CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 198/14

In the matter between:

TRENCON CONSTRUCTION (PTY) LIMITED Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED First Respondent

BASIL READ (PTY) LIMITED Second Respondent

Neutral citation:	*Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J and Theron AJ
Judgment:	Khampepe J (unanimous)
Heard on:	5 March 2015
Decided on:	26 June 2015
Summary:	Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 — test for exceptional circumstances Court in as good a place as the administrator — decision of the administrator is a foregone conclusion — considerations of fairness weigh in favour of substitution order — exceptional circumstances warrant substitution order

Standard of appellate court interference — discretion in the true sense

---

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the North Gauteng High Court, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The order of the North Gauteng High Court, Pretoria is reinstated save for the deletion of paragraphs 1.2 and 1.3.
5. The respondent is ordered to pay the applicant's costs, including the costs of two counsel, in the Supreme Court of Appeal and in this Court.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Madlanga J, Molemela AJ, Nkabinde J and Theron AJ concurring):

Introduction

[1] In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair,

equitable, transparent, competitive and cost-effective.[1] Where the procurement process is shown not to be so, courts have the power to intervene.

[2] The first respondent, the Industrial Development Corporation of South Africa Limited (IDC), made a decision declaring the tender application of the applicant, Trencon Construction (Pty) Limited (Trencon), non-responsive,[2] and awarded the tender to the second respondent, Basil Read (Pty) Limited (Basil Read).

[3] The High Court set aside the decision of the IDC and substituted the award of the tender to Trencon. The Supreme Court of Appeal then overturned the High Court's decision, remitting the matter to the IDC for reconsideration. In this Court, Trencon seeks leave to appeal against the judgment and order of the Supreme Court of Appeal.

Facts

[4] On 18 May 2012, the IDC issued a public invitation to building contractors to submit proposals in order to prequalify for a principal building contract to upgrade the IDC's head office. The request for proposals (RFP) was an invitation to contractors to bid for the tender and it set out the rules governing the tender process.

[5] The RFP provided that any application received after the stipulated closing date would not be evaluated or assessed. The closing date and time was Monday, 4 June 2012 at 12h00. Trencon and other contractors submitted their proposals on time. Basil Read, however, submitted its proposal 14 minutes after the deadline. In accepting Basil Read's proposal, the IDC took the view that its own guidelines permitted acceptance of late proposals if doing so was in the IDC's interest.

[1] Section 217 of the Constitution.

[2] A non-responsive tender is one that was found by the IDC not to conform to all terms, conditions and specifications of its tender documents.

[6] The tender process was carried out by the IDC's Bid Evaluation Committee[3], Support Services, Procurement Department, Procurement Committee and Executive Management Committee (Exco). The IDC engaged Snow Consultants Incorporated (Snow Consultants), an independent firm of experts, as its principal agent for the evaluation of the tender. It also engaged the De Leeuw Group of quantity surveyors (Quantity Surveyors) to assist the committees. The tender process was conducted in two phases.

[7] The first phase involved the screening of contractors' profiles based on their technical capability, environmental management, personnel capabilities, financial standing and litigation history. On 25 June 2012, during this phase, Snow Consultants shortlisted seven contractors including Trencon and Basil Read. On 2 July 2012, the Support Services, through the Procurement Department, shortlisted the same contractors. With regard to Trencon, the Support Services in its shortlisting submission to the Procurement Committee stated:

> "The bidder demonstrated extensive capacity i.e. work experience; equipment and financial capacity to deliver on this project. The bidder's proposed key personnel demonstrated adequate skills and experience in providing the required services."

[8] On 4 July 2012, the Procurement Committee approved the seven shortlisted contractors to participate in the second phase. On 12 July 2012, the IDC issued a tender invitation to those contractors, which provided that the site handover date would be 6 September 2012.

[9] The second phase involved the evaluation of tender submissions on the basis of price and broad-based black economic empowerment (empowerment) points.[4] The IDC's committees had all the documentation required from the contractors. These

[3] The Bid Evaluation Committee consisted of the Procurement Department Manager in consultation with individual specialists from different functional areas.

[4] This is informed by the Broad-Based Black Economic Empowerment Act 53 of 2003. The empowerment points were calculated in accordance with each bidder's level of certification.

included relevant registration, tax and verification certificates, performance guarantees, proposed waste management, environmental and local sourcing plans as well as a priced and extended provisional bill of quantities.[5] The contractors were required to price each item listed in the provisional bill of quantities.

[10] The tender closed on 14 August 2012, at which time Trencon, Basil Read and two other contractors had submitted proposals for the award of the tender.[6] The four proposals were then evaluated according to the prescribed criteria and weighting in the Tender Data.[7]

[11] In allocating points for price and empowerment rating, the IDC chose the 90/10 method. This required the bids to be measured against one another to determine which was the lowest. It is common cause that Trencon submitted the lowest bid price at R117 112 972.21, excluding VAT. Basil Read's bid price was R120 164 912.30, excluding VAT.

[12] According to the 90/10 method, each contractor could be awarded up to a maximum of 90 points for price and up to a maximum of 10 points for empowerment. The points allocated to each contractor were calculated based on a comparison of the value of the contractor's bid with that of the lowest bid.[8] As it submitted the lowest bid, Trencon was awarded 90 points for price. Empowerment points were allocated

[5] The provisional bill of quantities listed all the items that would be necessary for the project. It was divided into five cost components including preliminaries, rehabilitation work on roof and façades, aesthetics upgrade, civil engineering construction and provisional sums.

[6] The three other bidders shortlisted to submit their bids, Aveng (Africa) Limited, ENZA Construction (Pty) Limited and Group Five Construction (Pty) Limited, all failed to do so.

[7] The Tender Data was applicable to the tender and provided for, amongst other things, the evaluation of tender offers.

