



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 21375/20

| | |
|---------------------------|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |
| | |
| SIGNATURE | DATE |

In the matter between:

COLLINS SEBOLA FINANCIAL SERVICES (PTY) LTD

APPLICANT

and

SOUTH AFRICAN FORESTRY COMPANY SOC LTD

FIRST RESPONDENT

TSEPO MOHANENG

SECOND RESPONDENT

CLEMENT NHUVUNGA

THIRD RESPONDENT

**THE CHAIRPERSON OF THE BID SPECIFICATION
COMMITTEE OF THE FIRST RESPONDENT IN
RESPECT OF THE RFB 011/2019**

FOURTH RESPONDENT

THE CHAIRPERSON OF THE BID EVALUATION

**COMMITTEE OF THE FIRST RESPONDENT IN
RESPECT OF THE RFB 011/2019**

FIFTH RESPONDENT

**THE CHAIRPERSON OF THE BID ADJUDICATION
COMMITTEE OF THE FIRST RESPONDENT IN
RESPECT OF THE RFB 011/2019**

SIXTH RESPONDENT

PHEPHA MV SECURITY SERVICE

SEVENTH RESPONDENT

**THE CHAIRPERSON OF THE AUDIT COMMITTEE
OF THE FIRST RESPONDENT**

EIGHTH RESPONDENT

**THE CHAIRPERSON OF THE FINANCIAL
COMMITTEE OF THE FIRST RESPONDENT**

NINTH RESPONDENT

PHUTHADICHABA TRADING ENTERPRISE CC

TENTH RESPONDENT

JUDGMENT

BASSON J

INTRODUCTION

[1] This is yet again another dispute about the awarding of a tender. The applicant, together with the seventh respondent, were the successful bidders in respect of a tender for the supply of security and associated services to different forest plantations owned and operated by the first respondent across different regions in the country. The seventh respondent received a substantial portion of the contract value for the supply of the relevant services to the value of R 62 193 884.32. The applicant received approximately a third of the contract value to the order of R 18 285 386.01.

[2] The applicant is Collins Sebola Financial Services (Pty) Ltd, Registration Number: 2014/012078/07 and trades under, *inter alia*, the name CS Security, an enterprise that provides guarding services and alarm sales and service. The deponent to the affidavit on behalf of the applicant is Mr. Collins Sebola ("Sebola") the sole shareholder and sole director of the applicant.

[3] The applicant was the preferred bidder in terms of the Preferential Procurement Policy Framework Act¹ (“PPPFA”) and the regulations thereto in respect of the tender that is the subject of this application. Despite having been the preferred bidder, the applicant was ultimately only awarded approximately a third of the tender with the bulk awarded to the seventh respondent, Phepha.

[4] The first respondent is South African Forestry Company SOC Ltd. The first respondent is a major public entity in terms of Schedule 2 to the Public Finance Management Act² (“the PFMA”).

[5] The second respondent is Mr. Tsepo Mohaneng, the Chief Executive Officer and Accounting Officer and also a director of the first respondent. He is cited in such capacity. No relief is sought against the second respondent.

[6] The third respondent is Mr. Clement Nhuvunga who is the senior manager of the supply chain management of the first respondent. He is cited in such capacity. No relief is sought against the third respondent.

[7] The fourth respondent is the Chairperson of the Bid Specification Committee of the first respondent in respect of RFB 011/2019. He is cited in his capacity as chairperson of that committee. No relief is sought against the fourth respondent.

[8] The fifth respondent is the Chairperson of the Bid Evaluation Committee of the first respondent in respect of RFB 011/2019. He is cited in his capacity as chairperson of that committee. No relief is sought against the fifth respondent.

[9] The sixth respondent is Mr. Dumisa Hlatshwayo (“Hlatshwayo”) who is cited in his capacity as Chairperson of the Bid Adjudication Committee of the first respondent. He is also the Chief Financial Officer and a director of the first respondent. No relief is sought against the sixth respondent.

¹ 5 of 2000.

² 1 of 1999.

[10] The seventh respondent is Phepha MV Security Service (Pty) Ltd (Registration Number: 2017/286721/07) ("Phepha"). The seventh respondent was awarded approximately 74% of the work in respect of the tender under consideration.

[11] The application is opposed on behalf of all the respondents except for the seventh respondent (Phepha).

THE DISPUTE

[12] The applicant feels aggrieved by the award and contends that it was entitled to the exclusive and sole award to render the relevant services to the first respondent.

[13] It is common cause that the applicant scored 100 points on the 90:10 system in terms of the PPPFA and Phepha scored 95 points. Both the applicant and Phepha scored full points in respect of specific goals as contemplated in section 2(1)(d) of the PPPFA. In respect of points for price and functionality, the applicant trumped Phepha. The applicant also trumped Phepha in respect of price for the whole project. It is further common cause that the applicant was the preferred bidder in respect of the whole of the tender throughout the evaluation process until the meeting of the Bid Adjudication Committee held on 12 December 2019. I will return to this meeting in more detail later in the judgment.

