IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: 18/2022

In the matter between:

NORLAND CONSTRUCTION (PTY) LTD	**Applicant**
and	
CHRIS HANI DEVELOPMENT AGENCY (SOC) LIMITED	**First Respondent**
SIYALIMA CIVILS (PTY) LTD	**Second Respondent**

JUDGMENT

Govindjee J

[1] The applicant ('Norland') is an aggrieved unsuccessful tenderer. During 2021, the first respondent ('the Agency') invited its panel of contractors to submit tenders for

a project.[1] Norland, the second respondent ('Siyalima') and four other entities submitted tenders. Siyalima was successful, prompting an application for interim relief, which was granted, and these proceedings, based on s 6 of the Promotion of Administrative Justice Act[2] ('PAJA'), for the review and setting aside, or correction of the decision to award the tender to Siyalima.

[2] The Agency concedes that the appointment of Siyalima ought to be set aside as unlawful. Norland's tender price was some R8,7 million lower than Siyalima's. Nonetheless, the Agency refuses to appoint Norland on the basis that this would be unlawful, alternatively contrary to constitutional prescripts. There are various reasons advanced for this position. The Agency regarded Norland's tender as non-responsive because it provided incomplete documentation, and because certain documentation had not been certified. It also places reliance on a 'probity report' it obtained from its outsourced internal auditors ('SNG Grant Thornton'), which concluded that none of the tenderers were to be awarded the contract and that Norland's bid should have been disqualified as non-responsive, alternatively should not have been considered due to various issues of non-compliance. Counsel for the Agency argued that Norland had not submitted proof of compliance with its municipal dues. This was a specified requirement and there was authority holding this omission to be fatal to the application.

[3] In terms of the tender invitation and conditions, the bid was subject to the Preferential Procurement Policy Framework Act, the General Conditions of Contract (GCC) and the standard conditions of tender, the CIDB Standard for Uniformity and Construction Procurement as varied or added in terms of the tender data. The tender was addressed to the Agency's Panel of Contractors. Norland had been appointed to the panel for a 36-month period from 26 February 2021. It is common cause that contractors on the panel were considered to have passed functionality and prequalification, so that appointments could occur quickly and without the need to re-evaluate functionality and technical ability. A two-stage evaluation system was

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[1] The project is framed as 'Phase 6: Xonxa Dam Transfer Scheme – Bulk Water Pipelines and Break Pressure Tank for Ilinge and Machibini Villages Bulk Water Supply'. Tenderers were invited to submit their tenders for the supply, lay and testing of a 315mm diameter PVC to a 100mm diameter galvanized mild steel pipeline, covering approximately 30 000 kms.

[2] Act 3 of 2000. S 6(1) provides that 'any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action'.

accordingly inapplicable. Norland's BBBEE level (Level 1) was at least the same as that of Siyalima, and the procedure for the evaluation of responsive tenders was based on price and BBBEE with the 90/10 preference points system used. It is further common cause that no objective criteria were stipulated in the tender documents to enable the Agency not to award the tender to the tenderer scoring the highest points, as per its obligation in terms of its Supply Chain Management Policy. The crux of its case is that Norland's bid was non-compliant and correctly ruled out.

[4] The following issues arise: whether the Agency was entitled to rely on the reasons contained in the probity report as a basis for not awarding the tender to Norland; whether Norland's tender was properly declared non-responsive for the reasons contained in the Bid Evaluation Report; if not, what would be a just and equitable remedy.

The probity report

[5] It is convenient to first consider the Agency's reliance on the probity report. The duty to give reasons for an administrative decision is a central tenet of the constitutional duty to act fairly. A failure to give proper or adequate reasons ordinarily renders a disputed decision reviewable.[3] The general rule is that 'reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful'.[4] To quote a recent decision of the SCA:[5]

'What is clear from this passage is that *ex post facto* reasons must be excluded from consideration. These are reasons which did not form the basis for the decision at the time but are subsequently formulated to meet the attack of a reviewing applicant. Of course, it is not always easy to distinguish the two. It is safe to say, however, that reasons which motivated the decision at the time must form the basis for the evaluation by a court.'

