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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 10878/2009

In the matter between:

SIZABONKE CIVILS CC t/a PILCON PROJECTS **APPLICANT**

and

ZULULAND DISTRICT MUNICIPALITY **FIRST RESPONDENT**
NRB CONSTRUCTION & HIRE CC **SECOND RESPONDENT**
THE MINISTER OF FINANCE **THIRD RESPONDENT**

JUDGMENT

GORVEN J

[1] This application arises from the award of a contract by the first respondent to the second respondent after a tendering process. The tender document was based on regulations made by the third respondent pursuant to the powers given to him under the Preferential Procurement Policy Framework Act, No. 5 of 2000 ("the Act"). S 2 of the Act provides that "An organ of state must determine its preferential procurement policy and implement it within the following framework..." Municipalities are organs of state ("organs of state").[1] As such, the Act applies to the award of the contract. The applicant submitted a tender but was unsuccessful.

[1] S 151(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") provides that "The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic."

[2] The applicant approached this court on the basis of urgency. It initially requested an interdict preventing the second respondent from taking any further steps to perform the contract work pending the outcome of this application. Such an interim order was granted. At that stage very little work had been done on the project with only one payment certificate having been certified by the project manager in an amount of R668 763.73. This in a contract worth more than R10.6m.

[3] The applicant seeks the following relief:

(a) That the award of the contract under tender number ZDM769/2008 by the first respondent to the second respondent be and hereby is reviewed and set aside.

(b) That it is hereby declared that regulation 8 of the Preferential Procurement Regulations, 2001 published in Government Notice R725 of 10 August 2001 ("the regulations") is inconsistent with section 2 (1) (b) of the Preferential Procurement Policy Framework Act, No. 5 of 2000.

(c) That regulation 8 of the regulations is remitted for reconsideration by the third respondent.

(d) That until such time as regulation 8 of the regulations has been reconsidered and a replacement regulation issued, it is declared to be invalid.

(e) That tender number ZDM 769/2008 is remitted for reconsideration and re-evaluation by the first respondent in accordance with:

i. the circular of the KwaZulu-Natal Provincial Treasury dated 19 October 2009 and headed "Conflict between PPPFA and PPPFA Regulations: Evaluation of Functionality"; or

ii. some other fair tender evaluation mechanism which does not rely upon regulation 8 of the regulations.

(f) That the costs of this application be paid by the first respondent and any other respondents which may oppose the application jointly and severally the one paying the other to be absolved.

[4] The second respondent opposed the application. The third respondent opposed the application on the narrow ground that no declaratory relief relating to the legality or otherwise of the regulation in question should be granted. The first respondent did not oppose the application.

[5] S 2 of the Act provides in its material parts as follows:

> An organ of state must determine its preferential procurement policy and implement it within the following framework...
>
> (1)(b)(i) For contracts with a rand value over the 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.

[6] S 2(1)(d) in turn provides as follows:

> The specific goals may include –
>
> (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* 16085 dated 23 November 1994.

[7] S 5(1) provides in its material parts that:

> The minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

[8] The third respondent, empowered by s 5(1) of the Act, made regulations by way of Government Notice R725 in Government Gazette 2549 of 10 August 2001. Regulation 8 provides as follows:

> Evaluation of tenders on functionality and price
>
> (1) An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.
>
> (2) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below, R500 000.00, not exceed 80 points.
>
> (3) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000.00, not exceed 90 points.
>
> (4) When evaluating the tenders contemplated in this item, the points for functionality must be calculated for each individual tenderer.
>
> (5) The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.
>
> (6) The points for price, in respect of a tender which has scored the specified number of points contemplated in subregulation (5) must, subject to the application of the evaluation system for functionality and price contemplated

in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4.

(7) Preferences for being an HDI and / or subcontracting with an HDI and / or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price.

(8) Only the tender with the highest number of points scored may be selected.

[9] Regulation 8(3) is that which applied to the tender process which is the subject matter of this application since the contract exceeds the threshold limit of R500 000.00. In the documents prepared by the first respondent inviting tenders, the system of allocating points was set out in paragraph F.3.11.3 for such contracts. This allocated 90 points for price and functionality and 10 points for HDI and local presence. The tender document allocated a maximum of 70 points for price and a maximum of 20 points for functionality. Functionality was in turn broken down into two categories, viz. Targeted Experience and Years in Business, each with a maximum of 10 points. It is significant that neither of these two categories relates in any way whatsoever to price.

