IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 3191/2013
Date heard: 5-7/2/14
Date delivered: 25/3/14
Reportable

In the matter between:-

JOUBERT GALPIN SEARLE	**1ST APPLICANT**
REHANA KHAN PARKER & ASSOCIATES	**2ND APPLICANT**
Z ABDURAHMAN ATTORNEYS	**3RD APPLICANT**
BLACK LAWYERS ASSOCIATION	**4th APPLICANT**

and

THE ROAD ACCIDENT FUND	**1ST RESPONDENT**
BATE CHUBB & DICKSON	**2ND RESPONDENT**
FRIEDMAN SCHECKTER	**3RD RESPONDENT**
POTELWA & COMPANY	**4TH RESPONDENT**
MNQANDI INC.	**5TH RESPONDENT**
KETSE NONKWELO INC.	**6TH RESPONDENT**
RAHMAN INC.	**7TH RESPONDENT**
TAU PHALANE INC.	**8TH RESPONDENT**
TOMLISON MNGUNI JAMES	**9TH RESPONDENT**
T M CHAUKE INCORPORATED	**10TH RESPONDENT**
DWARIKA NAIDOO & COMPANY	**11TH RESPONDENT**
MATTHYSEN & VAN VUUREN	**12TH RESPONDENT**
EDWARD NATHAN SONNENBERGS	**13TH RESPONDENT**
MAYAT NURICK	**14TH RESPONDENT**
LINDSAY KELLER	**15TH RESPONDENT**
SISHI INCORPORATED	**16TH RESPONDENT**

FOURIE FISMER INC.	**17TH RESPONDENT**
MOHLALA ATTORNEYS	**18TH RESPONDENT**
LINDA MAZIBUKO & ASSOCIATES	**19TH RESPONDENT**
MAYATS ATTORNEYS	**20TH RESPONDENT**
SHEREEN MEERSINGH & ASSOCIATES	**21ST RESPONDENT**
DIALE MOGOSHOA	**22ND RESPONDENT**
NOSUKO NXUSANI	**23RD RESPONDENT**
MNQANDI INC.	**24TH RESPONDENT**
MARIBANA MAKGOKA	**25TH RESPONDENT**
GOVINDASAMY NDZINGI GOVENDER INC.	**26TH RESPONDENT**
KESI MOODLEY	**27TH RESPONDENT**
TSEBANE MOLABA INC.	**28TH RESPONDENT**
HAJRA PATEL INC.	**29TH RESPONDENT**
DUDUZILE HLEBELA INC.	**30TH RESPONDENT**
ROBERT CHARLES	**31ST RESPONDENT**
MATHOBO RAMBAU SIGOGO	**32ND RESPONDENT**
NONGOGO NUKU INC.	**33RD RESPONDENT**
BOKWA ATTORNEYS	**34TH RESPONDENT**

Public procurement – award of tender to firms of attorneys by Road Accident Fund – review of award of tender – effect of expiry of tender validity period – whether tender can be revived after expiry of tender validity period – remedy – setting aside of invalid tender and suspension of order setting tender aside so that tender process can be carried out again.

JUDGMENT

PLASKET, J:

[1] The Road Accident Fund (the RAF) is an organ of state, as defined in s 239 of the Constitution, created by s 2(1) of the Road Accident Fund Act 56 of 1996 (the

RAF Act).[1] The reason for its existence is set out in s 3. Its function is 'the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles'. In order to settle or defend cases brought against it by those claiming to have been injured in motor vehicle accidents, the RAF engages the services of agents in the form of a large panel of firms of attorneys. This case concern the validity of the public procurement process by which the RAF sought to appoint 33 firms of attorneys to act on its behalf in the lower and superior courts of the country for a three year period.

Background

[2] This matter was brought as an urgent application in the latter part of 2013. In its notice of motion, the first applicant, a firm of attorneys from Port Elizabeth who had tendered unsuccessfully to be appointed to the panel (having been part of it for ten years before) applied for an interim interdict to maintain the status quo pending the review of the decision taken by the RAF to appoint 33 firms to its panel.

[3] Before the matter could proceed, however, the first respondent applied for the joinder of the successful tenderers – the second to 34th respondents. It also brought a separate application in terms of the Promotion of Access to Information Act 2 of 2000 (the PAIA) for information relating to the award of the tender. Parallel to that, a protracted battle for the record in terms of rule 53 of the uniform rules played itself out and two further unsuccessful tenderers and a voluntary association of lawyers, the Black Lawyers Association (the BLA), applied successfully to be joined as the second, third and fourth applicants.

[4] All the while, the papers continued to grow and grow.

[5] On 12 December 2013, I heard argument on the application by the first, second and third applicants for interim relief. On 31 December 2013, my judgment dismissing the application with costs was handed down. In accordance with an

[1] *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) para 19; *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E) para 14.

arrangement made when the application for interim relief was argued, the review application was postponed to 5 February 2014.

[6] I shall, in this judgment, proceed to deal in order with (a) the facts; (b) a preliminary point taken by the respondents that the first applicant delayed unreasonably before launching its application; (c) the grounds upon which the applicants attack the award of the tender; (d) the award of a just and equitable remedy; and (e) costs.

The facts

[7] The material facts are common cause. It is, however, necessary to set them out in some detail.

[8] As testament to the on-going carnage on the roads of this country, it is a notorious fact that the civil trial rolls of both the lower and the high courts throughout the country are dominated by cases involving motor vehicle accidents in which the RAF is sued in its capacity as the body responsible for compensating victims of road accidents. In order to fulfil its statutory duties, it is necessary for it to appoint agents to perform its litigious work. It is empowered to do so by s 8 of the RAF Act and has done so in the past by appointing firms of attorneys from across the country to a panel.

[9] According to Dr Eugene Watson, the Chief Executive Officer of the RAF, the panel of which the first, second and third applicants were members – the old panel – was appointed about ten years ago. As a result of various problems relating to the quality of work and unprofessional conduct on the part of some panellists,[2] the Auditor-General looked into the matter and found that the old panel had not been appointed in an open and competitive procurement process that is required by s 217 of the Constitution, but rather on the basis of direct negotiations between individual firms and the RAF. The Auditor-General requested the RAF to regularise the

[2] There is no suggestion that the first, second or third applicants are guilty of unprofessional conduct or that their work for the RAF was of a poor quality.

situation by conducting the type of procurement process required by the Constitution for the appointment of a new panel.

[10] On 13 July 2012, the RAF advertised in both the Government Tender Bulletin and the national press a 'request for proposals' under reference number RAF/2012/00021 with the description 'Panel of Attorneys for the Road Accident Fund (RAF) to provide specialist litigation services'. Attorneys were invited to bid for work, throughout the country, in the following terms:

'The RAF wishes to invite suitably qualified legal firms from all provinces to be listed on a panel of attorneys to provide specialist litigation services to the RAF as per the following categories:

1. Magistrate's Court/Regional Court
2. High Court
3. High Value Matters (+R3 million)

Bidders must submit a separate bid for each category.

The appointment to the panel will be based on the capacity of the firm as well as the firm's experience relating to personal injury litigation. The appointed legal firms will be used on as and when required basis.'