[14] The applicant launched a semi-urgent review application on 31 March 2020 in which it sought an order not only for the setting aside of the award of (part of) the tender to Phepha, but also for an order of substitution directing the first respondent to award the whole of the tender to it. A special allocation for the hearing of the matter on 9 October 2020 has been directed by order of the Acting Deputy Judge President.

[15] The respondents oppose the review and submit that none of the grounds of review are well founded. They also submit that the applicant has already concluded the relevant contract with the first respondent in which it agreed to supply security services in respect of the portion of the tender awarded to it and has not sought to set aside that contract. By virtue of that election, the respondents argue that the applicant

has no cognisable cause of complaint, and that it would neither be just nor equitable to set aside the award or portion of the tender to Phepha.

[16] The applicant takes issue with this argument and submits that there is no reason why the award, despite it having been awarded a portion of the tender, is not susceptible for review.

[17] In essence, what the applicant argues is that the whole of the tender should have been awarded to it. For that reason, so it is argued, the Court should, in the main, not only set aside the award to Phepha but also substitute the decision of the first respondent by awarding or directing the award of the whole of the tender to the applicant.

[18] To the extent that the applicant persists with the order of substitution it seeks in paragraphs 2.2. and 2.3 of the Notice of Motion, the respondents submit that the applicant has not established any factual and legal foundation for that order of substitution in the light of the well-established jurisprudence of the Constitutional Court, usefully set out in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*.³ The respondents argue that the applicant has no right to be awarded a tender. At best for it, so it was submitted, it only has a right to a procedurally fair consideration of its tender.

REVIEW APPLICATION

[19] The applicant relies on the provisions of the Promotion of Administrative Justice Act⁴ (“PAJA”) in this application to have a decision of the Board (“the Board”) of the first respondent dated 24 February 2020 (to award part of tender number RFB 011/2019 to Phepha) reviewed and set aside. As already pointed out, the applicant also asks for ancillary relief in terms of section 8(1)(c)(ii)(aa) of PAJA.

[20] It is accepted by all the parties that the evaluation and award of the tenders such as the one in issue in the present case, constitute “administrative action” as

³ 2015 (5) SA 245 (CC) at paras 34 - 36 and 98.

⁴ 3 of 2000.

defined in section 1 of PAJA. The award of the tender is therefore subject to review by this Court on any of the grounds of review specified in section 6(2) of PAJA.⁵ The

⁵ Section 6 reads as follows: “**Judicial review of administrative action**

- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if-
 - (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
 - (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
 - (g) the action concerned consists of a failure to take a decision;
 - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - (i) the action is otherwise unconstitutional or unlawful.”

fairness and lawfulness of the process must therefore be evaluated in terms of the provisions of PAJA. Where the award of the tender does not comply with the provisions of section 51(1)(a)(iii) of the the PFMA and section 2(1)(b)(i) of the PPPFA, the Court has the power to review and set aside an award of a tender and the contract concluded consequential to the award of the tender.

LEGISLATIVE FRAMEWORK

[21] The first respondent is an organ of state and subject to, *inter alia*, the PFMA and PPPFA and the 2017 Regulations in terms thereof (“the PPR”). The first respondent is the third largest forestry company which owns and operates forest plantations in the Limpopo, Mpumalanga and KwaZulu Natal Provinces, as well as in the Manica and Sofala Provinces of the Republic of Mozambique. The plantations that are located in South Africa are divided into three different regions: The Northern, Highveld and Central regions.

[22] Because the first respondent is one of the major public entities listed in Schedule 2 to the PFMA, it is required to procure goods and services in accordance with the system of procurement which is fair, equitable, transparent, competitive and cost-effective.

[23] It is not in dispute that the provisions of section 51(1)(a)(iii)⁶ of the PFMA applied to the tender and that it also provided for the allocation of points in accordance with the criteria referred to in section 2(1)(b)(i) of the PPPFA.⁷

BRIEF EXPOSITION OF THE FACTS

[24] I have already referred to the fact that the applicant, together with Phepha, were the successful bidders in respect of a tender but that Phepha received a far more substantial portion of the contract value of the contract. Pursuant to the above award, the first respondent executed two separate contracts on 4 June 2020: One with the

⁶ Section 51(1)(a)(iii) of the PFMA reflects the constitutional obligation prescribed in section 217(1) of the Constitution.

⁷ Section 2(1)(b)(i) provides for the application of a preference point system where 10 points are allocated for attainment of specific empowerment goals and 90 points are allocated for price.

applicant and one with Phepha. The terms of the contracts expressly set out the location of the forest plantations in various regions where the relevant services were required. In respect of the applicant, the service agreement concluded between the parties expressly indicates that the relevant services will be required for the plantations in parts of the Northern and Highveld regions.

[25] The tender related to the supply of security services in respect of the plantations in the above regions for a period of three years.

[26] The Conditions of Tender in respect of RFB011/2019 provided *inter alia* as follows:

1. Security services would be rendered in respect of plantations, other business units, and forest guards.
2. The value of the tender was estimated to be R70 million to R80 million, i.e. in excess of R50 million.
3. No “objective criteria” in terms of section 2(1)(f) of the PPPFA and Regulations 3(e) and 11 of the PPR are recorded in the tender conditions.
4. In consequence, the 90:10-point system in terms of section 2(1)(b)(i) of the PPPFA would apply. The Supply Chain Management Policy of the applicant also confirmed the 90:10-point system.