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[3] *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) para 27.
[4] See *National Energy Regulator of South Africa v PG Group (Pty) Limited and Others* 2019 (10) BCLR 1185 (CC); [2019] ZACC 28 ('*NERSA*') para 39.
[5] *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* [2022] ZASCA 102 para 19.

[6] The exception noted by the Constitutional Court in *National Energy Regulator of South Africa v PG Group (Pty) Limited and Others* is inapplicable in the present circumstances: the SNG Grant Thornton report was not in the nature of expert explanation of the rationale of the Agency's decision, based on its expertise in a particular area.[6] The focus must, therefore, be restricted to the reasons that motivated the Agency's decision at the time Norland's bid was rejected, as per its own explanation for its decision.[7]

The Bid Evaluation Report

[7] The following reasons were provided for declaring Norland's bid non-responsive: 'CVs of key personnel not certified; Letter of Good Standing regarding workmen's compensation not certified; Tender not completed in full (tender drawings); Unemployment Insurance Certificate not certified.' Four other tenders were similarly excluded.

Certification

[8] It may be accepted that the stipulated tender conditions included the various certification requirements highlighted by the Agency as part of its reasons for disqualifying Norland. Although the stipulated tender conditions appended to the tender notice made no such reference, it was noted that failure to 'submit all supplementary information will lead to the tender being considered non-responsive and not considered for award'. Various variations, amendments and additions to the Standard Conditions of Tender were applicable. Clause C.2.23 contained the following 'addition or variation to Standard Conditions of Tender':

'All certificates and information, as per T2.1 and T2.2 of the tender document are to be provided with the tender offer as well as:

a. Certified copy of a Workmen's Compensation Certificate, Act 4 of 2002;

b. Certified copy of Unemployment Insurance Certificate, Act 4 of 2002;

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[6] *NERSA* above n 4 para 39.

[7] See *Umgeni Water v Sembcorp Siza Water (Pty) Ltd* 2020 (2) SA 450 (SCA) para 52; Cf *Zweni v Road Accident Fund and Others* 2022 (6) SA 639 (WCC) para 27.

d. Certified copy of Curriculum Vitae of supervisory personnel indicated in Section T2.2;'

[9] The question remains whether the certification requirements specified were 'material'.

[10] An organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, must contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective.[8] Section 1 of the Preferential Procurement Policy Framework Act, 2000 ('the PPPFA')[9] defines an acceptable tender to mean any tender which in all respects complies with the specifications and conditions of the tender as set out in the tender documents. Whether a tender is acceptable must be construed taking cognizance of the system envisaged by s 217 of the Constitution.[10] The doctrine of legality demands that the legislature and executive in all spheres are constrained to exercise power and perform their functions in a manner consistent with the law. The acceptance by an organ of state of a tender which is not 'acceptable' within the meaning of the PPPFA would amount to an invalid act that would ultimately fall to be set aside. Acceptability is, therefore, a statutory threshold requirement.[11]

[11] There are degrees of compliance with any standard and, as the Supreme Court of Appeal held in *Metro Projects CC*, it is notoriously difficult to assess whether less than perfect compliance falls 'on one side or the other of the validity divide'.[12] This is due to the highly contextual and fact sensitive nature of the enquiry, so that judicial pronouncements must be understood within the factual matrix of each particular case.[13] There is no simple, single formula for evaluating responsiveness and acceptability and the consequences of non-compliance may vary depending on factors such as the purpose and materiality of the bid requirement in question and the extent

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[8] S 217 of the Constitution.
[9] Act 5 of 2000. It is accepted that this legislation gives effect to the directive contained in s 217(3) of the Constitution.
[10] *Chairpersons, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) ('*Sapela Electronics*') para 14
[11] *Sapela Electronics* above n 10 paras 11, 12.
[12] *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) ('*Metro Projects CC*') para 15. Also see, in general, P Volmink 'Legal consequences of non-compliance with bid requirements' (2014) 1 *African Public Procurement Law Journal* 41.
[13] Volmink above n 12 at 42.

of compliance.[14] Fair administrative process depends on the circumstances of each case and in some cases it is indeed fair to afford a tenderer an opportunity to correct an obvious mistake, to ask for clarification or further details, provided that the process on the whole does not lose the attribute of fairness.[15]

