IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 8027/2012

In the matter between:

METROPROJECTS DEVELOPMENT (PTY) LTD	Applicant
And	
JOZINI LOCAL MUNICIPALITY	First Respondent
MUNICIPAL MANAGER: JOZINI LOCAL MUNICIPALITY	Second Respondent
THE MEMBERS OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, KWAZULU-NATAL	Third Respondent

---

ORDER

The application is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

SEEGOBIN J:

[1] This is yet another application involving a municipal tender. The tender in question was for the development of a low cost housing project known as the Siqakatha Housing Project situated within the municipal boundaries of the first respondent.

[2] The applicant is Metroprojects Development (Pty) Ltd, a private company which has its principal place of business at 72 Boom Street, Klerksdorp and its KwaZulu-Natal regional office at Hillcrest.

[3] The first respondent is the Jozini Local Municipality, a local municipality established in terms of Chapter 2 of the Local Government: Municipal Structures Act No.117 of 1998.

[4] The second respondent is the municipal manager of the first respondent who is cited in his official capacity as Head of the Administration of the first respondent in terms of the Local Government: Municipal Systems Act No.32 of 2000. The second respondent is the accounting officer of the first respondent in terms of Section 60 of the Local Government: Municipal Finance Management Act No.56 of 2003.

[5] The third respondent is the Member of the Executive Council who administers the portfolio for Human Settlements within the KwaZulu-Natal province. No relief is sought against the third respondent.

NATURE OF RELIEF SOUGHT

[6] In its amended notice of motion[1] the applicant seeks the following relief:

> "1. Reviewing and setting aside the decision of the First Respondent, alternatively the Second Respondent, further alternatively of the First and Second Respondents taken on or about 15 June 2012 in terms of which the First and/or Second Respondents unilaterally suspended the rights and obligations of the Applicant and First Respondent arising from the appointment of the Applicant as Implementing Agent for the Siqakatha Low Income Rural Housing Project (tender number JMC 001/09/11).
>
> 2. Reviewing and setting aside the Resolution of the Council of the First Respondent adopted on or about 27 August 2012 under item number JMC 223 in terms of which the First Respondent resolved to withdraw the appointment of the Applicant as Implementing Agent for the Siqakatha Low Income Rural Housing Project (tender number JMC 001/09/11) and to re-advertise the tender.
>
> ALTERNATIVELY OR ADDITIONALLY TO PRAYERS 1 AND 2
>
> (i) Declaring the decision of the First Respondent, alternatively the Second Respondent, further alternatively of the First and Second Respondents taken on or about 15 June 2012 in terms of which the First and Second Respondents unilaterally suspended the rights and obligations of the Applicant and First Respondent arising from the appointment of the Applicant as Implementing Agent for the Siqakatha Low Income Rural Housing Project (tender number JMC 001/09/11) to be unlawful.

[1] Indexed papers, pages 1-3.

(ii) Declaring the decision of the Council of First Respondent taken on or about 27 August 2012 in terms of which the award of the tender under tender number JMC 001/09/11 to the Applicant be withdrawn and the tender to be re-advertised, to be unlawful.

3. Directing the First and Second Respondents to forthwith comply with all of their obligations towards the Applicant in its capacity as Implementing Agent for the Siqakatha Low Income Rural Housing Project.

4. Directing the First and Second Respondents to permit the Applicant to comply with its obligations as Implementing Agent for the Siqakatha Low Income Rural Housing Project.

5. Directing that the First Respondent shall be liable for the costs of this application.

6. Affording the Applicant such further or alternative relief as this Honourable Court may deem just."

BACKGROUND FACTS

[7] During or about September 2011 the first respondent ('the municipality') advertised a tender in terms of which proposals were invited from suitably qualified and experienced organisations for appointment as the 'Implementing Agent' in respect of the Siqakatha Housing Project ('the project'). The invitation to tender was contained in an advertisement which appeared in the media. The applicant and various other entities submitted their tenders in response to the advertisement.

[8] On 27 February 2012 the applicant was notified in writing that it was the successful tenderer and was appointed as the implementing agent for the project. On the same day the applicant accepted its appointment in writing.

