

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 33259/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 4 July 2022 E van der Schyff

In the matter between:

XOLISWA TINI FACILITIES MANAGEMENT
SERVICES (PTY) LTD

APPLICANT

and

MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE FIRST RESPONDENT

MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION

SECOND RESPONDENT

OMAROSTAX (PTY) LTD

THIRD RESPONDENT

LICIAFIN (PTY) LTD

FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] On 27 November 2020, the first respondent (the DPW) issued and advertised a tender, under tender number H20/011PF, for the procurement of alternative office accommodation of 12 146m² and 528 parking bays for a period of 5 years, for the second respondent (DIRCO). The initial submission closing date was 18 December 2020, but the date was changed to 22 January 2021 in an erratum published on 4 December 2020. The advertisement and tender document record that a minimum functionality score of 50% had to be met for further evaluation on price and preference.¹
- [2] The applicant and five other parties submitted bids. The DPW bid evaluation committee (the BEC) met on 16 February 2021 to evaluate the bids. All the bids were found to be responsive. The BEC convened again on 8 March 2021 and evaluated the bids on functionality. One of the bidders was disqualified for offering land instead of an existing building. Some bidders were eliminated for not scoring a minimum of 50%.
- [3] The applicant (XTFM), the third respondent (Omarostax), and the fourth respondent (Liciafin) proceeded to the next level of evaluation. Omarostax and Liciafin scored 80% for functionality, and XTFM scored 76%. At the meeting on 8 March 2021, the BEC recommended Omarostax as the successful and highest score bidder to the National Bid Adjudication Committee (NBACL). XTFM received an email on 10 May 2021 wherein the DPW informed that the tender was awarded to Omarostax on 3 May 2021.

¹ The erratum records that a minimum functionality score of 65% should be met for further evaluation on price and preference. Since the three bidders that moved forward all attained a score higher than 65% the issue as to whether a 50% or 65% functionality score had to be obtained before a bidder's tender would be evaluated on price and preference is neither here nor there.

- [4] XTFM approached the court on an urgent basis for relief. On 28 July 2021, XTFM obtained an order interdicting and restraining the DPW and the second respondent from taking any step in implementing the award pursuant to the tender process under tender number H20/011PF, pending the finalisation of a review application. This court is tasked with deciding the review application.

Preliminary and procedural issues

- [5] It is common cause that a case-management meeting was held before Ledwaba AJP on 10 March 2022. The purpose of the case-management meeting held at the bequest of Omarostax was to get the matter ripe for hearing and obtain a special hearing date. By the time the case-management meeting was held, the filing of affidavits had already deviated from what is ordinarily allowed in terms of Rule 6.

- [6] The following affidavits were filed in this application:

- i. XTFM filed its founding affidavit when the urgent application was launched;
- ii. DPW filed an answering affidavit;
- iii. XTFM filed a replying affidavit;
- iv. XTFM filed a supplementary founding affidavit;
- v. XTFM filed a 'further' supplementary founding affidavit;
- vi. Omarostax filed an answering affidavit to XTFM's founding and supplementary founding affidavits;
- vii. DPW filed an answering affidavit to XTFM's supplementary founding affidavit;
- viii. XTFM filed a replying affidavit to DPW's answering affidavit;
- ix. XTFM filed a replying affidavit to Omarostax's answering affidavit;
- x. Omarostax filed a supplementary answering affidavit;
- xi. XTFM filed a supplementary replying affidavit to Omarostax's supplementary answering affidavit.

- [7] The DPW and Omarostax submitted in their answering affidavits that XTFM's supplementary founding affidavit was not filed within the period allowed by rule 53(4). Omarostax objected to the late filing. Omarostax also takes issue with the fact

that the review record that XTFM had to prepare and certify in terms of rule 53(3) was filed 32 court days after the record was made available to the applicant. Omarostax submitted that no condonation application had been brought regarding these delays. It claims that it suffered prejudice because an inordinate delay in the occupation of the relevant office building caused losses for the DPW and a severe loss of income for Omarostax.

- [8] Omarostax's counsel submitted that XTFM's assertion that neither DPW nor Omarostax required at the case-management meeting before Ledwaba AJP that XTFM seek condonation, is without merit. Counsel explained that the meeting was not a case-management meeting in terms of Rule 37A but followed a request from Omarostax's attorney to arrange dates to get the matter ripe for hearing and obtain the earliest possible hearing date. Omarostax was not required to raise procedural or interlocutory issues at the case-management meeting and was not prevented from raising such issues at the hearing. Omarostax thus sought that the court considers its striking out application *in limine*. In the event that the court would not be willing to strike out the parts of the affidavits and the documents as set out in Omarostax's application to strike out, counsel implored that the court should refuse to give any weight to inadmissible hearsay evidence and irregularly presented 'expert' evidence in reply and the supplementary affidavit.