THE APPOINTMENT OF THE SERVICE PROVIDER

[27] There exists a dispute of opinion between the applicant and the respondents regarding whether the first respondent had the right to appoint more than one bidder or service provider per region or whether or not to appoint only one service for all the regions.

[28] This dispute emanates from the stipulation in the Conditions of Tender that “*more than one service provider per region*” may be appointed. It is also stated that one tenderer may be appointed in respect of the whole of the contract.

[29] According to the respondents, the Bids Specifications Committee (“the BSC”) expressly made it clear that the first respondent reserved the right to appoint more than one bidder or service provider per region or to appoint only one service provider for all the regions. At a compulsory briefing session held with all the bidders, on 10 September 2019, the first respondent repeated the choice open to it to either appoint a single service provider for all the plantations in all the regions, or the appointment of more than one service provider per region.

[30] The respondents further submitted that none of the bidders, including the applicant, raised any issue regarding the legality or justification for the choice set out in the bid specification. It is not part of the applicant’s grounds of review that that choice was invalid or unjustifiable. The respondents accordingly submit that the applicant’s grounds of review must be considered on the premise that the first respondent was entitled to assess and award the tender in accordance with the choice it expressly communicated to the bidders.

[31] I have taken note of this point of disagreement between the parties. Not much, however, turns on this in light of my finding as to why the award should be reviewed and set aside. As will be pointed out later in the judgment, the decision was taken by the Bid Evaluation Committee (“the BEC”) to award the tender to the applicant as a single service provider for the entire region after having duly taken into account concerns expressed that more than one service provider per region should be appointed. The Bid Adjudication Committee (“the BAC”) had on two occasions (on 8 November and 21 November 2019) accepted the reports by the BEC recommending that the applicant be appointed as the single service provider. It was only on 17 December –a month later –that the BAC inexplicably made an about turn and changed the allocation of the award.

THE EVALUATION PROCESS

[32] The first respondent’s Supply Chain Management Policy provides for, *inter alia*, a Bid Specification Committee (“the BSC”); a Bid Evaluation Committee (“the BEC”) and a Bid Adjudication Committee (“the BAC”).

Bid Specification Committee

[33] The BSC drafts and compiles the specifications and terms of reference for procurement of goods and services for the first respondent. The BSC also determine which preference point system (i.e 80:20 or 90:10) will be applied and which evaluation criteria would apply. The BSC then makes a recommendation to the BAC for approval of its specification before tender is published.

Bid Evaluation Committee

[34] The BEC is, according to the Supply Chain Management Policy, one of the most important phases of the procurement process. The Policy states that the evaluation should be based on the pillars of procurement namely, fairness in the evaluation of tenders, a transparent evaluation process, ensuring accountability from all role players in the process, openness of the evaluation process and ensuring that the first respondent receives value for money.⁸

[35] The BEC is responsible (*inter alia*) for evaluating bids in line with the approved published bid specifications or terms of reference including evaluation criteria, weight and specific goals. An important function of this committee is to evaluate each bidder's capability to execute the contract —the so-called “functionality” assessment. This committee is also required to identify all the risks associated with a recommendation.

[36] The BEC will then recommend the award of the bid to the highest scoring bidder. In this matter it is common cause that the BEC had twice recommended the applicant as the preferred bidder.

Bid Adjudication Committee

[37] The BAC is “constituted by SAFCOL Executives and Senior Employees to review and ratify/approve or reject recommendations made by the Bid Evaluation Committee” and to “ensure that a transparent review of the evaluation is undertaken”. The BAC is also required to consider “The preference point system prescribed and that appropriate goals are identified and points allocated for those goals are consistent

⁸ Clause 3.2 of the Memorandum from the Chief Financial Officer of the first respondent addressed to all members of the Bid Committees on 10 April 2019 setting out their role, functions and powers.

with the requirements of the PPPFA regulations”. In this matter the BAC twice approved the recommendation of the BEC that the applicant be appointed as the preferred service provider. It is only at the third meeting that the BAC made an about turn on this decision.

THE EVALUATION PROCESS OF THE BID

[38] Seventy-nine bidders submitted competing bids. Some bids were for specific plantations in a particular region. Others were for a combination of plantations in more than one region. Others were for all of the plantations in all the regions. Nine bidders' bids were eliminated during the pre-qualification phase because their bids failed to comply with the pre-qualification requirements prescribed in Bids Specifications. In addition, 59 bids were found to be non-responsive in that they were not accompanied by prescribed documentation such as public liability insurance.

The first BEC meeting: 23 and 25 October 2019

[39] In terms of the first respondent's supply chain management policy the BEC is required to consider and evaluate competing bids, with reference to functionality, price and B-BBEE and thereafter to recommend a preferred bidder.

