REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:4291/2023

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

Signature:

Date:

In the matter between:

MABOTWANE SECURITY SERVICES CC	**1ST APPLICANT**
BROWN DOGS SECURITY SERVICES CC	**2ND APPLICANT**
LETONA 6 SECURITY PTY LTD	**3RD APPLICANT**
And	
SEKHUKHUNE DISTRICT MUNICIPALITY	**1ST RESPONDENT**
M N RAMPEDI	**2ND RESPONDENT**
TUBATSE SECURITY SERVICES PTY LTD	**3RD RESPONDENT**

JUDGMENT

MONENE AJ

INTRODUCTION

[1] Sekhukhune District Municipality, the first respondent in this matter, needing security services in four different clusters under its jurisdiction put a tender inviting security service providers to submit bids in competition thereto. The tender advert stated, inter alia, that bidders could bid for some or all the clusters. It further stated that four bidders would be appointed ostensibly meaning one per each cluster.

[2] In the wake of the procurement process completing its course through all the committees, four different entities, one per cluster, were recommended as the successful bidders by both the Bid Evaluation Committee and the Bid Adjudication Committee. These "winning" bidders were the first, second and third applicants as well as the third respondent.

[3] When the recommendations of the Bid Adjudication Committee landed on the second respondent's desk, he, as the acting municipal manager then, overturned the recommendations or deviated therefrom, deciding to appoint the third respondent in all four clusters and reasoning, ostensibly as supported by uncontroverted facts, that the third respondent had scored best amongst all bidders in all four clusters. This resulted in the appointment of the third respondent in all four clusters and commencement with the provision of the security services which provision persists to date.

[4] Unhappy with the decision of the municipality per the acting municipal manager, the three applicants brought this application, in the main, seeking to review and set that decision aside. Curiously, hardly had the application gotten out of the blocks that the second and third applicants lost their appetite to proceed with it leaving the first applicant to soldier it alone. Apparently the two applicants backed down in the wake of a municipality enquiry report which laid bare fraudulent averments in their bid documents and in the light of an Auditor-General report which flagged the bid *in casu* as one which reflected gross irregular expenditure.

[5] The application was going forward only opposed by the first and third respondents with the second respondent understandably not featuring in the backdrop of employment fortunes neither favoring him with a continuance in the acting stint nor elevation to permanency. However, by the time this matter which commenced as an urgent application and ended up being heard by this court on special allocation was argued, only the third respondent stood in the opposing corner with first respondent, the municipality, having in biblical Pontius Pilate fashion washed its hands in the figurative waters of abiding or as their counsel termed it, “withdrawing opposition” to the setting aside of the tender award decision.

[6] Cutting out the fatty excesses of legalese, the grounds based on which the first applicant challenges the decision are the following:

6.1 That the acting municipal manager and thus the municipality in appointing only one bidder for all four clusters flouted the terms of the tender advertisement as four different service providers one per cluster were supposed to be appointed.

6.2 That the accounting officer, the acting municipal manager, was not empowered to vary or overturn a recommendation of the Bid Adjudication Committee.

[7] In sum the defenses hoisted by the third respondent in the papers, heads of argument and submissions before court are the following:

7.1 As preliminary points that the matter is not urgent, has been prosecuted irregularly in terms of rule 6 instead of rule 53 and is premature before this court owing to failure to exhaust internal remedies available as per the municipality’s supply chain management policy.

7.2 That the Supply Chain Management policy of the municipality does empower the municipal manager to reject and deviate from the recommendations of the Bid Adjudication Committee.

7.3 That the terms of the tender did not mandate the appointment of four different bidders but simply four bidders which, in their view, could mean one bidder counted four times.

[8] Outside the framework of routine and traditional legal sophistry, to which I shall to the extent necessary hereunder later briefly go, the above constitute the simple and mundane facts as well as disputes arising from the parties' divergent interpretation of those facts, which serve before me for determination it being so that in the notice of motion the first applicant premised on the Promotion of Administrative Justice Act 3 of 2000("PAJA") prayed for the following:

8.1 That the decision of the first respondent to award Tender SK8/3/3/1-51/2022/2023: Appointment of service provider for security services for a period of three years in respect of Cluster 1, Cluster 2, Cluster 3 and Cluster 4 to the third respondent be declared constitutionally invalid, reviewed and set aside.