[9] While the applicant was in the process of giving effect to its development planning obligations (being the first phase of the project) in terms of its appointment, it received a letter dated 15 June 2012 signed by the acting municipal manager of the municipality informing the applicant *first* that an appeal had been lodged with regard to the applicant's appointment as implementing agent, *second*, recommending that all activities be put on hold until such time that the issue was resolved, and *third*, cautioning the applicant that should it choose to continue with any activities relating to the project, it will be completely at the applicant's risk. The municipality was immediately informed by the applicant that it was not accepting the repudiation of the agreement by the municipality and affording the municipality seven (7) days to rectify its repudiation. On August 2012 the Council of the first respondent adopted the report of its forensic investigators, effectively ending the operations of the applicant and withdrawing the letter of appointment. Getting no response from the municipality, the present application was launched by the applicant in September 2012.

RESPONDENTS' OPPOSITION

[10] The first and second respondents' ('the respondents') oppose the relief sought. The answering affidavit was deposed to by one Bongumusa Ntuli in his capacity as municipal manager of the first respondent.[2] It should be pointed out Ntuli was not the municipal manager of the first respondent when the tender in question was dealt with and awarded to the applicant. Ntuli's appointment as acting municipal manager took place in June 2012 and he was permanently appointed as municipal manager with effect from 1 December 2012.

[11] Aside from certain technical defences raised by the respondents to the application, by far the main thrust of their opposition relates to a number of irregularities which were allegedly committed by the first respondent and its then acting municipal manager in the adjudication process and the award of this tender to

[2] First and second respondents answering affidavit, indexed papers, pages 138-189.

the applicant. In this regard Ntuli avers that when he was appointed the acting municipal manager of the first respondent his attention was drawn to various tenders that were awarded and in respect of which there were alleged irregularities in the tender process and also allegations of fraud. In light of this the first respondent's Council resolved to appoint forensic investigators to investigate the matters and to compile a report in respect thereof. The contents of this report (relevant to the applicant) were made available to it when the application was initially launched. In view of the findings contained in the forensic report, the Council of the first respondent resolved not to proceed with the further processes pursuant to the letter addressed to the applicant on 27 February 2012. It was also found that an appeal lodged by an unsuccessful tenderer was never dealt with. According to the respondents the number of irregularities vitiates the conclusion of any agreement concluded between the applicant and the first respondent. These irregularities will be dealt with later in this judgment.

ISSUES TO BE DECIDED

[12] Four main issues were identified for determination in this application. These are:

[12.1] Whether the applicant must be non-suited *in limine* since the application was not instituted within 180 days, as is required by s 7(1) of the Promotion of Justice Act, 2000 (Act 3 of 200) ('PAJA').

[12.2] Whether the applicant should be non-suited since it did not exhaust its internal remedy in terms of paragraph 48 of the municipality's Supply Chain Management Policy (SCMP), before approaching this court.

[12.3] Whether the award of the tender to and the appointment of the applicant to carry out the project was conditional.

[12.4] Whether the tender process and hence the award of the tender to the applicant was vitiated by irregularities with regard to the procurement process

and more especially non-compliance with the requirement of the Preferential Procurement Policy Framework Act 5 of 2000 ('the Procurement Act') and the regulations promulgated in terms thereof (the regulations), as well as the municipality's SCMP.

[13] At the hearing of this application the applicant was represented by Mr Hartzenberg SC while the first and second respondents were represented by Mr Dickson SC and Mr Hattingh. I am indebted to counsel for their assistance in this matter.

[14] At the outset I point out that by the time the matter was argued before me on 21 February 2014, the first and second respondents had effectively abandoned the first issue set out above. I find myself in agreement with Mr Dickson that it is really the fourth issue that deals with the merits of the matter and on which the application must ultimately be decided. For this reason I consider it necessary to deal with the fourth issue first.

PROCUREMENT FRAMEWORK AND GENERAL PRINCIPLES

[15] In *Steenkamp NO v Provincial Tender Board EC,*[3] Moseke DCJ stated that:

> "Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law made contract for goods and services on behalf of government. However, the tending system it devises must be fair, equitable, transparent, competitive and cost effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in s 195(1)."

[3] [2006] ZA CC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR (CC) para 33.

[16] The above principle was elaborated upon by Jafta JA in *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & Others*[4] as follows:

> "The … Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (Section 217). The section requires the tender process preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent, competitive and cost-effective'. Finally, as a decision to award a tender constitutes administrative action, it follows that the provisions of PAJA apply to the process."