[8] The formula used for scoring was Nf = W1 x [1-(P-Pm) / Pm].

Nf = the number of tender evaluation points awarded for the financial offer; W1 = 90; Pm = the value of the comparative offer of the most favourable tender; and P = the value of the comparative offer under consideration.

depending on each contractor's empowerment verification certificate.[9] Of the bidders, Trencon was also awarded the most points for empowerment.

[13] In its proposal, Trencon included a condition that its price would remain fixed for the planned duration of the contract provided that the site handover date of 6 September 2012 remained unchanged. The Quantity Surveyors sought clarification from the contractors about their pricing during the evaluation process. During the first round of clarification, the four contractors were asked to advise on their conditions should the site handover be delayed to 1 October 2012. Trencon indicated that it would charge an additional monthly 0.6% escalation amount – approximately R315 000, excluding VAT. Basil Read indicated that its bid price would remain fixed, regardless.

[14] In the second round, several matters were raised regarding Trencon's bid; two of which bear significance. The first matter concerned Trencon's interpretation of the IDC's bill of quantities in relation to sun screens. Trencon priced its bid on the basis that it was required to repaint and reinstall the existing sun screens. The IDC, however, maintained that the bill of quantities should have been interpreted to require the supply of new sun screens, and therefore, the screens had not been properly priced in Trencon's bid. In its clarification answers on this matter, Trencon did not accept the IDC's interpretation that the bill of quantities required the supply of new sun screens and thus, refused to alter its bid to account for the supply.

[15] The second matter, which was raised with Trencon as well as the other contractors, concerned the provisional sums of two items that had not been included in the IDC's approved cost estimate. The Quantity Surveyors, in their clarification questions, thus asked the contractors to confirm a reduction of their bid price for both

[9] For example, an empowerment Level 1 certification received 10 points, an empowerment Level 2 certification received 9 points, and so on.

items. All the contractors agreed to the reduction. Trencon, however, made its agreement subject to conducting a final review with the Quantity Surveyors.

[16] On 7 September 2012, Snow Consultants issued a Tender Evaluation Report. It included all the information regarding the evaluation of price and empowerment points; the Quantity Surveyors' tender clarifications and evaluation; the scoring of the tender offers; and a recommendation by the Quantity Surveyors.

[17] To accommodate concerns that arose during the clarification process, the Quantity Surveyors recommended that Trencon be awarded the tender, subject to two conditions, that Trencon: (1) remove its conditional acceptance of the revised contract award value; and (2) either agree to the IDC's interpretation of the new sun screens in the bill of quantities and absorb the cost or confirm the value to be added to its bid price to allow for the new screens. The contract value recommended was the revised contract award value of R110 948 822.71, excluding VAT.[10]

[18] Snow Consultants, in its letter dated 7 September 2012, also recommended that the tender be awarded to Trencon subject to the same two conditions. Again, the value recommended for the award was the revised contract value. On 10 September 2012, the Support Services, through the Procurement Department, submitted their recommendation to the Procurement Committee. They, too, recommended that Trencon be awarded the tender. In making the recommendation, the Support Services consolidated the contractors' scores, considered and endorsed the conditions set out in the Tender Evaluation Report and carried out a background check on Trencon.

[19] Importantly, all the recommendations to the Procurement Committee included the price escalation required by Trencon should the site handover date occur on

[10] The revised contract award value was calculated to account for the two items that had not been included in the IDC's approved cost estimate. See [15].

1 October 2012. In spite of the price escalation, Trencon's bid price was still the lowest.

[20] On 12 September 2012, the Procurement Committee considered the Tender Evaluation Report, the recommendations of Snow Consultants and the Support Services and carried out its own evaluation of the bids. To account for the two items not captured in the cost estimate, the Procurement Committee carried out the price evaluation based on the revised value of each bid, in accordance with the contractors' agreement in the second round of clarifications. In Trencon's bid price, the Procurement Committee also included the escalation costs if the site handover was to occur on 1 November 2012 and a possible extra cost for the supply of new sun screens. The Procurement Committee ultimately recommended Trencon subject to the same conditions as the Tender Evaluation Report, and the recommendations by Snow Consultants and the Support Services.

[21] The IDC's approved Delegation of Authority matrix required that any award above R50 000 000 be approved by Exco. Accordingly, on 14 September 2012, the Procurement Committee supplied Exco with a "board pack". It contained detailed reports of the first phase of the tender process. It also included the Tender Evaluation Report on the second phase, as well as the recommendations of Snow Consultants and the Support Services.

[22] On 19 September 2012, at a meeting convened for Exco to consider the award of the tender, Exco awarded the tender to Basil Read. It declared Trencon's bid non-responsive. This was because Exco found that, by adding the price escalation, Trencon failed to keep its price fixed for the 120 days of the tender evaluation period.

High Court

[23] Trencon challenged this award in the High Court. The Court found that the award of the tender to Basil Read was based on a material error of law and that

Basil Read's late proposal should not have been considered by the IDC.[11] The Court set aside the IDC's decision to award the tender to Basil Read.[12]

[24] The final issue before the Court was the appropriate remedy. It considered section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act[13] (PAJA). The Court accepted that a substitution order must be granted only in exceptional circumstances.[14]

[25] It found that from the moment the bids were submitted, Trencon's outweighed Basil Read's. Even in its response to the proposed delay of the site handover date, Trencon's price adjustment remained lower than Basil Read's price. Moreover, Snow Consultants and all the IDC committees recommended Trencon as the

---

[11] *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* [2013] ZAGPPHC 147 (High Court judgment) at paras 31-2 and 39.

[12] Id at para 44.