[10] The applicant complained that regulations 8(2) to 8(7) ("the impugned regulations") and in particular regulation 8(3), are inconsistent with s 2(1)(b) of the Act. It said that by including functionality in the 90 points which are required to be allocated for price in the Act, less than the full 90 points will be allocated for price alone. This means that the minimum number of 90 points cannot be allocated for price as is required by the Act. The second and the third respondents disagreed. They submitted that the word "price" in the Act could be construed to include functionality. This submission was not strongly pressed in oral argument. I have considered

whether price could be understood to include functionality on construction of the regulations. I have concluded that this is not the case. If this were so there would be no need to mention the word "functionality" in the impugned regulations at all. This would offend against the canon of construction which has as a starting point that each word in legislation must have some meaning attributed to it. In *Wellworths Bazaars Ltd v Chandlers Ltd and Another*[2] DAVIS AJA quoted with approval the following passage from *Ditcher v Denison* 11 Moore PC 325 at 357:

> It is a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.

In the present matter I can see no reason to regard the word "functionality" in the impugned regulations as superfluous. In addition, on the plain grammatical meaning of the words, price does not include functionality. They are entirely distinctive concepts.

[11] Accordingly those parts of regulation 8 which mention functionality, and in particular regulation 8(3), are in conflict with the Act since they envisage that points for functionality may be allocated within the 90 points required by the Act to be awarded for price alone. It also does not assist to argue that, because organs of state inviting tenders may under the impugned regulations decide to award the entire 90 points for price, the impugned regulations pass muster. This is because the Act requires a minimum allocation of 90 points for price whilst the regulations purport to give a discretion to organs of state to allocate fewer than 90 points for price. This must be so

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[2] 1947 (2) SA 37 (A) at 43. See also *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd & Others* 1984 (1) SA 61 (A) at 70A-D

since the impugned regulations allow for some points for functionality to be included within those 90 points. This was, of course, the approach adopted by the first respondent in the present matter. The impugned regulations thus purport to grant a discretion to allocate fewer than 90 points to price. The Act does not allow for any such discretion. The only discretion allowed in the Act is as to the allocation of the balance of a maximum of 10 points after a minimum of 90 points have been allocated for price. The impugned regulations are therefore inconsistent with the provisions of s 2(1)(b) of the Act.

[12] The applicant, represented by Mr Lopes SC along with Mr Wallis, submitted that as a result the third respondent acted *ultra vires* s 5(1) of the Act in making the impugned regulations. Alternatively he breached the principle of legality in purporting to do so. This, it was submitted, entitles the applicant to:

1. The setting aside of the contract awarded to the second respondent pursuant to its tender being accepted; and
2. The declaration of invalidity of the impugned regulations.

[13] Two separate enquiries arise. The first is whether the award of the contract should be reviewed and set aside. The second is whether the impugned regulations should be declared invalid. Different principles govern each of these enquiries.

[14] It was submitted that the former relief was by way of review of an administrative act and the declaratory relief arose by way of a review of the act of making the impugned regulations. The latter form of review is based on the principle of legality and would lie if it is found that the third respondent did not have power

conferred upon him by law to make the impugned regulations. This will be dealt with in more detail below.

[15] I did not understand either of the opposing respondents to contend that the act of awarding the contract was not administrative in nature. Neither was it submitted that the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), which must be complied with in review applications involving administrative acts[3], were not complied with by the applicant. Both are clearly the case.

[16] Likewise, no argument was advanced by either of the opposing respondents that this court is not entitled to grant the relief sought in relation to the declaration of invalidity of the impugned regulations. The applicant submitted that the court can do so regardless of whether the act of making the impugned regulations was administrative or legislative in nature. Dealing with the often slippery distinction between the two in delegated legislative acts, the court in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*[4] said the following:

> In addressing this question it is important to distinguish between the different processes by which laws are made. Laws are frequently made by functionaries in whom the power to do so has been vested by a competent Legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative". The process by which such legislation is made is different in character to the process by

[3] In *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para [95], Chaskalson CJ said the following "PAJA is the national legislation that was passed to give effect to the rights contained in s 33 [of the Constitution]. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so." See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) paras [25] & [26].

