IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 198/2014

In the matter between

TRENCON CONSTRUCTION (PTY) LTD Applicant

and

THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED First Respondent

BASIL READ (PTY) LTD Second Respondent

TRENCON'S WRITTEN SUBMISSIONS

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INTRODUCTION

1 This application for leave to appeal raises squarely three questions frequently confronted by courts tasked with crafting a just and equitable remedy in tender review applications under s 8(1) of the Promotion of Administrative Justice Act[1] ("**PAJA**") in circumstances where the tender process is found to be irregular, namely whether:

1.1 the fact that the tender validity period has expired means that an order of substitution of the award to the successful challenger (rather than remitting it back to the decision maker to be commenced *de novo*) is incompetent?

1.2 an order for substitution amounts to a breach of the separation of powers in circumstances where the court concludes that the decision-maker could not lawfully have awarded the tender to another bidder? and

1.3 the fact that a period of time has elapsed since the tender was awarded and circumstances have changed renders an order for substitution incompetent?

2 It also again raises the question of under what circumstances an appeal court may legitimately interfere with a high court's exercise of the remedial discretion which is granted to courts under s 172 of the Constitution and s 8 of PAJA, and in particular whether an appeal court has power to do so when it does not find that the discretionary power *a quo* was exercised "*capriciously, was moved by a wrong principle of law or an incorrect application of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons*."[2]

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[1] Act 3 of 2000.
[2] Ferris and Another v Firstrand Bank Limited and Another 2014 (3) SA 39 (CC) at para 28.

3 In this application, the Applicant, Trencon Construction (Pty) Ltd ("**Trencon**") applies for leave to appeal against the order and judgment of the Supreme Court of Appeal ("**SCA**")[3] handed down on 1 October 2014 in which the SCA partially upheld the appeal of the First Respondent, The Industrial Development Corporation of South Africa Limited ("**IDC**") against the order of the North Gauteng High Court ("**High Court**") handed down on 3 June 2013.[4]

4 The High Court (per Mothle J) had decided Trencon's review application in Trencon's favour and set aside the decision of the IDC to award the impugned tender to the Second Respondent, Basil Read (Pty) Ltd ("**Basil Read**"). Following a lengthy and well-reasoned exposition on the appropriate remedy, instead of remitting the award to the decision-maker for reconsideration, Mothle J held that there were exceptional circumstances present as the award of the tender to Trencon was a foregone conclusion. The learned judge accordingly made an order for substitution in terms of s 8(1)(c)(ii)(aa) of PAJA.[5] In doing so, Mothle J was influenced by the fact that:

4.1 It was common cause that Trencon's bid scored the highest points and that Trencon was recommended for award of the tender by an independent consultant, the support services of the IDC as well as the procurement committee of the IDC ("**PC**");[6]

4.2 The IDC was unable to present any evidence on the record why the tender should not be awarded to Trencon;[7]

4.3 The IDC was unable to show any reason why it would be necessary to cancel the

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[3] SCA judgment, Record p. 925.
[4] High Court judgment, Record p. 818.
[5] High Court judgment, Order, Record, p. 840.
[6] High Court judgment, para 50, Record, p. 839.
[7] High Court judgment, para 51, Record, p. 839.

contract and order that the process start *de novo*;[8]

4.4 The High Court was in as good a position as the IDC to take the decision;[9] and

4.5 It was not in any party's interest to delay the implementation of the project.[10]

5 The IDC appealed the High Court's judgment in respect of both the merits of the review[11] and the question whether substitution was the appropriate remedy.[12]

6 On appeal, the IDC conceded that its decision to disqualify Trencon's bid was based on a material error of law (thereby abandoning its appeal on the merits),[13] and the SCA accepted that this concession was proper.[14] The appeal on the merits accordingly failed.

7 In respect of remedy, the IDC's appeal was successful and the SCA upheld the appeal against the order of substitution, replacing it with an order remitting the impugned decision back to the IDC. In doing so, the SCA (incorrectly it is submitted) held that the High Court erred in finding that the award of the tender was a foregone conclusion,[15] notwithstanding the SCA's own conclusion that "**Exco could not have lawfully awarder the tender to another bidder**."[16] The SCA also (again incorrectly it is submitted) took into account that over two years had elapsed since the beginning of the tender process as a factor mitigating against an order of substitution, and declined to impose any conditions for the remittal in the light of the IDC's purported discretion to

[8] High Court judgment, para 51, Record, vol 9, p. 839.
[9] High Court judgment, para 53, Record, vol 9, p. 840.
[10] High Court judgment, para 52, Record, vol 9, p. 840.
[11] Notice of application for leave to appeal, para 1 Record, vol 9, p. 846.
[12] Notice of application for leave to appeal, para 23 Record, vol 9, p. 850.
[13] SCA judgment, para 11, Record, vol 10, p. 931.
[14] SCA judgment, para 14, Record, vol 10, p. 932.
[15] SCA judgment, para 18, Record, vol 10, p. 934.
[16] SCA judgment, para 15, Record, vol 10, p. 932

forego the tender process should it so wish.[17]

8 The effect of the SCA's order for remittal is that the tender process will be discontinued and must effectively commence *de novo,* if at all.[18] Our courts have made it clear that once the tender validity period of an impugned tender has expired (including through the award of a tender), the tender process is at an end.[19] In the premises, the impugned tender expired on the date that the IDC made the unlawful award to Basil Read and there is effectively no valid tender offer for the IDC to consider. Upon remittal, the IDC has no option but to cancel the tender and to commence afresh with a new tender process or to abandon the tender process entirely.

9 The SCA's order, if it is allowed to stand, would have the effect that businesses that tender for work and win it legitimately but are unlawfully denied an award at the last stage would be denied just and equitable relief from a court on review and, at best, could hope for an award setting aside the tender and forcing them to re-tender afresh for the same work. On the other hand, an organ of state could simply ignore the constitutional guidelines for valid public procurement and the Preferential Procurement Policy Framework Act[20] ("**PPPFA**") and award the tender to whomever it wanted without real consequence since, if the tender is challenged, at worst, the tender would be set aside and remitted back to be discontinued or commenced afresh.[21]

10 If the SCA's decision is left as the yardstick by which matters of this kind are adjudicated, this will:

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[17] SCA judgment, para 20 Record, vol 10, p. 935.
[18] Founding Affidavit in support of application for leave to appeal, para 11.5, Record, vol 10, p. 874.
[19] See Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited [2011] ZAGPPHC 1 (7 January 2011) and Joubert Galpin Searle Inc and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP) at para [70].
[20] Act 5 of 2000.
[21] Founding Affidavit in support of application for leave to appeal, para 11.7, Record, vol 10, p. 875.

10.1 disincentivise aggrieved unsuccessful tenderers from challenging the invalid award of procurement contracts; and

10.2 open the door for invalid, unlawful and even corrupt tender processes going unchallenged.

11 The effect of the SCA judgment is contrary to the constitutional principles surrounding the public procurement of goods and warrants interference by this Court.

CONSTITUTIONAL ISSUES FOR DETERMINATION

12 In this Court, Trencon seeks an order setting aside the order of the SCA and replacing it with an order dismissing the IDC's appeal to the SCA with costs,[22] thereby allowing the order of the High Court (including the substitution order) to stand.

13 This application is opposed by the IDC. Basil Read did not oppose the matter in the High Court or the SCA. Nor does it oppose Trencon's application before this court.

14 In considering this application, this Court will be faced with the following issues:

14.1 Can the IDC rely on a clause which confers on it the discretion not to award a tender that (all other factors indicate) should be awarded to Trencon to argue that substitution is not an appropriate remedy?[23] Put differently, does such a clause – common throughout public tenders – mean that an award of the

[22] Applicant's notice of application for leave to appeal, Record, vol 10, p. 867.
[23] SCA judgment, para 20, Record, vol 10, p. 935.

tender is not a foregone conclusion and therefore that substitution cannot be awarded?

14.2 Did the High Court fail to balance the effect of making an order of substitution against the principle of separation of powers?[24]

14.3 Can a court point to changed circumstances (e.g. prices are different now compared to two years ago when bids for the tender were submitted) as posing practical challenges and accordingly be a basis for not awarding substitution bearing in mind that no facts to this effect were placed before the SCA? [25]

14.4 Given that the tender validity periods had expired by the time the review and appeal process had been completed, is remittal a just and equitable remedy, as a remittal in these circumstances requires that the tender must be discontinued (effectively cancelled)?[26]

15 Both Trencon and the IDC accept that the application raises constitutional issues.[27] The adjudication of the tender process impacts the right to administrative justice in terms of s 33 of the Constitution and PAJA and triggers the need for compliance under s 217 of the Constitution so that procurement processes by organs of state such as the IDC ensure that cost-effectiveness, fairness and competitiveness are met in the provision of public services.

[24] SCA judgment, para 18, Record, vol 10, p. 934.
[25] SCA judgment, para 19, Record, p. 935.
[26] Founding affidavit in support of application for leave to appeal, paras 12.1-12.4, Record, vol 10, p. 876.
[27] Founding affidavit in support of application for leave to appeal, para 13, Record, p. 876; First respondent's answering affidavit, para 2.11.1, Record, vol 10, p. 943.

16 In addition, this matter raises constitutional questions concerning the appropriate exercise of discretion by the courts in awarding a just and equitable remedy once it has been found that a tender process was unlawful for failing to comply with the requirements of administrative fairness under PAJA – consistent with this Court's decision in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)**[28] ("**AllPay merits**"). It also concerns the question as to when the exercise of that discretion will be interfered with on appeal.

17 In summary, Trencon's submissions are that the order of the SCA was not just and equitable in that:

17.1 The SCA found that Trencon scored the highest number of tender evaluation points and that there were no objective reasons (in terms of s 2(f) of the PPPFA) or justifiable reasons (in terms of the Supply Chain Management Policy of the IDC) for the award of the tender not being made to Trencon.[29] The IDC admitted that Trencon was the cheapest bidder and had the highest points.[30]

17.2 The only reason which had been advanced by the IDC for the non-award of the Tender to Trencon was based on an error of law which the IDC belatedly conceded.[31]

17.3 Despite the aforegoing, the SCA held that the award of the tender to Trencon was not a foregone conclusion because the tender document contained a term which

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[28] 2014 (4) SA 179 (CC).
[29] SCA judgment, paras 13-15, Record, vol 10, pp. 932-933.
[30] First Respondent's answering affidavit, para 154, Record, vol 6, p. 600.
[31] SCA judgment, paras 14, Record, vol 10, pp. 932-933.

did not bind the IDC to award the tender to the lowest bidder or at all.[32] As this Court is aware, this is a standard term found in most if not all public tender documents – with the result that the SCA's decision will impact deleteriously on public tenders where such a term will be relied on formalistically by organs of state like the IDC to resist substitution orders in cases where that would otherwise substantively be the most constitutionally appropriate remedy.

17.4 Furthermore, if the judgment is allowed to stand it would mean that an order of substitution would not be available to disgruntled tenderers who should – on the objective facts – have been awarded a tender but for some administrative error by the organ of state.