Application to strike out

- [9] Omarostax filed an application to strike out in terms of rule 6(15) of the Uniform Rules of Court. Omarostax seeks the striking out of:
- i. Annexure RRA2 to XTFM's Replying affidavit, all references to such report, its content and the annexures thereto, the affidavit of Mr. Van Zyl, annexure RRA3, and all paragraphs in the replying affidavit where reliance is placed on the affidavit and report;
 - ii. All references in XTFM's replying affidavit to Omarostax's answering affidavit to annexure RRA2, the affidavit of Mr. Van Zyl, and RRA3;
 - iii. The further report of Mr. Van Zyl annexed to XTFM's supplementary replying affidavit as well as all paragraphs in the applicant's supplementary replying affidavit where reliance is placed on the report, being paragraphs 13 to 18.

- [10] I am not inclined to waste any time discussing what may or may not constitute technicalities. As for the alleged late filing of the record of proceedings by XTFM, and the fact that it was not timeously certified, it is evident that XTFM had difficulties obtaining legible copies of the ROD from the DPW. Whether this record was adequately indexed and paginated may be a bone of contention between two opposing parties, but as far as I am concerned, the parties are satisfied that the record of the decision that this court is sought to review is properly before the court. The parties' inability to sit around a table and finalise the full extent of the record resulted in the so-called 'complete ROD' only becoming available after XTFM filed its supplementary founding affidavit, and this, in turn, caused them to deal with the completed bid only in its replying papers. This led Omarostax to file a supplementary answering affidavit which in turn prompted the filing of a supplementary replying affidavit by XTFM. I am convinced that the *audi et alteram* principle has been satisfied and that all the parties had sufficient opportunity to place their respective versions before this court. Omarostax had sufficient opportunity to answer all matters raised in XTFM's replying affidavit, and XTFM had the opportunity to reply to the new matter introduced in Omarostax's supplementary answering affidavit.
- [11] Omarostax's counsel lamented that XTFM did not file a condonation application, formally seeking the condonation of the late filing of the ROD and its supplementary founding affidavit and permission to file the supplementary replying affidavit. XTFM's counsel submitted that the launching of condonation proceedings would have delayed the finalisation of the matter and caused additional costs. XTFM submitted that the starting point for condonation is prejudice and that neither the DPW nor Omarostax set out with any particularity the prejudice they may suffer if the supplementary founding affidavit is allowed. XTFM submitted that neither the DPW nor Omarostax indicated at the case-management meeting with AJP Ledwaba that XTSF must apply for condonation for the late filing of its papers. They both, however, requested an opportunity to file supplementary answering affidavits. XTFM submitted that in its view, no condonation is required in the circumstances. However, if condonation is required, XTFM requested that the late filing of their supplementary founding affidavit be condoned.

- [12] Parties to legal proceedings sometimes lose sight that the Uniform Rules of Court are a set of procedural prescripts which must be followed by parties and their lawyers within the court's jurisdiction. The view that condonation need not be sought by one party because the other party also filed papers outside the prescribed time period, is untenable. Rule 27 provides that where parties cannot agree, the court may, on application on notice and on good cause shown, make an order extending or abridging any prescribed time periods. Rule 27(3) provides that the court may, on good cause shown, condone any non-compliance with the rules. It is, however, trite that the power conferred to the court by rule 27(3) is wide. In *Ncoweni v Bezuidenhout*² it was held that:

'The Rules of Procedure of this Court are devised for the purpose of administering justice and not for hampering it'

- [13] XTFM effectively sought condonation from the bar since no substantive condonation application was filed. However, the DPW and Omarostax were forewarned since XTFM alluded in their heads of argument that although they are of the view that condonation need not be sought, they request the court to grant them condonation if the court holds otherwise.
- [14] Where public funds are at stake, and an administrative decision is sought to be scrutinised for irregularities, in circumstances where XTFM explained the reasons that caused the late filing of the ROD and its supplementary founding affidavit, where it is not evident from the papers that either the DPW or Omarostax are prejudiced in the conduct of the proceedings, and where another court already granted interim relief by interdicting the implementation of the impugned decision, I am condoning the late filing of the ROD and the supplementary founding affidavit. Omarostax and the DPW filed supplementary answering affidavits, which in turn necessitated filing a supplementary replying affidavit by XTFM. To deprive an applicant of its right to reply to an answering affidavit would be to ignore the *audi et alteram partem* - doctrine.