[40] The following appears from the minutes of the meeting of the BEC: In respect of functionality, the applicant scored 88 points and Phepha scored 71 points. The applicant also scored the highest total points on B-BBEE. The applicant's tender came to R87 750 115.14 and Phepha's tender came to R92 338 372.17: a difference of R4 588 260.00.

[41] The evaluation for price and B-BBEE was based on the “90:10 PPPFA”.⁹ The applicant received the highest score – a total overall score on the “90:10 PPFA” of 100. Phepha was placed second and scored 95.29. The applicant was then recommended as the preferred bidder. Next to “reasons for recommendation” it is recorded that: “The bidder scored the highest TOTAL POINTS on Price and B-BBEE evaluation”.

⁹ Page 7 of the minutes.

[42] The following recommendation was thereafter made:

“It is recommended that:

“The BAC considers and approves the appointment of Collins Sebola Financial Services (Pty) Ltd T/A CS Security for the Provisions of Security Services, including forest guards, to all the regions of SAFCOL at an amount of R87 750 115.14 (including VAT) for a period of three (03) years.”

[43] The first respondent thereafter requested the applicant for a discount on its bid amount. It is common cause that the BEC recommended the applicant as the preferred bidder after it negotiated a discount of 2% from the price originally tendered by the applicant. It thus recommended that the applicant’s bid be accepted at the price of R86 064 474.86 (“the first recommendation”).

The first BAC meeting: 8 November 2019

[44] The first recommendation of the BEC (recommending the applicant as the preferred bidder) served before the BAC on 8 November 2019.

[45] Under the first respondent’s supply chain management policy, the BAC is required to consider recommendations submitted to it by the BEC and thereafter either accept or reject such recommendation. The BAC is thereafter required to submit its recommendation to the Finance Committee of the first respondent on the award of the tender.

[46] After deliberations at a meeting of 8 November 2019, the BAC accepted the first recommendation of the BEC and thereafter recommended to the Finance Committee that the applicant be appointed as the preferred bidder. It is important to note that the applicant was appointed for the totality of the tender.

The Internal Audit Committee: Meeting of 13 November 2019

[47] The Internal Audit Committee of the first respondent is then required to consider and audit the recommendation of the BAC whereafter it is considered by the Finance Committee in order to ensure that that recommendation complies with the

requirements for tender and the supply chain management policy. The Internal Audit did perform a compliance process and did not find any issue with the process.

[48] In this instance the Internal Audit Committee considered the recommendation of the BAC and prepared its report wherein it raised two concerns. The first was that neither the BEC nor the BAC evaluated the competing bidders *per region* in order to assess whether the latter evaluation would yield a better value for money for the first respondent. The second concern was that had the BEC and the BAC also considered the evaluation of competing bids per region, they would have identified a cost-saving for the first respondent to the order of R1 421 921.51. This, the applicant argued, was not the task of the Internal Audit.

The meeting of the Finance Committee

[49] The report of the Internal Audit Committee was considered by the Finance Committee together with the recommendation of the BAC. The Finance Committee resolved not to approve the recommendation of the BAC because of the concerns raised. It then resolved to remit the matter to the BEC and the BAC for further consideration in the light of the concerns expressed by the Audit Committee.

The second BEC meeting: 19 November 2019

[50] The BEC reconvened on 19 November 2019 to specifically consider the concerns of the Audit Committee and the Finance Committee. The BEC concluded that it was not entitled to evaluate the competing bids per region in order to determine whether it should recommend the appointment of more than one bidder per region. The BEC therefore disagreed with the concerns raised by the Audit Committee and recorded the following:

“The BEC therefore finds the IAR [Internal Audit Report] misleading in the pronouncements that there could have been a saving and that there is a loss that will result in wasteful expenditure, as the context from which the Internal Audit base its concerns is misunderstood.”

[51] The recommendation by Internal Audit that possible capacity or delivery issues “would have probably resulted from awarding 1 service provider on all regions” was specifically considered and rejected. The BEC concluded that this would not be an issue “as the functionality evaluation tested this and this is a contractual matter and should be dealt with as such”. It is further specifically recorded in the report that it (the BEC) was of the view that it would be impractical to appoint more than one service provider per region.

[52] The BEC, for the second time, recommended the appointment of the applicant as the preferred bidder and sole supplier of the security services for all the plantations in all the regions (“the second recommendation”).

The second BAC meeting: 21 November 2019

[53] The BAC considered the second recommendation of the BEC on 21 November 2019 together with the concerns raised by the Audit Committee in its report. The BAC resolved to adopt the second recommendation of the BEC. The following is noted in the minutes signed by Hlatshwayo:

“In addition, BAC noted the concern of the Internal Audit with regard to the cost saving if appointing service providers per region, but of the view that value for money not only comprises cost saving, but include opportunity costs, which will be a netter saving and logistically best for the company to appoint one service provider for all regions.”

The second meeting of the Finance Committee

[54] The Finance Committee met again on 22 November 2019. It noted that the queries raised by the Audit Committee were not addressed by the BEC and the BAC. It also concluded that the BEC was mistaken when it made the second recommendation on the basis that it was not permitted to evaluate competing bids on a regional basis. The Finance Committee indicated that the invitation for tenders expressly reserved the right for the first respondent to appoint more than one bidder per region, and that the BEC had the right to evaluate competing bids on a regional basis.