[13] 3 of 2000. Section 8(1) provides:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(1), *may grant any order* that is just and equitable, *including orders*—
>
> (a) directing the administrator—
>
> (i) to give reasons; or
>
> (ii) to act in the manner the court or tribunal requires;
>
> (b) prohibiting the administrator from acting in a particular manner;
>
> (c) setting aside the administrative action and—
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases—
>
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
>
> (bb) directing the administrator or any other party to the proceedings to pay compensation;
>
> (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
>
> (e) granting a temporary interdict or other temporary relief; or
>
> (f) as to costs." (Emphasis added.)

[14] High Court judgment above n 11 at para 46.

successful bidder.[15] The IDC was unable to present evidence justifying the refusal of the tender award to Trencon as the highest points earner. In addition, the IDC was unable to show circumstances that would have necessitated the process starting anew and therefore, the cancellation of the tender.[16] Given the urgency of the matter, the substantial amount of public funds involved and the unjustifiable prejudice that would be occasioned by further delay, the Court held that remittal would not be prudent.[17]

[26] The Court concluded that it was qualified to grant an order of substitution and that it would be just and equitable to do so. It therefore awarded the tender to Trencon.[18]

Supreme Court of Appeal

[27] The IDC sought and was granted leave to appeal against the High Court's judgment.[19] It conceded that Exco had committed an error of law in declaring that Trencon's bid was non-responsive. However, it persisted that it had been correct in

[15] Id at paras 49-50.

[16] Id at para 51.

[17] Id at paras 52-3.

[18] Id at para 55. The High Court order in relevant part reads:

> "1. The decision of the [IDC] to declare the tender submission of [Trencon] non-responsive and to award the tender . . . to [Basil Read] (the 'decision') is reviewed, set aside and substituted with an award of the tender to [Trencon] in terms of section 8(1)(c)(ii)(aa) of [PAJA] on the following terms:
>
> 1.1 The contract sum shall be in the amount of R110 633 822.28 (one hundred and ten million six hundred and thirty three thousand eight hundred and twenty two rand and twenty eight cents) plus VAT of R15 488 735.12 (fifteen million four hundred and eighty eight thousand seven hundred and thirty five rand and twelve cents) . . .;
>
> 1.2 The [IDC] shall negotiate in good faith the terms of any final contract and service level agreement with [Trencon];
>
> 1.3 [Trencon] shall have the right to submit claims in terms of clause 29.2.1 read with clause 32.12; and/or clause 32.5 of the JBCC Series 2000 Principal Building Agreement – Edition 4.1 Code 2101 March 2005 prepared by the Joint Building Contracts Committee Inc."

[19] *Industrial Development Corporation of South Africa Limited v Trencon Construction (Pty) Limited and Another* [2014] ZASCA 163; [2014] 4 All SA 561 (SCA) (Supreme Court of Appeal judgment).

accepting Basil Read's late proposal.[20] The IDC further contested the appropriateness of the remedy granted by the High Court.

[28] The Supreme Court of Appeal found that the High Court had overlooked the fact that the IDC was not obliged to award the tender to the lowest bidder or at all. Therefore, despite the fact that Trencon had the highest tender points, it still could not be a foregone conclusion that it would receive the tender. Furthermore, the Supreme Court of Appeal held that the High Court failed to balance the substitution remedy against separation of powers concerns.[21]

[29] Considering that over two years had elapsed since the tender was awarded, the Supreme Court of Appeal found additional difficulty in what it considered "unavoidable supervening circumstances such as price increases that have to be taken into account".[22]

[30] As a result, it concluded that the substitution order was inappropriate. The Supreme Court of Appeal remitted the matter, without conditions, to the IDC for reconsideration.[23]

Leave to Appeal

[31] This matter implicates a breach of the right to just administrative action as contained in section 33 of the Constitution.[24] PAJA is the legislation that gives effect to section 33 and the cause of action in this case requires the interpretation of exceptional circumstances that would warrant a substitution order as provided for in

[20] Id at para 11.

[21] Id at para 18.

[22] Id at para 19.

[23] Id at para 20.

[24] Section 33(1) provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

section 8(1)(c)(ii)(aa) of PAJA. As this Court held in *Bato Star*, "matters relating to the interpretation and application of PAJA will of course be constitutional matters".[25] Furthermore, there are prospects of success.

[32] This decision will seek to clarify the test for exceptional circumstances where a substitution order is sought. It is in the interests of justice that leave to appeal be granted.

Issues

[33] This case raises the following issues:

(1) What is the test that courts should apply in establishing whether there are exceptional circumstances justifying a substitution order under section 8(1)(c)(ii)(aa) of PAJA?

(2) Are there exceptional circumstances that justify a substitution order?

(3) Can an order of substitution be made where the tender validity period has expired?

(4) What is the standard for appellate court interference with a High Court order made under section 8(1) of PAJA?

(5) Should the Supreme Court of Appeal have interfered?

[25] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 25. (Footnote omitted.)

Also see *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) at para 16.

(1) Exceptional circumstances test

[34] Pursuant to administrative review under section 6 of PAJA[26] and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant "any order that is just and equitable".[27] In exceptional circumstances, section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.[28]

[35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution.

[36] Long before the advent of PAJA, courts were called upon to determine circumstances in which granting an order of substitution would be appropriate. Those courts almost invariably considered the notion of fairness as enunciated in *Livestock*[29] and the guidelines laid down in *Johannesburg City Council*.[30]

[37] In *Livestock*, the Court percipiently held that—

> "the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."[31]

[26] Section 6(1) provides:

> "Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

[27] See section 8(1) of PAJA above n 13.

[28] Id.

[29] *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) (*Livestock*).

[30] *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) (*Johannesburg City Council*).

[31] *Livestock* above n 29 at 349G.