² 1927 CPD 130.

- [15] As for the application to strike out the report and affidavit of Mr. Van Zyl, the so-called Ohkre-report, it is sufficient to state that the basis on which this review application is decided renders the consideration of the admissibility of the Ohkre-report redundant.
- [16] The DPW, the custodian of the ROD, purported to attach Omarostax's bid to its answering affidavit in the urgent application. It provided parts of the record as annexures to the answering affidavit filed in the urgent court application during July 2021, uploaded a ROD to Caseline on 31 August 2021, and again uploaded a so-called- complete ROD on 3 December 2021. The DPW did not explain the need to upload a complete ROD or why the ROD provided during August was not 'complete'. Although no finding turns on this, due to the basis on which the application was decided, the DPW should be aware that the absence of an explanation may raise questions about the authenticity of the parts of the record belatedly uploaded.

Grounds for review

- [17] XTFM raised the following grounds for review:
- i. The property offered by Omarostax, Oak Avenue, does not comply with the space requirement stipulated in the tender document. The tender document requires office space of 12 146m² and 528 parking bays;
 - ii. Oak Avenue is not correctly zoned as it is zoned for 'industrial 2' use, and property zoned 'industrial 2' is not to be used for office space as the main use.
 - iii. Omarostax was not the property owner at the time it submitted its bid. As a result, and in accordance with the responsiveness criteria set out in the tender document, Omarostax was obliged to submit a signed purchase agreement and title deed with its bid. The ROD reflects that Omarostax's bid did not include a signed purchase agreement or the title deed in respect of Oak Avenue;
 - iv. Omarostax failed to comply with important conditions of bid;

- v. Miscellaneous irregularities relate to the date of occupation, Omarostax not being registered for VAT, the period that Omarostax was in business; alleged non-compliance with National Building Regulations;
- vi. The lease agreement which forms part of the tender document is not the same as the lease agreement concluded between Omarostax and the DPW;
- vii. Irregularities pertaining to the scoring sheets.

- [18] XTFM avers that the decision by the DPW to award the tender to Omarostax was
- i. Procedurally unfair;
 - ii. Made for an ulterior purpose in that the space offered was, according to the DPW and Omarostax, 'exactly' the same as the space required;
 - iii. Taken because irrelevant conditions were taken into account or relevant conditions were not considered;
 - iv. Taken in bad faith, arbitrarily, and capriciously;
 - v. Not rationally connected to the purpose for which it was made, the purpose of the empowering provision, the information before the DPW, or the reasons given for it by the DPW;
 - vi. So unreasonable that no reasonable person could have made the same decision; and
 - vii. Unconstitutional as it is inconsistent with section 217 of the Constitution.

The issues for determination

- [19] The parties compiled and filed a joint practice note, wherein they identified the following issues for determination on the merits:
- i. Whether the property offered by Omarostax (Oak Avenue) complied with the tender requirements, in particular:
 - a. Whether the bid invitation required an exact size or whether size was estimated, as contended for by the DPW;
 - b. Whether Oak Avenue is suitable in terms of the bid invitation;
 - c. Whether Oak Avenue complied with the required lettable space in terms of the bid invitation;

- d. Whether Oak Avenue is correctly or appropriately zoned for the purpose it was offered;
- ii. Whether there was a valid purchase agreement of Oak Avenue between Omarostax and the owner of Oak Avenue (Fortress) and whether XTFM has sufficient standing and knowledge to challenge an agreement between third parties;
- iii. Whether Omarostax's bid complied with all the conditions of the tender invitation;
- iv. Whether XTMF made out a case for an order of substitution;
- v. The nature of the just and equitable relief in the event of the review application being successful.

The approach to tenders

[20] Section 217(1) of the Constitution provides that an organ of state that contracts for goods or services, must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. It is trite and has been confirmed by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*³ that 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 s 217 of the Constitution. This review inquiry is therefore governed by s 217 of the Constitution.

[21] A court that is approached to review an administrative action does not have a free hand to interfere in the administrative process. Lowe J explained in *C & M Fastners CC v Buffalo City Municipality*⁴ that a court's powers are limited in this regard:

'[8] ... As Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* "[j]udicial review is concerned, not with the decision, but

³ 2014 (1) SA 604 (CC) at par [32].