[55] The Finance Committee then concluded that –

“it would not be appropriate for the [finance] committee to support the recommendations of the BAC to appoint Collins Sebola Financial Services (Pty) Limited t/a CS Security (the applicant) for the provision of security services as the internal audit report did not provide assurance that the supply chain process has been followed in line with applicable laws and policies”.

[56] Once again, the Finance Committee remitted the matter back to the BEC to address the concerns raised by the Audit Committee in the light of the right of the first respondent to award more than one bidder per region as expressly provided for in the tender documents.

Letter of the BEC

[57] On 5 December 2019, the BEC addressed a letter to the BAC responding to the Financial Committee’s concerns. In that letter the BEC recorded that it has already responded to the concerns raised by the Internal Audit and raised the fact that their report seems not to have been forwarded to the Financial Committee. The BEC requested that the BAC confirm that all of their reports were tabled at the Financial Committee. The BAC did not respond to the letter of the BEC. The following is recorded in the letter:

“We however take note of the need to substantiate the reasons for concluding that the appointment of more than one service provider per region is not practical. Therefore, we have attached hereto the analysis done and reasons (Annexure E), which was not previously provided.

The BEC therefore requests that the BAC confirm that the reports, as attached and except for Annexure E, were tabled at FINCO and that they were deliberated on as Annexure A seems to indicate the contrary.”

[58] Attached to this document is a document tabling the risks of appointing more than one service provider per region. The document ends by stating that the appointment of more than one service provider presents a potential higher cost to the organisation and will be to the detriment of the first respondent. The applicant is then

recommended as the service provider. It is further noted that the risks identified in the document associated with appointing more than one service provider per region are reduced significantly with the appointment of the applicant as the service provider.

The status quo as at 5 December 2019

[59] As at 5 December 2019, the applicant was the preferred service provider and was twice recommended as such by the BEC and the BAC. From the minutes of the meetings of the BEC and the BAC it is clear that the concerns raised by the Financial Committee regarding the appointment of more than one service provider were considered but rejected. The clear message sent to the first respondent was that it was not practical to appoint more than one service provider per region and that, in fact, there were significant risks that may result from appointing more than one service provider per region. For this reason the applicant was recommended as the preferred service provider for the entire region.

[60] What then changed?

The third BAC meeting

[61] The BAC met again on 12 December 2019 to consider the concerns raised by the Finance Committee and the Audit Committee. It then considered the bids of the applicant, Phepha and Phuthadichaba. This time the bids were evaluated per region to assess whether the first respondent would achieve cost-savings based on that evaluation.

[62] The BAC then resolved that the bid of Phuthadichaba was too expensive across all regions and did not bring about any savings for the first respondent. It therefore eliminated that bid from further consideration.

[63] Thereafter, the BAC considered the bids of the applicant and Phepha per region to assess whether there would be any cost-savings. I should interpose here to refer back to the letter from the BEC wherein it was specifically stated that the appointment of more than one service provider was not in the interests of the first respondent and in fact, posed significant risks to the first respondent.

[64] However, notwithstanding what transpired prior to this meeting and notwithstanding the fact that the BAC itself had twice recommended the applicant as the preferred bidder, the BAC now concluded that the bid of Phepha provided cost-savings in most of the Highveld region, the whole of the Central region and a subsequent part of the Northern region. The BAC also concluded that the bid of the applicant was competitive in parts of the Northern and Highveld regions.

[65] As far as the dispute between the parties is concerned, this meeting of the BAC on 12 December 2019 is the most important one.

[66] In considering the about-turn, it is necessary to also mention the role of Mr. Nhuvunga and Mr. Hlatshwayo as both of them ultimately played a pivotal role in the awarding of the tender to Phepha.

[67] Mr. Nhuvunga is the Senior Manager of Supply Chain Management of the first respondent. He is thus the custodian of the totality of the procurement process within the first respondent. Importantly, he attended the meetings of the BAC on 8 and 21 November 2019 when the evaluation by the BEC was supported by the BAC. At the meeting of 21 November 2019, Mr. Nhuvunga (and Mr. Hlatshwayo) added the following to the resolution of the BAC:

“In addition, BAC noted the concern of the Internal Audit with regard to the cost saving if appointing service providers per region, but is of the view that value of money not only comprises cost saving, but include opportunity cost, which will be a better saving and logistically best for the company to appoint one service provider for all reasons.”

[68] It does not appear from the papers that the report of the BAC reached the Financial Committee on 22 November 2019. That explains why the Financial Committee resolved to refer the matter back to the BEC to again address the concerns of the Internal Audit. The question irresistibly arises why did Mr. Nhuvunga not alert the Financial Committee to the fact that the concerns had already been considered.

[69] Apart from the fact that this inexplicable about-turn is not explained, what transpired *after* this meeting is even more suspect.

Discount negotiations

[70] After that assessment, the BAC sought to establish from the applicant and Phepha the extent of the discount they were willing to offer. Phepha gave a discount of 10.5% of its prices in the regions identified by the BAC. The applicant was not willing to offer any discount on the regions identified by the BAC. I will return to the significance of this hereinbelow.