[11] The closing date for the submission of bids was 20 August 2012 and the tender validity period was '90 days from the closing date'. In terms of clause 1.3.1, bidders agreed that 'the offer herein shall remain binding upon me/us and open for acceptance by the Road Accident Fund during the validity period indicated and calculated from the closing hour and date of the Bid'.

[12] A total of 152 bids were submitted to the RAF by the closing date. The applicants submitted their bids timeously and awaited the outcome.

[13] It is not necessary to deal in great detail at this stage with the way that the bids were dealt with by the RAF. Suffice it to say that the process involved the participation of the RAF's procurement office, a Bid Evaluation Committee (BEC), the Procurement Control Committee (PCC) and its board. The process was both complex and time-consuming. Watson admitted that the RAF had under-estimated the time required to complete the evaluation and scoring of the bids and the eventual

awarding of the tender. That said, it is also clear that the process did not always run smoothly, that mistakes were made that had to be corrected and that time was not always utilised optimally by the RAF.

[14] When the RAF commenced work on the evaluation of the bids that it had received, 15 were eliminated at an early stage because they did not contain original and valid tax clearance certificates or the attorneys concerned had failed to attend a compulsory briefing session.

[15] Commencing on 27 August 2012, the remaining 137 bids were then evaluated for compliance with functionality criteria. The first part of this process was to evaluate the bids against mandatory functionality requirements that included a minimum of five years' experience on the part of the senior attorney of each bidder who would be dealing with RAF matters, the provision of certificates of good standing not older than six months in respect of those dealing with RAF matters and the production of Fidelity Fund certificates. This process saw more bidders fall by the wayside, including the second and third applicant who had failed to furnish certificates of good standing.

[16] On 29 August 2012, the remaining bidders were evaluated against still other functionality criteria stipulated in the tender. These included the knowledge and experience of the firms' practitioners. Bidders also had to be able to demonstrate their capacity to provide the infrastructure necessary for uninterrupted electronic communication with the RAF. Those who did not achieve the threshold score of 65 points out of a possible 90 points in this stage were excluded and the remaining bidders then had their references vetted. If their references were confirmed, they were awarded a further ten points. Those bids that achieved 70 points or more out of 100 were then evaluated for B-BBEE. This criterion was scored out of ten points and, according to Watson, was central to the outcome of the tender evaluation process.

[17] This is when the first of a series of problems arose. The BEC had disqualified some bids where certificates of good standing had been provided for firms rather than for individual attorneys in a firm. It had then been informed by the Law Society of South Africa that a certificate of good standing issued in respect of a firm meant

that all of the partners were in good standing. The BEC then decided to re-institute those bids that had been disqualified on this basis.

[18] The BEC finalised its evaluation of all of the bids on 21 September 2012. It then began the process of checking the references of the successful bidders. This proved to be more time consuming than had been envisaged. Once this was done, the bids were consolidated and an evaluation report was compiled for presentation to the PCC. This too was a time consuming exercise. The report was finalised on 2 November 2012. It was tabled before the PCC which met on 5 December 2012. By this time the tender validity period had expired.

[19] The PCC disagreed with the BEC's approach to certificates of good standing for firms. It took the view that the tender required certificates of good standing to be submitted in respect of each individual attorney who would be doing RAF work. The PCC referred the matter back to the BEC. It decided to reject the bids where no individual certificates of good standing had been submitted.

[20] The BEC tabled a revised report on 16 January 2013. Revisions were made to it on the request of the PCC and the final evaluation report was submitted in March 2013. On 13 March 2013, the PCC resolved to recommend to the board the award of the tender to a set of preferred bidders.

[21] Watson stated that it was only at this stage, when all of the administrative issues were checked, that it was realised that the tender validity period had lapsed. This is not entirely accurate. The BLA had written a letter to him dated 3 March 2013 in which the expiry of the tender validity period was raised squarely and it was pointed out that, as a result, the entire procurement process was rendered 'unfair, unjust and invalid'. (The BLA's letter was in response to letters sent to old panellist dated 28 February 2013 in which they were given notice of the termination of their contracts with the RAF with effect from 31 March 2013, necessitated, the letter said, by the fact that the 'procurement process for the appointment of a new Panel of Attorneys will be finalised by 31 March 2013'.)

[22] In its meeting of 8 March 2013, the PCC noted that this letter had been received and that it addressed 'issues of the passing of the validity period of the tender process of 90 days and the changing of the scores of the bidders'. It was resolved that legal advice on the issues raised by the BLA be obtained from the Manager, Legal and Compliance Department.

[23] At its meeting of 12 March 2013, the PCC was advised that the expiry of the tender validity period was a problem and that there was 'a high risk of the process being challenged on the basis of the 90 day issue'. Despite this the PCC recommended to Watson and the board that the tender be awarded to those firms of attorneys that had been recommended by the BEC.

[24] An opinion was then sought from the RAF's attorneys, Webber Wentzel (WW). Following a consultation on 27 March 2013, the opinion was furnished on or about 16 April 2013. The opinion records the RAF's instructions to WW as follows:

'1.8 We are instructed that the Board has not yet made a decision to appoint the preferred bidders to the panel. This is because the period of validity of these bidders' bids expired on approximately 20 November 2012 (90 days from the closing date). Consequently, their bids are no longer open for acceptance.

1.9 It is against this background that we have been asked to consider and opine on the following issues:

1.9.1 Can RAF request the bidders to extend the bid validity period?

1.9.2 If so, what procedure is RAF required to follow? In particular, is RAF required to request all bidders to extend their bid validity periods or can it request the extension from the preferred bidders only?'

[25] It proposed two options. The first, described as 'the more risk-averse option', was that the RAF should issue the request for proposals again, start the tender process again and ensure that this time a longer tender validity period is provided for. The second option, which it was said 'may have more risk associated with it', involved requesting bidders to 'amend and renew their bids to reflect a one year validity period', amending the request for proposals to reflect this, evaluating the bids on 'the same criteria stipulated in the current RFP' and making a decision within the stipulated time. It was suggested that the RAF ask bidders for their comments on

the proposal so as to comply with its obligation to act in a procedurally fair manner (in terms of s 3 of the Promotion of Administrative Justice Act 3 of 2000 – the PAJA).

[26] After receiving WW's opinion, the board resolved to follow the notice and comment procedures suggested in it. It sent letters, dated 2 May 2013, to the bidders who had not been eliminated from the process. The letters were headed 'Invitation for comments on a proposed decision to be made by the Road Accident Fund requesting bidders to amend and renew their bid validity period'. The letters read:

'1. The Road Accident Fund ("RAF") published a Request for Proposal, Ref No RAF/2012/00021, in the Government Tender Bulletin on 13 July 2012, inviting suitably qualified legal firms countrywide to bid to be listed on the RAF's Panel of Attorneys to provide specialist litigation services in the following categories: Magistrate's Court/Regional Court; High Court; and High Value matters ("the RFP").

2. The closing date for the submission of bids in response to the RFP was 20 August 2012 at 11am. The bid documents included an undertaking that the bids would be open for acceptance for a period of 90 days from the closing date. In other words, the bid validity period was for 90 days, which period expired on or about 20 November 2012.

3. Pursuant to the closing date for the submission of bids, RAF's internal committees have evaluated and recommended preferred bidders for appointment to the panel. RAF's Board ("the Board") have not yet appointed these preferred bidders because it became aware that the validity periods of their bids have expired.