17.5 The SCA supported its decision in part on the basis that an order of remittal is almost always the preferred route.[33] Whilst this may often be so, it is not always the case (for instance where all tender offers had been evaluated and adjudicated but the organ of state had made an error in the final award, as in this instance). Tender offers have validity periods and these have long since expired by the time a court makes an order in review proceedings. Once the tender validity period expires, the tender process is at an end, and an order of remittal in these instances means that the tender process will invariably be discontinued (since there is no valid tender offer for the organ of state to consider). A remittal in the circumstances deprives Trencon of a just and equitable remedy.

17.6 The IDC's main argument why an order of substitution was not appropriate was based on the fact that it had no obligation to award the tender to the lowest bidder

[32] SCA judgment para 18, Record, vol 10, p. 934.
[33] SCA judgment para 17, Record, vol 10, p. 934.

or at all.[34] Whilst it is correct that it does not have to award the tender to the lowest bidder, it must award the tender to the tenderer scoring the highest number of points (in this case Trencon). The IDC advanced no other reason why substitution was inappropriate: the High Court found that there was no "***evidence on the record***" why the tender should not be awarded to Trencon;[35] and the SCA found that "***Exco could not have lawfully awarded the tender to another bidder***".[36]

17.7 It bears emphasis that at no stage prior to the High Court's judgment did the IDC intimate that it might not proceed with the works. On the contrary, the IDC:

17.71 awarded the tender to Basil Read (unlawfully);

17.71 continued to seek an award of the tender to Basil Read before the High Court;[37]

17.71 brought an application for leave to appeal before the High Court asking that Trencon's review application be dismissed, no doubt in order to enable it to allow Basil Read to proceed with the works.

17.8 It was only in the IDC's heads of argument in the SCA, filed shortly before the hearing of its appeal, that the IDC, for the first time, conceded that the Executive Management Committee of the IDC ("**Exco**") had made an error of law in not awarding the tender to Trencon.[38]

17.9 What followed was a complete *volte face* on the part of the IDC as regards the

[34] SCA judgment para 18, Record vol 10, p. 934.
[35] High Court judgment para 51, Record, vol 9, p. 839.
[36] SCA judgment, para 15, Record, vol 10, p. 933.
[37] First Respondent's Answering Affidavit, para 156, Record, vol 6, p. 600.
[38] SCA judgment, para 11, Record vol 10, p. 931.

nature of the relief that it sought: Upon making the concession that it had made an error of law in not awarding the tender to Trencon, it now argued, not for relief that would enable it to proceed with the works with Basil Read as its contractor, but that the High Court had erred in not referring the matter back to it for reconsideration because it had a discretion whether or not to proceed with it at all.

18 In what follows, we set out:

18.1 the background facts to this application;

18.2 the relevant constitutional provisions;

18.3 the correct approach to the remedy of substitution;

18.4 the "red herring" – namely the validity or otherwise of Basil Read's bid; and

18.5 the conclusion.

BACKGROUND FACTS

19 The parties have filed an agreed statement of facts setting out the facts that are common cause in this application and we refer the Court to this statement of facts.[39] In these submissions, we accordingly set out only the most salient facts:

19.1 In 2011, Exco took a decision to upgrade the head-office building of the IDC in Sandton, Johannesburg ("**the project**") and on 18 May 2012, the IDC invited prospective building contractors to submit proposals ("**RFPs**") to prequalify for the project.[40]

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[39] Statement of Agreed facts, Record,vol 10, p .974.
[40] Founding Affidavit, Record, vol 1, p. 18.

19.2 The tender process was conducted in two parts:

19.21 The first stage involved pre-qualifying prospective building contractors based on, *inter alia* their technical ability, management experience, personnel capabilities and financial position. Building contractors were required to submit their RFPs by a closing date, being Monday 4 June 2012 at 12:00 noon. Only qualifying contractors would be eligible to participate in the second stage;[41]

19.21 The second stage involved shortlisted contractors submitting competitive tender submissions on which they were to be evaluated only on price and preferences. An award of the Tender would be made at the end of this stage.[42]

19.3 On 4 July 2012, the PC concluded the first stage and approved the shortlisting of seven contractors to participate in the second stage.[43]

19.4 Four contractors submitted bids for the award of the tender, namely: Trencon, Basil Read, Murray and Roberts Construction (Pty) Ltd; and GVK-Siyazama Building Construction (Pty) Ltd.

19.5 The second phase commenced on 12 July 2012 and involved the bids of tenderers being evaluated on the basis of price and BBBEE points, in terms of the PPPFA, and was conducted in a staggered process by the IDC's bid evaluation committee ("**the BEC**"), the procurement department, the PC and finally Exco. These committees were assisted in the process by an independent firm of experts, Snow Consultants Incorporated ("**Snow**").

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[41] Founding Affidavit para 8.1, Record vol 1, p. 19.
[42] Founding Affidavit para 8.1, Record vol 1, p. 19.
[43] Founding Affidavit para 17, Record vol 1, p. 22.

20 Trencon submitted the lowest of the bid prices and was allocated the highest number of points for price and BBEE. Following a compete and comprehensive evaluation, adjudication and comparison of the bids of the qualifying tenders, Snow,[44] the BEC, the procurement department of the IDC[45] and the PC[46] all recommended Trencon as the successful tenderer.

21 Notwithstanding these recommendations, when Exco met to consider the award of the tender on 19 September 2012, it did not award the tender to Trencon. Rather, it rejected Trencon's bid, purportedly on the ground that it was non-responsive, and decided to award the tender to Basil Read (the next highest points scorer after Trencon).[47] This decision formed the subject of the High Court review application.

22 Although Basil Read did not oppose the relief sought, the IDC did on the basis that it wanted Basil Read and not Trencon to proceed with the works,[48] notwithstanding that:

22.1 Basil Read's price was approximately R3 million higher than that of Trencon; and

22.2 it was common cause that Trencon's price was the lowest and it had scored more preferential procurement points than Basil Read or any other tenderer.

23 It is common cause between the parties (including the IDC) that the IDC's rejection of Trencon's bid was without foundation and constituted a material error of law.[49] The rejection of Trencon's tender violated:

23.1 section 2(f) of the PPPFA which provides that "***a contract must be awarded to***

[44] Letter from Snow Consultants Inc, Record vol 2, p. 229.
[45] Procurement Committee Submission, Record vol 2, p. 232.
[46] Unredacted Submission by Procurement Committee to EXCO, Record, vol 5, p. 508.
[47] [Redacted] minutes of the extraordinary Exco (Policy) dated 19 September 2012, Record, vol 3, p. 247.
[48] First Respondent's Answering Affidavit, Record vol 6, p 563.
[49] High Court judgment paras 27-32, Record vol 9, pp 829-832.

the tenderer who scores the highest points, unless objective criteria… justify the award to another tenderer"; and

23.2 clause F.3.11.3(d) of the Standard Conditions of Tender ("**SCT**") applicable to the tender which enjoined the IDC to "***recommend the tenderer with the highest number of evaluation points for the award of the contract, unless there are justifiable reasons not to do so***".

24 Both the High Court[50] and SCA[51] accepted that the rejection of Trencon's tender by the IDC was a material error of law and held that there were no "***objective criteria***" or "***justifiable reasons***" for the award of the tender to another tenderer.

25 The High Court and SCA, however, did not agree on the appropriate relief to be granted. The High Court found that there were "***exceptional circumstances***" which justified an order for substitution of the award to Trencon in terms of s 8(1)(c)(ii)(aa) of PAJA.[52] The SCA rejected this finding and ordered a remittal of the decision back to the IDC,[53] the practical effect of which (as set out above) is that the tender must commence *de novo* if at all.

The respective findings of the High Court and SCA

26 One of the issues which confronts this Court is whether the SCA was justified in interfering with the High Court's discretion in regard to the issue of remedy. For this

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[50] High Court judgment para 51, Record, vol 9, p. 839.

[51] SCA judgment, paras 14-15, Record, vol 10, p. 933.

[15] Apart from this failed reason, there are no apparent objective criteria or compelling reasons justifying Exco's decision that Trencon's bid was non-responsive and invalid. To my mind, once it is accepted that Exco erroneously excluded Trencon from the tender process and that its decision therefor constitutes a reviewable error, as was conceded, it must follow that Exco could not have lawfully awarded the tender to another bidder. Any attempt to do so would, of necessity, have resulted in another reviewable error. Whether or not Basil Read's late RFP was responsive is wholly irrelevant and cannot sustain the appeal."

[52] High Court judgment, para 46, Record vol 9, p. 837.

[53] SCA judgment, para 20, Record vol 10, p. 935.

reason, it is relevant to set out in these submissions the respective findings of the High Court and SCA regarding the issue of substitution.

27 The High Court held:

"SUBSTITUTION

45. Trencon submits that if I find that the decision of the executive committee of the IDC should be reviewed and set aside I should then award the tender to it. This is provided for in terms of Section 8 of PAJA. IDC on the other hand submits that in the event I find that its decision should be reviewed and set aside, I should cancel the tender and order that the process of tendering should start de novo.

46. It is trite that the general rule in review proceedings is that a Court would, in the event it reviews and sets aside an administrative decision; remit it to the decision-maker for reconsideration, in some instances, subject to conditions. The provisions of Section 8(1)(c)(ii)(aa) of PAJA that the Court, instead of remitting the decision, may itself decide, should only occur in exceptional circumstances. See Gauteng Gambling Board v Silver Star Development Limited 2005 (4) SA 67 (SCA). Are there exceptional circumstances in this case?

47. The underlying test to be applied by the Court in terms of its departure from the general practice of remitting the matter back to the administrator, has its roots in the common law principles stated in the seminal case of Johannesburg City Council v The Administrator, Transvaal 1969 (2) SA 72 (T) at 76. This case, decided before the advent of the present constitutional dispensation, established the common law principles that a Court will be prepared to substitute an administrative decision where:

47.1 the end result is a foregone conclusion and it would be a waste of time to remit the decision to the original decision-maker;

47.2 any further delay would cause unjustifiable prejudice to the Applicant; and

47.3 the original decision maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the Applicant to submit to its jurisdiction again.

48. In Gauteng Gambling Board supra, the Court added a further principle that such decision may be taken where the court is as well qualified to make that

decision.

49. It is common cause that from the moment the building contractors were invited to submit the RFPs and later the bids, Trencon performed better than Basil Reed in terms of scoring. It is also a matter of record that during the evaluation of the tender, Trencon's bid scored the highest points.

50. It is also significant to notice that even after Trencon, in response to an enquiry from IDC, indicated that they would request an escalation and price adjustment on their fixed price in the event there is a delay in the site handover date, the price of Trencon for the entire tender remained lower than that of Basil Reed. It is further significant that an independent consultant, in this case Snow Consultants, the Support Services of IDC as well as the Procurement Committee of IDC, all recommended Trencon as the successful bidder.

51. I have found that the reasons forwarded by ENS on behalf of IDC, as to why Trencon was not awarded the tender as recommended, were influenced by a material error of law. This aside, the IDC is unable to present any evidence on the record as to firstly why the tender should not be awarded to Trencon and secondly why it would be necessary for this Court to cancel the contract and order that the process should start de novo.

52. This is not a case where there are grounds upon which a court would consider cancelling the tender. Similarly, it would not be in anybody's interest including that of the IDC, to delay the implementation of the project.