[71] Based on the discount offered by Phepha, the BAC resolved to recommend the appointment of Phepha as the preferred bidder for the plantations in the Highveld and Central regions and part of the Northern region at the price of R62 193 884.32, and that the applicant should be appointed for provision of security services in parts of the Northern and Highveld regions at the price of R18 285 386.01.

The Finance Committee meeting

[72] The recommendation of the BAC was considered by the Finance Committee on 24 February 2020 and the Finance Committee resolved to approve that recommendation because it addressed the concerns raised by the Audit Committee and assessed the competing bids on a regional basis.

[73] The Finance Committee also accepted the recommendation of the BAC because the assessment of the competing bids on a regional basis achieved savings for the first respondent in the order of R5 585 204.30.

PRINCIPLES

[74] The validity of a tender should be scrutinized against the acceptable principles laid down for awarding tenders. These principles have been summarized in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* as follows:

“[4] The final Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s 217).¹⁰ The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent, competitive and cost-effective'. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of the Promotion of Administrative Justice Act (PAJA) apply to the process. This is the legislative background against which the present matter must be considered.”¹¹

[75] The applicant contends that the goals as set out in the section 217 of the Constitution were thwarted resulting in an award of the tender to Phepha that was not fair, equitable nor transparent and also not cost effective.

[76] Was there adherence to the provisions of the PPPFA? According to the applicant no “objective criteria” in terms of section 2(1)(f) of the PPPFA is recorded in the tender conditions. In consequence, the 90:10-point system in terms of section 2(1)(b)(i) of the PPFA would apply. The Supply Chain Management Policy of the first respondent also confirmed the 90:10-point system. The relevant sections read as follows:

“2 Framework for implementation of preferential procurement policy

(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed;

¹⁰ Section 217(1) of the Constitution, 108 of 1996 states as follows: **“217 Procurement**

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

¹¹ 2008 (2) SA 481 (SCA).

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

.....

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;”

[77] The applicant submits that it was therefore imperative for the first respondent to award the tender to the tenderer who scored the highest points. I have already pointed out that the applicant scored the highest points – 100 – as opposed to Phepha’s 95. The only instance in which the tender could be awarded to someone else is when the first respondent had stipulated objective criteria in the tender document. But the first respondent never did that.

[78] It is so that the Request for Bid provided in paragraph (b) that the first respondent reserves the right to negotiate price with the preferred bidder. The reason for this is sound. The preferred bidder had already scored the highest in respect of functionality and price in total and there could be no prejudice to other bidders when the first respondent negotiated with the preferred bidder. Clearly, as will be pointed out hereinbelow, the negotiations cannot just take place randomly in the way it was done in the present matter.

[79] Returning to the facts in this matter. The applicant seeks to review the award of the tender on various grounds. They include: (i) bias (alternatively reasonably suspected of bias) in the manner in which the tender was awarded, particularly in light of the inexplicable about–turn on 12 December 2019; (ii) the fact that the mandatory 90:10 scoring point system was not complied with. Although that was initially done, the scoring system was thereafter completely ignored at the meeting of the BAC on 12 December 2019; (iii) the fact that the award was procedurally unfair in that Phepha was informed what the amount was it had to present as a discount; (iv) the fact that the prescripts of section 2(1)(a)(b)(i) of the PPPFA were not followed; (v) the fact that a price was negotiated with a bidder other than the preferred bidder; (vi) the fact that the decision was materially influenced by an error of law in that objective criteria were

not stipulated and it was an error of law to ignore functionality and only consider price; and (vii) the fact that relevant considerations were ignored. The first respondent considered a discount in excess of R 2 million a risk yet when Phepha afforded a discount in excess of R 7 million, this was not considered but ostensibly overlooked.

[80] I am of the view, having considered the facts, that the applicant succeeds on all of these grounds and that the (partial) award to Phepha should therefore be reviewed and set aside: The tender was not issued in accordance with the constitutional and legislative procurement framework and cannot be said to have been issued in accordance with a system which is fair, equitable, transparent, competitive and cost effective – all principles that are fundamental to a valid tender process. See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*:

“[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus s 217 of the Constitution:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[33] The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act (Procurement Act). The Public Finance Management Act is also relevant.

[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment,

transparency and efficiency under the Constitution. 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.”¹²

[81] I will now turn to the about-turn on 12 December 2019 which resulted in the award of the partial award of the tender to Phepha and why I say that principles of fairness and transparency in the award of the tender were not adhered to.

The about-turn on 12 December 2019

[82] During the meeting of the BAC on 12 December 2019, it was now resolved to appoint service providers per plantation thus deviating from two previous decisions awarding the tender to the applicant. The reasons for this about-turn during that meeting are not before the Court. I have already pointed out that the respondents have not placed before the Court the recording of the meeting. The recording of this meeting is pertinently relevant and constitutes, in my view, an important omission: There is, in the absence of such recordings, nothing before the Court to explain the about-turn particularly in light of the fact that the BAC had on two previous occasions agreed, without any qualification whatsoever with the evaluation of the BEC, to appoint the applicant as the preferred service provider. To restate: It is important to again point out that the second time the BAC had agreed with the BEC was *after* the Internal Audit had raised the possibility of adjudication per regions.