8.2 That any agreement concluded between the first respondent and the third respondent pursuant to the tender award, be set aside.

8.3 That the tender in respect of Cluster 1 be awarded to the third respondent.

8.4 That the tender in respect of Cluster 2 be awarded to the first applicant

8.5 That the tender in respect of Cluster 3 be awarded to the second applicant

8.6 That the tender in respect of Cluster 4 be awarded to the third applicant.

8.7 That the third respondent be mulcted with costs on account of opposing the application.

PRELIMINARY ISSUES

Whether this court should have recused itself from hearing the matter

[9] Prior to the hearing of arguments from the parties I disclosed to the parties that, upon reading the papers, I had had a sense that the story of a four-cluster tender being awarded to one tenderer allegedly instead of four had sounded a bit familiar to me.

[10] I indicated further that my vague memory suggested that I must sometimes in 2023 have received a call, in my capacity as counsel, either from an unknown union official or political party attorney indicating a likelihood of briefing me in such a matter and that hoever it was unclear to me now as to on which side of the dispute that potential client was intending to be. Nothing had come of the matter after the call as I was ultimately never briefed in the matter. Suffice to say that neither of the parties currently before me ever engaged me regarding this matter.

[11] I made it clear that I did not see this disclosure as remotely suggestive of bias attaching to me or any reasonable apprehension thereof and that in my view my recusal from hearing the matter does not even begin to arise. I just wanted to disclose that.

[12] Upon being given a chance to comment on my disclosure, both counsel for the first applicant and for the first respondent agreed with me. Counsel for the third respondent disagreed and launched into an impromptu application to the effect that merely because I had previously gotten wind of a bit the facts from some unknown party and not the litigants before me, I had to recuse myself from hearing the matter. I disagreed with him and decided to proceed to hear the matter.

[13] This matter not really being about recusal per se, and there being no formal recusal application serving before me, I am disinclined to saddle this judgement with a lot of analysis of the now trite law on recusals. There is just no bias on my part in this matter, nor can there be any reasonable apprehension of bias from any of the parties. Just how would hearing about some of the facts partially amount to bias against the third respondent is beside me. It is like, as one of the counsel suggested, a judge hearing about a robbery on the radio and later seating in judgement over accused persons in a subsequent criminal trial. Anybody who alleges bias or apprehension thereof from merely such meagre facts would be manifestly unreasonable. Judges and this include acting judges like this one, are not sourced at the beginning of a trial or any hearing from another planet where they come to try facts being completely ignorant and oblivious of anything on earth. They are human and live amongst humanity with all their senses inclusive of sight and hearing employed to their human milieu.

[14] Without unnecessarily belaboring the point, that is the reasoning that informed my decision to decline the third respondent's invitation upon me to recuse myself.

Urgency

[15] I have already indicated *supra* that the application first came to court as an urgent application in early to mid 2023. It is now then heard before me as a special allocation a year later. Yet curiously and incredulously I am apparently being called upon to decide urgency and in that regard being referred to what was not done on time or known and not known by the applicant in the context of approaching a court urgently in April 2023. I do not intend expending too much time on the alleged lack of urgency point because, in my view, it is a non-starter. This court has held in ***Arocon Mbokodo CC v Mogalakwena Local Municipality (2650/2024)[2024] ZALMPPHC 57(7 June 2024)*** that:

> "*[14]I must state from the outset that, in my view, it would be a circuitous, imprudent, and wasteful exercise to deploy scarce judicial resources at special*

allocations only to sidestep dealing with the merits of opposed applications meagerly insulated by dismissing those motions on the technical basis of urgency. Once a matter is given a special allocation more so by agreement between the litigants, it must, in my view, be disposed of on the merits and not on such dilatory in limine points as urgency. In that regard points in limine should, in my view, only be magnified if they are dispositive of applications.

[15] It is from that premise that I am inclined to enroll this matter as urgent and hear and determine the merits thereof for it certainly cannot be in the interests of justice that heads of court allocate matters on special allocation, secure judges from a very limited base; that litigants secure counsel, and in this particular matter expensive heavy artillery senior counsel who engaged in extensive preparation at great cost to litigants; that matters are recircled on the escapist probable ruse of them not being urgent."

[16] I stand by the above assertions and find again that in general non-dispositive preliminary points such as urgency have no place in specially allocated applications. Matters must, at special allocation, be dealt with at merits level without giving any regard to dilatory erudite sounding but litigiously unhelpful legal gymnastics.