[38] In *Johannesburg City Council*, the Court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts will depart from the usual course in two circumstances:

> "(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.
>
> (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."[32]

[39] On a plain interpretation of *Johannesburg City Council*, the factors under the exceptional circumstances enquiry – like foregone conclusion, bias or incompetence – are independent. That is, if any factor is established on its own, it would be sufficient to justify an order of substitution. Indeed, this interpretation is also supported by subsequent case law.[33]

[40] The Supreme Court of Appeal in *Gauteng Gambling Board* seems to have added another consideration, whether the court was in as good a position as the administrator to make the decision.[34] For this, it noted that the administrator is "best equipped by the variety of its composition, by experience, and its access to sources of

---

[32] *Johannesburg City Council* above n 30 at 76D-G.

[33] See generally *Vukani Gaming Free State (Pty) Ltd v Chairperson of the Free State Gambling and Racing Board and Others* [2010] ZAFSHC 33 at paras 53-4 and *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at para 109F.

[34] *Gauteng Gambling Board v Silver Star Development Limited and Others* 2005 (4) SA 67 (SCA) (*Gauteng Gambling Board*) at para 39, where the Court held that—

> "the court *a quo* was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter."

relevant information and expertise to make the right decision".[35] The Court also considered the broader notion of fairness in accordance with *Livestock*.[36] This notion seemed to colour the Court's analysis of whether, after the Court was satisfied that it was in as good a position as the administrator and a foregone conclusion was established, an order of substitution was the appropriate remedy.[37] In applying the notion, the Court's findings were also informed by how a party is prejudiced by delay and potential bias or the incompetence of an administrator if the matter were remitted.[38]

[41] It is instructive that cases applying section 8(1)(c)(ii)(aa) of PAJA have embraced a similar approach to those that ordered substitution under the common law. However, because the section does not provide guidelines on what exceptional circumstances entail, it is of great import that the test for exceptional circumstances be revisited.

[42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy.[39] Remittal is still almost always the prudent and proper course.

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.

---

[35] Id at para 29.

[36] Id at para 28. See also *Livestock* above n 29 at 349G.

[37] *Gauteng Gambling Board* above n 34 at paras 39 and 40.

[38] Id at para 40.

[39] See section 8(1) of PAJA above n 13.

[44] It is unsurprising that this Court in *Bato Star* accepted Professor Hoexter's account of judicial deference as—

> "a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."[40]

[45] Judicial deference, within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution. In *Allpay II*, Froneman J stated that—

> "[t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.
>
> . . .
>
> Hence, the answer to the separation-of-powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency".[41] (Footnote omitted.)

[40] *Bato Star* above n 25 at para 46. See Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 at 501-2.

[41] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 42 and 45.

[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. As already stated, earlier case law seemed to suggest that each factor in the exceptional circumstances enquiry may be sufficient on its own to justify substitution.[42] However, it is unclear from more recent case law whether these considerations are cumulative or discrete.[43]

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight.[44] The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was

[42] See [36] to [39].

[43] See *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2014] ZAWCHC 134; [2015] 1 All SA 100 (WCC) at paras 33-9; *Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another* [2014] ZAGPJHC 194 at para 25; *Nucon Roads and Civils (Pty) Ltd v MEC for Department of Public Works, Roads and Transport: N.W. Province and Others* [2014] ZANWHC 19 at paras 32, 41 and 44; and *Reizis NO v MEC for the Department of Sport, Arts, Culture and Recreation and Others* [2013] ZAFSHC 20 at paras 33-4.

[44] It should be emphasised that the exceptional circumstances enquiry only arises in the context of the appropriate remedy to be granted as per section 8(1) of PAJA. Thus, it is only after the unlawfulness of the award has been established pursuant to section 6 of PAJA that the remedy, and therefore the exceptional circumstances enquiry, arises.

situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.[45]

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter".[46] Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.

[50] The distinction between the considerations in as good a position and foregone conclusion seems opaque as they are interrelated and inter-dependent. However, there can never be a foregone conclusion unless a court is in as good a position as the administrator. The distinction can be understood as follows: even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. This is typical in instances of policy-laden and polycentric decisions.[47]

---

[45] See *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) and *Hutchinson v Grobler NO and Others* 1990 (2) SA 117 (T) at 157B-E.

[46] *Johannesburg City Council* above n 30 at 76D-H.

[47] See *Bato Star* above n 25 at para 48.

[51] A court must consider other relevant factors, including delay. Delay can cut both ways. In some instances, it may indicate the inappropriateness of a substitution order, especially where there is a drastic change of circumstances and a party is no longer in a position to meet the obligations arising from an order of substitution or where the needs of the administrator have fundamentally changed. In other instances, delay may weigh more towards granting an order of substitution. This may arise where a party is prepared to perform in terms of that order and has already suffered prejudice by reason of delay. In that instance, the delay occasioned by remittal may very well result in further prejudice to that party. Importantly, it may also negatively impact the public purse.

[52] What must be stressed is that delay occasioned by the litigation process should not easily clout a court's decision in reaching a just and equitable remedy. Sight must not be lost that litigation is a time-consuming process. More so, an appeal should ordinarily be decided on the facts that existed when the original decision was made.[48] Delay must be understood in the context of the facts that would have been laid in the court of first instance as that is the court that would have been tasked with deciding whether a substitution order constitutes a just and equitable remedy in the circumstances.

[53] There are important reasons for this approach. Where a matter is appealed, delay is inevitable. Thus assessing delay with particular reference to the time between the original decision and when the appeal is heard could encourage parties to appeal cases. This, they would do, with the hope that the time that has lapsed in the litigation process would be a basis for not granting a substitution order. Where a litigant wishes to raise delay on the basis of new evidence, that evidence must be adduced and

[48] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at para 35 where it was held:

> "In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards." (Footnote omitted.)

admitted in accordance with legal principles applicable to the introduction of new evidence on appeal.[49] Ultimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties.

[54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.