[17] The starting point for an evaluation of the proper approach to an assessment on the constitutional validity of outcomes under the State procurement process is thus Section 217 of the Constitution which provides:

> "(1) 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 of services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Sub-section (1) does not prevent the organs of State or institutions referred to in that sub-section from implementing a procurement policy providing for:
>
> (a) categories of preference in the allegation of contracts;
> (b) the protection or advancement of persons, categories of persons, disadvantage for unfair discrimination.
>
> (3) National Legislation must prescribe a framework within which the policy referred to in sub-section (2) must be implemented."

[4] [2007] ZASCA 165; 2008(2) SA 481 (SCA) para 4.

[18] The national legislation prescribing the framework within which a procurement policy must be implemented is the Procurement Act (referred to above). The Public Finance Management Act No.1 of 1999 (PFMA) is also relevant in this regard.

[19] Section 2 of the Procurement Act prescribes that:

> "2 (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
>
> (a) A preference point system must be followed;
>
> (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph *(d)* provided that the lowest acceptable tender scores 90 points for price;
>
> (iii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph *(d)* provided that the lowest acceptable tender scores 80 points for price;
>
> (c) any other acceptable tenders which are higher in p rice must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
>
> (d) the specific goals may include –
>
> (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
>
> (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* 16085 dated 23 November 1994;
>
> (e) and specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
>
> (f) 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; and
>
> (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole

discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection (1) *(e)* must be measurable, quantifiable and monitored for compliance."

[20] In terms of the Procurement Act and "acceptable tender" is any "tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". The procurement regulations define a tender as "a written offer in a prescribed or stipulated form in response to an invitation by an organ of State for the provision of services, works or goods, through price quotations, advertised competitive tending processes or proposals".

[21] An organ of State *must* indicate in the invitation to submit a tender:

(a) if that tender will be evaluated on functionality;

(b) that the evaluation criteria for measuring functionality are objective;

(c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;

(d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and

(e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the application prescribed point system.
[my emphasis]

[22] The object of the Public Finance Management Act is to "secure transparency, accountability and sound management of the revenue, expenditure, assets and

liabilities of the institutions" to which it applies. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective". Section 2 of the Procurement Act sets out the points system which every organ of State is obliged to follow when assessing tenders for goods and services.

[23] In respect of municipal procurement the specific relevant instrument is a provision of Local Government, Municipal Finance Management Act 56 of 2003. In Chapter II (part 1) Sections 110–119 procurement is dealt with. Section 111 and Section 112 require each municipality to implement a supply chain management policy. Section 115 imposes on the municipal manager duties to take all reasonable steps to avoid unfair and irregular practices. Section 116 requires any contract procured through the supply chain management system to be in writing. This is no doubt designed to ensure that the process ends fairly and without interference, corruption or fraud.

[24] Section 195 of the Constitution deals with the "basic values and principles governing public administration". These principles prescribe that (a) a high standard of professional ethics must be promoted and maintained (Section 195 (1)(a)); (b) services must be provided impartially, fairly, equitably and without bias (Section 195 (1)(d)); (c) public administration must be accountable (Section 195 (1)(f)) and (d) transparency must be fostered by providing the public with timely, accessible and accurate information (Section 195 (1)(g)).

[25] The principles set out above apply to all organs of State. In *Van der Merwe and Another v Taylor NO and Others*[5] in a minority judgment Mokgoro J observed the following at paragraphs 71-72:

[5] 2008 (1) SA 1 (CC).

> "[71] Section 1 of the Constitution, read with Section 195 indeed sets high standards of professional public service as applicant submits. It requires ethical, open and accountable conduct towards the public by all organs of State. These are basic values for achieving a public service envisaged by our constitution, which requires the State to lead by example. In this case, the State has failed to do so.
>
> [72] The remissness on the part of the respondents should not be countenanced. Correctly so, none of the respondents attempted to defend it. In this constitutional error, where the constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as in envisaged in the constitution and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past. Section 195 envisions that a public service reminiscent of the black era has no place in our constitutional democracy".

[26] It is well settled that all government action must comply with the principle of legality (see: *Fedsure Life Insurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC)). At paragraph 56 of the judgment the position was put as follows:

> "[56] These provisions simply imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely that the exercise of public power is only is only an estimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law …"

[27] It is well established that the provisions of PAJA apply to all procurement processes. The provisions of s 7(2) in particular are relevant in this regard. It should be noted that the appeal remedy invoked by the unsuccessful tenderer, namely Mkhhombe Developments (Pty) Ltd, has not yet been completed.