4. Accordingly, the Board proposes making the following decision:

4.1 amend the current RFP to require a one year bid validity period (this deviation will be done pursuant to obtaining the requisite approvals envisaged in RAF's Supply Chain Management Policy);

4.2 request all bidders to amend and renew their bids to reflect a one year validity period as opposed to a 90 day validity period (where no other amendments to the bids can be made);

4.3 evaluate the bids on the same criteria stipulated in the current RFP; and

4.4 make a final decision regarding the award of the tender to the successful bidders (this is referred to as "the proposed decision").

5. The only alternative decision (to the proposed decision) that RAF is considering is to cancel the tender and start the tender process afresh by issuing a new RFP. However, there are serious disadvantages to such an approach as: it will result in a further delay, it will be costly (and potentially amount to fruitless and wasteful expenditure) and it will result in prolonging the tenure of the existing panel of attorneys (whose appointment has already been questioned by the [Auditor General]).

6. Against this background, RAF wishes to invite comments from all bidders on the proposed decision as well as the possible cancellation of the tender. Comments are to be submitted to the address set out below within a period of 21 days from the date of this notice.
7. Please note that RAF is inviting comments from bidders in order to enhance transparency, openness and fairness. This call for comment should not be construed as a concession that either of the aforementioned decisions amount to administrative action as defined in the Promotion of Administrative Justice Act, 2000. RAF expressly reserves its rights in this regard.'

The final paragraph provided the details of a person to whom and an address to which comments could be sent.

[27] JGS responded to this letter on 23 May 2013. It said:

'Based on our understanding of the attached case and from a legal perspective, the tender should be cancelled and the process should start afresh.
However, we would not have any objection should the validity period be extended.'

[28] After representations had been received, the RAF sought further advice from WW. This was contained in a letter dated 31 May 2013 and headed 'Panel of Attorneys – evaluation of comments received in response to Notice'. At paragraph 6 and 7, WW dealt with the representations and how to proceed. These paragraphs say:

'6. RAF received approximately 72 responses from the 152 bidders who we were instructed were sent the Notice. The majority of the bidders expressed agreement with the proposed decision. A few bidders expressed reservations about the proposed decision and others expressed outright disagreement (we referred to the latter group of bidders as "the disgruntled bidders"). This being said, none of the comments received raised any issues which we had not considered in drafting our Opinion. The most notable issue raised by the disgruntled bidders was the fact that RAF had no valid tenders which it could accept and that the tender offer lapsed after a 90 day period. This was to be expected as this issue was foreshadowed in the Notice.
7. From the correspondence received from the disgruntled bidders, as well as that received from the Black Lawyers' Association ("BLA"), dated 13 May 2013, there are clear indications that in the event that RAF takes the proposed decision, a legal challenge may follow. It seems to us that there may well be a judicial review of the proposed decision and/or the final decision to appoint the panel of attorneys.'

[29] At paragraph 15, WW advised the RAF that the most effective way to avoid an inevitable challenge 'is to start the tender process afresh' but if this is not possible 'in the current circumstances' the RAF should proceed to take the 'proposed decision', in which event it must prepare for a challenge.

[30] During the course of June 2013, the procurement department provided an executive summary to the PCC of the options available. It sought to set out the considerations that would have to be taken into account by the board. It said:

'<u>Option 1</u>: the most effective way for the Fund to avoid a legal challenge is to start the tender process afresh, but this will be costly and time consuming. This might also be challenged to be fruitless and wasteful expenditure in terms of the PFMA prescripts. This option also results in a continuation of the current unsatisfactory arrangement with the current panel.

<u>Option 2</u>: the Fund is advised that it has a relatively good argument that the tender process was conducted in a fair, competitive, cost-effective and transparent manner. All bidders were given an opportunity to comment (*making it transparent, equitable and fair*) and all bidders would be given an opportunity to amend their bid submissions (*also making it competitive, fair and equitable*). The bidders who have failed to comment may have difficulty in challenging the implementation of this option without proffering comments or making representations despite having been given the opportunity to do so. This option avoid issues raised with option 1, but from the comments received it appears that this decision is likely to be challenged.'

[31] During the same month, the PCC resolved to recommend to the board that option 2 be implemented. On 29 July 2013, the board passed a resolution in the following terms:

'The Board having considered the responses received in respect of the proposed decision as communicated to bidders in accordance with the PAJA process, approved:

1. Option 2, implementation of the proposed decision;
2. The initial tender assessment outcomes which would remain the same, subject to those bidders amending their bids to reflect the one year validity period, as those were audited by Internal Audit and only the bid validity period changed;
3. That a second tender be issued using the same terms of reference, but limited to the courts and geographic areas where the current panel tender did not yield a sufficient outcome;

4. The extension of the current panel's contract until 30 June 2014, subject to earlier termination in the event that the second tender is awarded prior to the aforementioned date, to allow the second tender to be issued and for new service providers to adequately plan the handover of files;
5. New panel members, who are smaller in number, commence working on new matters in their assigned geographic areas and courts, while the old panel members continue to cover historic matters and new matters in areas where the new panel is not represented; and
6. The management gives effect to the decisions above, inclusive of the Chief Operations Officer ensuring that effective management of the process is put in place.'

[32] On 5 August 2013, the RAF wrote to bidders to say that it had taken a decision to proceed with its proposal concerning the extension of the tender validity period. It asked bidders to 'amend and renew' their bids in accordance with this decision by 13h00 on 14 August 2013. They were warned that if the RAF did not receive confirmation of the renewal and amendment of their bids by that time and date it would 'result in your bid being excluded from further assessment . . .'.

[33] On the same day JGS 'renewed and amended' its bid and confirmed that it agreed to the 'amendment and renewal of the bid validity period' from 90 days to a year. On 16 August 2013, the RAF wrote to JGS to inform it 'with regret' that 'after consideration of the bid submitted and evaluation thereof, your bid response had been unsuccessful'. The letter also said that if JGS wanted a 'debriefing' it was welcome to contact the RAF to arrange a meeting.

Delay

[34] The first respondent took the point that the application should fail on the basis that the first application delayed unreasonably before launching its application, or that, at the very least, the applicants should be denied the remedy they seek on this account.

[35] It is by now trite that decisions to award tenders by organs of state constitute administrative actions for purposes of the PAJA.[3] That being so, the time limits prescribed by s 7(1) apply to this application for judicial review of administrative action.

[36] Section 7(1) of the PAJA provides:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

> (*a*) subject to subsection (2)(*c*), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(*a*) have been concluded; or
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> (*b*) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[37] Section 9(1) provides, however, that the 180-day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned'. Section 9(2) provides that such an application may be granted 'where the interests of justice so require'. It makes no mention of condoning unreasonable delays of less than 180 days.

[38] The courts have applied the time limit and condonation provision in the PAJA in much the same way as the delay rule of the common law was applied before the coming into force of the PAJA (and, even thereafter, to exercises of public power that are not administrative action as defined in the PAJA and to applications for remedies other than review and setting aside).[4] That involves a two-stage enquiry in which it is first decided whether the delay in launching the application is unreasonable or the application was brought more than 180 days after the applicant acquired knowledge

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[3] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21; *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) para 19; *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 6.