53. Counsel for IDC submitted, in the alternative, that I should consider remitting the matter to IDC with instructions to award the tender to Trencon. I am of the view that this is an instance where it would make no difference if the Court, as authorised by Section 8 of PAJA, would itself take that decision. This Court is qualified to do so. According to the evidence, the decision was, barring the material error of law, a foregone conclusion, considering the recommendations by the staff of IDC in the Support Services and Procurement Committee. This tender involves quiet a substantial amount of public funds and any further delay of the project would cause unjustifiable prejudice to Trencon, the IDC and National Treasury. A case has been made out that it will be just and equitable to award the tender to Trencon and I am unable to see no reason, given the urgency of the matter, why I should refer this decision to IDC to award the tender to Trencon."[54]

28 The SCA overturned the High Court's exercise of discretion and order of substitution in

[54] High Court judgment, paras 45-53, Record pp. 837-840.

just four and a half paragraphs, only two of which mention the facts of the case.

"[17] The power of a court provided in s 8(1)*(c)(*ii)(aa) of PAJA to substitute or vary administrative action or to correct a defect resulting from an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances. In *Gauteng Gambling Board v Silverstar Development* this court described 'exceptional' as follows:

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'

[18] With these principles in mind, it is clear that the court below erred in substituting its own decision in the circumstances of this case. It overlooked the fact that IDC was not obliged to award the tender to the lowest bidder or at all. The award of the tender could not be a foregone conclusion in the circumstances. Furthermore, the court does not appear to have balanced the substitution remedy against the requirements of the separation of powers and failed to exercise judicial deference. As was pointed out in *Gauteng Gambling Board*:

An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47]-[50]; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) at paras [46]-[49]. That is why remittal is almost always the prudent course.'

[19] There is an additional practical difficulty which would challenge the implementation of the substitution order. Over two years have elapsed since the beginning of the tender process. The information upon which the tenders were evaluated is obviously dated. The order does not accommodate unavoidable supervening circumstances such as price increases that have to be taken into account.

[20] No exceptional circumstances exist here to justify the order of substitution.

This is a proper case to refer back to the administrator for its reconsideration."[55]

29 We deal further below with the SCA's impermissible interference in the High Court's discretion. But first we turn to consider the constitutional framework within which the issues in this application for leave to appeal should be oriented.

RELEVANT CONSTITUTIONAL PROVISIONS

30 An interlacing body of constitutional provisions apply to public procurement and the adjudication of disputes in this area. These are:

30.1 Section 217 of the Constitution;

30.2 Section 195 of the Constitution and the duty of accountability. This Court has endorsed a principle that the State, including organs of state like the IDC, must be held accountable for their conduct;[56] and

30.3 Section 33 of the Constitution and its progeny – PAJA.

31 The IDC was established in 1940 in terms of the Industrial Development Corporation Act 22 of 1940 and is fully owned by the South African government. It is an organ of state in terms of s 239(b)(ii) of the Constitution and a national public entity within the meaning of the Public Finance Management ("**PFMA**").[57] It is obligated in terms of s 51(1)(a)(iv) of the PFMA, to have and maintain "***an appropriate procurement and provisioning system***" consistent with the principles enshrined in s 217 of the

[55] SCA judgment, paras 17-20
[56] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC).
[57] Act 1 of 1999)

Constitution, namely "***fair, equitable, transparent, competitive and cost-effective***".[58]

Section 217 of the Constitution

32 Section 217 lays down minimum mandatory requirements for a valid tender process and the contracts entered into with a successful tenderer flowing from that process.[59] It requires strict compliance.

33 The importance of requiring strict compliance with s 217 is trite. Tendering authorities must act fairly, impartially and independently, consistently with their statutory mandate and in accordance with constitutional precepts on administrative justice and the basic values governing public administration.[60] Our courts have expressly recognised that "***Procurement law is prescriptive precisely because the award of public tenders is notoriously prone to influence and manipulation*.**"[61]

34 Froneman J in **Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & Others** held that:

"*The procurement of goods and services by organs of state and the rendering of those goods and services by third parties is a public, not private, matter under our constitutional system of government. The mischief that this public gaze seeks to avoid is nepotism, patronage, "or worse".... The constitutional imperative of transparency in the process cuts both ways: not only is the general public entitled to insist on an open transparent procurement process in order to hold the public authority accountable, but the members of the public who want to avail themselves of the opportunity to take part in the process*

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[58] Section 217(1) of the Constitution, "Procurement", provides that – "When an organ of state in the national provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[59] Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others 2008 (2) SA 481 (SCA) at para 4; See also: Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at paras 20 and 33.

[60] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA (CC) at paras 33-35.

[61] Sanyathi Civil Engineering and Construction (Pty) Ltd and another v Ethekwini Municipality and others; Group Five Construction (Pty) Ltd v Ethekwini Municipality and others [2012] 1 All SA 200 (KZP) at para 34, relying on Minister of Social Development and Others v Phoenix Cash and Carry PmB CC [2007] 3 All SA 115 (SCA) paragraphs [1]–[2].

should know that by doing so they too become subject to public security (sic). They should know that they cannot obtain these benefits in a private process not open to public scrutiny."[62]

35 Only by rigorous adherence to fair procedures and the provisions of s 217 can our legal system ensure substantively just outcomes. The approach adopted by the SCA unfortunately renders the protections of s 217 ineffective, as it effectively permits the IDC to avoid awarding the tender to Trencon – the tenderer who both scored the most points and was the cheapest – without any lawful ground for doing so.

Section 195 of the Constitution

36 Section 195 of the Constitution, *"**Basic values and principles governing public administration**"*, stipulates nine principles that apply to administration in every sphere of government (in terms of s 195(2)):

> ***"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:***
> ***(a) A high standard of professional ethics must be promoted and maintained.***
> ***(b) Efficient, economic and effective use of resources must be promoted.***
> ***(c) Public administration must be development-oriented.***
> ***(d) Services must be provided impartially, fairly, equitably and without bias.***
> ***(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.***
> ***(f) Public administration must be accountable.***
> ***(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.***
> ***,...."***

37 This Court has endorsed a principle that the State, including organs of state like the

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[62] [2007] JOL 20448 (SE) at paragraphs 29-30.

IDC, must be held accountable for their conduct.[63] However, the SCA, in allowing the IDC to forego its constitutional requirements to act fairly, equitably and transparency in awarding the impugned tender to the bidder who scored the highest number of points, has undermined this principle. The SCA's order allows the IDC to avoid accountability for its mistake and, even more seriously, if it is allowed to stand, it opens the door for corruption and malfeasance in future tender awards.

Section 51 of the PFMA

38 Section 51 of the PFMA stipulates the general responsibilities of accounting officers of public entities such as the IDC. These include ensuring that the IDC has and maintains "***an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective***" (s 51(1)(a)(iii)).

39 The IDC has a procurement policy, as required by Regulation 16A3.2 of the Treasury Regulations (under the PFMA), that requires that procurement and tendering should be in accordance with a system which is "***fair, equitable, transparent, competitive and cost-effective***".[64]

40 By refusing to grant an order of substitution and insisting that the tender is sent back to the IDC to start *de novo*, the SCA has effectively endorsed an approach by the IDC which is **unfair** (in that it was unlawful), **shrouded in secrecy** (because it is still not clear why the IDC is so opposed to awarding the tender to Trencon when, on its own version, it scored the highest points), **anti-competitive** (because the best tenderer has not won the tender), and **not cost effective** (because Basil Read's bid was R3 million

[63] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC).
[64] GN R225 published in Government Gazette 27388 of 15 March 2005, as amended by GN R146 in Government Gazette 29644 of 20 February 2007.

more expensive than that of Trencon – money which must be funded from the public purse).

PAJA

41 Furthermore, the decision to award the tender to Basil Read and not Trencon amounts to unlawful administrative action under PAJA. Any decision on the part of an organ of state to award or reject a tender constitutes administrative action in terms of the Constitution and for the purposes of PAJA.[65]

42 We discuss in more detail below, how the SCA misconstrued what fairness, rationality, and reasonableness required, and thus upheld the appeal against the order of substitution in circumstances where substitution was the only just and equitable remedy.

APPROPRIATE RELIEF AND THE REMEDY OF SUBSTITUTION

43 Both the Constitution (s 172(1)(b)) and PAJA (s 8(1)) empower a court to grant a just and equitable remedy when reviewing administrative action. Furthermore, once a constitutional breach is established, a court is "***mandated to grant appropriate relief***".[66]

44 The starting point in the analysis of appropriate relief is the constitutional requirement that conduct which is unconstitutional must be set aside. As this Court held in **AllPay**

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[65] Logbro Properties CC v Bedderson NO & Others 2003 (2) SA 460 (SCA) at paras 5 to 14

[66] Constitution, section 38. President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) at para 18, confirmed President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC) at para 53.

merits:[67]

"***Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.***"[68]

Section 8 of PAJA

45 Section 8 of PAJA 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."

46 Section 8 is not exhaustive of the appropriate remedies which may be granted by a court following a finding of unlawful administrative action. It merely provides ***"[e]xamples of public remedies suited to vindicate breaches of administrative justice***"[69], but is not a closed list. Section 8 confers on a court a "***generous***

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[67] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) at para 25.
[68] See too Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) at paras 81-3, and Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para 19 and De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at para 104.
[69] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 29 - 30

jurisdiction to make orders that are 'just and equitable'".[70]

47 Secondly, the provisions of s 8 must be read in accordance with the Constitution where it is reasonably possible to do so,[71] specifically section 172 and 38.

48 In considering the requirements of s 8, this Court stated in **Steenkamp NO v Provincial Tender Board, Eastern Cape**[72] that it "***goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury***."[73]

49 In **Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency ("Allpay remedy")**[74] this Court stated "***Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality***."

50 From this extract it emerges that the Court views prevention as the primary option. The

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[70] Ibid. Quoted with approval in Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) at para 83

[71] Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) at para 82; Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-6.

[72] 2007 (3) SA 121 (CC) para 29.

[73] See too Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 69, where this Court held that ***"[i]n our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced."***

And in Mvumvu and Others v Minister for Transport and Another 2011 (2) SA 473 (CC) para 48, this Court confirmed that ***"constitutional breaches ... must be redressed effectively, by, where possible, vindicating the infringed rights fully***".

[74] 2014(4) SA 179 (CC) at para 30

Court consequently noted a "corrective principle" in the Constitution's approach to remedies as a secondary option and further stated at paragraph 32 "***This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case***."

51 These cases hold important implications for what could be considered a just and equitable remedy in a matter such as the present. The first option must be to attempt to prevent adverse consequences of invalidity following the review – i.e. allowing IDC to avoid granting the tender to Trencon. Put differently, the primary option must be to achieve an outcome that will reflect the position if the breached fundamental rights are restored, which is that Trencon must be awarded the tender.

52 In the present matter that outcome would best be achieved by a substitution order. In fact, no other order would vindicate Trencon's rights. The tender context is in this regard different from many other instances of administrative action, because of the limited validity period of the bids. In many other scenarios a remittal would facilitate the revisiting of the impugned administrative decision to the benefit of the lawfully entitled private party. That is, the remittal will facilitate the substantive outcome that would have followed had the administrative action been lawfully taken. However, such a course of action would mostly not be possible in tender cases because the bids will no longer be open for acceptance.

