Reportable:	**YES** / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2802/2016
2804/2016
Heard on: 01/06/2017
Delivered on: 21/07/2017

In the matter between:

EXILACLOX (PTY) LTD Applicant

(Registration Number: 2014/039737/07)

and

THE MEC FOR THE PROVINCIAL 1st Respondent
DEPARTMENT OF ROADS AND PUBLIC WORKS
NORTHERN CAPE PROVINCE

THE MEC FOR THE PROVINCIAL 2nd Respondent
DEPARTMENT OF TREASURY
NORTHERN CAPE PROVINCE

ALKARA 79 CC 3rd Respondent

(Registration Number: 2010/132064/23)

In the matter between:

OCEAN ECHO PROPERTIES 333 CC Applicant

and

THE MEC NORTHERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF ROADS AND PUBLIC WORKS 1st Respondent

ALKARA 79 CC 2nd Respondent
(Registration Number: 2010/132064/23)

Coram: Mamosebo J et Lever AJ

JUDGMENT ON REVIEW

MAMOSEBO J

Introduction

[1] The Department of Treasury in the Northern Cape Province needed office accommodation. As the holder of the provincial public purse the society expects it to be the epitome of good governance particularly where matters involving the *fiscus* are concerned. It needs to be vigilant, especially where action is taken in its name.

[2] Before us are two separate review applications which by agreement amongst the parties were consolidated and made an order of court on 03 February 2017 in terms of Rule 11 of the Uniform Rules of Court.

[3] The applicants, Exilaclox (Pty) Ltd and Ocean Echo Properties 333 CC seek an order:

3.1 reviewing and setting aside the decision to award a tender to Alkara 79 CC; and

3.2 that the tender be awarded to it.

The MEC for the Department of Works (the Department) and The MEC for the Provincial Department of Treasury (Treasury) are opposing this application.

The parties

[4] The applicant in Case Number **2802/2016** is Exilaclox (Pty) Ltd (Exilaclox), a company with its principal place of business at 459 Leyds Street, Sunnyside, Pretoria. The applicant in Case Number **2804/2016** is Ocean Echo Properties 333 CC, a close corporation with its main place of business at 41 Vermaas Street, Lindene, Kimberley. The first respondent in both applications is The MEC of the Department. The second respondent in the Exilaclox case is the MEC for Treasury. The third respondent also cited as the second respondent by Ocean Echo is Alkara 79 CC, a close corporation with its head office situated at 76 – 79 Quinn Street, Kimberley. Alkara is not opposing the application.

Factual background

[5] On 29 July 2016 The Department published an invitation to Bid under reference Number DRPW 035/2016 to tender for the provisioning of office accommodation for the Treasury for a period of five years. The closing date for the bid was 18 August 2016 at 11h00. A compulsory briefing session was held on 02 August 2016.

[6] Evident from the terms of reference the Department had itemised mandatory requirements and ancillary requirements that would be

negotiated with the successful bidder. In terms of the mandatory requirements, if not fully complied with, the bidder would be found to be unresponsive and the tender declared invalid.

[7] The following were essential: Standard bidding documents comprising **all** bid documents starting with the letters **NCP,** (NCP1, **NCP4**, NCP8, NCP9, NCP6.1 and a resolution of the board of directors); submission of **proof of ownership, proxy or a signed agreement between the bidder and the owner**; pricing breakdown schedule; a valid electrical certificate of compliance and the implementation plan. The B-BBEE status Contribution Certificate would not have invalidated the bid if it was not submitted.

[8] The following were amongst the minimum requirements: It had to be an existing building in Kimberley comprising a total of 7930m² of which 6580m² would be mandatory and the remaining 1350m² would be negotiable. The latter would form part of the implementation plan after the tender was awarded; the agreement would be for a period of 5 years and the lease agreement would be entered into with the Department. The fact that 1350m² was negotiable after the award clearly shows that the building would not be ready for immediate occupation, a point made by counsel for both applicants.

[9] It is common cause that the Bid was awarded to Alkara 79 CC. Section 6 (1) of PAJA stipulates:

"Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action." Exilaclox challenged the decision under Case No 2398/16. In that case the first respondent was MEC for Treasury and the second respondent was Alkara 79 CC. On 18

November 2016, by agreement between the parties, the decision to award tender DRPW035/2016 to Alkara was reviewed and set aside. Treasury was ordered to re-evaluate the tenders, including Exilaclox's tender within 10 days of the order.