⁴ (1371/2017) [2019] ZAECHC 22 (14 March 2019) at paras [8] – [10].

with the decision-making process". This was made clear by Innes CJ more than a century ago in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* when he said:

'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.'

[9] Less than a decade later, after Union and the establishment of the Appellate Division, Innes ACJ, in *Shidiack v Union Government (Minister of the Interior)*, captured the limits of the review function of a superior court when he said that a court would be "*unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong*". The reason for this is simple: the legislature mandated and empowered administrators to administer, and not courts, and the role of the courts is limited to ensuring that administrators do not stray beyond the legal limits of their mandates.

[10] The passages I have cited from the *Johannesburg Consolidated Investments* case and the *Shidiack* case articulated the position when the review of administrative action was a common law jurisdiction of the superior courts. The principles stated still hold good now that the power to review administrative action is sourced in the Constitution and the PAJA: the distinction between appeal and review, based as it is on the doctrine of the separation of powers, remains in place and remains fundamentally important. Administrative action may only be set aside by a court exercising its review powers if it is irregular. It may not be

interfered with because it is a decision a judge considers to be wrong.'

(Footnotes omitted).

- [22] With this principle in mind, cognisance must be taken of the Supreme Court of Appeal's view in *Dr JS Moroka Municipality & others v Bertram (Pty) Ltd and another*⁵ where Leach JA confirmed that it is essentially for the administrative organ and not the court, to decide what should be a prerequisite for a valid tender, but continued to explain that a failure to comply with prescribed conditions will result in a tender being disqualified as an 'acceptable tender' unless those conditions are immaterial, unreasonable or unconstitutional. This approach corresponds with the approach followed by Brand JA in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith*⁶ that:

'As a general principle an administrative authority has no inherent power to condone failure with a peremptory requirement. It only has such power if it has been afforded the discretion to do so'.

- [23] Bolton briefly explained in an article titled *Disqualification for non-compliance with public tender conditions*⁷ that in public procurement regulation, it is a general rule that procuring entities consider only conforming, compliant or responsive tenders:

'Tenders should comply with all the aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender document. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity

⁵ [2014] 1 ALL Sa 545 (SCA) at par [10].

⁶ 2004 91) SA 308 (SCA) at par [31].

⁷ *Potchefstroom Electronic Law Journal* vol 17:6 2014 2314-2354 on 2314.

will comply with its own tender conditions. Requiring bidders to submit responsive, conforming, or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.'

- [24] An acceptable tender is defined in s 1 of the Preferential Procurement Policy Framework Act, 5 of 2000, (the PPPFA) as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. It was held by the Supreme Court of Appeal in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*,⁸ that the meaning of 'acceptable tender' must be construed against the background of the system envisaged by s 217 of the Constitution. The court held that '[t]he acceptance of a tender which is not 'acceptable' within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside.' It explained that where a bidder gains an unfair advantage over competing tenderers by omitting, for example, a section of the work that should have been included and therefore submits the lowest tender, an unfair advantage is gained.
- [25] Article 43 of the UNCITRAL Model Law on Public Procurement (2011) states that a tender must conform to all the requirements in the solicitation documents to be responsive. The procuring entity may, however, regard a tender as responsive if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions, or other requirements set out in the solicitation documents or if it contains an error or oversight that can be corrected without touching on the substance of the tender.
- [26] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,⁹ the Constitutional Court set out the proper legal approach in determining whether a deviation from prescribed tender conditions renders the award of a tender unlawful. To fully grasp the extent of the Constitutional Court's guidance, it is necessary to consider the approach

⁸ 2008 (2) SA 638 (SCA).

⁹ 2014 (1) SA 604 (CC).

followed by the Supreme Court of Appeal (the SCA). When the SCA dealt with the matter,¹⁰ the SCA held that irregularities in the tender process must be consequential to render a tender reviewable. The SCA held that in its view, 'a fair process does not demand perfection and not every flaw is fatal,'¹¹ and pointed out that '[i]t would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities.'¹²

[27] The Constitutional Court, however, discarded this approach and dismissed the idea of an 'inconsequential irregularity' as being relevant to the determination of lawfulness.¹³ It rejected the idea that 'even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.'¹⁴ In the Constitutional Court's view, such an approach 'undermines the role procedural requirements play in ensuring even treatment of all bidders'¹⁵ and 'it overlooks that the purpose of a fair process is to ensure the best outcome.'¹⁶ The Constitutional Court distinguished between the lawfulness inquiry and the determination of a just and equitable remedy.

