantly, these documents ultimately revealed that a key Treasury official and the BAC formed the view early on that there had been an error in the evaluation of Stiegelmeyer's bid and that it should have received the award. Notwithstanding this, throughout the litigation the Treasury persisted in claiming, disingenuously in my view, that the items had been deliberately evaluated on an individual basis. The Treasury's dogged adherence to this defence incidentally appeared to blind it to the real issue in dispute, namely, whether it was competent to have scored the disputed items grouped as a series. Most fundamentally, the Treasury failed to appreciate and apply a material term of the tender (clause 16.4 of the SCC) to the evaluation of bids and this was the root cause of the whole dispute.

[66] It seems quite likely that, had the Treasury not erred in one or more of the above respects, this litigation would not have taken place or, at the very least, would have

concluded at a much earlier stage. Taking all these factors into account, I consider that it would be inequitable for Stiegelmeyer to be saddled with a costs order. In these circumstances, and also as a mark of the Court's disapproval of their conduct as described above, the Treasury should be denied their costs.

[67] For these reasons the following order is made:

1. The application is dismissed with all parties to bear their own costs.

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BOZALEK J

APPEARANCES

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