[10] Pursuant to the re-evaluation and re-adjudication of the bid in compliance with the aforementioned court order Alkara was again found to be the most successful bidder and was awarded the tender. Hence the second challenge, this time round by both Exilaclox and Ocean Echo (before us.)

[11] Interestingly, though not surprising, the respondents made several concessions in their oral and written submissions. They initially adopted the stance, pertaining to the non-submission of the NCP 4 by Alkara, that all bidders were afforded an opportunity by the Supply Chain Management Unit (SCMU) to submit the NCP 4 declaration forms after the closing date of 18 August 2016 at 11h00. Proof of such invitation did not form part of the papers. It is evident from the papers that Exilaclox and Ocean Echo had in actual fact filed the NCP 4 form timeously. It therefore does not make any logical sense to require them to file what was already contained in their bids. This contention lacked merit and was misleading. Alkara filed its NCP4 on 30 August 2016. Adv Moroka SC, appearing for the respondents conceded, correctly so in my view, that **Alkara's bid was non-responsive** and should have been disqualified on that basis.

[12] Assuming that the respondents had erroneously awarded the bid to Alkara in the first round, it is inexplicable why they would in the re-adjudication award it to Alkara for the second time unless the re- repeated process was

hurriedly carried out or the committees were being inattentive. It was clear even at this stage that Alkara's bid was non-responsive based on the non-compliance with a mandatory requirement. Sec 217 of the Constitution of the Republic of South Africa, 108 of 1996, requires the respondents to have followed a process that is fair, equitable, transparent, competitive and cost-effective. ME Builders was the fourth bidder who remained in the race with Alkara, Exilaclox and Ocean Echo. Its bid was found to be non-responsive because the bidder did not return the NCP4 declaration of interest form. In ***Steenkamp NO v Provincial Tender Board, Eastern Cape*** 2007 (3) SA 121 (CC); 2007 (3) BCLR 300; [2006] ZACC 16 a para 60 at 146A Moseneke DCJ stated that tender processes compels *"strict and equal compliance by all competing tenderers on the closing day for submission of tenders."* Therefore, permitting Alkara to submit its NCP 4 after the closing date when other bidders were excluded or disqualified on the same basis is discriminatory, unlawful and unconstitutional.

[13] In any event, the requirements pertaining to the existing building were not met by Alkara either. This is what the Bid Evaluation Committee (BEC) stated in its meeting held on 26 September 2016 at 09h00:

*"Responsive: The bidder meets the requirements of the specifications in terms of square meters, however, **the building is still under construction**. It must be noted that the building will still need minor interior reconfiguration post award."*

The Bid Adjudication Committee (BAC) met on 29 September 2016 at 12h00 and one can say the entry shows a simple cut and paste because everything is captured in exactly the same wording as in the evaluation committee report.

I must interpose to say there is a reason, a good one I might add, why a member of the Provincial Treasury must be a member of both the BEC and the BAC. Of significance, is that in both instances, the treasury representative tendered an apology and did not attend either committee meeting.

[14] In ***Allpay Consolidated Investment Holdings and Others v Chief Executive Officer, South African Social security Agency*** 2014 (1) SA 604 (CC) at para 22 the following remarks are apposite:

"[22] This judgment holds that:

(a) The suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment of fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

(e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

(f) The remedy stage is where appropriate consideration must be given to the public interest in consequences of setting the procurement process aside."

[15] **It is my finding that the bid should not have been awarded to Alkara and the decision to award it to Alkara was unlawful and stands to be reviewed and set aside. See s 6(1) of the Promotion of Administrative Justice Act, 3 of 2000.**

[16] Notwithstanding the situation with the Alkara bid we remain with two applicants with competing interests to be awarded the same bid, they are Ocean Echo and Exilaclox. I will start by assessing the situation of Ocean Echo.

The case for Ocean Echo: Case No 2804/2016

[17] A good point of departure is to set out the relief sought by Ocean Echo:

17.1 That the applicant's non-adherence to this court's rules related to time periods and service is condoned, and the application is heard as an urgent review application in terms of Rule 6(12) and Rule 53.

17.2 That the first respondent's decision – ostensibly taken in November alternatively December 2016 – to exclude the applicant's bid from the further evaluation in the re-assessment process to award Bid DRPW035/2016: Provision of Office Accommodation for the Department of Provincial treasury is reviewed and set aside, alternatively, is declared unlawful and set aside;

17.3 That the first respondent's decision to award the bid mentioned in prayer 1 above to the second respondent is reviewed and set aside, alternatively is declared unlawful and is set aside;

17.4 That any Service Level Agreement concluded between the first and

the second respondent and related to the assailed decision is struck down in accordance with section 8 of the Promotion of Administrative Justice Act, 3 of 2000.