53 Invalidating and remitting an award decision would under these circumstances inevitably lead to adverse consequences in the form of the loss of the contract to the bidder that is lawfully entitled to it as well as the loss of the goods or services sought under the contract to the contracting authority in support of a public purpose, not to

mention ensuring a wasted tender process. Thus, the outcome that would have followed had the administrative action (the award of the tender) been taken lawfully cannot be achieved by remittal. This in itself ought to have qualified the present case as an exceptional one justifying a substitution order.

54 For the remedy to fit the injury complained of, the remedy must be such that it facilitates the award of the bid to the party that should on the objective facts, had the unlawfulness not occurred, been awarded the tender: Trencon. Under circumstances such as the present, where the validity periods of the bids have lapsed by the time the review is decided, such an outcome can only be achieved by a substitution order.

55 In deciding whether to substitute or whether to order the IDC to rerun the tender process, a court will be guided by the qualification of the substantive order as exceptional under PAJA as well as the jurisprudence dealing with substitution orders that have made it plain that "***remittal is almost always the prudent course***".[75] It is thus to be expected that faced with the choice between granting a substitution order or ordering the contracting authority to rerun the tender process, a review court will be inclined to opt for the latter. However, these principles are not the end of the matter.

56 The likelihood of reaching the same conclusion on a rerun of the tender award, i.e. that the outcome is a foregone conclusion, is again a factor in the choice between these two remedies. As this Court stated in Allpay merits[76] at paragraph 29 "***Indeed, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.***"

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[75] Gauteng Gambling Board v Silverstar Development 2005 (4) SA 67 (SCA) para 29.
[76] Ibid 22

57 In the current circumstances, a rerun of the tender will not provide effective relief. A rerun will still be detrimental to Trencon even though it may still have the chance of bidding for the contract in the new tender. A rerun will also be detrimental to the contracting authority and the public interest in that the project involved will be delayed as the High Court noted in this matter and the tender process that has already been completed will go to waste.

58 The jurisprudence of this Court confirms that, in the context of public law, an "***appropriate remedy***" would achieve the following primary purposes as regards this matter:

Vindication of the Constitution / Effective Relief

59 An appropriate remedy is an "***effective remedy***"; that is, one that upholds and enhances – vindicates – the values underlying and the rights entrenched in the Constitution.[77] Vindication is synonymous with defending or protecting the Constitution. [78]

60 The courts vindicate the values expressed in the Constitution when they provide a remedy to those whose rights have been violated. A successful applicant is therefore "***entitled***" to a remedy unless the "***interest of justice and good governance dictate otherwise***" or if there are "***compelling reasons for withholding the requested remedy***".[79]

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[77] Fose v Minister of Safety & Security 1997 (3) SA 786 (CC) at para 34 quoted with approval in Mvumvu and Others v Minister of Transport and Another 2011 (2) SA 473 (CC) at para 48. In National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) Ackerman J held that these comments are equally applicable to the current section 38.

[78] Fose v Minister of Safety and Security 1997 (3) SA 786 at para 98

[79] Mvumvu and Others v Minister of Transport and Another 2011 (2) SA 473 (CC) at para 46

61 As this Court held in **Hoffmann**: "***Appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'***".[80]

62 It follows that the Constitution is not properly vindicated by a failure to provide a substitution order where justice and equity demand that on the facts of the case such an order is appropriate. Indeed, for the reasons we gave earlier, the order of the SCA in this matter means that Trencon has effectively been left empty-handed.

Good governance and administration / public interest

63 The purpose of an appropriate remedy is not only to afford the prejudiced party administrative justice, but to **"…*pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.*" [81]**

64 Having demonstrated before both the High Court and the SCA that it was the only

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[80] Hoffmann v South African Airways 2001 (1) SA 1 (CC) at para 42.
[81] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 29.

tenderer in favour of which an award could have lawfully been made, the only way in which Trencon's administrative justice rights could properly be advanced is by a substitution order – and by failing to grant that order the SCA in fact ensured the retardation of efficient and effective public administration in violation of separation of powers and failed to entrench the rule of law.

65 With respect, the SCA failed to appreciate that the public interest is always served by the vindication of the violated rights of the successful applicant. That is because *"**[c]ertain harms, if not addressed, diminish our faith in the Constitution***".[82]

66 Far from failing to respect the separation of powers as the IDC seeks to argue in its opposition to the granting of leave to appeal in this application,[83] the substitution order of the High Court **entrenches** the separation of powers and good governance by providing judicial oversight to ensure that administrative action is both fair and lawful, thereby vindicating the rule of law, a founding value of the Constitution.[84]

67 In sum, the SCA erred in its judgment in the present matter in a number of respects that will have significant adverse implications for public procurement law. The effect of this judgment is that a substitution order will virtually never be granted in tender cases, thereby depriving the would-be winning bidder of the outcome it was lawfully entitled to and depriving the contracting authority of any benefit from the completed tender process. This is obviously detrimental to the public interest generally and the public purse in particular as it would inevitably result in duplicate tender processes and delays in public programmes. The SCA's treatment of the powers of the contracting

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[82] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para 98
[83] First Respondent's answering affidavit, paras 4.5-4.6, Record, vol 10, p. 950.
[84] Constitution, section 1.

authority under the tender conditions in complete isolation of the applicable regulatory regime is furthermore in need of correction. Without doing so the SCA's decision risks the effect of contracting authorities simply bypassing many crucial regulatory prescripts by allocating discretionary powers to themselves in their own tender conditions, through what the SCA referred to as "***built-in discretion***"[85]. Such an approach holds obvious adverse implications for the rule of law.

THE SCA JUDGMENT FAILS TO GIVE EFFECT TO THE PRINCIPLES

68 The SCA made four erroneous findings which resulted in its holding that an award of substitution is not warranted in the circumstances. These erroneous findings operate like building blocks: if any one of them is found to be incorrect or unwarranted in fact or law, then the remainder (including the conclusion on appropriate relief) cannot be sustained and the entire argument collapses. We deal with these four findings in turn:

First finding – the IDC not obliged to award the tender to the lowest bidder or at all

69 The SCA held that the High Court had overlooked the fact that in terms of the IDC's tender notice and invitation to tender (the "invitation to tender") and the SCT it was not obliged to award the tender to the lowest bidder or at all and that the outcome of the tender evaluation process was accordingly not a foregone conclusion as the High Court had found.[86]

70 The clauses in question were the following: The invitation to tender contained a clause under the heading "***Acceptance of tenders***" reading "***The IDC reserves the right not***

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[85] Paragraph 20 of the SCA judgment
[86] SCA judgment, para 18, Record, pp. 934-935.

to accept the lowest tender or any tender in part or in whole."[87] Furthermore, clause F.1.5 of the SCT provided 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 a contract***."[88]

71 These are standard clauses and almost all tender invitations issued by organs of state for the procurement of goods or services contain clauses akin to the above.

72 Accordingly, if the SCA's decision stands, the very existence of those clauses (whether they are invoked by the decision-maker or not) will prohibit an order of substitution and will result in matters being referred back to the organ of state for reconsideration (which inevitably results in cancellation of the tender) irrespective of the unique circumstances of each particular matter.

73 Furthermore, on the facts of the matter, the SCA's finding in this regard was incorrect: Section 2(f) of the PPPFA provides that "***the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer***."

74 The SCT at clause F.3.11.3 (d) enjoined the IDC to "***recommend 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.***"[89]

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[87] Tender Notice and Invitation to Tender, Record, vol 2, p. 164.
[88] Tender Data, Record, vol 2, p. 174.
[89] Tender Data, Record, Vol 2, p. 180.

75 As is clear from paragraph 15 of the SCA judgment, the IDC could *only* lawfully award the tender to Trencon.[90] An award to any other tenderer would have constituted a reviewable irregularity. This is borne out by s 2(f) of the PPPFA, which applied to the current procurement, and which obliges the contracting authority to award the tender to the highest scoring tender unless objective criteria justify an award to another tenderer. Since, as the SCA also held, there were no objective criteria that could justify an award to a tenderer other than the highest scoring one, Trencon, it follows that under the PPPFA there were no compelling and justifiable reasons not to award the tender to Trencon.

76 The SCA, however, considered that the IDC had another option, namely not to award the tender at all. In the SCA's view it consequently followed that the outcome of the tender process was not a foregone conclusion, and substitution was not an appropriate remedy. The key question to interrogate is thus whether the IDC could lawfully refuse to award a tender? At the heart of this inquiry is the question whether the IDC is at liberty not to award a tender at all in circumstances when there are responsive and acceptable bids.

77 The power to cancel a tender prior to award is expressly given to an organ of state in regulation 8(4) of the Preferential Procurement Regulations, 2011.[91] In terms of this provision an organ of state may only cancel a tender for one of three reasons, namely:

77.1 if the goods/services are no longer needed because of a change of circumstances;

77.2 if funds are no longer available to cover the cost of the contract;

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[90] SCA judgment, para 18, Record, p. 934.
[91] R502, published in Government Gazette 34350 of 8 June 2011, issued in terms of section 5 of the PPPFA.

77.3 if no acceptable tenders were received.

78 An "***acceptable tender***" is defined in s 1(i) of the PPPFA as "***any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document***".

79 Given that:

79.1 Trencon's bid was, according to the SCA, acceptable; and

79.2 the IDC:

79.21 in fact awarded the tender to Basil Read;

79.21 advanced no substantiation in support of its opposition to the order of substitution in the affidavits filed of record by it other than the discretion "***not to accept the lowest tender or any tender in part or in whole***";[92]

79.3 it follows that the IDC did not have the authority in terms of regulation 8(4) of the Preferential Procurement Regulations, 2011 to cancel the tender, which is what a decision not to award the tender at all would amount to.

80 The SCA referred to the tender conditions and the ostensible discretion that it granted to the IDC not to award a tender at all. There is an apparent tension between these clauses of the tender conditions and regulation 8(4) of the Preferential Procurement Regulations, 2011 to the extent that the right not to award a tender at all can be equated with a decision to cancel or discontinue with the tender. To allow a tender document to broaden the state's powers in this regard would mean that the organ of

[92] Notice of Application for Leave to Appeal, para 26.2.2, Record, vol 9, p. 851.

state is extending its power to cancel a tender by way of contract and outside of the applicable regulatory provisions, which, as the following authorities demonstrate, would be unlawful:

80.1 Froneman J in ***Allpay merits*** held at paragraphs 22 and 40, that compliance with the regulatory framework for valid tender processes is legally required and may not be disregarded by contracting authorities.[93]

80.2 More specifically, in ***Logbro Properties CC v Bedderson NO and Others***[94] the SCA held that a public authority's contractual rights could not be divorced from its regulatory obligations. In a core passage Cameron JA stated at paragraphs 7 - 8:

> ***"[the] provisions [of the tender call] did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights ... would necessarily yield before its public duties under the Constitution and any applicable legislation ... The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract."***

81 From these authorities it follows that it would be unlawful for an organ of state to attempt to rely on contractual powers to achieve an outcome that is in conflict with regulatory provisions.[95] It would also fly in the face of the well-established rule that organs of state cannot extend their own powers beyond regulatory limits by means of obligations such as estoppel.[96] What is more, it would allow an organ of state to rely

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[93] Also see Joubert Galpin Searle Inc and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP) at para 73 where Plasket J described the procurement regulatory framework with reference to the Constitutional Court's ruling in Allpay as "those provisions that both empower and limit the powers of public bodies involved in the procurement of goods and services" .