[83] It is important to also note that the BAC had, on both the 21 and 12 December meetings, at its disposal the letter written to it on 19 November 2019. In that letter it is noted that the purpose was to respond to the concerns raised by the Internal Audit in the report issued to the BAC dated 11 November 2019. The BEC specifically responded to paragraph 3 of the Terms of Reference which provided that “SAFCOL

¹² 2014 (1) SA 604 (CC).

reserves the right to appoint more than one service provider per region and to appoint one service provider for all regions". The BEC responded by stating that it was of the view that it is impractical to appoint more than one service provider per region. The letter concludes by stating that:

"In conclusion, the BEC stands by its recommendation to BAC, as per the BEC Report dated 4 November 2019, for the BAC to consider and approve the appointment of Collins Sebola Financial Services (Pty) Ltd T/A CS Security for the Provision of Security Services at a discounted amount of R 86 064 474.68 (including VAT) for a period of three (03) years."

[84] In addition, the BAC also had the legal opinion of the legal advisor of the first respondent in which the approach of the BAC was favoured.

[85] Why the letter of the BEC and the legal opinion was ignored at the 12 December 2019 meeting of the BAC is not explained on the papers.

[86] At the meeting of 12 December 2019, it was now resolved – as reflected in the Executive Summary dated 17 December 2019 which the Chairperson of the BAC addressed to the CEO that:

"The reasons furnished by the BEC as per the report are frivolous and therefore not be accepted by the BAC, moreover the reasons are not addressing the concerns as per the Internal Audit Report and resolution of FINCO."

It also informed the CEO that:

"The BAC reconvened on the 21st November 2019 to consider the recommendations of FINCO and subsequently instructed the BEC to reconsider their recommendations and resubmit to the BAC. The BEC subsequently reconvened, however the committee remained adamant and resolute in their decision or outcome to appoint Collins Sebola Trading as CS Security Services Pty (Ltd) (sic). The BEC cited reasons, which were entirely not consistent, objective and not addressing the Internal Audit and FINCO recommendations respectively."

[87] These about–turn comments must, however, be read in light of what the BAC noted in its minutes of the BAC meeting on 21 November 2019:

“It was resolved that the BAC accept the recommendation of the BEC to appoint Collins Sebola Security Services (Pty) Ltd t/a CS Security to provide security services for a period of three (3) years at an amount of R 86 064 474.68 (inclusive of VAT) and for further recommendation by EXCO as per the delegation of authority, as the amount that may be incurred for the services is not within the mandate of the BAC.

In addition, BAC noted the concern of the Internal Audit with regard to cost saving if appointing service providers per region, but is of the view that value for money not only comprises cost saving, but include opportunity costs, which will be a better saving and logistically best for the company to appoint one service provider for all regions.”

[88] The BAC, in my view, misled the CEO about what had transpired prior to the meeting on 12 December 2019: Not only was the CEO not told that the BAC had twice recommended the appointment of the applicant, the BAC in turn omitted to inform the CEO that the concerns raised by the Internal Audit and FINCO were indeed considered but that the applicant was nevertheless recommended because it was “logistically best for the company to appoint one service provider for all regions”. The labelling of the reasoning of the BEC as “frivolous” is clearly an attempt at withholding information from the CEO in respect of the previous two resolutions by the BAC to award the tender to the applicant. As already pointed out, there is no explanation by the sixth respondent, Mr. Hlatshwayo, as to why there was such an about– turn.

[89] I am thus in agreement with the submission that the BAC, in their executive summary to the CEO, cannot be seen as anything but purposively withholding information.

[90] As a result of the BAC report, on 24 February 2020 the Board of the first respondent considered the recommendation of the Finance Committee. It resolved to accept that recommendation and decided to award the tender for the supply of security services by the seventh respondent for all the plantations in the whole of the Highveld and Central regions and part of the Northern region, at the price of R62 193 884.32.

[91] The Board also resolved to award part of the tender to the applicant for the supply of security services in respect of some of the plantations in the Northern region at the price of R18 285 386.01.

[92] I am, in light of the above, persuaded that the award of the tender to Phepha falls to be reviewed and set aside: (i) It is clear that the 90:10-point scoring system has not been complied with. (ii) The BAC was compelled to recommend awarding the bid to the highest scoring bidder taking into account objective criteria. This is the imperative of the PPPFA. This was not done. Objective criteria were ultimately ignored by the BAC in December 2019 and replaced by subjective wishes. (iii) The manner in which the BAC acted showed a clear intention to awarded the tender to Phepha on grounds totally disconnected with the clear and considered recommendations that preceded the 12 December 2019 meeting. To diminish the recommendations of the BEC as “frivolous” after the BAC had on two occasions unconditionally accepted the recommendations of the BEC, shows, in my view, a clear intent not only to award the tender to Phepha, but to mislead the CEO in respect of the unequivocal recommendations that preceded the meeting on 12 December 2019. The manner in which the tender was ultimately awarded to Phepha, taking into account all the facts, cannot be interpreted in any other way than a bias in favour of Phepha. (iv) The tender was ultimately awarded with no regard to the risks that it posed for the first respondent. The first respondent considered it a risk to afford a discount in excess of R2 million. That is not in dispute. But, when it came to awarding the tender to Phepha, a discount in excess of R7 million was simply ignored. I will now return to this fact.