[28] The Constitutional Court confirmed the inevitable - procedural requirements must be considered on their own merits. Once a ground for 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.¹⁷ The Constitutional Court reiterated that there is no reason to conflate procedure and merit.¹⁸

[29] In line with the approach set out in *AllPay*, it is thus necessary to first establish whether an irregularity or irregularities occurred. If that is found to be the position,

¹⁰ 2013 (4) SA 557 (SCA) at par [96].

¹¹ *Supra* at par [21].

¹² *Ibid.*

¹³ 2014 (1) SA 604 (CC) at par [22].

¹⁴ *Supra* at par [23].

¹⁵ *Supra* at par [24].

¹⁶ *Ibid.*

¹⁷ *Supra* at par [25].

¹⁸ *Supra* at par [28].

the irregularities must be legally evaluated to determine whether it amounts to a ground of review under PAJA. In this legal evaluation the materiality of any deviance from legal requirements must be considered 'by linking the question of compliance to the purpose of the provision, before establishing that a review ground under PAJA has been established.'¹⁹

- [30] Froneman J provided further guidance on assessing the materiality of compliance with legal requirements. He contextualised the approach to be followed by explaining:²⁰

'Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being "whether what the applicant did constituted compliance with the statutory provisions viewed in light of their purpose.' (Footnotes omitted)

The call for tender H20/011PF

- [31] The cover page of tender H20/011PF reflects the following:

'RETURNABLE DOCUMENTS FOR PROCUREMENT OF
ALTERNATIVE OFFICE ACCOMMODATION PF 12 146M² AND 528
PARKING BAYS FOR A PERIOD OF 5 YEARS FOR DEPARTMENT

¹⁹ Ibid.

²⁰ Supra at par [30].

OF INTERNATIONAL RELATIONS AND COOPERATION IN
HATFIELD, CENTURION, BROOKLYN, AND MENLYN'

- [32] It is stated in PA-04 (LS): Notice and Invitation to Bid, that only bidders responsive to the listed responsiveness criteria are eligible to submit bids. These criteria include, amongst others:

'If the bidder is an agent, a copy of the mandate from the owner and title deed must be submitted with the bid documents or in the case of a prospective buyer the signed purchase agreement and title deed must be submitted. If the bidder is the owner, the title deed must be submitted.'

- [33] The important conditions of bid relevant to this application as set out in PA-10(LS) are the following:

- i. Bids that are not accompanied by written proof that the bidder is authorised to offer the accommodation for leasing will not be considered;
- ii. The DPW is the sole adjudicator of the suitability of the accommodation for the purpose for which it is required. The Department's decision in this regard will be final.
- iii. The DPW will in no way be responsible for or committed to negotiations that a user department may or might have concluded with a lessor or owner of a building;
- iv. It is a requirement that the accommodation offered, including all equipment and installations, must comply with the National Building regulations and the requirements of the Occupational Health and Safety Act, 85 of 1993, as amended. A certificate to this effect must be issued;
- v. Drawings / Architect plans of the accommodation must be submitted. In this regard, it is a prerequisite that bidders should do a preliminary planning on the floor plans in accordance with the norm documents;

- vi. Lettable areas have to be determined in accordance with the SAPOA method for measuring floor areas in office buildings. The offer may not be considered if a certificate by an architect, certifying the area is not submitted.

[34] Bidders were obliged to confirm compliance with all the Acts, regulations and by-laws governing the built environment.

[35] One of the annexures annexed to the tender document is titled 'Estimated Space Requirement for Leasing of Buildings'. The lettable area without parking area is indicated therein as 12 148m². The exact measurement of the lettable area of the Oak Avenue property is a point of contention between the parties. However, I need not deal with the issue in light of the finding I came to.

(i) *Omarostax as a prospective buyer of Oak Avenue*

[36] It is common cause that Liciafin and Omarostax presented the same property, Oak Avenue, as suitable office accommodation to the DPW. The Sale of Property Agreement between the owner of the property and Omarostax provides that the agreement, save for clauses 1, 3, 7.2, 16, 17, and 19-24, is subject to and conditional upon the fulfilment or waiver of certain conditions. Important for purposes of this review application:

Clause 3.1.3 provides that:

'the Purchaser being successfully awarded the tender for the leasing of the Property by the Department of Public Works for DIRCO Tender No. H19/014PF, and the Purchaser advising the Seller, in writing, that this condition has been fulfilled, by no later than 90 (ninety) days from the Date of Signature.'