[4] *Beweging vir Christelik-Volkseie Onderwys & others v Minister of Education & others* [2012] 2 All SA 462 (SCA) para 41 (hereafter referred to as *BCVO*).

of, or ought reasonably to have acquired knowledge of, the administrative action concerned and secondly, if so, whether the delay ought to be condoned.[5]

[39] The first respondent has put forward three dates, in the alternative, as the date on which the clock started ticking for purposes of s 7(1). The application was launched within 180 days of each of those dates.

[40] Section 7(1) talks of applications for review being brought 'without unreasonable delay and not later than 180 days . . .'. Notionally, therefore, it is possible that a delay in launching a review application of less than 180 days after the cause of action arises can be an unreasonable delay but I think that it is fair to say that cases of this sort will be rare and have exceptional characteristics. I say this because in practice, prior to the PAJA coming into force, delays of anything between six and nine months were generally regarded as not being unreasonable and, since the PAJA came into force, the 180 day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay.

[41] The relationship between the requirement of 'without unreasonable delay' and that of 'not later than 180 days' was discussed by Brand JA in *Opposition to Urban Tolling Alliance v South African National Roads Agency.* He held in relation to the two-stage enquiry referred to above:[6]

'Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislature; it is unreasonable *per se*.'

[42] Section 9(1) refers, for purposes of condonation, only to the 'extension' of the 180-day period. As mentioned, it makes no mention of condoning an unreasonable delay of less than 180 days. I agree with Gautschi AJ in *Thabo Mogudi Security*

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[5] See in particular, *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C-D. See too *BCVO* (note 4) para 46; *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 26.

[6] Note 5 para 26. See too *Thabo Mogudi Security Services CC v Randfontein Local Municipality & another* [2010] 4 All SA 314 (GSJ) para 59.

Services CC v Randfontein Local Municipality & another[7] that it could not have been the legislature's intention that courts could condone delays of over 180 days but not unreasonable delays of less than 180 days. As a result, I accept that if a delay of less than 180 days is found to be unreasonable, a court is able to enquire into whether an acceptable explanation for the delay has been given and, if it has, to condone the delay. Whether that is done by extending, through creative interpretation, s 9(1) and (2) of the PAJA to unreasonable delays of less than 180 days or as a result of the application of the second leg of the common law delay rule makes no practical difference as the approach to both is the same, even if the terminology differs.[8]

[43] I turn now to the facts concerning the period leading up to the launching of the application.

[44] It was suggested by Mr Kennedy who, together with Mr Ngcukaitobi, appeared for the RAF, that the clock started ticking as early as May 2013 when the RAF asked for the views of bidders on its proposed decision to extend the tender validity period because JGS knew, according to its understanding of the law, that that decision would be unlawful. This is not correct. No final decision had been communicated to it or otherwise made known. There was nothing that could be reviewed and any application at that stage would have been met with the correct assertion that the application was premature.[9] The invitation to bidders to give their views on the proposal was no more than the RAF seeking to comply with its duty to act in a procedurally fair manner: it did not constitute a decision and it did not affect the rights of JGS or have the capacity to do so.[10]

[45] So too with the decision communicated on 5 August 2013 to the effect that the RAF had decided to follow the option of extending the tender validity period. Even if that decision was unlawful, if JGS had applied to review it then, it would have been

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[7] Note 6 para 60.

[8] *BCVO* (note 4) para 47; *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54; *Price Waterhouse Coopers Inc & others v Van Vollenhoven NO & another* [2010] 2 All SA 256 (SCA) paras 6-7.

[9] See for example, *Netto v Clarkson & another* 1974 (1) SA 66 (D) at 70D-F.

[10] See *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) paras 22-24; *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 10.

met with the response – and correctly so – that its application was still premature because no adverse decision had been taken against JGS to its knowledge and so it had not been prejudiced.[11] An application to review this decision at that stage would have been an academic exercise and, as Holmes JA said in *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others*,[12] 'the Court is disinterested in academic situations'.

[46] It was perhaps when the RAF informed JGS that its bid had been unsuccessful that the clock could have begun to tick for purposes of the delay rule. That was on 16 August 2013. As the application was launched on 1 November 2013, the delay that was involved was a period of two and a half months. But, at that stage, JGS did not have the reasons for the decision.

[47] During that time, JGS were not idle. On 21 August 2013, it requested reasons for the decision within 14 days, declared a dispute in terms of the bid conditions and asked for information in terms of the Promotion of Access to Information Act 2 of 2000 (the PAIA). The PAIA request was only acknowledged on 2 September 2013 and JGS was told that it was receiving attention.

[48] On 6 September 2013, the RAF purported to furnish reasons but it is doubtful that what was furnished qualify as adequate reasons for purposes of s 5(2) of the PAJA.[13] If the provision of inadequate reasons could have started the clock ticking, the delay viewed from this starting point would have been less than two months. JGS continued with its efforts to obtain adequate reasons and the information upon which the decision was based. It made it clear that it required these in order to assess its position. With the passage of time, it made it clear that all it required was limited information in order to expedite the matter and that this could even be given to it

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[11] *Jockey Club of South Africa & others v Feldman* 1942 AD 340 at 359; *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others* 1961 (4) SA 402 (A) at 407E-408B; *Bhugwan v JSE Ltd* (note 10) para 11; *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd & others* 2012 (2) SA 16 (SCA) paras 16-21. See too Lawrence Baxter *Administrative Law* at 718 (hereafter referred to as Baxter); Cora Hoexter *Administrative Law in South Africa* (2 ed) at 584-585 (herafter referred to as Hoexter).

[12] Note 11 at 408A-B.

[13] See generally on the adequacy of reasons *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40 and, on the inadequacy of reasons such as those given by the RAF to JGS, *Kiva v Minister of Correctional Services* (2007) 28 ILJ 597(E) paras 34-41.

informally. The RAF made it clear, however, that it required JGS to follow the formal procedures of the PAIA and even extended the time period for its response to JGS's PAIA request. The PAIA request was eventually refused on 7 October 2013, with two exceptions: JGS was provided with access to its own bid and 12 pages of correspondence.

[49] On 18 October 2013, the RAF sent service level agreements to the new panellists with a request that these be signed and returned. On 21 October 2013, JGS launched an application against the information officer of the RAF in the High Court, on an urgent basis, in terms of s 82 of the PAIA, in order to obtain the information it required to assess its position. On 25 October 2013, it demanded an undertaking from the RAF that it would suspend the implementation of the tender until such time as its legality had been determined. On 29 October 2013, the RAF's attorneys failed to provide the undertaking and on 1 November 2013, the application was launched.

[50] The application consisted of two parts. It sought an interim interdict to prevent the implementation of the tender[14] and it also sought to review and set aside the award of the tender, brought in terms of rule 53. By this stage, JGS still did not have the record of the decision even though it had asked for it within days of the adverse decision having been communicated to it. It also did not have proper reasons: all it had was a bald statement that its bid had been unsuccessful 'due to other bids scoring higher, more particularly with regards to BEE'.

[51] I know of no case in which a time lapse of two and a half months from when the cause of action arose to when the application for review was launched has been held to be an unreasonable delay requiring condonation. Mr Kennedy was unable to refer me to any case of this nature.