HAS THE TENDER PROCESS BEEN VITIATED DUE TO IRREGULARITIES?

[28] The answering affidavit deposed to by Ntuli on behalf of the first and second respondents is replete with allegations of irregularities that accompanied the tender process. These relate to the following:

[28.1] No rand value was prescribed for the tender. This made it impossible to ascertain what preferent point system had to be followed if regard is had to the provisions of Section 2 (1)(b)(i) and 2 (1)(b)(ii) of the Procurement Act.

[28.2] The invitation to submit the tender did not specify a goal for which a point may be awarded (Section 2 (1)(e)).

[28.3] The municipality did not comply with the following regulations namely:

(a) Regulation 3(a), which provides that the first respondent, is obliged, prior to the invitation to tender, to plan and as far as possible to accurately estimate the cost of the provision of the services for which an invitation to tender is to be made.

(b) Regulation 3(b) which provides that the first respondent is obliged, prior to the invitation to tender, to determine and stipulate the appropriate relevancy point system to be utilized in the valuation and adjudication of the tenders.

(c) Regulation 4(1) which provides that the first respondent is obliged to indicate in the invitation to tender whether the tender will be evaluated on functionality.[6]

[6] Regulation 4 deals with the evaluation of tenders on functionality and reads as follows:
"**4 Evaluation of tenders on functionality**
(1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.
(2) The evaluation criteria for measuring functionality must be objective.
(3) When evaluating tenders on functionality, the-
(a) Evaluation criteria for measuring functionality;
(b) Weight of each criterion;

[28.4] The municipality failed to comply with Section 17(h) of its own SCMP which provides that the bid specification committee (BSC) must comply with, *inter alia*, the Procurement Act and the Regulations. In this case no bid specifications had been prepared.

[28.5] The bid evaluation (or specification see para 28.4) committee (BSC) in its report dated 2 December 2011 applied the 90/10 preference point system whereas the rand value of the contract was never determined.

[28.6] Whereas the BSC applied functionality as a criteria, the bid invitation is silent about this. If regard is to be had to Regulation 4 of the Framework Regulations as set out below, such must clearly specify in the invitation to tender (i) the valuation criteria for measuring functionality (ii) the weight of each criteria (iii) the applicable values and (iv) the minimum qualifying score for functionality. This did not happen in the present instance.

[29] Ntuli goes on to catalog various irregularities which were committed in respect of the municipality's SCMP. In this regard the following are relevant:

[29.1] While s 17(j)(i) requires that the advertisement in the newspaper should provide for a closing date in not less than thirty days, if the value of the contract is more than R10million, in the present case the advertisement was placed on the 8 September 2011 and closed on 7 October 2011, which is twenty nine days only. While the value of the tender is not referred to in the advertisement in the newspaper or any other document for that matter, it nonetheless seems that the parties conducted themselves as if the value was in excess of R10million.

(c) Applicable values; and
(d) Minimum qualifying score for functionality,

must be clearly specified in the invitation to submit a tender.

(4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.

(5) Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point systems prescribed in regulations 5 and 6.

[29.2] Section 17(j)(iv) requires the advertisement to contain a statement regarding where copies of the bid specifications may be obtained and the deposit payable. The advertisement in question was silent about this.

[29.3] Section 17(j)(v) requires that the advertisement contain a statement that the bids must be submitted in a sealed envelope or package on which the address of the bidder and bid number and name have been clearly written. The advertisement in the present instance is silent about this.

[29.4] Section 17(j)(vii) requires a statement that if a bid does not comply with provisions of the SCMP it will be rejected. The advertisement in question is silent about this.

[30] Ntuli further points to various other irregularities committed by the various committees which were charged to perform specific functions in relation to the tender process. These are apparent from his affidavit and I do not wish to repeat them herein. The most glaring irregularity, however, was that the scoring price was not considered at all or if it was its consideration did not comply with the Procurement Act. In terms of the Act the points system must be used (100 points) and of this 90 points are for price and 10 points are for “specific goals”. The bid evaluation committee on the 9 January 2012 recommended Mkhhombe Developments (Pty) Ltd on an evaluation as follows:

Functionality:	
Capacity	35
Experience	45
Women equity	5
Disability	5
Total	90

[31] It will immediately be observed from the above that no consideration was given for price. This is not surprising as the tender made no reference to a Rand value from the outset. The advertisement (Annexure "ML3" to the founding affidavit) is completely silent in this regard.