Clause 3.2 provides that the conditions precedent referred to in clauses 3.1.1, 3.1.2, 3.1.3, and 3.1.4 have been inserted for the benefit of the purchaser, who shall be entitled to waive fulfillment of same (if capable of waiver) by written notice to the seller.

Clause 3.6 provides that the parties may extend the date for the fulfillment of any of the conditions precedent to such further dates as they may, in writing, agree.

Clause 3.7 provides that should the conditions precedent not be fulfilled or waived within the time period stipulated therefor, or within such extension, as may be agreed between the parties, then the agreement, save for clauses 1, 3, 16, 17, and 18-24, shall cease to be of any force or effect.

Clause 18 of the agreement provides that no addition or variation, consensual cancellation or novation of the agreement, and no waiver of any right arising from the agreement, or its breach or termination shall be of any force or effect unless reduced to writing and signed by all parties or their duly authorised representatives.

Clause 20 provides that no latitude, extension of time, or other indulgence which may be given or allowed by any party to any other party in respect of the performance of any obligation or any right arising from the agreement shall be construed to be an implied consent by such party or operate as a waiver or a novation of, or otherwise affect any of that party's rights in terms of or arising from the agreement or estop such party from enforcing, at any time and without notice, strict and punctual compliance with every provision or term thereof.

Clause 23 of the agreement provides that the agreement constitutes the whole agreement between the parties.

In clause 26.1 of the agreement, reference is again made to Tender No. H19/014PF.

- [37] The purchaser and seller signed the agreement on 26 February 2020 and 27 February 2020, respectively. The initial closing date for tender H20/011PF was 18 December 2020, although it was subsequently extended.
- [38] The sale agreement concluded with Liciafin contains similar conditions. However, the agreement with Liciafin refers to Tender No H20/011PF. It was concluded in January 2021.

- [39] Several addenda concluded between Omarostax, and the owner of the Oak Avenue property reflect that the time periods within which the respective parties were obliged to act in some way or another way in terms of the agreement were frequently extended. The DPW acknowledges that the bids submitted by Liciafin and Omarostax referred to the same property but contends that they followed this up with the property owner. The owner confirmed in an email that valid sale agreements were concluded with Omarostax and Liciafin.
- [40] The ROD uploaded to Caselines on 31 August 2021 reflects that the initial purchase agreement concluded between Omarostax and the owner of the Oak Avenue property formed part of the record when the decision was taken to award the bid to Omarostax. I am alive to the fact that it was not annexed to the DPW's answering affidavit in the urgent application, but the mere fact that it was not attached at that time does not inevitably point to it not forming part of the record. The main agreement records a sale agreement concluded subject to certain conditions precedent. The relevant condition precedent is that the agreement between Omarostax and the owner of Oak Avenue was subject and conditional upon Omarostax being successfully awarded the tender for the leasing of the property by DPW for DIRCO' Tender No H19/014PF'. Although this condition has been inserted for the benefit of Omarostax, who was entitled to waive fulfillment by written notice to the seller of the property, such waiver is not included in the documentation submitted as part of the bid bundle. Such a waiver was, in fact, not placed before the court at all. The tender reference number included in the agreement was also not the result of a typing error or oversight, as the same tender number is also referred to in clause 26 of the main agreement, and the agreement was concluded prior to tender H20/011PF being advertised.
- [41] Can it be said, in the circumstances that Omarostax's bid was non-responsive because the sale agreement was conditional on Omarostax being awarded a different tender, albeit that the tender also related to the provision of office space to the DPW for DIRCO's benefit?

- [42] The DPW submitted that the fact that 'the sale has not yet been perfected' is of no consequence. I disagree. I am of the view that clause 3.1.3 of the agreement concluded between Omarostax and the owner of the Oak Avenue property during February 2020 constitutes a suspensive condition. It is trite that when a contract is subject to a suspensive condition, the contract only comes into effect if the condition is met. The Supreme Court of Appeal explained in *Mia v Verimark Holdings (Pty) Ltd*:²¹

'Suspensive conditions are commonly encountered in contracts for the sale of immovable property. Their legal effect is well settled. The conclusion of a contract subject to a suspensive condition creates 'a very real and definite contractual relationship' between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure...' (Footnotes omitted.)