[55] In my view, this approach to the exceptional circumstances test accords with the flexibility embedded in the notion of what is just and equitable. It is, therefore, consonant with the Constitution while at the same time giving proper deference and consideration to an administrator.

(2) Are there exceptional circumstances in this case to justify a substitution order?

[56] The High Court held that the decision to declare Trencon's bid non-responsive and award the tender to Basil Read was unlawful. This finding was not appealed. The gravamen of the IDC's appeal was the High Court's remedy. Therefore, the issue squarely before this Court is whether the circumstances of this case are exceptional and warrant a substitution order.

(a) In as good a position

[57] This Court, as was the High Court, is in as good a position as the IDC to award the tender to Trencon. The material error of law occurred when the procurement process was in the stages of finalisation. The two-stage process of bidding and evaluation had been completed; the various committees of the IDC, as well as Snow Consultants and the Quantity Surveyors, had considered the bids and

[49] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 42-3.

undertaken all the technical components of the process.[50] At that point, the bids had been evaluated on price and empowerment points and the recommendation that Trencon be awarded the tender had been made to Exco. All that remained was for Exco to approve the Procurement Committee's recommendation.

[58] The IDC itself stated that Exco had fully considered Trencon's bid. This Court has the benefit of the record, with all the pertinent information and recommendations that would have been before Exco at its meeting on 19 September 2012. Furthermore, the IDC does not explain how its administrative expertise could come into play at this point or on what basis it could decide differently. It is on the basis of the technical and administrative recommendations and processes that had already been completed that this Court finds itself in as good a position as the IDC to decide whether to award the tender to Trencon.

(b) Foregone conclusion

[59] A finding that the IDC's decision is a foregone conclusion depends on whether there was only one proper outcome of the exercise of its discretion and remittal would serve no purpose. In other words, if the matter were to be remitted, the IDC would not have any discretion left to exercise. In my opinion, the award of the tender to Trencon is a foregone conclusion. It is common cause that Trencon was the highest points earner and that the IDC's Support Services; Procurement Committee; Quantity Surveyors; and principal agent, Snow Consultants, all recommended that it be awarded the tender. It is also common cause that, but for an error of law regarding Trencon's price escalation for the delayed site handover, Trencon's bid would not have been declared non-responsive.

[60] The Supreme Court of Appeal, despite finding that the IDC could not have lawfully awarded the tender to any other bidder, overturned the High Court's order.[51]

[50] See [6] to [22].

[51] Supreme Court of Appeal judgment above n 19 at paras 15 and 21.

This was on the basis that the IDC still had a discretion not to award the tender to the highest points earner or not to proceed with the tender at all. In this Court, the IDC persists with this argument. It also argues that Exco did not have an opportunity to fully evaluate the bids absent the error of law. For this reason, the IDC has challenged the finding of the Supreme Court of Appeal that the disqualification of Basil Read's bid in the High Court was irrelevant. It contends that without the disqualification, the IDC would have been found to have exercised its discretion in comparing the two bids against one another.

[61] There are three contentions made by the IDC that this Court must deal with. The first is that the IDC had a discretion not to award the tender to the highest points earner. The second is that the IDC did not have an opportunity to evaluate the bids absent the error of law. And the third is that the IDC had a discretion not to award the tender at all.

(i) Discretion not to award the tender to the highest points earner

[62] The IDC argued that it had a discretion not to award the tender to the highest points earner.[52] During oral argument, the IDC conceded, however, that this discretion is constrained by section 2(1)(f) of the Preferential Procurement Policy Framework Act[53] (Procurement Act) and clause F.3.11.3(d) of the Standard Conditions of Tender.[54] These clauses required the IDC to award the tender to the highest points earner unless there were "objective criteria" or "justifiable reasons" not to do so.

[52] The IDC's argument was based on its tender invitation which provided that "the IDC reserves the right not to accept the lowest tender".

[53] 5 of 2000. Section 2(1)(f) states that—

> "the contract must be awarded to the tenderer who scores the highest points, unless objective criteria . . . justify the award to another tenderer."

[54] Clause F.3.11.3(d) provides that the IDC is required to—

> "[r]ecommend the tenderer with the highest number of tender evaluation points for the award of the contract unless there are compelling and justifiable reasons not to do so."

[63] Throughout the evaluation process, a number of concerns regarding Trencon's bid were raised.[55] However, in this Court, the IDC did not contend that any of these concerns would have constituted objective criteria or justifiable reasons not to award the tender to Trencon.

[64] On the papers the concerns do not hold weight. First, the concern about the price escalation was based on a material error of law and should not have been considered by Exco. Second, Trencon accepted that it would absorb any price discrepancy on an item that it had allegedly under-quoted. This was deemed acceptable by the Quantity Surveyors and the Procurement Committee. Third, Trencon confirmed its unconditional acceptance of the revised contract award value. It was this award value that Trencon sought, and was granted, in the High Court. Lastly, the concern about the mispricing of sun screens because of Trencon's interpretation of the bill of quantities is misplaced. Even accounting for the additional price of new sun screens, Trencon's bid was still lower than all the other bids. Furthermore, I am satisfied that any dispute regarding the interpretation of the sun screens in the bill of quantities could be dealt with contractually under the Joint Building Contracts Committee Series 2000 Principal Building Agreement (JBCC Agreement).[56]

[65] Exco, at its approval meeting, discussed all the concerns that had been broached throughout the evaluation process.[57] Despite this discussion, the only reason

[55] The concerns raised were as follows: (a) the price escalation for the delayed site handover; (b) the price discrepancy on an item, GDK Sambesi Mesh, under-quoted by Trencon; (c) Trencon's conditional acceptance of the revised contract award value (to account for the reduction of the provisional sums of the photovoltaic panels and structural steel requirements in the bill of quantities); and (d) Trencon's misinterpretation of the bill of quantities to price for the supply of new sun screens rather than the repainting of the existing ones.