[52] It cannot be expected of an applicant that he or she rush to court to review and set aside administrative action without investigating and attempting to determine

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[14] I heard this application on 12 December 2013 and dismissed it with costs. See *Joubert Galpin Searle Inc & others v Road Accident Fund & others* ECP 31 December 2012 (case no.3191/13) unreported.

whether he or she has a case. It is no answer to say that rule 53 enables an applicant to launch a review on the thinnest of bases and then supplement his or her case when reasons are provided, if they are, and the record is furnished in due course.

[53] In *Scott & others v Hanekom & others*[15] Marais AJ, although dealing with a different context, stated:

'The scope of review proceedings is limitless. The antecedent investigations and preparation of process may be simple or complex. The time required for this purpose may be short or it may be long. The parties may have spent many fruitless months in attempting to negotiate an acceptable compromise or settlement before resorting to litigation.'

[54] This case is a good illustration of what Marais AJ had in mind. JGS requested reasons and information and also indicated their preference to attempt to resolve the matter through negotiations. It could do very little before it had reasons and the information upon which the RAF took its decision against it. That also, of necessity, required it to have information relating to why the RAF decided in favour of successful bidders. It spent most of the ten week period trying to get reasons and information – the essence of any review application – with very little to show for its efforts. The RAF refused to even give JGS the limited information that it was later prepared to settle for in order to be able to assess its position.

[55] Litigants should, I believe, be encouraged to engage with adversaries in an effort to find acceptable settlements, rather than be forced into rushing to court lest they be non-suited for their delay. They should also be encouraged to investigate their positions adequately before launching proceedings. All of this requires time – in some cases more than in others. It has always been accepted that delays for these types of reasons are acceptable and nothing in the PAJA suggests to me that this is no longer to be the case.

[56] I have considered the facts put up by JGS to explain the time lapse from 16 August 2013 to 1 November 2013. I find that it did not delay unreasonably in launching its application. That being so, there is no need to deal with the second leg

[15] *Scott & others v Hanekom & others* 1980 (3) SA 1182 (C) at 1192H.

of the enquiry into delay: as the delay was not unreasonable, the question of condonation does not arise.

The issues

[57] Because the RAF is an organ of state it is required by s 217(1) of the Constitution, when it contracts for goods or services, to do so in accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective'. These core principles of public procurement are given effect by a range of statutes, such as the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and the Public Finance Management Act 1 of 1999 (PFMA),[16] subordinate legislation such as the regulations made in terms of the PPPFA and the Treasury Regulations made in terms of the PFMA, policies and guidelines, such as Supply Chain Management policies of bodies such as the RAF.[17] In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*,[18] Froneman J stressed that '[c]ompliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required' and that they 'are not merely internal prescripts' that may be disregarded at whim.

[58] As the RAF's decisions concerning the award of tenders are administrative actions for purposes of the PAJA, they are subject to review in terms of s 6(1) of the PAJA on the basis of the grounds of review set out in s 6(2).[19] As those grounds of review give effect to the fundamental right to just administrative action, the RAF's procurement decisions must, in a nutshell, be lawful, reasonable and procedurally fair.[20]

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[16] Section 51(1)(a)(iii) provides that the accounting officer of a public entity such as the RAF must ensure that it has and maintains 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective'.
[17] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC) paras 31-37; Phoebe Bolton *The Law of Government Procurement in South Africa* at 5-6.
[18] Note 17 para 40. See too *CEO, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd* [2011] 3 All SA 233 (SCA) para 15.
[19] Section 6(1) provides: 'Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.' Section 6(2) empowers a court (or tribunal) to 'judicially review an administrative action' on the basis of a list of grounds of review.
[20] Constitution, s 33(1).

[59] It must be stressed that the *wisdom* of the RAF's decision to implement option 2 rather than option 1 is not relevant to these proceedings: judicial review is concerned with whether the exercise of public power is regular or irregular, not with whether the decisions of public functionaries are 'good' decisions or 'bad' decisions, 'wise' decisions or 'foolish' decisions.[21]

[60] In *Allpay Consolidated Investment Holdings*[22] Froneman J dealt with the relationship between s 6 of the PAJA and the five procurement principles that have their origin in s 217 of the Constitution. He said:

'[42] It is apparent from section 6 that unfairness in the outcome or result of an administrative decision is not, apart from the unreasonableness ground, a ground for judicial review of administrative action. That is nothing new. The section gives legislative expression to the fundamental right to administrative action "that is lawful, reasonable and procedurally fair" under section 33 of the Constitution. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.

[43] The legislative framework for procurement policy under section 217 of the Constitution does not seek to give exclusive content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution. The framework thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

[44] Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to

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[21] Baxter at 305; Hoexter at 61; *Steyn v City Council of Johannesburg* 1934 WLD 143 at 146-147; *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802-803; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 154d; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31.

[22] Note 17 paras 42-45.

establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

[45] Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.'

[61] The central issues to be decided are the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an end to the tender process, it could subsequently be 'revived' by the RAF. In other words, the issue to be decided ultimately is this: if the expiry of the tender validity period put an end to the tender process, did the RAF have the lawful authority to 'revive' it?

[62] It is also necessary to deal with two further issues. The first is Mr Kennedy's submission that, in terms of the *Allpay Consolidated Investment Holdings* matter, the RAF was permitted to deviate from the prescribed procedure as long as the deviation was reasonable and justifiable. The second is a submission made by Ms Tiry, who appeared for the thirtieth respondent, that the applicants misconceived their grounds of review and should have applied to compel the RAF to take the decision timeously as their complaint is, in truth, a complaint that the RAF failed to take a decision, as envisaged by s 6(2)(g), read with s 6(3), of the PAJA.

The tender validity period and its extension

[63] Before turning to what I have identified as the central issues, it is necessary to say something of the facts. While not necessarily conceding that the expiry of the

tender validity period is fatal, it was argued by Mr Kennedy that this case concerns two separate tender processes. The first was an 'open' tender process in which the proposal was advertised and interested parties were invited to submit bids. This, of course, was the process that, to put it at its best for the RAF, stalled. The second was a 'closed' tender process in which a decision was taken to award the tender to some of those who had submitted bids in the 'open' tender process.

[64] I do not accept this categorisation of the facts as accurate. Administratively, there was only one tender process in the sense that no new tender was advertised and no new reference was ever allocated to the 'closed' tender process. The closing date for bids remained unaltered and if there had been a new tender process that surely would have been different. The information that was evaluated – to the extent that the bids were evaluated at all after the extension of the tender validity period – remained exactly the same as it had been on the closing date a few days short of a year before. That information included certificates of good standing now hopelessly out of date.

[65] The purpose of seeking legal advice from WW was to ascertain if there was an alternative to starting the tender process again by breathing life back into the stalled tender process. The advice that was given – insofar as option 2 was concerned – did not envisage a new tender process but a possible (but risk-laden) way of completing the stalled tender process. The decision that was taken by the board involved precisely that – the completion of the tender process in order to be able to award the tender to the bidders who had already been identified – and not to start a new tender process (no matter how it may have been dressed up).

[66] What then is the effect of the expiry of the tender validity period? This issue was dealt with squarely in a matter that is essentially on all fours with this case, *Telkom SA Limited v Merid Training (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Limited & others*.[23]

[23] *Telkom SA Limited v Merid Training (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Limited & others* [2011] ZAGPPHC 1.