[4] 1999 (1) SA 374 (CC)

> which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described.[5]

[17] In that matter it was held that even organs of state with original legislative powers could have their actions set aside if they offend against the principle of legality.[6] In other words they "may exercise no power and perform no function beyond that conferred upon them by law".[7] If they failed to act within the powers conferred upon them, that action could be reviewed and set aside without the courts breaching the principle of the separation of powers. It was further held that the common-law principles of *ultra vires* remained intact under the interim constitution.[8] In the *New Clicks* case, the Constitutional Court dealt with the issue of review of delegated legislative action by way of making regulations and said the following[9]:

> It would no doubt be possible to give a narrow construction to 'administrative action' in s 33 and to have two systems of review, one under the common law for delegated legislation, and the other under the Constitution for administrative action construed narrowly. But that would not be consistent with the purpose of s 33, which is to establish a coherent and overarching system for the review of all administrative action; nor would it be consistent with the values of the

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[5] *Fedsure* case at para [27], in the judgment of Chaskalson P, Goldstone and O'Regan JJ. Contrary views were expressed in other judgments in the matter but this proposition was not dissented from.
[6] In the *Fedsure* case, at para [40], the following was said: "It is not necessary in the present case to attempt to characterise the powers of local government under the new constitutional order, or to define the grounds on which the exercise of such powers by an elected local government council itself can be reviewed by the Courts. The exercise of such powers, like the exercise of the powers of all other organs of State, is subject to constitutional review which, as we describe later, includes review for 'legality'. Whether they are also subject to review on other grounds need not now be decided." This case arose under the Interim Constitution. S 1(c) of the Constitution now pertinently provides that the rule of law is one of the foundational values of the Constitution. See, in this regard, *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) para [17]
[7] *Fedsure* case at para [58].
[8] *Fedsure* case at para [59], *Pharmaceutical Manufacturers* case at para [20].
[9] Per Chaskalson CJ at para [118]

> Constitution itself. Properly construed, therefore, 'administrative action' in s 33(1) of the Constitution, includes legislative administrative action.[10]

That being the case, in this matter the actions of the third respondent, who does not have original legislative powers but is akin to a functionary with powers vested in him by the Act, are subject to review. In my view his actions are characterised as legislative administrative action[11] and are reviewable under PAJA.[12]

[18] The applicant first seeks to review and set aside the contract awarded pursuant to the tender process. It is clear that, regardless of the legality or otherwise of the regulations, the tender document prepared by the first respondent setting out how points would be awarded made provision for a maximum of 70 points to be awarded for price. It is also clear that the first respondent, in awarding the contract to the second respondent, utilised this as the basis for awarding points. That being the case, the first respondent acted contrary to the provisions of the Act which required a minimum of 90 points, as opposed to a maximum of 70 points, to be allocated for price. The award of the contract was therefore contrary to the provisions of the Act. This is so even though the first respondent clearly complied with the impugned regulations. The award of the contract must therefore be reviewed and set aside if an application is brought at the instance of a party who has the requisite *locus standi*. This brings me to the submissions made on behalf of the second respondent.

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[10] Footnotes omitted.
[11] Per Chaskalson CJ in the *New Clicks* case at para [116] quoted *supra*.
[12] *New Clicks* case at paras [133] – [135], para [480]. I do not consider it necessary to debate the precise nature of the act involved in the making of the present regulations as was done in the *New Clicks* case. The present process is distinguishable from the regulations dealt with in that case as also those dealt with in *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC) at para [15].

[19] Mr Broster SC, who appeared for the second respondent, submitted that the applicant had failed to prove that it had the requisite *locus standi* to challenge the award of the contract. This was because the applicant was not the lowest tenderer. He submitted that if the word "price" means the lowest tender amount Brainwave Projects 848 ("Brainwave"), which had the lowest price, ought to have succeeded. Brainwave would have been awarded 90 points for price. The highest number of points which the applicant could then have scored would, on any calculation, have been less than 90 points. The applicant could therefore not have been awarded the contract even if it could show that the award by the first respondent was reviewable. That being so, the applicant failed to discharge the *onus* of proving that it had a direct and substantial interest in the outcome of the application.

[20] This submission does not take into account all the evidence or consider vital matters which bear on this issue. In the first place, regulation 9, which has not been attacked, provides as follows:

> Despite regulations 3.(4), 4.(4), 5.(4), 6.(4) and 8.(8), a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points.