17.5 That the first respondent is ordered to award the bid to the applicant and to conclude a Service Level Agreement (SLA) with it to perform the contract, in accordance with section 8 of the Promotion of Administrative Justice Act, 3 of 2000.

17.6 Alternatively to prayer 5 above, the Department to re-evaluate the tenders submitted and award the contract in accordance with a lawful process.

[18] Ocean Echo's bid price for this tender was arguably the lowest. Adv Grobler, its counsel, argued that it ought to have been awarded the tender since it complied with all the requirements. To its dismay it was informed by letter dated 04 October 2016 that its bid was unsuccessful. Attempts to obtain reasons were futile. It approached court on an urgent basis under case number 2368/2016. The matter was set down for 04 November 2016 coincidentally, the Department provided reasons on that same day followed by other documents and records on 11 November 2016. Ocean Echo was unaware that Exilaclox had also approached the court for a similar relief.

[19] The following reasons were initially furnished by the Department as the basis for Ocean Echos' non-responsive bid:

19.1 That the property that Ocean Echo used to bid for the tender does not belong to them even though a letter of endorsement has been issued; but this in itself is not proof of ownership.

19.2 That the building that was submitted for the bid is zoned for residential and not commercial purposes.

19.3 Furthermore the building is not in a fit state for occupancy as it needs to be renovated to meet the client's needs/requirements. The space is also too small thus inadequate for the space required.
Ocean Echo was dissatisfied with the above reasons.

[20] After the Court order of 18 November 2016 Ocean Echo's bid was re-evaluated and re-adjudicated along with those of the other bidders. It was still unsuccessful. The reasons therefor were set out in a letter addressed to a Mr PD Simons dated 02 December 2016 in these terms:

"RE: SUBMISSION OF TENDER

You submitted a proposal for the abovementioned tender. The Bid Evaluation and Bid Adjudication process had to be redone after a court order had been obtained in the High Court Northern Cape Division granted on 18 November 2016. We regret to inform you that your proposal was not successful after this process had been done.

The reasons for rejecting your proposal are the following –

1. *It was noted in your bid that* ***the property does not belong to the bidder but has been issued with a letter of endorsement to market the property by an estate agent;***
2. ***No clear ownership of the building [could] be established as the person issuing the mandate to market the property is not the owner;***
3. *The building is used as a residential accommodation and is not in a proper state. It still needs to be renovated to meet the requirements of the client department and the expected time frames of issuing eviction notices poses a risk.*
4. *The bidder is offering new construction in terms of the proposed renovations which is not in line with the specifications.*

5. *The square meters offered are 9840 but the **current building is only 6000 square meters** and there is no indication of when the other square meters will be available.*
6. *Your bid does not meet the requirements of the specifications in terms of parking bays required.*

If you believe that the Department made a procedural or technical error in reaching this decision or that it was biased, you are entitled to take the decision on review to the High Court, Northern Cape Province, Kimberley in terms of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000). Such an application must be made to the Court within 180 days (6 months) of receipt of this Notice."

[21] Mr Grobler submitted that there is no reason or justification why the bid should not be awarded to Ocean Echo because it has met all the requirements. Ms Moroka, arguing for the respondents, reiterated that Ocean Echo's bid is still non-responsive. Mr Grobler was pressed to address the 'proxy' aspect and whether or not Ocean Echo met the mandatory requirement in the submission of **'proof of ownership, proxy or a signed agreement between the bidder and the owner'**. The document that Ocean Echo submitted reads:

"Re: Market House, CNR Southey and Phakamile Mabitja Roads, Kimberley

The landlord of the abovementioned property has agreed to give Ocean Echo Properties 333 CC a sole mandate to market the property to public works and to outright purchase the property once the tender is successful."

[22] Counsel sought to nudge us in the direction that the proxy issue has become moot and that it was not exactly clear what the term 'proxy' was

designed to convey. It must be borne in mind that the owner of the building did not bid for the tender but Ocean Echo did. Be that as it may, the bid was not for the sale of the building but for a lease thereof. We are cognizant of the fact that Ocean Echo was not appointed a proxy in accordance with s 58 of the Companies Act, 71 of 2008, a point correctly conceded by Mr Grobler.