- [43] *In casu*, the agreement between Omarostax and the owner of the Oak Avenue property lapsed when the condition was not met. Since it is impossible to meet the condition, which was not waived at any time, the question of a possible revival of the contract does not arise. In the result, it cannot be said that a valid agreement existed when the bidding period closed, irrespective of the extension of time periods provided for in subsequent addenda. Tender H19/014PF was not awarded to Omarostax, and the condition was not waived. On this ground, the BEC should have found that Omarostax's bid was non-responsive.

- [44] The parties brought the respective decisions in *Benkenstein v Neisius and Others*²² and *Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC*²³ to my attention as it

²¹ [2010] 1 All SA 280 (SCA) (18 September 2009) at par [1].

²² 1997 (4) SA 835 (C).

²³ 2018 (3) SA 108 (Nk)

relates to the issue of the lapsing and revival of a sale agreement. In *Benkenstein*, the court held that where a contract is terminated by failure of a suspensive condition, the subsequent revival of the contract by virtue of a second agreement is possible provided that, among others, the conditional terms in the original agreement are varied to the agreement from again self-destructing on account thereof. *In casu*, the relevant condition precedent was not varied, and the reference to Tender No. 19/014PF was never amended or removed. The court confirmed in *Benkenstein* that the non-fulfillment of a suspensive condition on the due date automatically terminated the contract. Because Omarostax and the owners of the Oak Avenue property failed to amend the condition precedent save for the performance date, the contract could not be revived. In *Abrinah 7804*, the court held that a contract irrevocably lapsed when a condition was not met before the initial expiry date and that no subsequent 'revival' is possible. In the current matter, and because the condition precedent referring to Tender No. H19/014PF was not waived or amended, the question as to whether a contract can, or did, revive is moot.

(ii) *The zoning of the property*

[45] Omarostax attached a zoning certificate issued in terms of the Tshwane Town-Planning Scheme, 2008 (revised 2014) (the Scheme), dated 10 July 2017, to their tender documents. It is indicated in this zoning certificate that the Oak Avenue property is zoned 'Use Zone 11: Industrial 2'. As far as consent use is concerned, reference is made to 'consent/T4337.pdf', and it is recorded on the zoning certificate that the consent use cannot be verified as the rights might have lapsed.

[46] Under 'use zone 11', the following purposes for which buildings may be erected or used are permitted in terms of the Scheme:

- 'Business Building subject to Schedule 10
- Cafeteria
- Car wash
- Commercial use
- Industry
- Light Industry
- Parking garage subject to schedule 10
- Parking Site subject to Schedule 10

Place of Refreshment
Retail Industry
Shop subject to Schedule 10.'

'Industry' is defined to mean land and buildings where a product or part of a product is manufactured, mounted, processed, repaired, rebuilt, or packed, including a power station and incinerator plant and may include a cafeteria and a caretaker's flat and any other activities connected to or incidental to the activities mentioned, excluding noxious industries, light industries, and retail industries.

[47] 'Commercial use' is, in turn' described as:

'Cafeteria
Commercial Use
Funeral undertaker
Parking Garage subject to Schedule 10
Parking Site subject to Schedule 10
Retail Industry
Showroom'

'Commercial use' is defined to mean 'land and buildings used for Distribution Centres, Wholesale Trade, Storage Warehouses, Telecommunication Centre, Transport depot, Laboratories and Computer Centre's and may include Offices, light Industries, a Cafeteria, and a Caretaker's Flat, which are directly related and subservient to the main commercial use which is carried out on the land or in the building.

[48] Offices are provided explicitly for under 'use zone 8. In terms of 'use zone 11: industrial 2', offices are only allowed if they are directly related and subservient to the main use carried out on the land or in the building. Although 'commercial use' is included in the list of permitted uses under 'use zone 11', Omarostax presented the Oak Avenue property for its exclusive use as offices, unrelated, and not subservient to any main use provided for under commercial use.

[49] The Scheme also provides for use, other than the use described in Table B: Use of Buildings and Land, with the municipality's consent. Omarostax did not provide proof that the necessary consent was obtained to use the Oak Avenue property mainly as

offices, as provided under 'use zone 8'. The consent provided relating to the extension for the relaxation of the applicable height restriction does not equate to consent for using the land exclusively as offices. The Scheme, amongst others, stipulates in clause 26 that buildings must not exceed the prescribed maximum height of buildings but provides that in an 'industrial 2' zone, the municipality may grant permission to an increased height in respect of buildings. The relaxation of the height restriction is not simultaneously a consent to use the land for other than prescribed uses.