[94] 2003 (2) SA 460 (SCA)

[95] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) para 58.

[96] See Hoexter, Administrative Law in South Africa, second edition, 2012 39 – 42.

on form (through reliance on the standard clause) to overcome substance (in this case, being to award the tender to Trencon when there were – in the words of the SCA – no "***objective criteria***" or "***justifiable reasons***" for the award of the tender to another tenderer. Our courts – including this Court – have repeatedly set their faces against such reasoning and outcomes.[97]

82 The SCA failed to take proper cognisance of the limited ambit of the power to cancel a tender process under the PPPFA. At best, the IDC could have relied on its powers under the invitation to tender and SCT not to award a tender where those powers coincided with the power to cancel a tender under the Preferential Procurement Regulations, 2011 and/or s 217 of the Constitution. Since the former were not fulfilled in the present case, it follows that the IDC could also not rely on the invitation to tender or the SCT for non-award, which is tantamount to a decision to cancel or discontinue with the tender.

83 It further follows that the IDC did not have the option of not awarding the tender in the present matter. In the result, there was indeed only one lawful outcome to the tender process, namely an award to Trencon. Under the common law, as also reflected under s 8(1)(c)(ii) of PAJA, the appropriate substantive relief was clearly a substitution order.[98]

84 The SCA's treatment of the IDC's powers in this matter with exclusive reference to the provisions in the invitation to tender and SCT (which are both contractual powers) is,

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[97] Rane Inv Trust v Commissioner, SARS 2003 (6) SA 332 (SCA). See also Municipal Manager: Quakeni Local Municipality and Another v SV General Tradings CC 2010 (1) SA 356 (SCA) at para 26; Head of Department, Mpumulanga Dept of Education and Another v Hoerskool Ermelo and Another 2010 (2) SA 415 (CC) at para 97; Theart and Another v Minnaar NO 2010 (3) SA 327 (SCA) at para 14; Shaikh v Standard Bank SA Ltd and another 2008 (2) SA 622 (SCA) at para 18.

[98] National Tertiary Retirement Fund v Registrar of Pension Funds 2009 (5) SA 366 (SCA) para 26.

with respect, one of the most problematic aspects of the judgment, and merits correction on appeal to this Court. The approach of the SCA in ignoring the public-law dimension of the relationship between the parties and treating the tender as if it is simply another commercial relationship requires constitutional correction.

Second ground – the impact of the separation of powers on the just and equitable remedy

85 The second ground advanced by the SCA for overturning the High Court's substitution order was based on a finding that the High Court did not "***appear***" to have balanced the substitution remedy against the separation of powers and failed to exercise "***judicial deference***"[99].

86 Once again, if this speculative hypothesis is allowed to stand as a basis for an appeal court overturning a high court's substitution order it is difficult to imagine a single invalid procurement award that will not have to be referred back to the organ of state that originally took the reviewable decision.

87 There is in any event on the facts of this matter no evidence that Mothle J did not have due regard to the need to exercise the necessary care and deference when he decided to substitute the decision that had been taken by Exco. On the contrary, the judgment makes it clear in express terms that the High Court fully appreciated that it should only order substitution where the circumstances were exceptional,[100] which for reasons weighed carefully by the High Court and explained more fully below, they certainly are in this case.

[99] SCA judgment, para 18, Record, vol 10, p. 933.
[100] High Court judgment, paragraphs 45 – 53, Record, vol 9, pp. 837-840.

88 Furthermore, the High Court specifically found that it was "**qualified**" to make the order of substitution inasmuch as the High Court was in as good a position to decide who the successful tenderer should have been as the IDC was. In this regard the following is relevant to the circumstances of this case:

88.1 The first stage of the tender process was held in order to identify a number of qualifying tenderers that satisfied the stringent requirements laid down by the IDC and its independent experts so as to ensure that the candidates that were allowed to participate in the second tender evaluation stage were suitable;

88.2 The second stage of the tender evaluation process was confined to identifying the best tenderer in terms of price and BBBEE points with a view to awarding the tender to that tenderer;

88.3 Trencon, together with a number of other reputable building contractors, had passed the first stage of the process thereby confirming its suitability to participate in the second stage;[101]

88.4 The second stage of the tender evaluation process involved a detailed price and points evaluation and comparison by both in-house and external experts, culminating in a recommendation to Exco by every one of these tender evaluation bodies that the tender should be awarded to Trencon;

88.5 All of the documents that were before the relevant tender evaluation bodies and that were eventually placed before Exco, formed part of the record that was placed before the High Court;

88.6 The High Court was accordingly in as good a position as Exco to determine which

[101] Murray and Roberts Construction (Pty) Ltd scored 84 points, Trencon 83 points, Basil Read 81 points and GVK Siyazama Building Construction (Pty) Ltd scored 70 points during this evaluation.

of the competing tenderers had fared best in terms of price and BBBEE points;

88.7 Other than the error of law that was made by Exco, there were no other reasons advanced by Exco why the tender should not be awarded to Trencon;[102]

88.8 Given the two stage tender evaluation process that had been followed it was unsurprising that the record before the High Court did not reveal any facts or reasons which warranted an order other than one awarding the tender to Trencon.

89 Both the High Court and the SCA placed reliance on the judgment of Heher JA in **Gauteng Gambling Board v Silverstar Development**[103] in determining whether exceptional circumstances exist to warrant and order for substitution. Heher JA held:

89.1 that a court can only decide whether a case is exceptional "***upon a proper consideration of all of the relevant facts***";[104]

89.2 that submissions must be "***reconcilable with the proven facts***" and must "***derive support from the evidence, ie the factual averments in the affidavits***";[105]

89.3 that substitution in that instance was appropriate because "***Applications, like trials, depend on evidence, not conjecture. The Board, despite ample opportunity, has laid no basis in fact or expert opinion, to suggest that a reasonable possibility exists that, upon balanced reconsideration, it will make a finding adverse to Silverstar.***"[106]

90 In the premises, **Gauteng Gambling Board v Silverstar Development** supports the

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[102] High Court judgment, paragraphs 51, Record, vol 9, p. 839.
[103] 2005 (4) SA 67 (SCA).
[104] At paragraph 28.
[105] At paragraph 34.
[106] At paragraph 38.

High Court order for substitution. The High Court was in as good a position as Exco to determine to whom the tender should be awarded and, notwithstanding the need to show due deference, it quite correctly decided to do so.

91 With respect, in those circumstances the SCA failed properly to appreciate the role that separation of powers ought to have played in its reasoning. Given that the High Court was in as good a position as Exco to determine that Trencon ought to be awarded the tender the SCA ought to have laid an entirely different emphasis on separation of powers. That emphasis is the one stressed by this Court in **Allpay remedy**, where Froneman J in dealing with the issue of separation of powers held at paragraph 42:

"There 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…"

92 Having regard to the circumstances of this matter, the High Court was acting consistently with the requirements of the separation of powers when it made its substitution order, more especially because the following exceptional circumstances justify such an order (in no particular order of preference):

92.1 The IDC was responsible for the delay in handing over the site;

92.2 The JBCC Agreement specifically provides for Trencon to be compensated for the delay, just as a rerun tender is likely to cost the IDC more than the bid prices submitted for the tender;

92.3 Basil Read is not opposing the relief sought;

92.4 The IDC has placed no facts before the Court that would suggest that the substitution order is not a "**just and equitable**" remedy;

92.5 Trencon was the highest point scorer;

92.6 A detailed two stage tender process was undertaken and no objective criteria or justifiable reasons not to award the tender to Trencon were identified;

92.7 In fact, Trencon scored well during the two stage tender process;

92.8 In the final stage, the award is to be decided with reference to price and BBBEE points only, leaving little to no discretion to deviate from s 2(f) of the PPPFA;

92.9 All tenderers had a legitimate expectation that the tender would be awarded to the highest point scorer;

92.10 The process in evaluating and adjudicating the bids during the second stage of the tender process (absent the error of law) met the principles set out in s 217 of the Constitution;

92.11 The bids had been comprehensively evaluated by both external and internal experts all of whom recommended the award to Trencon;

92.12 All information before the Exco was before the High Court and the SCA;

92.13 Exco had received the recommendation from PC to award the tender to Trencon approximately 5 days prior to the meeting at which it committed the error of law by awarding the tender to Basil Read;

92.14 Price and points were investigated and Trencon's bid was approved;

92.15 Trencon is 100% black owned;

92.16 The IDC in fact decided to award the tender, that is, it was indeed going ahead with the work and was prepared to do so at a cost that was approximately

R3 million more than Trencon's price;

92.17 The IDC could find no reason not to award the tender to Trencon (other than by perpetrating a material error of law);

92.18 The only reason advanced by the IDC as to why the matter should be remitted was because it had the right not to award the tender at all;

92.19 Remittal without directions is not a just and equitable remedy in tenders for the procurement of goods and services where the tender period has expired. When the entire tender period has lapsed, there are no longer any valid tenders to consider with the result that the only outcome is the discontinuation of the tender with no prospect whatsoever of the tender being awarded to Trencon;

92.20 Speculation as to possible changes in circumstances that may or may not exist cannot override these circumstances where none are placed on record by the only entity able to do so;

92.21 IDC's treatment of Trencon and steps taken to award the tender to Basil Read and defend such award are indicative of it being biased against Trencon or is at the very least sufficient to give rise to a concern on the part of Trencon that it will not be awarded the contract on remittal;

92.22 The clause relied upon by the IDC to support remittal, namely that it has the right not to award the tender at all, is contrary to its own Procurement Policy and the Regulatory regime governing the award and cancellation of the tender;

92.23 A remittal without directions will not give rise to an outcome that is just and equitable;

92.24 The outcome was a foregone conclusion – unless the IDC is permitted to rely on some new, hitherto unknown facts for not awarding the tender to Trencon (if such speculative conjecture suffices to take a matter out of the realms of exceptional circumstances) then it is difficult to conceive of any case in which a remittal would be appropriate;

92.25 The IDC suggested to the High Court that the matter should be remitted to it so that the IDC could award the tender to Trencon[107];

92.26 Justice delayed is justice denied;

92.27 After having gone through an elaborate and expensive process in order to extract tenders and deciding to go ahead with the tender, the IDC has at no stage indicated that it has decided not to proceed with the tender;

92.28 A discontinuation of the tender, and the rerun of the tender shall come at considerable expense to the public purse and would result in fruitless and wasteful expenditure on the part of the IDC;

92.29 Trencon's price for the tender was in line with the IDC's budget, that is, it was a realistic price for the work – The IDC accordingly had a genuine bona fide tender for the doing of the work;

92.30 Certainty would be promoted if the Court makes an order of substitution; and

92.31 The Court is not interfering with/contravening the separation of powers but is actually giving effect thereto.

93 In those circumstances, if the reasons for not awarding substitution advanced by the

[107] Paragraph 53 of the High Court judgment

SCA suffice to render the above circumstances not exceptional then we submit that it is difficult to imagine there ever being a procurement matter in which substitution can be ordered by a court – and the SCA's reasoning will effectively have rendered substitution, as a just and equitable remedy, a dead letter.

Third ground - given that tender validity periods have expired by the time a review is heard, is remittal a just and equitable remedy as it simply means the tender must be discontinued?

94 The SCA held that remittal without directions was a just and equitable remedy, without taking into account the effect of the fact that the tender validity periods of the bids (which were only valid for 120 days) would have lapsed.