[23] It was enquired from counsel whether the letter that was submitted by Ocean Echo constituted an agreement with the owner of the building or a proxy the response was none of the above. Mr Grobler objected to the introduction of an additional affidavit by Exilaclox which sought to challenge the eligibility of Ocean Echo to be favourably considered in this bid. In the end Mr Grobler conceded that the document cannot serve as proof of ownership and neither does it satisfy the elements of a proxy. It was also not a document signed by the bidder and the owner.

[24] I have not elaborated on the suitability of the building and the comments made by the respondent in the technical reports in that respect because the disqualification was ultimately based on the failure to meet the mandatory requirements of a proxy.

[25] Although in the Notice of Motion substitution was sought or the remittance of the matter to the respondents for re-evaluation and re-adjudication, Mr Grobler in oral argument somersaulted and moved for the re-advertisement of the bid, something that was never pleaded. To introduce this aspect without having afforded the other parties an opportunity to comment on it would be prejudicial. The suggestion by counsel for re-advertisement will not be just and equitable regard also being had to the time lapse that Treasury must still endure awaiting the

outcome of the process. I am mindful that Treasury is also partly to blame for the delay, particularly by not having scrutinised the process with diligence, more so at the evaluation and adjudication stages.

[26] **It is therefore my finding that Ocean Echo's bid was unresponsive and its application stands to be dismissed. However because it was successful in as far as having the respondent's decision being reviewed and set aside, it will only be fair for it to be awarded costs. The first respondent, the Member of the Executive Council: Department of Roads and Public Works, must bear the costs of this application.**

<u>The final matter: The Exilaclox (Pty) Ltd Case</u>

[27] The Department initially awarded the tender to Alkara having found Exilaclox's bid non-responsive. The following reasons were furnished by the BAC as set out by the Head of Department, Mr Kholekile Nogwili, in his answering affidavit on behalf of the Department on 26 January 2017:

"16.1 Non-responsive: Members found that the signature in the offer to purchase is not that of the seller: seller signed as the purchaser and purchaser signed as the seller (see attached legal advice);

16.2 There is no letter of authority for Mr J Du Toit for signing the offer to purchase (see attached legal advice);

16.3 The number of square meters 6369 as per "invalid" offer to purchase is far less than the floor layout plan as per bidder's specification plan of 10477 square meter."

[28] Exilaclox approached Court (Case No 2398/2016) seeking to review and

set aside the decision to award the tender to Alkara. Matlapeng AJ granted the order by agreement on 18 November 2016 in the following terms:

"1. The decision of the first respondent to award tender DRPW035/2016 ("the tender") to the second respondent is reviewed and set aside.

2. The first respondent is ordered to re-evaluate the tenders, including the tender of the applicant, within 10 days after the granting of this order.

3. Each party pays its own cost."

[29] Pursuant to the afore-mentioned order the Department wrote a letter dated 02 December 2016 to Exilaclox informing it that the tender was re-adjudicated by BAC on 30 November 2016 to comply with the Court order of 18 November 2016 but the bid was unsuccessful. Should reasons be required they will be furnished on request.

[30] Notwithstanding the aforementioned letter the Department addressed a separate communication dated 02 December 2016 and provided the following reasons for rejecting Exilaclox's proposal:

"1. The advert did not specify that qualified tenders would be considered when calling for tenders and thus your tender which was qualified could not be considered;

2. The Deed of Sale that had been submitted with the Bid had suspensive conditions which were not met and in particular we refer you to that the seller had to sign the offer to purchase by 16 August 2016 for the sale to be valid and the seller only signed on 17 August 2016 thus the suspensive clause kicked in on the 16th invalidating the offer;

3. *No proof had been provided that the Company is a financially stable company in that upon investigation by the Department the company was found to have been dormant and thus had no record of financial activities. The Committee felt that this would not guarantee that the company would obtain finance to provide the services required in terms of the tender;*
4. *The Company is not VAT registered with the South African Revenue Service and thus its Tax matters are called into question;*
5. *There is no letter of authority signed by Mr J Du Toit granting him the authority to sign the offer to purchase on behalf of the company. The Committee was made aware that this document was presented at Court during the proceedings but this document had not been part of the Bid Documents upon submission to the Department;*
6. *Even though the bidder indicated that they will provide 10 477 square meters and their bid price was lower therefore you would not have scored the highest points as your bid was non-responsive;*
7. *Furthermore the technical report indicated that during the site visit the bidder had informed the team that it would not put in new lifts but merely refurbish the old ones this posed a risk to the tenants who would use the building as the lifts were quite old, secondly, the parking space alluded to was 1 kilometer away and no document was included in the bid document to indicate that parking would be leased as the current parking at the proposed building is insufficient for the tenant's use."*