[32] The Bid Evaluation (or specification see above) Committee on the 14 February 2012 changed this to recommend the applicant on the following criteria:

Presentation	15
Experience	20
Terms of reference	20
Qualifications	15
Ability to transfer skills	20
Triple BEE	10
Total	100

90 points were not allocated to price. However, the bid adjudication committee used these recommendations in order to justify the award to the applicant.

[33] In order to understand how the municipality and its officials dealt with the valuation of this tender (and other tenders for that matter), one only has to have regard to certain affidavits which were presumably procured by the forensic investigators at the time. The first affidavit is one deposed to by one Mkambule Nkosinathi Sidwell who was employed by the municipality as its supply chain officer. Paragraph 12 of his affidavit which was deposed to on the 5 July 2012 reads as follows:

"12

> I was the secretary during the BEC on 02nd of December 2011 that recommended Mkhombe construction. Members of the BEC were Bhengu S, Kunene X as the chair, Thabede FF (human settlement representative), Xulu IS, Mabaso S. As the BEC we decided to *manipulate* the system of points allocation as it (sic) there was no

BSC report; hence there was no price for the project or any other guide on how to allocate points and the advert was silent on that."
[my emphasis]

[34] The other affidavit is the one deposed by one Isaac Sifiso Xulu who was employed by the municipality as the Assistant Manager: Expenditure. The following appears in paragraphs 18 and 19 of his affidavit:

"18

I was the member of the BEC that set (sic) on 02 December 2011. Mkhombe Development (PTY) Ltd (Mkhombe) was recommended for the project to be Implementing Agencies for the construction of Siqakatha Low Income Rural Housing Project for 1000 units. The BAC recommended that we conduct presentations. Presentations were conducted and we scored participants. I submitted my score sheet to the secretary of the BEC Mr. Nkosinathi Nkambule (Nkambule), who passed it to the chairperson of the BEC Mr. Simphiwe Bhengu (Bhengu). I am not sure of other peoples points as we never shared them.

19

I wish to state that the advert was silent in the allocation of points and it never mentioned that there will be presentations. *We came with our own evaluation criteria in order to be able to allocate points*."
[my emphasis]

[35] The above affidavits formed part of the documentation (record) which was provided by the respondents to the applicant in terms of Rule 53. The extracts referred to above demonstrate adequately that the point allocation by the various committees was nothing more than a thumb suck.

[36] In view of these irregularities in the process, the first and second respondents contend that the entire process is irregular and unconstitutional and should accordingly be set aside in its entirety. They further submit that no signed contract has been concluded with the applicant and as such the award has no effect in law.

[37] The applicant while accepting *first* that a procurement contract for municipal services concluded in breach of the provisions of the applicable legislation which are designed to ensure a transparent, cost effective and competitive tendering process in the public interest, is invalid and will not be enforced and *second*, that depending on the legislation involved, and the nature and functions of the body concerned, a public body may not only be entitled but duty-bound to approach the court to satisfy its own irregular administrative act, avers that the municipality in the present instance has not done so. The applicant contends that what happened in this matter is that the municipality has converted the applicant's application, originally brought on a limited basis, and with limited information at its disposal, into a full scale wide-ranging review of its own decision to award the tender to the applicant. This, so the submission goes, is both substantively and procedurally grossly unfair to the applicant and should not be permitted.

[38] In my judgment, the irregularities highlighted by the first and second respondents in their answering affidavit, the most significant of which relates to the absence of a price for the tender, are material and affect the core values which are enshrined in Section 217 of the Constitution and the various pieces of other legislation flowing from Section 217. The applicant attempts to explain away these irregularities as being insignificant and not prejudicial to the tender process. I do not agree. Once it is found that a tender process has been conducted in a grossly irregular manner, any act flowing therefrom cannot be regarded as being valid in law. In *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading*[7] Leach AJA said the following in paragraph 15:

[7] 2010 (1) SA 356 (SCA).