[17] Given that the matter first found its place on the urgent roll a year ago in 2023, even if I be wrong in my above assertion on the legal fruitlessness and wastefulness of dilatory points *in limine* raised in specially allocated matters, it stands to reason that the matter now being argued in 2024, urgency cannot be argued in interpreting the past, that is, as to whether it was urgent in 2023 seen through the 2024 lense, a year later. Had the matter been struck off for lack of urgency in 2023, it most probably would have been heard in the normal cause earlier than it was argued before me.

[18] Accordingly I frown most sternly on the lack of urgency "point" taken by the third respondent and have no hesitation in dismissing it.

The rule 30 and/or 30A irregular step point

[19] The nub of this point as taken by the third respondent is that the applicants irregularly brought this application bringing it only in terms of rule 6 and not rule 53.

[20] It is then argued that the third respondent is somewhat prejudiced in the proper and adequate vindication of its rights particularly regarding its right of access to court by some unexplained deficit in the record of the proceedings leading to the decision sought to be reviewed in casu.

[21] For me the question is whether the decision impugned by the applicants is clearly defined before court and is capable of being responded to by the respondents. I understand the importance of rules within the context of them being made for the court and not the court for them and brood no favour for feverish almost religious and puritan escapist apparent upholding of rules at the expense of determination of clearly defined disputes.

[22] Much like my approach to the preliminary point on urgency above, I find the point taken to be serving no purpose other than being needlessly dilatory. That much is apparent from a portion in the rule 30/30A notice which calls upon the applicant to withdraw this application and then deliver another perhaps compliant with rule 53.

[23] Beyond this court's *supra* stated frown upon non-dispositive points *in limine* in specially allocated matters the following further inform this court's disinclination to uphold the third respondent's rule 30 / 30A objection:

> 23.1 Rule 53 is not the only vehicle through which a review can be prosecuted. There are others available which include uniform rule 6 as permitted in terms of PAJA regulations which was employed by the first applicant in casu.

23.2 The furnishing of the record in terms of rule 53(3) is as per that subrule a mandate of the registrar and not per se of an applicant. Reference to the subrule in a review notice of motion calls upon whomever has the record to avail it to the registrar. It cannot therefore, in my view, be an irregularity that is imputed against an applicant if there is some defect in the record. Such an irregularity would lie at the foot of the decision maker because an applicant who is not a decision maker is not a custodian of the record.

23.3 The above said, the impugned decision of the acting municipal manager does not call for a lot of record. With what is available already the issues between the parties have been clearly defined and the third respondent has been able to answer and mount a defence. Its right of access to court being compromised as argued in the third respondent's heads of argument is, in my view, a baseless red herring.

[24] In the above premises, I find that the approach or procedure followed by the applicant in employing uniform rule 6 to be permissible and to the extent that it is not perfect for incongruencies such as referring to PAJA regulations as rules, I am inclined to condone it.

[25] Accordingly, the rule 30/30A objection by the third respondent is dismissed.

The failure to exhaust internal remedies point

[26] As I understand this point taken by the third respondent it is suggested that in terms of the supply chain management policy of the municipality and in particular paragraph 225 thereof, the first applicant, unhappy with the decision to appoint only the third respondent for all four clusters, should have first appealed that decision within the municipality by giving a written notice of appeal to the accounting officer within 21 days of the decision they now seek to review.

[27] It is contended with reference to such matters as ***Koyabe and Others v Minister for Home Affairs and Others 2010(4) SA 327 (CC)*** and ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004(4) SA 490(CC)("Bato Star")*** that the first applicant's failure to appeal internally should see this application dismissed.

[28] It is the third respondent's further contention that for this court to attend to this review application without first prosecuting an internal appeal, the first applicant should have demonstrated exceptionality in the interests of justice in an application for exemption or condonation of failure to exhaust internal remedies.

[29] In opposing this point the first applicant stated that clauses 225 to 227 of the municipality's supply chain management policy which speak to internal appeals are embodied in section 62 of the Local Government: Municipal Systems Act of 2000 which does not make an internal appeal mandatory. They argue further that they elected to proceed to court without internally appealing because engaging in an appeal first would have caused unreasonable delays which would have subverted their rights.