- [50] It is trite that when a landowner wants to use land for a purpose not permitted in the zoning scheme or regulations, he or she must apply to the municipality for rezoning or a use departure.²⁴ The mandatory nature of land uses according to how property is zoned for respective purposes within the area of jurisdiction of the City of Tshwane is evident from clause 14(4) of the Scheme, where it is stipulated that:

'No person shall use or cause or allow to be used, any land or building or part thereof for a purpose other than that for which it was approved or has the rights in terms of Clause 14, unless such building has been altered for any new use and any necessary Consent or Permission of the Municipality has been obtained.'

- [51] Omarostax's tender contained the zoning certificate indicating the property's zoning as 'use zone 11: industrial 2'. It did not provide the BEC with any consent that would allow the use of the property for other than the prescribed uses. Omarostax referred in its answering affidavit to 'Amendment Scheme 302' under the erstwhile Verwoerdburg Town Planning Scheme, 1992, and the provision of the Amendment Scheme that was attached to Omarostax's tender application. The zoning certificate, however, was issued in terms of the Tshwane Town-Planning Scheme, 2008 (revised 2014). In any event, the uses permitted under Amendment scheme 302 for land zoned as 'industrial 2', do not include offices unless related to the main use, or otherwise approved by the chief town planner. Omarostax avers in the answering affidavit that '[s]uch approval must without any doubt have been granted as the

²⁴ *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) par [17].

approved SDP [Site Development Plan], which was approved in 2001, showing new offices for Siemens SA. ... This SDP would never have been approved without the consent/approval of the chief town planner.'

[52] This court cannot merely presume that the chief town planner consented to any non-permitted use. The court cannot speculate about the purpose for which Siemens SA used the building or assume that it was unrelated to the main use for which the property is zoned. Even if it is accepted that any consent was given to use the land for purposes unrelated to the permitted main use, it is recorded on the zoning certificate that the validity of consent use 'cannot be verified as the rights may have lapsed'. In the absence of any proof to the contrary, the BEC erred when they disregarded the property's zoning as 'industrial 2', as indicated on the zoning certificate.

[53] In light of the two aspects dealt with above, it is not necessary to consider any of the remaining grounds of review. In accepting the agreement of sale presented by Omarostax as a valid agreement that meets the mandatory requirement stipulated in PA-04, where it is stipulated that 'in the case of a prospective buyer the signed purchase agreement must be submitted, the BEC committed an error of law. This requirement aims to ensure that a bidder can deliver what it offers. This requirement goes to the core of the bid, and non-compliance resulted in a mandatory provision of the tender not being met. It is likewise unlawful to award a tender when using the building that is the subject of the tender would constitute a zoning law contravention. The BEC erred in finding that Omarostax's tender was responsive, and as a result, the award of the tender to Omarostax stands to be set aside.

Just and equitable remedy

[54] It is trite that the court has a wide discretion in terms of s 8 of PAJA to grant relief that is just and equitable in the circumstances.²⁵ XTFM submitted that it is just and equitable to be awarded the tender. I disagree. The DPW did not regard the property

²⁵ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) par [34].

submitted by XTFM to be best or ideally suited, and it is not for XTFM to be awarded the bid by default. There is no reason for this court to substitute the DPW's decision-making powers for its own, and the court is not in a position to determine the suitability of the accommodation offered by XTFM for the purposes it is required. In the circumstances, it is just and fair that the tender process commences afresh should the DPW still need to obtain office space for DIRCO.

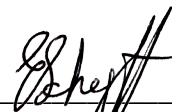
Costs

[55] There is no reason to deviate from the principle that costs follow the result.

ORDER

In the result, the following order is granted:

1. The decision of the first respondent to award the tender under tender number H20/011PF, for the procurement of alternative office accommodation of 12 146m² and 528 parking bays for a period of 5 years to the third respondent, and all administrative actions pursuant thereto, is reviewed and set aside.
2. The first respondent and third respondents, jointly and severally, to pay the costs of the application



E. van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:

Adv. J.F. Pretorius

Instructed by:

Fourie van Pletzen Inc.

For the first respondent:

Adv. HC Janse van Rensburg

Instructed by:

The State-Attorney

For the third respondent:

Instructed by:

Date of the hearing:

Date of judgment:

Adv. L.M. du Plessis

Moketla Mamabolo Inc.

7 June 2022

4 July 2022