[12] It is nevertheless accepted that compliance with bid requirements is necessary and has intrinsic value.[16] Equal bid requirement observed by all bidders enhances the fairness of the process, so that bid requirements simply cannot be discarded at the drop of a hat.[17] It must, by contrast, also be noted that there are inherent dangers in adopting an unduly rigid approach to the issue of responsiveness, and that courts must guard against the elimination of bidders based on administrative considerations as opposed to issues of substance.[18] Such an approach could defeat the objectives of fairness, transparency, competitiveness and cost effectiveness.[19] The Constitutional Court has eschewed both an overly rigid as well as an overly flexible approach and instead adopted a purposive approach to the issue of bid responsiveness.[20] On this approach, there are instances where substantial compliance with the tender terms and conditions (as opposed to perfect compliance) would suffice.[21] As Volmink has indicated:

'A process of fair-minded reasoning requires that bids be assessed on their merits and not be excluded for relatively minor breaches. Such an approach gives effect to the values of fairness, equity, transparency, competitiveness and cost effectiveness enshrined in section 217(1) of the Constitution. Thus, the courts are required to enquire into the underlying objective and materiality of a bid requirement, to ascertain whether its purpose was in fact met despite less than perfect compliance. A decision whether or not to exclude a non-compliant bidder from a bid process will depend on a variety of factors including: the wording of the RFP, the materiality of the unfulfilled requirements, the degree of non-compliance and the purpose of the requirement.'[22]

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[14] Volmink above n 12 at 44.
[15] *Metro Projects CC* above n 12 para 13 as cited in *Sapela Electronics* above n 10 para 19.
[16] See *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC); 2014 (1) BCLR (1) CC ('*AllPay*') at para 27. For an example of a strict approach, see *Minister of Environmental Affairs and Tourism and Another v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Another v Smith* 2003 (4) SA 1 (SCA) ('*Pepper Bay Fishing*').
[17] See Volmink above n 12 at 57.
[18] *Minister of Social Development v Phoenix Cash and Carry* [2007] JOL 19529 (SCA).
[19] Ibid para 2.
[20] *AllPay* above n 16 as cited in Volmink above n 12 at 51-52. A key question to ask, in terms of this approach, is whether what the applicant did constituted compliance with the statutory provisions viewed in light of their purpose.
[21] Volmink above n 12 at 52.
[22] Volmink above n 12 at 57..

[13] Importantly, it is for the department, as employer or institution inviting the tender, to decide the prerequisites for a valid tender.[23] A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the PPPFA, *unless* those conditions were immaterial, unreasonable or unconstitutional.[24] Put differently, a tender should not easily be invalidated on the basis that it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents.[25] Whether or not a deviation or qualification is material is a question to be determined by the BEC in its discretion, taking into account the set eligibility criteria.[26]

[14] The definition of 'acceptable tender' in the PPPFA must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost-effective'. In other words, whether 'the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents' must be judged against these values.[27]

[15] In *Millennium Waste*, the respondents argued that the appellant's tender was not an 'acceptable tender' and had been lawfully and properly disqualified. This on the basis that the terms of the tender documents relating to administrative compliance were couched in peremptory language which expressly stated that non-compliance would result in disqualification. Proper signing of the tender documents was one of the

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[23] *Dr JS Moroka Municipality & Others v Betram (Pty) Ltd & Another* [2014] 1 All SA 545 (SCA) ('*Moroka*') para 10, applied in *WDR Earthmoving Enterprises & Another v The Joe Gqabi District Municipality & Others* [2018] ZASCA 72 ('*WDR Earthmoving*') paras 29, 30 and 40.
[24] *WDR Earthmoving* above n 23 para 30. F.2.14 of the CIDB Standard (2010 and 2015) provides that tenderers 'accept that tender offers, which do not provide all the data or information requested completely and in the form required, may be regarded by the employer as non-responsive.' Also see *Moroka* above n 23 paras 10, 11, *Millennium Waste Management v Chairperson Tender Board* [2007] SCA 165 (RSA) ('*Millennium Waste*') para 19 and *AllPay* above n 16 para 28 read with paras 22 and 25.
[25] *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] ZASCA 50 para 50.
[26] *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209 (A) ('*Aurecon*') para 26. On the link between a 'responsive' tender and the PPPFA concept of 'acceptability', see *Sapela Electronics* above n 10 para 12.
[27] *Sapela Electronics* above n 10 para 14.