95 It is now established law that once the validity period of a tender has lapsed the organ of state can no longer validly award the tender and bring a procurement contract into existence. This position was confirmed by Plasket J in ***Joubert Galpin Searle Inc and Others v Road Accident Fund and Others***[108] and in ***Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited***.[109]

96 In the latter matter Southwood J held at paragraph 14:

> ***"...As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not***

[108] 2014 (4) SA 148 (ECP) at para 70
[109] [2011] ZAGPPHC 1 (7 January 2011)

equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced."

97 The setting aside of the IDC's decision to award the tender to Basil Read has the effect of invalidating that decision *ab initio*.[110] It follows that the IDC did not award the tender. The further consequence, given that the validity period of the bids had lapsed, is that the IDC cannot, following remittal, award the tender to any tenderer. The effect of the remittal is thus that the SCA decided that the IDC cannot award the tender under the current tender invitation. The SCA's order is accordingly, in substance, unenforceable.

98 Despite the argument before it, there is very little indication in the SCA judgment that the Court was alive to this effect. The result of the foregoing errors perpetrated by the SCA is that the SCA's order cannot be regarded, with respect, as a "***just and equitable***" remedy.

Fourth ground – information upon which tender was evaluated is dated

99 The fourth ground upon which the SCA relied for setting aside the High Court's substitution order was its finding that because over two years had elapsed since the beginning of the tender process the information upon which tenders were evaluated "*is obviously*" dated. The SCA went on to say that the High Court's order does not accommodate unavoidable supervening circumstances such as price increases that have to be taken into account. [111]

100 It is difficult to imagine any matter in which the decision of an administrative body is taken on review and in which there will not be a delay between the time that the invalid

[110] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 94; Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA) para 23; Pikoli v President of Republic of South Africa and Others 2010 (1) SA 400 (GNP) 408; C Hoexter Administrative Law in South Africa (2nd ed, 2012) 546.
[111] SCA judgment, para 19, Record, Vol 10, p. 935.

decision was taken and the matter winding its way through the courts, particularly if the matter is subject to an appeal.

101 In the result, if delay and speculative hypothesis that circumstances may have changed in the interim (without any evidence confirming the extent or nature of that change) are to be the measure for refusing substitution in matters such as this it is again difficult to conceive of any matters in which substitution would be permissible – and factors over which a litigant may have little or no control (such as the timing of a judgment, or delays occasioned around access to the record, or the availability of a court date on the roll) will then arbitrarily but fatally determine its rights to receive a just and equitable remedy of substitution.

102 In the instant case there was no evidence before the SCA to show that circumstances had changed after the expiry of the tender. As far as price increases are concerned, the JBCC Agreement stipulates how these are to be determined.[112]

103 It should also be borne in mind that the delays in implementing the contract are entirely due to the IDC's decision to oppose the relief sought by Trencon which included employing a host of unnecessary delaying tactics, and to take the matter on appeal to the SCA and only there, belatedly, admitting to an error of law being perpetrated on the merits. The IDC also delayed the matter by:

103.1 Taking a full month to provide reasons for its decision to award the tender to Basil Read;[113]

[112] JBCC Series 2000 Principal Building Agreement, clause 32.0 "Adjustment to the Contract value", vol 3, p. 210.
[113] High Court judgment, para 18, Record, p. 831.

103.2 Providing further records requested by Trencon for the purpose of challenging the impugned decision in drivs and drabs, initially in a redacted form, and later comprehensively;[114]

103.3 Only making certain pivotal documents (including the opinion secured by the IDC by Augustine prior to the Exco Meeting) available to Trencon on 19 March 2013.[115]

104 To hold that these circumstances disentitle Trencon, as the innocent party, from having the tender awarded to it and to afford the IDC an opportunity of revisiting the tender can never in these circumstances be "***just and equitable***".

105 The SCA's decision confirms that "***justice delayed is justice denied***" and if allowed to stand will ensure that due to unavoidable delays our courts are simply no longer capable of delivering just outcomes.

106 Having dealt with the grounds on which the SCA erred in its overturning of the High Court substitution order, we now turn to consider the appropriate relief in the circumstances.

RED HERRINGS

Basil Read's bid

107 In their opposition to Trencon's application for leave to appeal to this Court, the IDC makes much of the "***Disqualification of Basil Read***". As we show in this section, this is a red herring which is entirely irrelevant to the determination of the issues at

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[114] High Court judgment, para 18, Record, p. 831.

[115] High Court judgment, para 18, Record, p. 831.

stake in this appeal.

108 In addition to finding that the only person to whom the impugned tender could lawfully be awarded was Trencon, the High Court also found that the IDC erred in accepting Basil Read's bid, on account that the RFP in question was received some 14 minutes after the closing time for submissions.[116]

109 On appeal, Trencon argued that the decision whether to accept Basil Read's late RFP was irrelevant to the decision which the SCA had to deal with, namely, whether substitution was an appropriate remedy. The IDC, however, argued that Basil Read's bid should have been considered (as indeed it was) and that this was a relevant consideration in respect of whether substitution was an appropriate order.

110 The SCA, however, declined to decide the issue, and (with respect) correctly held that:

110.1 the award of the tender to Basil Read (rather than Trencon) was based on an error of law;[117]

110.2 there were no objective criteria or compelling reasons justifying Exco's decision that Trencon's tender was non responsive and invalid;[118]

110.3 the Exco could not have lawfully awarded the tender to another tenderer other than Trencon;[119] and

110.4 any attempt to award the tender to any tenderer other than Trencon would have

[116] See High Court judgment, para 39, Record, p. 834 where Mothle J held: "It is clear that the procedure followed by IDC in considering the RFP that was submitted late, went against their own stated rules and was therefore flawed and unfair to other tenderers."
[117] Paragraph 12 of the SCA judgment.
[118] SCA judgment, para 15, Record, vol 10, p. 933.
[119] SCA judgment, para 15, Record, vol 10, p. 933.

resulted in another reviewable error.[120]

111 In the premises, the SCA found that "**whether or not Basil Read's late RFP was responsive is wholly irrelevant and cannot sustain the appeal**."[121]

112 The IDC, however, now seeks to appeal that finding (although it has not launched a cross-appeal on this ground) and attempts to argue that the lawfulness of Basil Read's bid is relevant to the determination of whether substitution was an appropriate remedy.[122] The facts reveal that the validity or not of Basil Read's bid does not affect the overall outcome of a just and equitable remedy and is a red herring.

The "supervening circumstances"

113 The SCA found that there was a "**supervening difficulty**" which lay in the way of implementation of the High Court's substitution order.[123] It found: "**Over two years have elapsed since the beginning of the tender process. The information upon which tenders were evaluated is obviously dated. The order does not accommodate unavoidable supervening circumstances that have to be taken into account**."

114 The SCA finding in this regard is misplaced and is not based on the information which was before it: There was no need for the High Court to cater for the delay in time in relation to the price sensitive contract, since the JBCC contract expressly provided for payment of additional sums in the event of delay.[124] The amount of increase (or

[120] SCA judgment, para 15, Record, vol 10, p. 933.
[121] SCA judgment, para 15, Record, vol 10, p. 933.
[122] First Respondent's answering affidavit para 3.11, Record, vol 10, p. 948.
[123] SCA judgment, para 19, Record vol 10, p. 935.
[124] JBCC Series 2000 Principal Building Agreement, clause 32.0 "Adjustment to the Contract value", vol 3, p. 210.

decrease) in price as a result of the effluxion of time is not an issue for the court to decide, but is contractually regulated.

115 Furthermore, as we argued earlier, if the SCA is correct that an argument of "***supervening circumstances***" (or the fact that prices may have increased) constitutes a basis for not making an order of substitution, then this remedy would probably never be ordered.

IMPERMISSIBLE INTERFERENCE WITH THE HIGH COURT'S DISCRETION

116 Aside from the SCA's failings in respect of the just and equitable remedy in this matter, the SCA overturned the High Court's findings on substitution in a manner that flouts long-standing principles of appeal.

117 Ordinarily a court of appeal is not entitled to interfere with the exercise by the high court of its powers in respect of discretionary matters.[125] This Court has confirmed the same principle in the constitutional context,[126] most recently in **Ferris**.[127] While we accept that the question of remedy ordered by the High Court is a constitutional matter, the remedy granted by the High Court remains nevertheless the exercise of remedial discretion under s 172 of the Constitution and s 8 of PAJA.

118 In **Biowatch**,[128] this Court held that "***where the discretion contemplates that the Court may choose from a range of options, the discretion would be discretion in the strict sense, and would not readily be departed from on appeal***." As O'Regan

[125] Kekana v Society of Advocates of SA [1998] 3 All SA 577 (A).

[126] See for example National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) paras 11 to 14

[127] Ferris and Another v Firstrand Bank Limited and Another 2014 (3) SA 39 (CC) at para 28.

[128] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

J explained in **Giddey**,[129] "***the ordinary approach on appeal to the exercise of the discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above***."

119 The judgment went on to hold that the court at first instance must consider all the relevant facts placed before it and then perform the required balancing exercise. It is best placed to make an assessment of the relevant facts and correct legal principles, and "***it would not be appropriate for an appellate court to interfere with that decision as long it is it is judicially made, on the basis of the correct facts and legal principles. If the court takes into account irrelevant considerations or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the decision of the court of first instance will be unassailable***".

120 Applying these principles to the current case, for all the reasons we have already given the SCA inappropriately and with pithy reasoning interfered with the High Court's findings on the appropriateness of substitution. Looked at from the perspective of the ordinary principles on appeal, we submit that it could hardly be said that the High Court's discretion was exercised "***capriciously****" or* that it *"****was moved by a wrong***

[129] Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC) at para 19.

principle of law or an incorrect application of the facts" or that it ***"had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons***." In the premises, the High Court judgment is "unassailable" and ought to be vindicated by this Court.

121 On this related and reaffirming basis, the SCA's judgment is in need of constitutional correction.

LEAVE TO APPEAL

122 In all these circumstances, we submit that it is in the interests of justice that leave to appeal be granted and that this Court determines this matter.

CONCLUSION

123 Trencon accordingly seeks an order in terms of the Notice of Application.

DAVID UNTERHALTER SC
MAX DU PLESSIS
SARAH PUDIFIN-JONES

Chambers, Sandton and Durban
29 JANUARY 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO.: 198/2014
APPEAL CASE NO.: 642/2013
HIGH COURT CASE NO.: 70100/2012

In the matter between:

TRENCON CONSTRUCTION (PTY) LIMITED Applicant

and

THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED 1st Respondent

BASIL READ (PTY) LIMITED 2nd Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

G J MARCUS SC

M SIKHAKHANE

FIRST RESPONDENT'S COUNSEL

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INTRODUCTION: OVERVIEW OF FIRST RESPONDENT'S ARGUMENT

1.1 In the High Court, the applicant ("Trencon") sought to review and set aside the award of Tender T72/07/12 ("the tender") to the second respondent ("Basil Read"). The applicant also sought an order of substitution. Trencon succeeded in the High Court but was reversed by the Supreme Court of Appeal. It now seeks leave to appeal to this Court. The only issue in dispute is the appropriate remedy.