[67] In that matter, as in this one, Telkom published a request for proposals in order to appoint service providers. The request for proposals stipulated a closing date and a tender validity period of 120 days from the closing date, during which offers made by bidders would remain open for acceptance by Telkom. By the time the tender validity period expired, no decision had been taken by Telkom and the tender validity period had not been extended. Despite this, Telkom continued to evaluate and short-list the bids it had received. It was only after the tender validity period had expired that Telkom sent e-mails to the 15 bidders it had short-listed requesting them to agree to an extension of the tender validity period. Some, including the six successful bidders, agreed to do so. The decision to accept the bids of the six respondents was only taken after the expiry of this further period. Before any contracts had been concluded, Telkom decided, on legal advice, to apply for the setting aside of its own decision.

[68] As with this case, what had to be decided, according to Southwood J, was 'the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received'.[24] In deciding this issue, Southwood J's starting point was four inter-related propositions. They are that: (a) the decision to award a tender is an administrative action and the PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, 'even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid'.[25]

[69] Southwood J then went on to conclude:[26]

'The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract.

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[24] Para 4.
[25] Para 12. See further the authorities cited therein in support of these propositions.
[26] Para 14.

The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced.'

[70] I am in agreement with Southwood J for the reasons given by him. As a result, it is my view that, in this case, once the tender validity period had expired on or about 20 November 2012, the tender process had been completed, albeit unsuccessfully.

[71] I was referred to *Cato Ridge Electrical Construction (Pty) Ltd v Chairperson, Durban Regional Bid Adjudication Committee*[27] in support of the proposition that the expiry of a tender validity period is not fatal to the continued adjudication of a tender. While it is so that Moodley AJ held that this was the case, his statement to this effect was *obiter*: he had already found that the tender had been awarded prior to the tender validity period expiring.[28] He only dealt with the effect of the expiry of the tender validity period 'to the extent that I might have erred in this finding'.[29] In any event, for the reasons stated by Southwood J, I do not accept that Moodley AJ is correct in this respect.

[72] The issue that I now turn to is whether, having heard the views of the bidders whose hats, ostensibly, remained in the ring, the RAF could extend the tender validity period after it had already expired – and thus whether the unsuccessfully concluded tender process could, in this way, be revived.

[73] In my view, there is a simple answer to this. It is to be found in the National Treasury's *Supply Chain Management: A Guide for Accounting Officers/Authorities*,

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[27] *Cato Ridge Electrical Construction (Pty) Ltd v Chairperson, Durban Regional Bid Adjudication Committee* 2010 JDR 1523 (KNP).
[28] Paras 34-40.
[29] Para 41.

which is part of what Froneman J in *Allpay Consolidated Investment Holdings*[30] called 'the constitutional and legislative procurement framework'. As such, it forms part of those provisions that both empower and limit the powers of public bodies involved in the procurement of goods and services and is not merely an internal prescript that may be disregarded at whim.[31] The document provides a step-by-step guide which institutions such as the RAF must apply when engaged in procurement processes.[32] It makes it clear that an 'extension of bid validity, if justified in exceptional circumstances, should be requested in writing from all bidders before the expiration date'.[33]

[74] The reason for this provision is clear. By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*, the tender process has been concluded, albeit unsuccessfully. The result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to do. In the language of s 6(2)(a)(i) of the PAJA, the decision-maker – the board, in this instance – 'was not authorised' to take the decision. Put in slightly different terms, there were no valid bids to accept, so the RAF had no power to accept the expired bids.

[75] If I am wrong in my finding that this case concerned one, and not two, tender processes, then I am of the view that the RAF could not validly award the tender that it did in the way in which it did. It claims to have used a 'closed bid'. By that it means a procurement process otherwise than by public, open bidding. It is clear to me, however, that in the circumstances of this case, an open, competitive process was required. Clause 3.4 of the National Treasury Practice Note 8 of 2007/2008 provides:

'3.4.1 Accounting officers/authorities should invite competitive bids for all procurement above R500 000.

3.4.2 Competitive bids should be advertised in at least the Government Tender Bulletin and in other appropriate media should an accounting officer/authority deem it necessary to ensure greater exposure to potential bidders . . .

[30] Note 17.
[31] Para 40.
[32] Section 4.1.2.
[33] Page 39.

3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.'

In this case it is common cause that the value of the tender is in excess of R500 000.

[76] Treasury Regulation 16A6.4 provides:

'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from competitive bids must be recorded and approved by the accounting officer or accounting authority.'

[77] National Treasury Practice Note 6 of 2007/2008 gives content to Treasury Regulation 16A6.4. After first referring to s 217 of the Constitution as stipulating 'how Government's supply chain management (SCM) system should be managed'[34] and stating that the 'SCM process of procuring goods and services by means of public advertisement . . . gives effect to the Constitution's prescripts that all potential suppliers should be afforded the right to compete for public sector business through competitive bidding'[35] the practice note then circumscribes the circumstances in which this process can be departed from. The relevant provisions of clause 2 provide:

'2.3 It is, however, recognised that there will be instances when it would be impractical to invite competitive bids. In this regard, Treasury Regulation 16A6.4 provides for such instances where accounting officers or accounting authorities are allowed to dispense with competitive bidding processes to procure goods and services by other means. This provision is intended for cases of emergency where immediate action is necessary or if the goods and

[34] Clause 2.1.
[35] Clause 2.2.

services required are produced or available from sole service providers. The reason for such action must be recorded and approved by the accounting officer or accounting authority.
2.4 Despite Treasury Regulation 16A6.4 being intended for cases of emergency or where goods and services are available from sole service providers, it has come to light that institutions are deliberately utilizing this provision to circumvent the required competitive bidding process in order to, among others, enter into contractual commitments or incur expenditure at the end of a financial year with the view to avoiding the surrender of unspent voted funds to the National/ Provincial Revenue Funds.
2.5 An effective system of supply chain demand management requires an accounting officer or accounting authority to ensure that the resources required to support the strategic and operational commitments of an institution are properly budgeted for and procured at the correct time. Planning for the procurement of such resources must take into account the period required for competitive bidding processes. It must therefore be emphasised that a lack of proper planning does not constitute a reason for dispensing with prescribed bidding processes.'

[78] *Supply Chain Management: A Guide for Accounting Officers/Authorities* also deals with cases in which deviations from competitive bidding processes may be allowed. Clause 4.7.5 states:

'4.7.5.1 In urgent and emergency cases, an institution may dispense with the invitation of bids and may obtain the required goods, works or services by means of quotations by preferably making use of the database of prospective suppliers, or otherwise in any manner to the best interest of the State.
4.7.5.2 Urgent cases are cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. (However, a lack of proper planning should not be constituted as an urgent case.)
4.7.5.3 Emergency cases are cases where immediate action is necessary in order to avoid a dangerous or risky situation or misery.
4.7.5.4 The reasons for the urgency/emergency and for dispensing of competitive bids, should be clearly recorded and approved by the accounting officer/authority or his/her delegate.'