[30] Clauses 225 to 226 of the supply chain policy of the municipality provide as follows:

> "*225. In terms of Section 62 of the Systems Act, a person whose rights are affected by a decision taken by the Municipality, in terms of a delegated authority, in the implementation of its SCM system, may appeal against that decision by giving written notice of the appeal and reasons to the Accounting Officer within 21 days of the date of receipt of the notification of the decision.*
>
> *226. The tender documents must state that any appeal in terms of clause 225 must be submitted to the Accounting Officer at the address stated, and must contain the following:*
>
> *a. reasons and/or grounds for the appeal*

b. the way in which the appellants rights have been affected; and

c. the remedy sought by the appellant "

[31] Section 62 of Act 32 of 2000 as amended provides for almost the same wording as the policy quoted *supra save* for detailing further which bodies serve as appeal authorities for which decisions.

[32] Indeed neither the policy nor section 62 of the Act make the processing of an internal appeal mandatory.

[33] As I understand the **Bato star** principle on exhaustion of internal remedies at paragraph 25 of that judgement, a key rationale behind the principle is the due regard a court must give to pre-litigation decisions of internal appeal structures, bearing in mind special expertise or experiences such structures may have. It is not and cannot have been merely a pedantic approach which routinely sees fatality for the mere fact of not going through internal appeals. I understand neither **Bato Star** nor ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others 2014(5) SA 138(CC)*** at para 123 to be authority to a proposition which suggest that a court, particularly one seating at special allocation, should cop out of deciding review applications on a dilatory point of failure to exhaust internal remedies more so in matters were allegations and proofs of irregular expenditure as pointed out by the Auditor-General *in casu* relating to this tender are commonplace. The courts have a duty to intervene in situations where chapter 9 institutions like the Auditor General regarding this tender have pointed out financial irregularities detrimental to the general populace. Courts cannot and should not, in my view, bury their heads in the sand of immaterial non-compliances in the face prima facie illegality

[34] In my view therefore the failure of the first applicant to appeal the decision of the Accounting Officer to either the executive mayor or the Municipality's council is not fatal to this application regard being had to the following considerations:

35.1 The Auditor-General's findings of financial improprieties attendant to this matter which were highlighted by the first respondent in initially opposing this matter before it chose the Pontius Pilate approach, cannot be ignored by this court. It is in the interests of justice that those be factored into a decision on whether to condone the failure to appeal internally or not. In themselves those findings by the Auditor-General are exceptional circumstances which although not raised in an application for exemption by the applicant are available to the court's ear and cannot be ignored by any court acting reasonably in the interests of justice.

35.2 What compounds the first consideration *supra* is the fact that, it being more than a year since the decision sought to be reviewed was taken, it would clearly not be helpful to the interests of justice for the court to deafen itself to hearing it because it being remitted back to the internal appeal process would now be trumped by the 21 days *dies* within which an internal appeal ought to have been prosecuted. The circuitous condonation applications that could arise therefrom and further delay the ultimate determination of the lawfulness of the tender *in casu* cannot be countenanced by this court in the light of the Auditor General's findings of financial irregularity. This court has already emphasized twice elsewhere in this judgement the distaste it has towards circuitous legalistic gymnastics employed as preliminaries, in the main, to frustrate the determination of clearly determinable legal disputes. The situation becomes worse when such points *in limine* are magnified and given undue prominence in the backdrop of a consuming fire of the nature the Auditor-General has alerted regarding the tender *in casu*.

35.3 Looking at the character of the decision sought to be reviewed in casu, as one of the considerations O'Regan J in **Bato Star** urged that due weight should be accorded, which is neither a technical nor a specialized decision that needs any expertise from possible appeal tribunals, I see no reason why this court should, sitting as a special allocation court, refrain from hearing this matter deferring to an internal appeal which would whichever way it went fail to bring the matter closer to any finality. I am seized with this matter; the dispute is clear, and no party is prejudiced in any manner if I proceed to hear and determine it. So, I should proceed to hear the matter.

35.4 In my view the failure to first appeal internally prejudices nobody in this matter. Nowhere does the third respondent suggest any prejudice to itself. All it says, as part of numerous hurdles it places on the tracks of this application, is that that the appeal did not happen and should have happened before this court was approached.

35.4. The fact that the appeal clause does not make an appeal peremptory speaks volumes to this court as it decides whether to be seduced into refusing to hear this matter or not. It ultimately says to me that I must, in the interests of justice, exercise my discretion in favour of hearing the matter.