[93] In addition to the above and further underscoring the suspicious circumstances in which the BAC had made an about–turn. It is not in dispute that at the meeting of 12 December 2019, the members of the BAC were in agreement that any discount on the tender price in excess of R2 million would be excessive and would constitute a pertinent risk as to the quality of the services to the first respondent. Yet, the first respondent had no hesitation in accepting the 10.5% discount offered by Phepha and which amounted to approximately R7 million. Why red flags were not raised, is not explained in the papers. What compounds matters for the respondents is the fact that

Mr. Hlatshwayo was present on 12 December 2019 when it was agreed that a discount in excess of R2 million would pose a risk. Yet in the letter to the CEO of the first respondent this second respondent ostensibly endorsed the discount with no warning as to the risks attached thereto. Mr. Hlatshwayo in his letter to FINCO dated 22 February 2020, likewise endorsed the discount without any word of warning.

[94] A further shadow is casted over the actions of the BAC by the fact that it would appear from the facts that Phepha knew exactly what amount it had to offer (after discount) when it made its offer to the first respondent on 18 December 2019. On 18 December 2019, the first respondent requested a discount from Phepha on the amount of R69 490 373.54. On the same day Phepha offered a discount of 10.5% resulting in an offer of R62 193 884.32. Yet, on 17 November 2019, a day earlier, Mr. Hlatshwayo recorded the exact amount in the Executive Summary which Phepha offered only one day later.

[95] When the applicant was requested for a discount on 31 October 2019, it was imperative for it to furnish the revised rates or prices. It was clear that the applicant could not then give merely a percentage discount. On 1 November 2019, the applicant responded to the request and also attached a revised pricing schedule together with the rates. Yet, when Phepha provided its discount it merely gave a discount of 10.5% i.e R7.296 million on the amount with no reference to any rates. Also, when the applicant revised its rates, it responded by stating what it considered in doing so: It considered PSIRA pricing structures, the National Minimum Wage Act, and the Private Security Sectoral Determination. Apart from the fact that Phepha just happened to offer the exact discount amount a day after it was recorded by Mr. Hlatshwayo in the executive summary dated 17 December 2019, no particulars are furnished by Phepha in respect of how this discounted amount had been arrived at, particularly if regard is had to how the applicant previously arrived at the discounted rate.

THE RELIEF

[96] The tender falls to be reviewed and set aside. Should the Court substitute the decision of the respondents? The respondents argued that, should the Court uphold the review, the appropriate remedy is one of remittal and not the order of substitution

sought by the applicant. They argue that the applicant has not shown the existence of exceptional circumstances, in line with the judgment of the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another*.¹³ In that matter the Constitutional Court emphasized that, when a court is called upon to exercise the discretion conferred upon it to grant or refuse an order of substitution, it must bear in mind the separation of powers principle and afford the necessary deference to the administrator whose decision is sought to be reviewed.

[97] I am in complete agreement with the principle stated in that judgment that a court should afford the necessary deference to the administrator or decision-maker as they are in the best position to make a decision. In the present matter the decision-maker had already held, on more than one occasion, that the applicant is the preferred bidder. The tender has been the subject of a vigorous process which ultimately resulted in the applicant being held to be the preferred bidder. This decision had been reached after having taken into account objective criteria and after having considered the concerns raised by the Financial Committee. By ordering a substitution, this Court is not usurping the decision-making function of the respondents: It is merely ordering that the decision which had been recommended on two occasions, should be implemented. But for the interference of, *inter alia* Mr. Hlatshwayo, the tender would have been awarded to the applicant. I should also mention that I do not accept that just because contracts have been concluded and just because the applicant has signed a contract in which it was afforded only part of the contract, results in it being non-suited to contest the award in the manner it did.

[98] The application therefore succeeds. Costs should follow the result and should include the costs of senior counsel where so employed.

THE ORDER

[99] The following order is made:

1. The decision of the Board of the first respondent dated 24 February 2020 to award part of tender number RFB011/2019 to the seventh respondent

¹³ 2015 (5) SA 245 (CC).

is reviewed and set aside.

2. The first respondent is directed to award the part of tender RFB011/2019 that was awarded to the seventh respondent to the applicant at the price which the applicant has tendered for such part.
3. The first respondent is ordered to administer a reasonable and expeditious handover from the seventh respondent to the applicant.
4. The respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs, such costs to include the costs occasioned by the employment of senior counsel.

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 January 2021.

Case number:

21375/2020

Matter heard on:

8 October 2020

APPEARANCES

For the Applicant:

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Instructed by:

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For the Respondent:

VINCENT MALEKA SC

Instructed by:

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