[31] It is by virtue of the reasons furnished above that Exilaclox approached the court again to have that decision reviewed and set aside. The Department seems to have abandoned some of the initial reasons and

introduced new fresh ones. When considering the furnished reasons of 02 December 2016 against the mandatory requirements of the tender, the following observations are significant:

31.1 The Department did not consider its own mandatory requirements when assessing the application but rather considered extraneous requirements;

31.2 Although the first stated reason was that the tender was not considered because it was a *"qualified"* tender however at para 60 of its answering affidavit the Department couched its initial stance as follows:

"I admit that the bid was not conditional but that the agreement of sale contained a suspensive condition. The applicant's bid was not judged to be non-responsive on the basis of this clause but the risk was indeed highlighted."

Thus this no longer served as the reason to disqualify Exilaclox.

31.3 A further mandatory requirement was a signed agreement between the bidder and the owner of the building. The second reason advanced by the Department was that there was no letter of authority for Mr Du Toit who had signed the purchase agreement. Nowhere in the mandatory requirements was it specified that it was necessary for the signatory to additionally attach a letter of authority. The Department further made this averment in its answering affidavit:

"In terms of applicable legislature therefore the seller and the owner had to exhibit clear authority to contract."

It was persuasively argued by Adv Cillier SC that this argument confused the requirements in s 2(1) of the Alienation of Land Act, 68 of 1981, with the mandatory requirements in the tender. Mr

Cillier further argued that the reasoning by the Department in first holding that the purchase agreement was invalid and thereafter that no agreement with the owner accompanied Exilaclox's tender and was, consequently, non-responsive for lack of compliance with mandatory requirements to furnish an agreement with the owner constituted a material misdirection. I agree. See ***Papenfus v Steyn*** 1969 (1) SA 92 (T).

31.4 The third reason cited by the Department for non-responsiveness was that Exilaclox failed to submit proof that it was financially stable. This was however not part of the mandatory requirements. Despite the fact that Exilaclox had attached the organogram showing how it fits into the SMADA Group an aspect totally ignored by the Department, nowhere in the papers was this requirement specified.

31.5 The other basis for the exclusion or disqualification of Exilaclox was that it was not VAT registered with the South African Receiver of Revenue Services. In its answering affidavit the Department provided this unmeritorious and contradictory position:

"I do however, point that the issue of the applicant's tax affairs and non-registration as a VAT practitioner did not disqualify the applicant."

31.6 As far as the refurbishment of lifts is concerned as opposed to replacement, an aspect mentioned in the technical reports, the Department used this aspect to disqualify Exilaclox. It nevertheless furnished the following statement in its answering affidavit:

"this did not constitute a disqualification of the applicant's bid."

31.7 The issue of parking that was a kilometer away was also cited as a reason for the non-responsiveness. Parking was also not a

mandatory requirement. In actual fact it was mentioned under the head "additional required items." The relevant terms of reference read: "*these items are subject to negotiation prior to the award, preferred bidder will be required to submit [a] detailed implementation plan with regard to additional items.*"

[32] It is clear that the Department adjusted the reasons to find Exilaclox non-responsive. This is illustrated by the change in reasons between the reasons furnished by the adjudication committee and those furnished by the HOD. It remains inexplicable why the HOD would come up with reasons for the disqualification when he was not even part of the adjudication committee and was not part of the team that assessed and analysed the qualification of the bidders.

[33] In ***National Lotteries Board v SA Education & Environment Project*** 2012 (4) SA 504 SCA at 513 paras 26 – 28; [2012] 1 All SA 451 (SCA) Cachalia JA pronounced:

"*[26] …The question here is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application.*

[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For

in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision.

Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.

[28] …The fact that it may have had other reasons for having come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision. In fact, it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right."

[34] A decision maker may conceivably give supplementary reasons if it is evident that a certain aspect was erroneously overlooked. However, self-contradiction, as is apparent from this case does not resort in such a category. Borrowing from Cachalia JA's pronouncement, the fact that it may have had other reasons for arriving at a decision does not change the fact that the Department made the decision unlawfully. It cannot remedy its unlawful act by giving different reasons after the fact.