1.2 The tender is for the upgrading and renovation of the Independent Development Corporation's (IDC) Head Office in Sandton, Johannesburg. The tender notice was issued by the IDC in July 2012.

1.3 Having disqualified Trencon's tender, the Executive Committee **("Exco")** of the IDC appointed Basil Read, as the successful bidder. Although Trencon had been recommended by the Procurement Committee ("PC"), its tender was considered to be conditional and therefore non-responsive. Accordingly, and in good faith Exco sought to avoid making an appointment that was vulnerable to challenge.[1]

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[1] Volume 10, First Respondent's Answering Affidavit, page 939, para 2.1; Statement of Agreed Facts, para 10

1.4 Trencon approached the High Court seeking a range of declaratory orders all of which rested upon the contention that the IDC's decision to declare its bid as non-responsive as well as the awarding of the tender to Basil Read were unlawful and should be set aside. Trencon sought the substitution of the IDC decision with an award of the tender to itself in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act No.3 of 2000 **("PAJA")**.[2]

1.5 The High Court reviewed and set aside the decision not to award the tender to Trencon. It went further, however. It also substituted the awarding of the tender to Basil Read with the award of the tender to Trencon. It found that the late submission of Basil Read's tender, by some 14 minutes, was a fatal irregularity.

1.6 Although general leave to appeal was granted by the High Court the IDC persisted in only two interrelated grounds of appeal to the SCA. They were:

1.6.1 The High Court erred in finding that Basil Read's tender was disqualified (because it was submitted 14 minutes late);

1.6.2 The High Court erred in substituting Trencon as the successful tender.

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[2] Volume 10, First Respondent's Answering Affidavit, page 940, para 2.2

1.7 With regard to the disqualification of Basil Read, it was submitted that the High Court was wrong for two reasons:

1.7.1 First, it ignored the fact that in terms of the tender documents and guidelines, there was a discretion to accept late proposals (which was duly and properly exercised); and

1.7.2 Second, in any event, such irregularity as may have occurred by submitting the proposal 14 minutes late, was immaterial.

1.8 With regard to the order of substitution, it was argued that the High Court had erred in four respects:

1.8.1 First, it failed to appreciate that the IDC had a discretion not to award the tender at all or not to award it to the lowest bidder;

1.8.2 Second, the order amounted to an improper intrusion into the separation of powers;

1.8.3 Third, the order did not take into account changed circumstances relating to a price sensitive contract;

1.8.4 Fourth, the order of substitution ignored the fact that the tender validity period had expired and therefore the tender had lapsed.

1.9 The SCA upheld the appeal on the basis that the order of substitution was an extraordinary remedy which must be exercised sparingly and in exceptional circumstances only. It thus found that the High Court had erred in substituting its own decision in the circumstances of the case.[3]

1.10 In addition, the SCA drew attention to the practical difficulty concerning the implementation of the order of substitution, some two years since the beginning of the tender process. On this issue, the court held that **"the information upon which the tenders were evaluated is obviously dated"** and that the order **"does not accommodate unavoidable supervening circumstances such as price increases that have to be taken into account"**.[4]

1.11 The IDC makes the same arguments in these proceedings.

1.12 The SCA declined to deal with the High Court's finding that Basil Read's tender had been disqualified. It considered that this was irrelevant and could not sustain the appeal.[5]

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3 Volume 10, SCA judgment, page 934, paras 17-18.
4 Volume 10, SCA judgment, page 934, para 19
5 Volume 10, SCA judgment, page 933, para 15

1.13 For purposes of opposing the present application for leave to appeal, it will be submitted that the order of the SCA is entirely correct and based upon established principles of law. In addition, it will be contended that the High Court's disqualification of Basil Read was indeed relevant and that the error in that regard strongly supports the conclusion that substitution was an inappropriate remedy.

1.14 For purposes of opposing this application for leave to appeal, the IDC –

1.14.1 accepts that the application raises constitutional issues;

1.14.2 denies that it is in the interests of justice for leave to appeal to be granted, inasmuch as there are no prospects of success.

2 THE ESSENTIAL FACTS

2.1 In response to the tender invitation issued in July 2012, on 14 August 2012 Trencon submitted its tender for the Works and offered a total price inclusive of VAT in an amount of R133,508,788.81;[6]

2.2 In its letter dated 14 August 2012 Trencon stated:

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[6] Volume 2, Annexure TRE 6, page 213

> **"with regards to escalation our price will remain fixed and firm for the planned duration of the contract, provided the Works start as per the date indicated in the tender document";**[7]

2.3 Tenderers were advised that the site handover date, 6 September 2012, would change to 1 October 2012. Trencon indicated that should the handover date change, an additional amount of R315, 000.00 (excluding VAT) would be added. Basil Read, in a letter dated 23 August 2012, advised that its price would remain firm should handover occur on 1 October 2012;[8]

2.4 On 1 September 2012, the PC met to consider the recommendation of the appointment of Trencon as the preferred bidder. The PC recommended the appointment of Trencon to Exco for approval, subject to a number of conditions;

2.5 The recommendation was accompanied by a list of issues under the heading "*Action*". One of the issues raised by the PC was in relation to the additional costs for site handover after 1 October 2012;[9]

2.6 The recommendation of the PC was prepared and submitted in the form of a Board Pack to members of the Exco and covered all

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7 Volume 2, Annexure TRE 5, page 212; Volume 6, Answering Affidavit, para 39, pages 575-576

8 Volume 6, First Respondent's Answering Affidavit, page 577, para 44; Volume 2, TRE 9, pages 220-221

9 Volume 6, First Respondent's Answering Affidavit, page, 581, para 50.3; TRE 15, page 241

issues which were debated at the PC meeting held on 12 September 2012;

2.7 The Board Pack incorporated a concern expressed by the IDC's internal quantity surveyor that the acceptance of the condition relating to price escalation would be in contravention of the IDC's conditions of tender, tender validity period and fixed price (as stated in the published tender) and thus potentially raise an audit challenge regarding compliance with the internal processes;[10]

2.8 Exco received the recommendation (Board Pack) approximately five days prior to the meeting of Exco which was to be held on 19 September 2012 and its contents were considered by each member before Exco met on 19 September 2012;

2.9 Prior to the meeting of Exco, a confidential opinion was obtained from IDC's attorneys Edward Nathan Sonnenberg (ENS) and received on 17 September 2012 and was one of the documents considered by Exco in its deliberations;

2.10 On 19 September 2012 Exco met and considered the recommendation and the opinion, and debated issues which are recorded in the minutes of the meeting; [11]

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10 Volume 3, TRE 15, page 242

11 Volume 6, Answering Affidavit, page 584, para 55-57; Volume 3, TRE 19, pages 247-248

2.11 During its deliberations, the committee raised concerns in relation to a number of items, one of which was the issue of delay and the escalation fee claimed by Trencon for the duration of the delayed site handover;[12]

2.12 The Board of IDC, which is the ultimate decision-maker, has never in fact considered Trencon's bid. This is an important reason why the order of substitution is inappropriate in the present circumstances.

3 THE DISQUALIFICATION OF BASIL READ

3.1 It is common cause that Basil Read was late in its RFP submission. The proposal was received 14 minutes late. This was found as a fact by the SCA.[13]

3.2 On this score, the High Court held at para 39:

> **"It is clear that the procedure followed by IDC in considering the RFP that was submitted late, went against their own stated rules and was therefore flawed and unfair to other tenderers in terms of section 6(2)(b) of PAJA. IDC failed to comply with its own mandatory condition prescribed in the RFP invitation instructions. In my view, this procedural irregularity is material and sufficient to warrant the decision of the EXCO being reviewed and set aside."[14]**

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12 Volume 6, Answering Affidavit, page 584, para 58
13 Volume 10, SCA judgment, para 4
14 Volume 9, page 834, para 39

3.3 In making a finding of materiality, it is assumed that the Court was alive to the long established principle of administrative law that a mere irregularity does not give rise to a review. The irregularity must occasion prejudice.[15]

3.4 The High Court judgment, however, is silent on the question of prejudice flowing from a submission some 14 minutes late. This is unsurprising. It could scarcely be suggested that any party was prejudiced by an inconsequential delay. This flows from a separate, but related, principle, namely *de minimis non curat lex* – the law does not concern itself with trivial things.[16]

3.5 The relationship between an irregularity and its materiality is comprehensively dealt with in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**[17]. For present purposes, this Court laid down the following principles:

3.5.1 **"The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained".**[18]

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15 Rajah and Rajah v Ventersdorp Municipality 1961 (4) SA 402 (A) at 407-408

16 Century City Apartments Property Services CC and Another v Century City Property Owners Association 2010 (3) SA 1 (SCA) at para 12

17 2014 (1) SA 604 (CC).

18 At para 22B

3.5.2 The legal evaluation of an irregularity must **"take into account the materiality of any 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".**[19]

3.6 It is submitted that there are two purposes underlying the cut-off time for submission of proposals:

3.6.1 The first is one of administrative convenience. It makes practical sense that there should be a set time and place for receipt of proposals so that they can effectively be distributed to the relevant officials instead of coming in, in dribs and drabs.

3.6.2 The second goes to competitiveness. It would not be conducive to a fair competitive tender to give one party more time than the others to produce a proposal.

3.7 On the facts, and given the triviality of the lateness, neither of these purposes was remotely compromised. Importantly, there was no suggestion at all by Trencon of any disadvantage or prejudice.

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[19] At para 28

3.8 It is submitted that the above principles are sufficient to dispose of the High Court's finding that Basil Read was disqualified. In this regard Trencon had contended that the requirement for the timeous receipt of proposals was absolute and operated as a guillotine without any exception. In order to advance this argument, Trencon argued that the IDC had no discretion at all. This argument is unsustainable.

3.9 On this argument, the lateness by 14 minutes, even if trivial, was irrelevant. Taken to its logical conclusion, this argument means that a proposal that was 14 seconds late would have to suffer the same fate. We submit that this proposition would create an absurdity as it fails to appreciate and consider the extent of the non-compliance as well as the prejudice that results therefrom.

3.10 The guidelines and the RFP explicitly vested the IDC with a discretion. There were two clear sources of discretion, one general, the other specific:

3.10.1 The RFP conferred a general discretion in the following terms:

> **"The application or any applicant who has not conformed to these RFP document rules and conditions and the instructions reflected in the**

> **official invitation may be disqualified at the <u>sole discretion</u> of the Employer".**[20] (emphasis added)

3.10.2 A specific discretion was contained in the Procurement Procedure Guidelines which vested the procurement department manager with a discretion to accept late bids, inter alia, **"if it is determined that the inclusion of such late bid will be in the best interests of the IDC"**. When this discretion is exercised, the reasons and justification must be documented and included in the submission for approval by the procurement committee. It is common cause that these procedural requirements were met in the present case.

3.11 An argument advanced by Trencon that the guidelines could not **"override"** the procurement policy found favour with the High Court.[21]. Such an approach is untenable. This was not a situation where the policy trumped the guidelines. Both are policy documents and there was no challenge to the provisions of the guidelines.

3.12 It is submitted that not only was the High Court wrong in this regard, but the error effectively formed the foundation for the further error of substitution. In other words, having found that Basil Read ought to have been disqualified, the field was then

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[20] Volume 2, TRE 2, RFP, page 130, para 2.9

[21] Volume 9, High Court judgment, pages 833-834, para 38

cleared to enable Trencon to be appointed as the successful tenderer without the relevant authorities weighing up the competing merits of the two bids. This in turn destroys the requirement of competition, one of the elements demanded by section 217 of the Constitution. For this reason, it is submitted that the disqualification of Basil Read was relevant to the order of substitution.