terms which if not complied with, it was argued, led to disqualification.[28] The appellant had omitted to sign a declaration of interest. The SCA explained that the tender committee was permitted to condone non-compliance with peremptory requirements in cases where condonation was not incompatible with public interest, and provided such condonation was granted by the body for whose benefit the provision was enacted. It held that condonation of the appellant's failure to sign the declaration would have served the public interest as it would have facilitated competition amongst tenderers, and would have promoted the constitutional values listed in s 217, also given that the appellant's tendered price was substantially less than that of the successful bidder.[29]

[16] The SCA also interpreted the definition of 'acceptable tender' in the Preferential Procurement Act against the backdrop of s 217(3) of the Constitution. Drawing on *Sapela Electronics*, it highlighted that whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against [the constitutional] values'. The court added as follows:

'[19] In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether this non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question …

[21] Since the adjudication of tenders constitutes administrative action, of necessity the process must be conducted in a manner that promotes the administrative justice rights while satisfying the requirements of PAJA. Conditions such as the one relied on by the tender committee should not be mechanically applied with no regard to a tenderer's constitutional rights. By insisting on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably. Its decision in this regard was based on the committee's error in thinking that the omission amounted to a failure to comply with a condition envisaged in the Preferential Procurement Act. Consequently, its decision was "materially influenced by an error of law" contemplated in s 6(2)(d) of PAJA, one of the grounds of review relied on by the

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[28] *Millennium Waste* above n 24 para 14.
[29] *Millennium Waste* above n 24 para 17. Cf *Moroka* above n 23 para 18.

appellant. Therefore, the tender process followed by the department was inconsistent with PAJA …' (References omitted).

[17] Norland attached a copy of a 'letter of good standing' from the Federated Employers' Mutual Assurance Company (RF) Pty Ltd, noting its compliance with the Compensation for Occupational Injuries and Diseases Act, 1993, ('COIDA') and the approval of its registration by the Compensation Commissioner and Department of Labour. A 'certificate of compliance', effective from 14 November 2020 to 13 November 2021, issued by the Unemployment Insurance Commissioner was also attached. The curricula vitae of four employees of Norland were also appended. Norland admitted that none of these documents had been certified by a commissioner of oaths. It pleaded, inter alia, that the certification requirement was not material, alternatively that 'it would have been a simple matter for the First Respondent to have requested certification of the three documents submitted in terms of item C2.17 of the Addition or Variations to the Standard Conditions of Tender…'

[18] Significantly, the Agency failed to address these matters in its answer, maintaining only that there had been a failure to comply with a stipulated requirement, and highlighting the findings of the probity report, coupled with the following:
'In the circumstances, Norland's tender ought to have been regarded as non-responsive and have been rejected from the beginning. It did not qualify for further consideration or the allocation of points as it contends. Norland is not entitled to be appointed. I deny that the non-compliance aforesaid was not material.'

[19] The effect of this approach is that there is nothing before the court to explain the importance of certification of the documentation in question in the context of the entire tender process. It bears emphasis that this is not an instance of prescribed documentation being omitted. The documentation was provided but in uncertified form. The importance of the curricula vitae, the letter from the Unemployment Insurance Commissioner and the Letter of Good Standing in terms of COIDA is not in question. Rather, it is the failure to provide certified copies of that documentation that resulted in Norland's disqualification, in circumstances where the importance of certification has been left unexplained. As Mr *De La Harpe* argued, the Agency's approach attached materiality to that which, on balance, was immaterial. It seemingly

failed to give consideration to affording Norland an opportunity to address the oversight, this in circumstances where the list of returnable documents omitted reference to certified copies. Eschewing the constitutional value attached to cost-effectiveness in tenders, it proceeded by way of an ultra-strict approach, even though the consequence would be acceptance of a more expensive bid. In the circumstances of this case that approach was unfair.