[36] In all the above premises I am disinclined to uphold the failure to exhaust internal remedies point. It just is not, in my view, a strong enough point in the light of all the factors involved in this matter, to see me refusing to entertain this review application.

<u>THE ISSUES, THE LAW AND ANALYSIS</u>

[37] Crisply the issues are the following:

37.1 Whether the decision of the acting municipal manager to appoint only one bidder for all four clusters contravenes the terms of the tender.

37.2 Whether the acting municipal manager was authorized to change, deviate from or reject the recommendations of the Bid Adjudication Committee which sought to have four different bidders appointed, that is, one for each security cluster.

[38] The first issue speaks to section 2(f)(i) of PAJA which speaks to the judicial reviewability of an administrative action which is not authorized by the empowering provision. In this regard the empowering provision is Security Tender Terms of Reference which at paragraphs 6.2 and 6.3 reads thus:

"*6.2 Respondents are advised that this Tender will be awarded to four (04) preferred Security Service providers as per the four (04) clusters.*

6.3 Respondents are allowed to bid for all clusters if they wish."

[39] Both the Bid Evaluation and Bid Adjudication Committees understood this empowering provision to mean that although the bidders could bid for all four clusters, no bidder could be awarded more than one cluster. That is also the understanding of the first applicant before this court.

[40] The nub of the third respondent's take on the empowering provision is that it does not say four "different" bidders but simply four. This to the third respondent does not exclude the possibility of one bidder being awarded the tenders four times.

[41] One does not even have to refer to any authority on interpretation of texts to immediately see how absurd and manifestly wrong the third respondent's preferred meaning of the empowering provision is. Why would the text have to say four preferred service providers per four clusters if it was referring to a simple ordinary situation of the best bidder winning at every cluster. It is true that the word "different" is not employed in the text, but its meaning is patently clear to this court on the textual reading of the

empowering provision. One does not even have to infer such a meaning. It is a patent, clear in your face meaning because had the third respondent's preferred meaning been possible the text would simply have stated that the best bidder will win or simply stated nothing there. The emphasis of the word "four" twice in paragraph 6.2 of the empowering provision means exactly what it ordinarily means; four preferred bidders one per cluster. One bidder chosen four times can, assuming the Bantu Education arithmetic we learned is still correct, never be said to amount to four service providers. One entity does not become four when referred to four times. It remains one.

[42] Paragraph 6.3 of the empowering provision only serves to further emphasize the point of four preferred service providers one per each cluster when it enlightens the bidders that they can take their chances in all four within an understanding that they, if successful, can only be appointed in one. I fail to see how any other meaning different from this that I give, can be preferred by any reader of the empowering provision.

[43] In the premises, I find that the decision of the second respondent as Acting Municipal Manager contravened the empowering provision and should on that ground alone be reviewed and set aside.

[44] The second issue speaks to section 2(a)(i) of PAJA which provides that a court or tribunal has the power to judicially review an administrative action if the administrator who took the decision was not authorized to do so by the empowering provision. In this regard, the question is whether the Supply Chain Management policy of the municipality authorizes the Accounting Officer to deviate from the recommendations of the Bid Adjudication Committee as he did in this case.

[45] I have gone through the Supply Chain Management policy attached to the papers as an annexure and could not find a single provision which authorized the Acting Municipal Manager to deviate from the recommendations of the Bid Adjudication Committee as he did. The closest I found resembling some kind of powers the municipal manager has in a case where he has hiccups with a recommendation is a referral back

to the Bid Evaluation or Adjudication Committee of a recommendation for reconsideration in terms of clause 224.

[46] In arguing this point the third respondent sought to suggest that clauses 220 and 222 of the Supply Chain Management policy empowered the second respondent to deviate or reject recommendations of the Bid Adjudication Committee as he did *in casu*. The clauses relied upon read as follows:

> "***Approval of Bid not recommended***
>
> *220. If a Bid Adjudication Committee decides to award a bid other than the one recommended by the Bid Evaluation Committee, the Bid Adjudication Committee must, prior to awarding the bid:*
>
> > *220.1 check in respect of the preferred bidder whether that bidder's municipal rates and taxes and municipal service charges are not in arrears.*
> >
> > *220.2 check in respect of the preferred bidder that it has the resources and skills required to fulfil its obligations in terms of the bid document.*
> >
> > *220.3 notify the Accounting Officer.*
>
> *221. The Accounting Officer may:*
>
> > *221.1 after due consideration of the reasons for the deviation ratify or reject the decision of the Bid Adjudication Committee referred to in clause 220 above.*

221.2 If the decision of the Bid Adjudication Committee is rejected, the Accounting Officer can refer the matter back to the adjudication committee for reconsideration.