4 THE ORDER OF SUBSTITUTION IS NOT JUSTIFED

The applicable principles

4.1 In relevant part section 8 of PAJA provides:

> **"8. Remedies in proceedings for judicial review**
>
> (1) **The court or tribunal, in proceedings for judicial review in term of section 6(1), may grant any order that is just and equitable, including orders –**
>
> **(a) …**
>
> **(b) …**
>
> **(c) setting aside the administrative action and –**
>
> **(i) remitting the matter for reconsideration by the administrator, with or without directions; or**
>
> **(ii) <u>in exceptional cases</u> –**
>
> **<u>(aa)</u> <u>substituting</u> or varying <u>the administrative action</u> or correcting a defect resulting from the administrative action; or**

> **(bb)** **directing the administrator or any other party to the proceedings to pay compensation.**
>
> **…"** (emphasis added)

4.2 The remedy of substitution is thus an extreme remedy to be given in exceptional circumstances. This principle has been emphasised by our courts.

4.3 The doctrine of deference, pursuant to which reviewing courts should defer in appropriate circumstances, has thus become a necessary feature of our law. It occurs as the reviewing court gives due weight to the expertise of the decision-makers with the authority to make the decision.

4.4 The SCA has made clear that when a decision is reviewed and set aside, remittal back to the decision-maker is almost always the remedy that should be adopted. In the Gauteng Gambling Board case the SCA held that:

> **"An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. … That is why remittal is almost always the prudent and proper course."**[22]

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[22] Gauteng Gambling Board v Silverstar Development Ltd v 2005 (4) SA 67 (SCA) at paras 29 and 41; See also Littlewood v Minister of Home Affairs 2006 (3) SA 474 (SCA) at para 18; Minister of Home Affairs and Others v Watchenuka 2004 (4) SA 326 at para 37

4.5 Dealing more specifically with the notion of exceptional circumstances, the SCA held in the same case that:

> **"[28] The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8 (1) (c) (ii) of the Promotion of Administrative Justice Act 3 of 2000. Since the rule of common law is that an administrative organ on which power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair…"**

4.6 A just and equitable remedy is never one-sided. It is intended to serve a variety of purposes seeking to achieve fairness to all affected parties as well as the public interest. Courts have a wide range of options at their disposal to achieve this end. In the case of **Steenkamp NO v Provincial Tender Board, Eastern Cape**, the following was stated in the context of a tender process:

> **"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law….The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to**

> **afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."[23]**

4.7 To expand on this principle, in **Bengwenyama** the following options for a public remedy are set out:

> **"This 'generous jurisdiction' in terms of section 8 of PAJA provides a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner and orders prohibiting him or her from acting in a particular manner.**
>
> > **…The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality."[24]**

4.8 It is thus for Trencon to show that this is an "*exceptional*" case in order to justify substitution. In this particular case, Trencon has failed to make a case showing that the SCA was wrong in its finding that there were no exceptional circumstances justifying an order for substitution.

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[23] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 29

[24] Bengwenyama Mineral (Pty) Ltd and other v Genorah Resources (Pty) Ltd and others 2011 (4) SA 113 (CC) at paras 83-84

The discretion not to award the tender or to accept the lowest tender

4.9 It is made explicit in the tender documents that the IDC retained a discretion not to award the tender at all or not to accept the lowest tender.

4.9.1 Paragraph 2.6 of the RFP provided:

> **"The IDC does not bind itself to accept any of the applications submitted, nor to continue with the tender process."**[25]

4.9.2 Paragraph 2.15.2 of the RFP stated:

> **"The IDC reserves the right to**
>
> **(a) accept or reject any application; and/or**
>
> **(b) cancel the RFP process and reject all applications."**[26]

4.9.3 The tender notice stated:

> **"The IDC reserves the right not to accept the lowest tender or any tender in part or in whole."**[27]

There is a similar provision in the Construction Industry Development Board Standard Conditions of Tender which were made applicable to the present tender.

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[25] Volume 2, RFP, page 129, para 2.6
[26] Volume 2, RFP, page 132, para 2.15.2
[27] Volume 2, Tender Notice, page 164, line 31

4.9.4 In the answering affidavit, the IDC made clear that it **"may cancel the tender process and reject all tender offers at any time before formation of the contract".**[28]

4.10 In light of this discretion, the effect of the order of substitution is to strip the IDC of its discretion and to prevent it from doing its statutory duty.

4.11 Apart from the above, and in light of the improper disqualification of Basil Read, the Executive Committee – which is the final decision-maker – was not afforded the opportunity of considering both bids. In fact, the Exco has never considered Trencon's bid (as it was disqualified). Nor has it weighed the respective merits of Trencon and Basil Read.

4.12 Trencon argues that the relevant provisions of the tender specifications (relating to discretion) would have the consequence that it can never be argued that the outcome is a foregone conclusion and thus substitution would be impossible. This argument misconceives the court's remedial powers. The existence of a discretion makes it extremely difficult for Trencon to argue that the outcome is inevitable. That, however, is the consequence of the tender specifications. In addition, the fact that the tender may neither be awarded nor awarded to the lowest bidder does not

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[28] Volume 6, Answering affidavit, pages 571-572, para 30.2

mean that the decision-maker has a free hand. The exercise of such discretion must occur within the legislative framework and must be constitutionally compliant. In the present case, the IDC has not had the opportunity of exercising the discretion at all.

Separation of powers

4.13 In addition to the above, it is submitted that an order of substitution needs to be balanced against the requirements of the separation of powers;

4.14 It is submitted that the order of substitution by the High Court in the present case amounted to a clear breach of the separation of powers. It was for the IDC, in the first instance, to make the determination and in so doing, it had a range of options:

4.14.1 It could have decided not to award the tender at all;

4.14.2 It could have decided to award the tender to Basil Read if there was a proper justification for doing so;

4.14.3 It could have decided to start the process afresh.

4.15 The High Court's approach evidenced a complete failure to afford appropriate respect to the competent organ of state.[29]

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[29] Bato Star Fishing v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at paras 47-48

Changed circumstances

4.16 Not only did the High Court order substitution, but it also ordered that the IDC must **"negotiate in good faith the terms of any final contract and service level agreement"** with Trencon.[30]

4.17 This was not what Trencon had in fact asked for. The problem then – and indeed now – is that circumstances have changed. Then, it was the question of escalated costs for the delayed handover. In order to cater for this, Trencon had asked, in its notice of motion, for an order increasing the contract price by R14 364.00 per day multiplied by the number of days of delay between the date on which the IDC undertook to handover the site – 6 September 2012 – until the date on which site handover actually takes place. After a lapse of two and a half years, this demand would increase the cost by approximately R15 million.

4.18 Although Trencon does not apparently persist in this prayer, it points to why substitution is so inappropriate where one is dealing with a price sensitive contract.

4.19 The High Court order directing IDC to **"negotiate in good faith"** was apparently adopted at the suggestion of Trencon's counsel. However, this obligation –

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30 Volume 9, High Court judgment, page 842, order para 1.2

4.19.1 was not canvassed on the papers at all; and

4.19.2 did not form part of any obligation of a contractual or statutory nature arising out the legal framework governing the tender.

4.20 The enforceability of such an obligation is, in any event, highly doubtful. The imposition of a contractual term to negotiate in good faith where none previously existed and without any deadlock breaking mechanism and in the absence of an objective or **"readily ascertainable external standard"** by which to measure the obligation, renders enforceability impossible.[31]

4.21 Where circumstances change in the context of a tender such as the present, it is generally highly inappropriate to make an order of substitution.[32]

The tender validity period had lapsed.

4.22 There was ongoing discussion between the parties in the prelude to the challenge concerning the tender validity period. Trencon had repeatedly requested IDC to extend the tender validity period. IDC had refused to do so.

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31 Southernport Development (Pty) Limited v Transnet Limited 2005 (2) SA 2002 (SCA); Everfresh Market Virginia (Pty) Limited v Shoprite Checkers 2012 (1) SA 256 (CC)

32 Logbro Properties CC v Bedderson 2003 (2) SA 460 (SCA)

4.23 The effect of the order of substitution, therefore, was to extend the tender validity period in circumstances where the tender had lapsed as a matter of law. Once the tender validity period had lapsed, the IDC itself had no power to award the tender. It was thus highly inappropriate for the High Court to do so.[33]

4.24 In the case of **Joubert Galpin Searle Inc and Others v Road Accident Fund,** the Court held as follows in regard to the expiry or extension of the tender validity period:

> **"[73] In my view, there is a simple answer to this. It is to be found in the National Treasury's Supply Chain Management: A Guide for Accounting Officers/Authorities, which is part of what Froneman J in *Allpay Consolidated Investment Holdings* called 'the constitutional and legislative procurement framework'. As such, it forms part of those provisions that both empower and limit the powers of public bodies involved in the procurement of goods and services and is not merely an internal prescript that may be disregarded at whim. The document provides a step-by-step guide which institutions such as the RAF must apply when engaged in procurement processes. It makes it clear that 'an extension of bid validity, if justified in exceptional circumstances, should be requested in writing from all bidders before the expiration date'."[34]**

4.25 It is submitted that Trencon's argument loses sight of the Treasury Guidelines. It does not mean that the lapsing of a tender is inevitable in all cases. What it does mean, however, is that where a tender has lapsed, it would be highly inappropriate for a court to

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33 Telkom SA Limited v Merid Training (Pty) Limited; Bihati Solutions (Pty) Limited v Telkom SA Limited [2011] ZAGPHC 1 (7 January 2011); Joubert Galpin Searle Inc. and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP) at paras 72-74

34 Gauteng Gambling Board case at para 73

order substitution. To do so, would effectively override an aspect of the constitutional and legislative framework.

5 CONCLUSION

In the light of the above, we submit that the appeal should be dismissed with costs, including the costs of two counsel.

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M SIKHAKHANE

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Chambers
Sandton
4 February 2015

LIST OF AUTHORITIES

1. Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC)

2. Bato Star Fishing v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at paras 47-48

3. Bengwenyama Mineral (Pty) Ltd and other v Genorah Resources (Pty) Ltd and others 2011 (4) SA 113 (CC) at paras 83-84

4. Bihati Solutions (Pty) Limited v Telkom SA Limited [2011] ZAGPHC 1 (7 January 2011);[1]

5. Everfresh Market Virginia (Pty) Limited v Shoprite Checkers 2012 (1) SA 256 (CC)

6. Gauteng Gambling Board v Silverstar Development Ltd v 2005 (4) SA 67 (SCA) at paras 29 and 41

7. Joubert Galpin Searle Inc. v Road Accident Fund 2014 (4) SA 148 (ECP)

8. Littlewood v Minister of Home Affairs 2006 (3) SA 474 (SCA) at para 18

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10. Minister of Home Affairs and Others v Watchenuka 2004 (4) SA 326 at para 37

11. Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC);

12. Southernport Development (Pty) Limited v Transnet Limited 2005 (2) SA 2002 (SCA);

13. Telkom SA Limited v Merid Training (Pty) Limited