[79] What emerges from the instruments that I have discussed is that generally speaking when the value of the tender exceeds R500 000 a competitive, open, procurement process must be followed. It is only in exceptional circumstances that deviations from this norm will be justified. Those circumstances are urgent cases and

cases of emergency. Poor planning cannot make a case an urgent one or an emergency.[36] In this matter, the RAF has conceded that the expiry of the tender validity period before the process was completed was brought about as a result of poor planning: the time that was required was hopelessly under-estimated. As a result, the decision to award the tender is reviewable in terms of s 6(2)(a)(i) of the PAJA in that the RAF had no authority to follow the 'closed bid' process that it claimed to have followed, with the result that no valid tender decision was taken. The decision is also reviewable in terms of s 6(2)(b) of the PAJA because 'a mandatory and material procedure . . . prescribed by an empowering provision was not complied with'.

Deviations from prescribed procedures

[80] It was argued by Mr Kennedy that the Constitutional Court in the *Allpay Consolidated Investment Holdings* case[37] has recognised an implicit licence granted to officials (in procurement cases at least) to deviate from prescribed procedures as long as they can subsequently satisfy a court that the deviation was reasonable and justifiable. Flowing from this, he argued, the RAF was authorised to deviate from an open bidding process and follow the procedure it did after the tender validity period had expired as long as the reasons for the departure are reasonable and justifiable.

[81] The passage of the judgment that he relies on is this:[38]

'Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.'

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[36] *CEO, SA Social Security Agency & others v Cash Paymaster Services (Pty) Ltd* (note 18); *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA); Phoebe Bolton 'Grounds for Dispensing with Public Tender Procedures in Government Contracting' (2006) 9 *PER* 2.

[37] Note 17.

[38] Para 40.

[82] With great respect to Froneman J, I must confess to experiencing considerable difficulty in understanding what exactly he had in mind. My difficulty stems from what appears to be a conflation of two distinct aspects of the administrative process namely, the *procedure* prescribed by an empowering provision for the taking of administrative action, on the one hand, and the *content* of the right to procedural fairness on the other.

[83] That said, it seems to me that Froneman J could not have had in mind a general licence on the part of administrators to deviate from prescribed procedures. That would undermine the principle of legality and hence the foundational constitutional value of the rule of law. It would also fly in the face of – and render nugatory – the ground of review codified in s 6(2)(b) of the PAJA, namely that administrative action is liable to be reviewed and set aside if 'a mandatory and material procedure . . . prescribed by an empowering provision was not complied with' and undermine the fundamental right to administrative action that is lawful.[39]

[84] In my view, when Froneman J spoke of deviations from prescribed procedures, he had in mind the substantial compliance doctrine, an issue that he dealt with earlier in his judgment.[40] I conclude this for two reasons.

[85] First, one must have regard to the context of the passage and, in particular, what preceded it. In the first part of the paragraph Froneman J made the point that compliance with constitutional and legislative prescripts in the procurement process was not a choice: it was 'legally required' and it is not open to administrators to 'disregard [them] at whim'.[41]

[86] Secondly, later in the paragraph, Froneman J referred (in footnote 51) to the Constitutional Court's judgment in *MEC for Education, Gauteng Province & others v Governing Body, Rivonia Primary School & others*.[42] He referred to paragraph 49(c) of the judgment but it is perhaps best to include paragraph 49(b). In these

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[39] Constitution, s 33(1).
[40] Paras 28-30.
[41] Para 40.
[42] *MEC for Education, Gauteng Province & others v Governing Body, Rivonia Primary School & others* 2013 (6) SA 582 (CC).

paragraphs, Mhlantla AJ said (of the powers of the head of the Education Department) that where he or she is authorised to intervene in a school governing body's policy-making role, he or she must act reasonably and in a procedurally fair manner.

[87] The reference to deviations from procedures having to be reasonable and justifiable must be a reference to something else – the departure, in exceptional cases, from the usual requirements of a fair hearing listed in s 3(2) of the PAJA. (Those requirements are adequate notice of the proposed administrative action, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of any right of review or internal appeal and adequate notice of the right to request reasons for the administrative action.) I say this because, in footnote 51, Froneman J also referred to s 3(4) of the PAJA. Section 3(4)(a) provides that if 'it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2)'. This provision is intended for special situations where, for instance, urgent, *ex parte*, action is authorised by a statute or where compliance with all of the requirements of procedural fairness would frustrate the purpose for which the power was granted.[43] (The factors listed in s 3(4)(b) to determine reasonableness and justifiability are illustrative of the type of cases that are envisaged.)

[88] The suggestion inherent in Mr Kennedy's argument that the judgment in *Allpay Consolidated Investment Holdings* has watered down the principle of legality by freeing administrators from their duty to adhere to procedures that have been prescribed by empowering provisions is therefore not correct. That means that the RAF could not have been, and was not, authorised to award the tender on the basis of a procedure that was at odds with the prescribed procedure, or the prescribed procedures in cases in which it had a choice of procedure, irrespective of the reasons for doing so.

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[43] An obvious example would be a decision to issue a search warrant or a decision to search without warrant (in circumstances in which this is permissible). See on the common law position that s 3(4) of the PAJA tries to accommodate, Baxter at 587-588, and on s 3(4) of the PAJA, Iain Currie *The Promotion of Administrative Justice Act: A Commentary* (2 ed) at 112-113. See too *Dhlamini v Minister of Education and Training & others* 1984 (3) SA 255 (N) at 257F-I; *Gemi v Minister of Justice, Transkei* 1993 (2) SA 276 (Tk) at 288D-G.

Sections 6(2)(g) and 6(3) of the PAJA

[89] It was argued by Ms Tiry for the thirtieth respondent that the applicants misconceived their grounds of review and that they ought to have applied for a *mandamus* to compel the taking of a decision before the expiry of the tender validity period. This possibility is catered for in s 6(2)(g), read with s 6(3), of the PAJA.

[90] Section 6(2)(g) of the PAJA states that a court may 'judicially review' a failure to take an administrative decision. Section 6(3) provides:

'If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.'

[91] In *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation & others*[44] Wallis AJA dealt with the purpose of s 6(2)(g). It was, he said, 'directed at dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against bureaucratic stonewalling', that its focus 'is the person who applies for an identity document, government grant, licence, permit or passport

[44] *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation & others* 2010 (4) SA 242 (SCA) para 43.

and does not receive it within an appropriate period of time, and whose attempts to chivvy officialdom along are met with: "Come back next week."'.

[92] Section 6(3) has no application in this case. In order for it to apply, the decision that has not been taken timeously must be capable of being taken – the administrator must be under a duty to take the decision 'notwithstanding the expiration' of the period within which the decision had to be taken. Once the tender validity period expired, the RAF could not take a decision and so could not be compelled to do so: its failure to take the decision timeously is not capable of correction by way of a *mandamus*. Prior to that, it could have taken a decision at any time, so the applicants would not have had a cause of action based on s 6(2)(g). What is more, prior to the expiration of the tender validity period, the applicants had no indication that the RAF would miss the deadline and no reason to believe that it would. This point has no merit.

<u>Remedy</u>

[93] I have found that the RAF acted irregularly when it awarded the tender to the second to 34th respondents. What happens when this point is reached was dealt with in the *Allpay Consolidated Investment Holdings* case, in which Froneman J stated:[45]

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

[94] Section 172(1) of the Constitution states:

'When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

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[45] Note 17 para 25.

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[95] Section 8(1) of the PAJA provides:

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

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

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

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.'