"[15] Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid. In *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) ([2000] 3 All SA 247) this court set aside a contract concluded in secret in breach of provincial procurement procedures, holding that such a contract was 'entirely subversive of a credible tender procedure' and that it would 'deprive the public of the benefit of an open competitive process'. Similarly in *Eastern Cape Provincial Government v Contractprops 25 (Pty)* validity of two leases of immovable property concluded between the respondent and a provincial department without the provincial tender board having arranged the hiring of the premises as was required by statute, this court concluded that the leases were invalid. In giving the unanimous judgment of this court, Marais JA, after outlining the applicable statutory tender requirements, said the following:

> 'As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfill provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.
>
> As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.'"

[39] It would seem to me that as soon as the respondents had satisfied themselves that the tender process was indeed flawed they were under a duty not to submit themselves to an unlawful contract and to resist any attempt at the enforcement thereof. In my view, whether the first respondent did so by approaching a court for appropriate relief or by instituting a counter-application or by opposing any application which had the effect of declaring the process to be a valid one, is immaterial. What is important is that the public body concerned took positive steps to ensure that it did not submit itself to an unlawful act. The point was aptly set out in *Qaukeni*, supra, at paragraph [23] as follows:

> "[23] … This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act: see *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) ([2003] 3 All SA 21) at para 10. Consequently, in *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407D-E it held that the interest a municipality had to act on behalf of the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity. Similarly, in *Transai (Pty) Ltd v National Transport Commission and Another* 1977 (3) SA 784 (A) at 792H-793G this court held that an administrative body, which held wide powers of supervision over air services to be exercised in the public interest, had the necessary locus standi to ask a court to set aside a licence it had irregularly issued. Finally, in *Premier, Free State and Others v Firechem Free State (Pty) Ltd,* supra, Schutz JA concluded in giving the unanimous judgment of this court that 'the province [the appellant] was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement'."

[40] The duty and indeed the obligation on the part of an organ of State to 'detect' and 'act' against'[8] allegations of impropriety in municipal tendering was recognized

[8] Regulation 15 (1) of the Procurement Regulations, 2001 provides: "An organ of State must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any

and affirmed by the Constitutional Court in *Viking Pony Africa Pumps v Hidro-Tech Systems* 2011 (1) SA 327 (CC).

[41] In my view, and quite apart from all the other irregularities outlined in the respondents' answering affidavit, the adjudication of the present tender in the absence of a price offends the core values set out in s 217 of the Constitution. By no stretch of the imagination can it be said that this was an "acceptable tender" within the definition of that term in the Procurement Act. The applicant's contention that this tender was to be determined in terms of functionality only and not in terms of price is, in my view, unacceptable.[9] This contention loses sight of the provisions of the Constitution and the Procurement Act, all of which are couched in peremptory terms. I accordingly have no difficulty in concluding that the award of the tender to the applicant made without due compliance with various statutorily prescribed procedures relating to municipal procurement, is invalid and cannot be enforced.

[42] The applicant's complaint that the respondents are gaining an unfair advantage by turning this application into a full-scale wide-ranging review of its own decision, is without substance. As pointed out in *Qaukeni*, *supra*, in these circumstances substance must triumph over form. The respondents, in my view, have fairly and squarely, raised the issue of legality in their opposition to the relief being sought by the applicant. In my view, they were justified in doing so.

[43] In the circumstances, I accordingly find that the entire tender process in the present instance has been vitiated by the irregularities dealt with above. In the result, it cannot be said that a valid and enforceable agreement has come about. I further consider that the appeal lodged by Mkhombe Development has not yet been determined and as such there can be no finality as far as the award is concerned. It

---

specified goals and are not attained in the performance of the contract, act against the person awarded the contract."

[9] Regulation 6 of the regulations prescribes that the 90/10 preference point system for acquisition of services, works or goods with a Rand value exceeding R1million must be used.

follows, in my view that this application cannot succeed for all of the reasons set out herein.

ORDER

[41] I accordingly grant the following order:

The application is dismissed with costs, such costs to include the costs of two counsel.

_____

Date of Hearing	:	21 February 2014
Date of Judgment	:	28 February 2014
Counsel for Applicant	:	Adv. CJ Hartzenber SC
Instructed by	:	Meyer van Sittert Kropman Attorneys
Counsel for Respondents'	:	Adv. AJ Dickson SC Adv. C Hattingh
Instructed by	:	Weich & Kriel c/o Wessels & Hattingh Inc.