The second respondent stated in its affidavit deposed to on 19 February 2010 that Brainwave was not awarded the contract for two reasons. First, the evaluating committee and the adjudicating committee considered that the price was too low to satisfy them that the work could be completed at that price. Secondly, they were not satisfied that Brainwave had undertaken work of a similar nature before. It is by no means inconceivable, therefore, that if 90 points had been awarded to Brainwave for price, the first respondent would nevertheless have invoked regulation 9 and awarded the contract to the applicant if it was the tenderer with the next highest number of

points. It certainly cannot be assumed, in the light of the second respondent's own evidence referred to above, that the applicant would not have been awarded the contract.

[21] In addition, if the impugned regulations are set aside and any new regulations promulgated by the third respondent provide for functionality as a qualifying criterion, Brainwave may be eliminated before the scoring part of the process is reached in any future consideration of tenders. This appears to be probable in the light of the above evidence of the second respondent. In his heads of argument Mr Broster SC very fairly accepted that there were compelling reasons advanced by the first respondent for the rejection of the tender of Brainwave. If, in the absence of any further regulations promulgated by the third respondent, the first respondent in reconsidering the tender were to adopt the suggestions of the provincial treasury department, it is likewise probable that Brainwave would be eliminated before reaching the scoring phase of the process. These suggestions provide for functionality to be considered as a gatekeeping exercise to ensure that tenderers have the requisite experience before points are allocated within the framework of the Act. As mentioned below, however, there are difficulties in the approach suggested by the treasury department.

[22] A further point arose during argument based on the recent decision of *Municipal Manager: Quakeni Local Municipality & Another v FV General Trading CC.*[13] The appellant municipality in that matter had failed to comply with the relevant legislation requiring it to have in place a supply chain management policy. It concluded a service delivery agreement with an external supplier but in doing so failed

[13] 2010 (1) SA 356 (SCA)

to follow a fair, competitive and cost effective bidding process. The court held that, even in the absence of a policy adopted by the municipality, the relevant legislation requires that it follow such a fair competitive and cost effective bidding process. The court further held that the contract concluded as a consequence of a failure to comply with legislation was invalid. The municipality was not entitled to submit to an unlawful contract and should resist a contractor's attempt to implement it. The municipality accordingly had the requisite *locus standi* to approach the court for a declaration of unlawfulness and was in fact obliged to do so. The award of the present contract is, on that reasoning, also invalid. When Mr Broster SC was requested to comment on the implications of this case for the present matter, he advanced no further submissions against the applicant's *locus standi* to approach the court to set aside the contract concluded as a consequence of the fatally flawed tender process.

[23] Substantial parts of the papers and the heads of argument were devoted to a debate on whether, if the provisions of the Act were given effect to, the applicant would have been the successful tenderer. This was presumably in an attempt on the part of the applicant to prove that it had the requisite *locus standi*. It included an attack by the applicant on that category under the functionality head relating to length of time in business as being arbitrary and irrational. An attack was also mounted on the award by the first respondent of points for a single person under both the Historically Disadvantaged Individual (HDI) head and the female ownership head when one of the three categories of HDI relates to females. The submission was that both of these approaches of the first respondent were reviewable and that as a result, if points had been appropriately awarded, the applicant ought to have been awarded the contract. The second respondent entered the lists in this debate. In the view I take of the matter

that the entire tendering process was fatally flawed and invalid, the setting aside of the specific contract is not going to result in the award of a contract to one of the other tenderers under the same process. Any award of a contract for the project in question will require the applicant to adopt an entirely new tender process based on the provisions of the Act. In the light of what I have said above about the question of *locus standi*, I therefore do not find it necessary to engage in this debate.

[24] All of this means that the applicant has a direct and substantial interest in the relief sought in the application and, accordingly, has the requisite *locus standi* to apply to set aside the contract awarded as a result of the invalid tender process. The award of the contract by the first respondent to the second respondent must therefore be reviewed and set aside.

[25] I am also satisfied that the applicant has *locus standi* in respect of the declaratory relief sought. If the contract arising from the tender process is set aside, the applicant has a direct and substantial interest in the provisions of the Act being applied to any process of re-awarding the contract. In addition, at the very least, the applicant has shown itself to be an entity which tenders for municipal contract work. It therefore has a direct and substantial interest in the tender process being conducted in accordance with the provisions of the Act rather than the impugned regulations in respect of any future tenders submitted by the applicant. I did not understand either of the opposing respondents to attack the *locus standi* of the applicant to apply for relief under this head.