[96] Howsoever a court fashions a remedy, it is required by s 38 of the Constitution to award a remedy that is not only just and equitable but also appropriate when, as here, a fundamental right has been infringed. Appropriate relief is relief that effectively remedies the breach of the right.[46] It is relief that fits the injury: it must be 'fair to those affected by it yet vindicate effectively the right violated' and be 'just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law'.[47]

[46] *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) para 106.

[47] *Steenkamp NO v Provincial Tender Board, Eastern Cape* (note 3) para 29.

[97] In *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others*[48] I believe it is fair to say that Froneman J made it clear that, even though courts always retain a discretion to refuse to award a remedy when unlawfulness is found, the default position is that the principle of legality should be upheld and vindicated, and that there must be compelling reasons to override this default position:[49]

'[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality.

[85] The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.'

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[48] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC). See too *Mpumalanga Construction (Pty) Ltd & others v Buffalo City Municipality & another* ECD 25 August 2009 (case no. ECD29/2009; EL229/2009) unreported paras 25-26.

[49] Paras 84-85. See too *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* (note 3) para 28; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36.

[98] In determining whether it is just and equitable to refuse to award a remedy when administrative action has been found to be invalid (or to grant other relief such as a suspension of an order of invalidity for a period), a court must consider the interests not only of the parties, but also the public interest.[50]

[99] I now proceed to apply the law as I have set it out to the facts of this case. My starting point is that I have found that the award of the tender was invalid. I may not, and do not intend to, shy away from that finding. I shall make an order setting aside the award of the tender. But that is not the end of the matter. I have to address three issues relating to any just and equitable orders that may also be appropriate. They are: (a) whether the invalid tender should be allowed to stand, in any event; (b) whether a declarator to the effect that the award of the tender was invalid will suffice; and (c) if not, whether an order can be fashioned to allow for a fresh tender process without undue dislocation of the functions of the RAF and undue hardship on the other parties.

[100] In my judgment in the application for an interim interdict[51] I dealt, when considering the balance of convenience, with whether, assuming that in the review application an irregularity was found, the tender would be likely to be allowed to stand. I expressed the view – tentatively, in view of the nature of the proceedings and because the review was going to be heard by me – that this was not the type of case in which a remedy would be withheld in the event of the award of the tender being found to be invalid. I am still of that view for the reasons that I set out below.

[101] First, this is not the type of tender in which relief should be withheld because too much water has flowed under the bridge by the time the review is decided. A relatively short period of time has passed from when the new panellists were appointed to the hearing of the review. This distinguishes this case from the typical situation where an irregularly awarded tender is allowed to stand because the work concerned has all but been completed by the time the review is heard.[52] This case

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[50] *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) paras 22-23.

[51] *Joubert Galpin Searle Inc & others v Road Accident Fund & others* (note 14).

[52] See for example *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* (note 3).

involves instructions being given to panellists on an *ad hoc* basis for individual cases from time to time. It is, as a result, similar to the tender in *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd*[53] in which these features led the court to set aside the irregularly awarded tender despite it only having a few months to run. Finally, if the tender process is set aside, a new tender process can be initiated for the same period as the impugned tender and if the panellists change, while it may cause inconvenience, it is possible to manage a handover of files from old panellists to new panellists. I do not believe that either the interests of the respondents or the public interest warrants the overriding of the principle of legality.

[102] It was argued by Mr Kennedy that, if I was minded to award a remedy to the applicants, it should be limited to a declarator. The Constitutional Court has made it clear in *Minister of Health & others v Treatment Action Campaign & others (No 2)*[54] that courts have wide powers, where fundamental rights have been infringed, to award remedies and that, when exercising these powers, they must strike effectively at the breach of the Constitution in order to protect and enforce it.

[103] In my view, a declarator, on its own, will not remedy effectively the unlawful administrative action that was taken in this matter. That can only be done by setting it aside. The RAF will then have to conduct the tender process again in order to appoint a panel of attorneys.

[104] The effect of the setting aside of the award of the tender will have profound effects on all of the parties. The RAF will no longer have a panel to do its litigious work. It will not be represented in the courts. The new panellists will no longer be panellists. The old panellists will also not be panellists because their contracts with the RAF have been terminated. One can imagine the problems that will manifest themselves in the courts. On the one hand, one may find plaintiffs taking default judgments against the RAF if it is not represented. On the other, matters may be postponed indefinitely, thus frustrating the rights of those plaintiffs who have legitimate claims with good prospects of success. Both of these scenarios would undermine the public interest.

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[53] *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* (note 3).
[54] Note 46 paras 101-102.

[105] It is therefore necessary to temper the setting aside of the tender in a way that minimises the negative effects. The applicants made certain proposals as to the form of the order that I should make. Essentially, they contended for an order that would put in place a system that would allow for the sharing of work between old and new panellists until a new tender process is completed. I am not able to make such an order because, to do so would amount to forcing the RAF to contract with the old panellists again, when only recently their contracts were terminated. I realise that this will probably work hardship on the old panellists but I am afraid that, broad as my remedial powers are, I am simply unable to remedy every possible problem, foreseen and unforeseen, that may arise between now and the award of a new tender.

[106] I intend to suspend the order reviewing and setting aside the tender so that something remains in place, imperfect as it may be. I intend giving the RAF what I consider to be a reasonable period within which to start and complete a new tender process. It will, however, have to work with expedition to complete the process timeously. I have been guided by the time it took the RAF from the publication of the request for proposals (on 13 July 2012) to the anticipated finalisation date (31 March 2013) as stated in the RAF's letter dated 28 February 2013 to old panellists terminating their contracts. Adding time at the beginning of the process and reducing time to an extent during the process, I consider it reasonable to expect the RAF to initiate and finalise the new tender within a period of eight months. I shall therefore suspend the order setting aside the tender for roughly eight months.

Costs

[107] Costs will follow the result. The costs order that I intend making will include any wasted costs occasioned by the postponement of the review application on 12 December 2013 and the costs of rule 30A proceedings initiated by the applicants.

The order

[108] I make the following order.

(a) The award of tender 'RAF2012/00021: Panel of Attorneys for the Road Accident Fund (RAF) to provide specialist litigation services' by the first respondent to the second to thirty fourth respondents is declared to be invalid and is set aside.

(b) The order contained in paragraph (a) is suspended until 1 December 2014.

(c) The first, tenth, twenty second, twenty sixth and thirtieth respondents are directed jointly and severally, the one paying the others to be absolved, to pay the costs of the applicants, including the costs of two counsel where two counsel were engaged, such costs also to include the wasted costs, if any, occasioned by the postponement of the review application on 12 December 2013 and the costs of the rule 30A proceedings.

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C Plasket
Judge of the High Court

APPEARANCES
First applicant: A Nelson SC and J Huisamen SC, instructed by Joubert Galpin Searle Inc
Second applicant: J Huisamen SC, instructed by Joubert Galpin Searle Inc
Third and fourth applicants: D Potgieter SC and G Potgieter, instructed by Joubert Galpin Searle Inc
First respondent: P Kennedy SC and T Ngcukaitobi, instructed by Goldberg & De Villiers
Tenth respondent: No appearance
Twenty second respondent: No appearance
Twenty sixth respondent: No appearance
Thirtieth respondent: A Tiry, instructed by Masiza Harker Inc