[56] The JBCC Agreement is a standard contractual document prepared by the Joint Building Contracts Committee Inc. The Agreement formed the basis of the IDC's tender contract as modified by the Contract Data.

[57] The IDC's answering affidavit in the High Court states at para 58:

> "Under the heading '*The committee raised the following concerns*' appear a number of items which . . . were questions posed by members of Exco and which were answered in the course of the debate. In fact what occurred is that at the meeting, questions were asked by the Exco members based on what is contained in the recommendation and these questions were

given by the IDC for refusing Trencon the award was the material error of law. If, after having considered all the concerns, the IDC found that there were further reasons – apart from the material error of law – justifying that Trencon be refused the tender, why would the IDC not have cited those reasons in its letter to Trencon explaining the refusal of the award? At close scrutiny, the argument on this score simply cannot stand. Since section 2(1)(f) of the Procurement Act is peremptory, in the absence of objective criteria, the IDC would not have been justified in not granting the award to Trencon. It was the highest points earner and following its consideration, Exco did not cite any other basis, barring the material of error of law, to have deviated from section 2(1)(f).

(ii) IDC did not have an opportunity to evaluate the bids

[66] The IDC also argues that, because of the material error of law, Exco did not have an opportunity to fully consider Trencon's bid. Based on the IDC's own affidavits in the High Court,[58] this argument is disingenuous. In response to allegations that the IDC had taken into account irrelevant considerations in reaching the decision to award the tender to Basil Read, the IDC proclaimed that "the decision of Exco was arrived at [by] taking into account the totality of the facts before Exco as reflected in its reasons and deliberations". The IDC was also explicit that "[t]he issues raised by Exco demonstrate that it applied its mind to issues which were relevant in relation to its decision [to award the tender]". Finally, it asserted in its affidavit that there is no evidence that Trencon's tender was "not properly evaluated". Remarkably, the IDC now argues that Exco had not had an opportunity to apply its mind to the bid.

---

answered by *inter alia* Augustine [the Manager of the Procurement Department] and Paulo Da Silva [the Building Management Specialist]."

[58] Both the answering affidavit and the supplementary affidavit were deposed to by the IDC's senior legal specialist. The IDC's Manager of the Procurement Department, the Sourcing Specialist for the Corporate Procurement Department, the Divisional Executive and General Counsel, the Company Secretary and the Internal Quantity Surveyor deposed to confirmatory affidavits for the answering affidavit. The IDC's Manager of the Procurement Department and its Divisional Executive and General Counsel deposed to confirmatory affidavits for the supplementary affidavit.

[67] Whether or not Basil Read's bid was valid is of no moment. I am in agreement with the Supreme Court of Appeal on this point. The main issue is whether, on the correct application of the law, the IDC was bound to award the tender to Trencon. The validity of any other bid, including that of Basil Read's, is irrelevant in that enquiry. Therefore, the argument that the IDC did not have an opportunity to evaluate the bids is misconceived.

(iii) IDC's discretion not to award the tender at all

[68] Lastly, the IDC argued that it had a discretion not to award the tender at all.[59] In oral argument, however, it conceded that this discretion was constrained by regulation 8(4) of the Procurement Framework Regulations, 2011[60] (Procurement Regulations). Under this provision—

> "[a]n organ of state, may, *prior* to the award of a tender, cancel a tender if—
>
> (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
>
> (b) funds are no longer available to cover the total envisaged expenditure; or
>
> (c) no acceptable tenders are received." (Emphasis added.)

This concession is correctly made. The IDC could only cancel the tender if one of the grounds stipulated in regulation 8(4) existed.

---

[59] The IDC's argument was based on the following provisions:

Clause F.1.5 of the Standard Conditions of Tender provides that the IDC—

> "may accept or reject any variation, deviation, tender offer, or alternative tender offer, and may cancel the tender process and reject all tender offers at any time before the formation of the contract."

The RFP rules and conditions, in relevant part, provide:

> "2.6 The IDC does not bind itself to accept any of the applications, nor to continue with the tender process;
>
> . . .
>
> 2.15.2 The IDC reserves the right to (a) accept or reject any application; and/or (b) cancel the RFP process and reject all applications."

[60] Published in *Government Gazette* 34350 of 8 June 2011, issued in terms of section 5 of the Procurement Act.

[69] Evidently, none of these grounds were applicable. With regard to regulations 8(4)(a) and (b), there is no doubt in my mind that the IDC intended to continue with the tender and that it had funds available to do so. The fact that the IDC ultimately awarded the tender to Basil Read provides sufficient credence for this. Further, there is no basis for the IDC to argue that no acceptable tenders were received.

[70] The IDC's argument cannot prevail. Almost all tender invitations issued by organs of state contain a clause giving the organ of state a discretion to cancel the tender or not to award it at all. If, when arguing that remittal is the proper remedy, an organ of state is able to raise the fact that it has this discretion without more, a court would virtually never have the power to grant a remedy of substitution. The organ of state would always be able to argue that it still had a discretion not to award the tender, thereby constraining the power of the courts to grant just and equitable remedies. It is a fundamental principle of the rule of law that organs of state, like the IDC, can only exercise power that has been conferred onto them. They cannot, on their own volition, confer power unto themselves that was never there.[61]

[71] In addition, according to the regulation, the IDC could only cancel "prior to the award of a tender". The IDC awarded the tender to Basil Read. Thus, it cannot, after awarding the tender, claim that it still possessed the power to cancel. This belated attempt must fail. The Supreme Court of Appeal erred in conceiving that the contractual power not to award the tender at all could in these circumstances have been lawfully exercised.[62] In any event, there was no suggestion by the IDC that it did not intend to continue with the tender. All be told, the award of the tender to Trencon is a foregone conclusion.