Tender drawings

[20] The judgment of Bloem J, granting Norland interdictory relief, describes this ground as 'difficult, almost impossible, to understand'. This is largely because the Agency's papers fail to explain the basis for the alleged requirement, resulting in the learned judge concluding that 'the first respondent imposed a requirement on the tenderers which was not contained in the tender invitation'.

[21] Even accepting that Norland breached a formal requirement in failing to return the tender drawings, the requirement cannot be said to be material. This is because the papers reveal that the drawings in question were nothing more than those e-mailed by the Agency to Norland, upon which it was expected to submit its tender. A clause provides that the drawings forming part of the tender document were to be regarded as provisional and preliminary 'for the Tenderer's benefit to generally assess the scope of work'. Unsurprisingly, the drawings were not included as part of the list of returnable documents and counsel for the Agency rightly did not press the point.

Just and equitable relief

[22] It is open to the court to grant an order that is 'just and equitable'. This includes an order setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions or, in exceptional cases, substituting or varying the administrative action or correcting a defect resulting from the administrative action.[30]

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[30] S 8(1) of PAJA.

[23] This involves a process of striking a balance between the applicant's interests on the one hand, and the interests of the respondents, on the other. Proper consideration of the facts is a prerequisite for the selection of the appropriate remedy.[31]

[24] Administrative action that is unlawful, reasonable or unfair in PAJA terms is ultimately inconsistent with s 33 of the Constitution, requiring the application of both s 38 and s 172(1) of the Constitution. Section 38 allows a court to grant 'appropriate relief' for the infringement of rights. The consequences of a declaration of invalidity must be dealt with in a just and equitable order under s 172(1)*(b)* and s of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.[32]

[25] It is trite that a court will only substitute or vary the administrative action, or itself correct a defect, in exceptional circumstances. This is because administrators are generally better equipped to make decisions regarding contracts of this nature. At common law it is well established that a court will generally refer the matter to the original decision-maker rather than attempt to 'correct' the decision by substituting its own view for that of the administrator.[33] Section 8(1)*(c)*(i) of PAJA makes specific reference to remitting the matter for reconsideration by the administrator, with or without directions.

[26] Having determined that the decision to award the tender must be set aside, it is not unusual for courts to grapple with whether the administrator should be required to reconsider the bids already submitted in response to the previous tender invitation, or run a fresh tender process. Hoexter and Penfold provide the following guidance:[34]

'The exercise of the court's remedial discretion should depend primarily on the nature of the irregularity and the extent to which circumstances have changed in the intervening period. If the irregularity taints the entire tender process (as where the tender criteria are vague or otherwise defective), a fresh tender process should be run … If, however, the irregularity relates to the manner in which decisions were taken by those responsible for the evaluation or adjudication of the tender, there would normally be no reason why the existing tenders

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[31] *Millennium Waste* above n 24 para 22.
[32] *AllPay* above n 16 para 25.
[33] C Hoexter and G Penfold *Administrative Law in South Africa* (3rd Ed) (2021) at 784.
[34] Hoexter and Penfold above n 33 at 785-786.

cannot simply be considered – unless, importantly, circumstances have changed and it is no longer appropriate to award a contract based on the original tender process.'

[27] In *Gauteng Gambling Board v Silverstar*,[35] Heher JA noted that 'remittal is almost always the prudent and proper course, a sentiment expanded upon by Plasket J in this Division:[36]

'The default position, when administrative action is reviewed and set aside, is for the decision to be remitted to the original decision-maker to decide again, with the benefit of the court's findings as to where he or she erred initially.'

[28] Such an approach has the obvious advantage that the administrator, who enjoys various advantages over a court in such matters, based on its composition, experience and access to relevant information sources, is re-tasked with making an appropriate decision. This approach has the added benefit of respecting the principle of deference.[37]

[29] In *Trencon*, the Industrial Development Corporation of South Africa ('IDC') was unable to present evidence justifying its refusal of a tender award to Trencon as the highest points earner.[38] The IDC was also unable to show circumstances that would have necessitated the process starting afresh so as to justify the cancellation of the tender. The High Court held that remittal would not be prudent and concluded that it would be just and equitable to grant an order of substitution, awarding the tender to Trencon. On appeal against a decision of the SCA to remit the matter to the IDC for reconsideration, the Constitutional Court explained the 'exceptional circumstances test, as follows:

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

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[35] *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) para 29.
[36] *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 50.
[37] *NERSA* above n 4 para 90.
[38] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 25.