[35] Since the decision to award the bid to Alkara stands to be reviewed and set aside, s 8(1) of PAJA affords this court a wide discretion to grant 'any order that is just and equitable'. Once it can be shown that exceptional circumstances exists, a court can exercise a discretion in terms of s 8(1)(c)(ii)(aa) to make a substitution order. The section provides:

"(1) The court or tribunal, in proceedings for judicial review in terms of 6(1), may grant any order that is just and equitable, including orders –

(c) setting aside the administrative action and –

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action."

[36] On a conspectus of the aforegoing analysis it is evident that this court will be qualified to grant an order of substitution provided that exceptional circumstances exist.

In determining whether exceptional circumstances exists in this matter or not I take cue from the pronouncements by Khampepe J writing for the unanimous court in the ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*** 2015 (5) SA 245 (CC) at 258 para 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 administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

[37] Khampepe J went on to say at 257D – F:

"[42] The administrative review context of s 8(1) of PAJA) and the wording under ss (1)(c)(ii)(aa) make it perspicuous that substitution

remains an extraordinary remedy. Remittal is still always the prudent and proper course.

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

[38] The bids in *casu* have been evaluated and adjudicated by the relevant committees. All that was left was to allocate the bid to the bidder whose bid was found to be responsive. I have already demonstrated in the preceding paragraphs how Alkara and Ocean Echo did not qualify because of the non-compliance with the mandatory requirements. This court is in as good a position as the administrator to make appropriate decision. The decision of the administrator is a foregone conclusion. As Khampepe J explained at 259E: *"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.'"*

[39] It is inconceivable that the department alter its preconceived notion should the matter be remitted to them again. It has already had two bites of the cherry and on both occasions awarded the bid to Alkara even though the overwhelming weight of evidence at its disposal pointed the other way. It is clear from the moment the bids were submitted that Exilaclox's bid was responsive and Alkara's and Ocean Echo's were

non-responsive. The department has not justified rationally its reasons for awarding the bid to Alkara. As already stated this bid was advertised on 29 July 2016 and we are almost a year down the line and the bid has not been executed. It will in all circumstances not be just and equitable to remit the matter to the department. Neither the department nor Ocean Echo has shown any cogent justification for the process to start afresh. In fact, it was not so pleaded by Ocean Echo. A substantial amount in public funds has already gone into the advertisements and processing of this bids. In my view, there may be unjustifiable prejudice occasioned by a further delay. The parties have already approached this court on several occasions for an appropriate remedy.

[40] Khampepe J continued at 260 para 54:

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

[41] In ***Livestock and Meat Industries Control Board v Garda*** 1961 (1) SA 342 (A) the court held:

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

[42] It is in the light of the aforementioned instructive decisions by the Constitutional Court and the provisions in the Constitution referred to hereinbefore that the decision taken by the MEC Northern Cape Provincial Department of Roads and Public Works is found to be unconstitutional and must be reviewed and set aside. Furthermore, that on the facts of this particular case exceptional circumstances have been shown to justify substitution and substitution in these circumstances would be both fair and just.

[43] In the result, the following order is made:

It is ordered:

1. **The decision of the first respondent, The MEC for the Provincial Department of Roads and Public Works, Northern Cape Province, in both applications to award tender DRPW035/2016 to Alkara 79 CC in Case No 2804/2016 and Case No 2802/2016 is reviewed and set aside.**
2. **It is declared that Exilaclox (Pty) Ltd, the applicant in Case No 2802/2016, submitted the only responsive tender to the Department.**
3. **It is declared that Exilaclox (Pty) Ltd is the preferred bidder.**
4. **The Department is ordered to negotiate with Exilaclox the requirements and finishes to which the building must comply with and do so in strict compliance with the terms of reference and the building specifications.**
5. **The MEC for the Provincial Department of Roads and Public Works, Northern Cape Province, is ordered to pay the costs of the applicants in Case No 2804/2016 and Case No 2802/2016, inclusive**

of the costs occasioned by the employment of two counsel where applicable.

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MAMOSEBO J
NORTHERN CAPE DIVISION

I concur

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LEVER AJ
NORTHERN CAPE DIVISION

For the applicant:	Adv PG Cilliers SC
	Adv APJ Els
Instructed by:	Waldick Jansen Van Rensburg Inc
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For the applicant:	Adv S Grobler
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