---

[61] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 56-8.

[62] See for example *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135; 2003 (2) SA 460 (SCA) at paras 23-5 where Cameron JA held that in the circumstances of that case, procedural fairness demanded that the procurement committee, in reconsidering tenders, afford compliant tenderers an opportunity to make representations on any factor that might lead the committee not to award the tender at all.

(c) Delay and supervening circumstances

[72] The Supreme Court of Appeal found that the amount of time that had passed was a relevant factor in revoking the High Court's substitution order, particularly because prices may have increased. On this point, the Supreme Court of Appeal erred.

[73] First, the Supreme Court of Appeal departed from the usual appeal process when it considered the issue of delay and supervening circumstances. Rather than determining the appeal on the facts that were before the court of first instance, the Supreme Court of Appeal determined the matter on the basis of the delay incurred as a result of the appeal itself. And although the IDC alleged that the facts and circumstances had changed because of the delay, it did not seek to introduce new evidence to substantiate those claims. The Supreme Court of Appeal did not take cognisance of the JBCC Agreement, and its application to price increases.

[74] Furthermore, the Supreme Court of Appeal failed to take into account the impact on the public purse of the further delay occasioned by remittal. Procurement disputes, especially those involving organs of state, must be resolved expediently. Even if price and supervening circumstances were factors which the Supreme Court of Appeal was competent to take into account, considerations of fairness still point towards the granting of an order of substitution.

[75] Second, the Supreme Court of Appeal did not value the distinction between public and private law. The decision to award a tender is a matter of public law. It is governed by the Constitution, the Public Finance Management Act,[63] the Procurement Act and the Procurement Regulations. Although there may be interplay between public and private law, the distinction must not be collapsed. Ordinarily, an issue like contract price adjustment that is subject to negotiation after the procurement process

[63] 1 of 1999.

has taken place, ought to fall squarely within the domain of private law. It is subject to ordinary contractual negotiations between enterprising parties. Importantly, the parties agreed during oral argument that this distinction is applicable.

[76] I am satisfied that the JBCC Agreement adequately provides for price adjustments. Even the IDC, in disputing Trencon's price escalation during the tender period, stated in its notice of application for leave to appeal to the Supreme Court of Appeal that "[i]n the post-award, Trencon could . . . claim for expenses or loss on account of the delay in handing over the contract site in terms of clause 29.2.1 read with clause 32.12 of the JBCC". It is not clear why, then, this option is not viable to account for the delay in these circumstances.

[77] Since both parties agree that the negotiations after the award of the tender would be subject to private law, I am inclined to accept that the final contract price will be a matter of contractual negotiations between them. The Supreme Court of Appeal erred in revoking the High Court's order of substitution on this ground.

(d) Other considerations

[78] The fact that the IDC acted in good faith when it was moved by a material error of law should be a strong consideration for the Court when considering whether to grant a substitution order. However, viewed through the lenses of fairness to both parties and in the context of the findings in relation to the other relevant factors, it would be unfair for this Court to remit the matter to the IDC.

(3) Expiration of the tender validity period

[79] The tender validity period has also been raised in regard to the appropriateness of a substitution order. The IDC relies on two cases – *Telkom* and *Joubert* – to contend that substitution is never appropriate where the tender validity period has

expired.[64] In both cases relied upon, the respective administrative bodies had failed to award tenders within the 120-day validity period. A substitution order therefore, required the period to be extended after it had expired.

[80] This case is distinguishable from *Telkom* and *Joubert*. The IDC awarded the tender within the validity period. In those cases, there was no award. Consequently, a substitution order here would not require the tender validity period to be extended because this period is held in abeyance pending the finalisation of the matter.

[81] This must be so. Once an award has been challenged, the litigation process will inevitably run longer than the 120-day tender validity period. If the 120-day period, in itself, were to be treated as a bar to an order of substitution, there may be no incentive for an aggrieved party like Trencon to lodge review proceedings. This is because its desired remedy – that of substitution – would not be available to it. This approach would not accord with the objectives of PAJA as the tender validity period would, in most instances, be deemed to have expired. Courts would almost always be deprived of their power to order substitution.

(4) Standard of appellate courts' interference

[82] Regardless of the merits, Trencon argues that the Supreme Court of Appeal's order should be set aside on the basis that it had no power to interfere with the High Court's order. Trencon seems to find a gripping ground for this argument in the nature of the discretion conferred by section 8(1) of PAJA, which Trencon claims to be a discretion in the "true" sense.[65]

[64] *Telkom SA Limited v Merid Training (Pty) Limited; Bihati Solutions (Pty) Limited v Telkom SA Limited* [2011] ZAGPHC 1 (*Telkom*) and *Joubert Galpin Searle Inc v Road Accident Fund* 2014 (4) SA 148 (ECP) (*Joubert*).

[65] The two types of discretion are often referred to as a discretion in the strict/narrow/true sense and a discretion in the broad/wide/loose sense. For consistency, I will refer to these two types of discretion as a discretion in the true sense and a discretion in the loose sense. The distinction between the two will be expanded upon below.

[83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law.[66] That distinction is now deeply-rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.

[84] In *Media Workers Association*, the Court defined a discretion in the true sense:

> "The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."[67]

[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs,[68] damages[69] and in the

[66] The distinction developed with reference to two cases, *Mahomed v Kazi's Agencies (Pty) Limited and Others* 1949 (1) SA 1162 (N) at 1168-9 (*Mahomed*) and *Ex parte Neethling and Others* 1951 (4) SA 331 (A) (*Ex parte Neethling*). In *Mahomed*, the Natal High Court held that there may be cases where an appellate court is in as good a position as the court of first instance and thus may interfere where the appellate court considers its conclusion to be more appropriate. In *Ex parte Neethling*, the Appellate Division, without referencing *Mahomed*, took the view that there were classes of decisions in which an appellate court could not simply interfere because it would have reached a different outcome. The Court considered cases regarding decisions on the question of costs, on a postponement and on an amendment of pleadings in the lower court. See page 335 where it established that in such cases, an appellate court could only interfere where—

> "the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons."