222. If a bid other than one recommended in the normal course of implementing this policy is approved, then the Accounting Officer must, in writing and within ten working days, notify the Auditor General, the Provincial Treasury and the National Treasury of the reasons for deviating from such recommendation…"

[47] Quite clearly, reliance on the above clauses as the ones empowering the second respondent to deviate from the recommendations of the Bid Adjudication Committee as he did *in casu* is misplaced. In the first place the clauses, as the heading thereof suggests, deal with what to do regarding approving a bid recommendation of the Bid Evaluation Committee with which the Bid Adjudication Committee does not agree. In the second place even where the municipal manager rejects the recommendation of the Bid Adjudication Committee after this committee second-guessed the Bid Evaluation Committee, he cannot just make an appointment of his own as he did in this matter. His option is to refer it back to the adjudication committee for reconsideration. Thirdly, in this matter these clauses do not arise at all as both the Bid Evaluation and Adjudication Committees made the same recommendations.

[48] In the premises the decision of the second respondent to deviate from the recommendations of the Bid Adjudication Committee in this case was not authorized by the empowering provision and is judicially reviewable and must be set aside. I was half-hearted referred to section 114 of the Municipal Finances Management Act 56 of 2003 by third respondent's counsel it being argued it empowered the second respondent to decide as he did. I read it. It does not.

[49] In all the above premises I find that a case for the setting aside of the decision of the first and second respondent to award Tender SK8/3/1-51/2022/2023: Appointment of service provider for security services for a period of three years in respect of Cluster

1 , Cluster 2, Cluster 3 and Cluster 4 to the third Respondent must be declared invalid and unlawful and be reviewed and set aside. That finding is simply on the facts and the PAJA provisions referred to unavoidable. Respecting precedence trite law and the stare decisis doctrine still, it is, in my view sufficient to, in casu, so find without the traditional references to caseloads of case law which sometimes tend to not disabuse some of the probably misplaced notion that they amount more to codified and canned strands of reasoning which unwittingly holds back the development of the law than to a helpful tool of analysis in determination of matters.

REMEDY

[50] I am empowered in terms of section 8(1) of PAJA to, post setting aside an administration action as invalid and unlawful, determine a remedy that is just and equitable.

[51] The first applicant seeks a substitution order in the sense of this court setting aside the decision to appoint the third respondent's appointment and replacing it with and order mirroring the recommendations of the Bid Adjudication Committee which should then see it, the second and third applicants and the third respondent being awarded a cluster each. While that is a remedy available in law as per section 8(1) (c) (ii)(aa) of PAJA, I am ,for the following reasons, disinclined to go that route:

> 51.1 Firstly, that order would be impractical in the sense of ordering for the second and third respondent an order they have not sought as they have pulled back as applicants. Additionally, in the light of evidence of fraud allegedly committed by the two applicants who subsequently distanced themselves from this application as per the first respondent's investigations and the Auditor General's report, the counsel of the SCA in ***Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another (201/19[2020] ZASCA 74 (29 June 2020)*** that no court in this land will allow a person to keep an advantage which he has obtained by fraud registers most positively with this court.

51.2 Secondly, it will offend my sense of what is just to order such substitution in the face of the supra-mentioned findings of the Auditor-General that the tender constitutes one of the many key case studies in irregular expenditure. It can never be just and equitable to order what at face value appears fair to the parties but is grossly unfair on the public purse. It being so that section 131(1) of the Municipal Finance Management Act 56 of 2003 makes it mandatory for a municipality to address any issues raised by the Auditor-General, it cannot be the court which makes an order which pulls the municipality towards non-compliance with the Act. Additional thereto is the fact that section 217 of the Constitution of this country binds organs of state to contract for goods and services in a cost-effective manner, a situation not painted by the Auditor-General's report.