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

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

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter" … in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.' (References omitted).

[30] The facts in *Trencon* demonstrate when substitution or correction is likely to be appropriate. In that matter, the various committees of the IDC had already evaluated the bids and had recommended the award to the applicant. It was also common cause that the applicant's bid had scored the highest points and that, but for an error of law, the applicant's bid would not have been disqualified. But a court must be certain that it really is as well qualified as the original decision-maker, and that all the relevant information is before, before proceeding on that basis.[39]

[31] As indicated, the Agency rightly concedes that the decision to award the tender to Siyalima must be set aside. There is no apparent basis for this court not to exercise its discretion accordingly. This serves the principle of legality. The contract was awarded pursuant to a defective tender process and Norland acted expeditiously in preventing the implementation of the contract.[40]

[32] This is not to suggest that the entire tender process must be set aside and re-advertised, particularly considering the absence of any self-review brought by way of a counter-application. That aside, the answering papers fail to detail irregularities of the kind that would justify this outcome.

[33] The question remains whether this is an 'exceptional case' to justify 'substituting or varying the administrative action or correcting a defect resulting from the administrative action', rather than remitting the matter for reconsideration by the administrator, with or without directions. Of relevance is that it is apparent from the papers and the preceding analysis that the Bid Evaluation Committee misdirected itself in various ways in performing its functions. In finding only Siyalima's bid to be responsive, it proceeded to evaluate its bid price. In doing so, various Bill of Quantity errors were ascertained, some of which were assessed as 'low risk'. Reference checks were seemingly only conducted in respect of Siyalima, as the only tender considered to be responsive.

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[39] *Hutchinson v Grobler NO* 1990 (2) SA 117 (T) as cited in Hoexter and Penfold above n 33 at 790.
[40] See *Esorfrankl Pipelines (Pty) Ltd v Mopani District Municipality* [2014] 2 All SA 493 (SCA) paras 22-27.

[34] Such matters bring to the fore the various complexities associated with public tenders. The extent of the finances involved also cannot be ignored, heightening the sense of care to ensure that the appropriate process and outcome is reached, and thereby giving effect to the principle of legality. Considering the stage of the process at which Norland was excluded, namely during a 'compliance check', its bid was not subjected to the kind of scrutiny (in respect of price, bill of quantities and reference checks) that resulted in the concerns expressed in the Bid Evaluation Committee Report regarding Siyalima. Such matters convince me that this court cannot be as well qualified, or in as good a position, as the original authority to make the decision, and I am unable to conclude that the result of proper re-evaluation is a foregone conclusion. The result is that this does not appear to be an 'exceptional case' to justify substitution or correction. That being the case, it is appropriate to grant Norland only the alternative relief it seeks, in addition to setting aside the original decision.

[35] The following order is issued:

1. The First Respondent's decisions to:

1.1 disqualify the tender which the applicant submitted to the First Respondent in response to the First Respondent's tender invitation in respect of the construction of Phase 6: Xonxa Dam Transfer Scheme bulk water pipelines and break pressure tank for Ilinge and Machibini Village bulk water supply, reference: PLB / 07 / 21-22 ('the Tender invitation / the Tender'); and

1.2 award the Tender to the Second Respondent and conclude a contract for the implementation thereof with the Second Respondent

are reviewed and set aside.

2. The matter is remitted for reconsideration by the First Respondent. The First Respondent is directed to:

2.1 re-evaluate the tenders submitted in response to the Tender invitation, including that submitted by the applicant;

2.2 award the Tender to the tenderer scoring the highest evaluation points; and

2.3 conclude a contract for the implementation of the Tender with the tenderer scoring the highest evaluation points.

3. The First Respondent is directed to pay the costs of this application, the costs to include supplementary heads of argument filed at the request of the court.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 09 November 2023

Delivered: 23 January 2024

Appearances:

For the Applicant:	Adv D H De L Harpe SC Applicant's Counsel St George's Chambers, Makhanda
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For the Respondent:	Adv M C Louw First Respondent's Counsel Chambers, Bloemfontein
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