[67] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited* 1992 (4) SA 791 (A) (*Media Workers Association*) at 800E.

[68] *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (*Giddey*) at para 19.

[69] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 93-4.

award of a remedy in terms of section 35 of the Restitution of Land Rights Act.[70] It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense—

> "means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."[71]

[87] This Court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*.[72] An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by

---

[70] 22 of 1994. See *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) (*Florence*) at para 111.

[71] *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (SCA) (*Knox*) at 361I. In that case, the subject of the discretion exercised was whether or not to grant an interim interdict. The Court at 362D-E remarked as follows:

> "If a court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict, and that a court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice. I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this court seem to refute it."

[72] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 47; *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 92; *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (4) BCLR 675 (CC) at para 26; and *Giddey* above n 68.

See also *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA (31) (T); [1989] 4 All SA 228 (T) where the Full Court commented on the distinguishing feature of the distinction to be whether the appellate court "is in as good a position as the court of first instance" to exercise the relevant discretion. This interpretation, however, has not been rigorously applied in case law.

broader policy considerations.[73] Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—

> "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[74] (Footnote omitted.)

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] In *Florence*, Moseneke DCJ stated:

> "Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."[75]

[90] This applies with equal force to the wide decision-making powers available to the courts under section 8(1) of PAJA.[76] It is perspicuous that there are a wide range of options available to a court exercising its discretion under section 8(1), as it lists a

[73] See *Media Workers Association* above n 67 at 800H.

[74] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[75] *Florence* above n 70 at para 113.

[76] See section 8(1) of PAJA above n 13.

number of just and equitable remedies that a court may grant. Significantly, it does not seek to confine a court to the listed remedies. It provides that a court may award any order that is just and equitable, *including, but not limited to* the listed remedies. It follows that any of these remedies is equally permissible and an appellate court could legitimately favour a different remedy than that preferred by a lower court. But that alone does not permit it to interfere with the lower court's discretion.

[91] A court may, in exceptional circumstances, grant an order substituting or varying the administrative action or direct the payment of compensation.[77] This may appear to be intimating a discretion in the loose sense. That would only be the case if a court, upon finding exceptional circumstances, were enjoined to grant either an order of substitution, variance or correction or to order the payment of compensation. However, the section operates differently. Even where a court finds exceptional circumstances, it may still grant any other order that is just and equitable.

[92] In this case when the High Court granted a substitution order, it exercised a discretion in the true sense.

(5) Should the Supreme Court of Appeal have interfered?

[93] The Supreme Court of Appeal intervened on the basis that the High Court had an incorrect appreciation of the facts and was moved by a wrong principle of law. Specifically, that the High Court had not considered the discretion of the IDC not to award the tender at all or not to award it to the highest points earner and had not correctly applied the separation of powers doctrine. The Supreme Court of Appeal determined that the IDC is the body vested with the power to award the tender and the High Court should have exercised more judicial deference when weighing exceptional circumstances for substitution.

[77] Id.

[94] However, the separation of powers is adequately provided for within the exceptional circumstances test itself.[78] Once a court has properly applied the test for exceptional circumstances and it makes a just and equitable order on the basis of that enquiry, the court has acted in accordance with the doctrine of separation of powers.

[95] This is precisely what the High Court did. It weighed the relevant factors and balanced the need to grant an effective remedy against the need to defer to the administrator and found, upon the existence of exceptional circumstances, that a substitution order was the appropriate remedy.

[96] In overturning the High Court's order, the Supreme Court of Appeal took a different view on the exceptional circumstances enquiry. It should have had regard to the fact that Exco had fully considered Trencon's bid. Moreover, the Supreme Court of Appeal interfered on the basis of supervening circumstances like price, issues that sit comfortably outside the realm of public law. It should not have concerned itself with these issues without further evidence having been properly tendered and admitted on appeal.

[97] Therefore, upon proper consideration of the facts and the applicable law, the Supreme Court of Appeal ought not to have interfered with the High Court's decision.

Remedy

[98] The unique circumstances of this case present a good example, in administrative law, of an instance where the Court is not usurping the functions of the administrative body by making a substitution order. I am satisfied that this Court is justified in making a substitution order and that this constitutes a just and equitable remedy in the circumstances.

[78] See [46] to [50].

[99] Trencon does not seek an increase of the contract sum reflected in paragraph 1.1 of the order of the High Court.[79] However, the IDC challenged the enforceability of the obligation, captured in paragraph 1.2 of the order, to "negotiate in good faith" as there is no objective standard against which compliance can be assessed. I need not deal with this contention as the parties are in agreement that, after the award of the tender, contractual negotiations – implicating paragraphs 1.2 and 1.3 of the order – are a matter of private law. Therefore, in the event of a breakdown in negotiations, they are content with resorting to private law for recourse.

Costs

[100] Given Trencon's success, costs must follow the result, including costs of two counsel.

Order

[101] In the circumstances, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The order of the North Gauteng High Court, Pretoria is reinstated save for the deletion of paragraphs 1.2 and 1.3.
5. The respondent is ordered to pay the applicant's costs, including the costs of two counsel, in the Supreme Court of Appeal and in this Court.

[79] See High Court order above n 18.

For the Applicant:	D Unterhalter SC, M du Plessis and S Pudifin-Jones instructed by Joubert Galpin Searle Inc.
For the Respondent:	GJ Marcus SC, M Sikhakhane and C Motsepe instructed by Edward Nathan Sonnenbergs Inc.