51.3 Thirdly, this court is not in as good a position as the first respondent to decide on who deserves the tender or tenders or not. Not only is it not a foregone conclusion as to how the tender should have been awarded but the actual state organ seized with the power to appoint is, in the light of the Auditor-General's recommendations not opposing the setting aside of its decision to appoint the third respondent.

51.4 This court does not have an appetite to offend or even appear to offend the separation of powers doctrine by encroaching onto the terrain of the municipality and indulging in what counsel for the first respondent has aptly termed "co-governance with the executive". Indeed, as has been repeated many times by our courts as in ***South African Association of Personal Injury Lawyers v Heath and Others 2001(1) SA 883*** and ***National Treasury v Opposition to Urban Tolling Alliance and Others 2012(6) SA 223(CC)*** the oversight role of a court should not be abused to usurp executive functions or to intrude into the executive and the legislature's terrains.

51.5 It will not only be impractical to order a piece of the tender to go to the third respondent and/or another piece to the first applicant, but it will be offensive to the separation of powers doctrine as the court will be engaging into some industrious role of an underqualified procurement official. There is just no piece of this tender that can creatively be excised from the whole which is, as determined already supra, invalid and unlawful.

[52] Accordingly, I am not persuaded that a substitution order will be just and equitable in the circumstances.

[53] In my view therefore a just and equitable order will be one which invokes section 8(1) (c) (i) of PAJA by setting the decision impugned in these proceedings aside with immediate effect and ordering the re-issuing of the tender and its processing on attenuated timeframes.

[54] I was addressed by all counsel on various permutations I can make regarding a just an equitable order if I, as I have now, set aside the decision impugned in these proceedings. I was invited to deal with the problem of how services may be rendered in the interim pending the tender being determined anew by suspending the declaration of invalidity and unlawfulness for a period equal to the time it will take to finalize a new tender. I do not find such an approach attractive in this matter. If to err be human, to nurse the continuation of the error in the circumstances, will, in my view, be diabolical for the religious and not in the interests of justice for legalistic. I am not blind to the immediate need for security services and the impact thereon by the setting aside order but, in my view, the first respondent has a lot of tools at its disposal to deal with situations emergent upon this order. Without being prescriptive, as that is not my role in the circumstances, I take note of tools like Regulation 36 of the Municipal Supply Chain Management Regulations which ought to be employable in the time between the order made in casu and the finalization of the new tender.

COSTS

[55] The first applicant having achieved some substantial success in the matter, there is no reason why it should not be entitled to costs against third respondent. I decline the invitation by the first respondent to mulct the second and third applicants with costs even after they had withdrawn from prosecuting the application. I do not understand why, given the heavily skewed power relations between the first respondent and the two former applicants, which skew favours the first respondent, and given the fact that it is the first respondent's conduct of making an invalid and unlawful appointment which birthed this matter, I should mulct the underdog with costs in the first respondent's favour.

CONCLUSION

[56] Resulting from all the above, the following order is made:

56.1 The application succeeds only to the extent of setting aside the award of the tender *in casu* to the third respondent.

56.2 The decision of the first respondent to award Tender SK8/3/3/1-51/2022/2023: Appointment of service provider for security services for a period of three years in respect of Cluster 1, Cluster 2, Cluster 3 and Cluster 4 to the third respondent is declared invalid, unlawful and is reviewed and set aside.

56.3 Any agreement and/or service level agreements concluded between the first respondent and the third respondent pursuant to the tender award is declared invalid, unlawful and is set aside.

56.4 The tender under Tender SK8/3/3/1-51/2022/2023 is remitted back to the first respondent to be started de novo and to be finalized within 45 court days of the delivery of this judgement

56.5 The third respondent is ordered to pay the first applicant's costs inclusive of counsel's costs on scale C.

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MALOSE.S. MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	*: 17 May 2024*
Judgement delivered on	*: 20 August 2024*
For the First Applicant	*: Adv. APJ Else SC* *: Instructed by Albert Hibbert Attorneys* *: Tel: - 012 346 4633* *: Email: albert@hibbertlaw.co.za*
For the First and Second Respondent	*: Adv. M Z Makoti with Adv R Mushiana* *: Instructed by P K Legodi Inc Attorneys* *: Tel: 012 100 3345* *: Email: pk@legodiinc.com*
For the Third Respondent	*: Adv. M R Maphutha* *: Instructed by Kutullo Kgafane Attorneys* *: Tel: 015 230 4000* *: Email: bafanantsoane@gmail.com*