[26] Consideration must now be given as to whether the applicant has made out a case for the grant of the relief declaring that the impugned regulations conflict with the Act and are, as a result, invalid. As indicated above, the opposition of the third respondent was directed solely at opposing the grant of such relief.

[27] Mr Semenya SC, who together with Mr Mthembu appeared for the third respondent, submitted that the fact that the impugned regulations conflict with the Act does not necessitate a declaration of invalidity. He relied, in essence, on two arguments in support of this submission. In the first place he submitted that no invalidity is visited on the impugned regulations. His argument in this regard was that s 5(1), which is the provision in the Act empowering the third respondent to make regulations, empowers him to do so "in order to achieve the objects of this Act". The objects of the Act are set out in the preamble which is to "give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith". Since the regulations meet these objects the fact that they conflict with the Act does not render them invalid. The third respondent has therefore acted within the powers given him by s 5(1) of the Act.

[28] The major difficulty with this argument is that the legislator saw fit to put in place as part of this framework a requirement that a minimum of 90 points for price must be allocated in contracts of a particular value. In the light of this provision, the legislator must be taken to have intended to circumscribe the power of the third respondent to make regulations which conflict with this framework. The allocation of points in the Act as the basis for the award of contracts which meet the different price

thresholds is clearly not contrary to the objects of the Act. As such, the provisions of the Act must have been intended to set parameters within which the third respondent had to operate if he made regulations. What the third respondent did is to ignore the framework put in place by the Act. It cannot be said, therefore, that the regulations meet the objects of the Act. I am accordingly of the view that the third respondent did not have the requisite power to make regulations inconsistent with this aspect of the Act. In doing so he acted contrary to the principle of legality.

[29] The second submission was that if there is a conflict between the impugned regulations and the Act, one must simply apply the provisions of the Act and ignore the impugned regulations. No declaration of invalidity and setting aside of the impugned regulations is necessary. Mr Semenya SC submitted that this was a constitutional issue and referred to cases where the courts have held that if a matter can be decided without recourse to constitutional issues that should be the course adopted.[14] In more general terms he relied upon the principle that findings should be made on only those issues strictly necessary to determine a matter.[15] He submitted that the present case is just such a case since the facts show that the applicant should succeed. I agree that the declaration of invalidity of the impugned regulations on the basis that the third respondent breached the principle of legality raises a constitutional issue[16]. The breach of the principle of legality would give rise to a constitutional review of such an act. However, I do not agree that it can be dealt with purely on the basis

[14] *S v Mhlungu & Others* 1995 (3) SA 867 (CC) para [59]; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para [9]; *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC) para [7]

[15] *Kauesa v Minister of Home Affairs & Others* 1996 (4) SA 965 (NmSC) 974D-F. In this matter the Namibian Supreme Court was involved in a constitutional matter. It cited the dictum in the Indian case of *MM Pathak v Union* (1978) 3 SCR 334 where it was held, "It is the settled practice of this Court to decide not more than what is absolutely necessary for the decision of a case". This dictum was approved, specifically in relation to constitutional matters.

[16] In the *New Clicks* case, Chaskalson CJ said, at para [39] "The question whether the regulations are invalid is a constitutional matter." See also the *Bato Star Fishing* case, *supra*, at para [25].

that the applicant can succeed, on the facts, in having the contract set aside and that the regulations need not be declared invalid.

[30] If one adopts the approach suggested by the third respondent, it raises squarely the question what is likely to happen if the impugned regulations are not declared invalid. The overwhelming probability is that organs of state, possibly even the first respondent, will apply the impugned regulations in future tendering processes. This is likely to give rise to further litigation or, at the very least, uncertainty. There is evidence on the papers that the officials in the provincial treasury department have sought to address the conflict between the Act and the impugned regulations by suggesting that the functionality component be utilised, not in the assessment of points, but as a gatekeeping exercise to determine whether or not the respective tenderers qualify to reach the scoring component of the tender process at all. Boiled down to its essentials, this initiative amounts to an attempt to remove from organs of state inviting tenders the discretion given to them in the impugned regulations. This must be so since it suggests that the functionality question should not arise in the points scoring part of the process despite the impugned regulations according to organs of state a discretion to include points for both functionality and price within the 90 points. That circular was dated prior to the award of the tender in the present matter and was directed to all municipalities. The first respondent nevertheless invoked the impugned regulations by exercising its discretion to include in the 90 points 20 points for functionality and 70 points for price. It is therefore clear that, unless the impugned regulations are declared invalid, at least certain organs of state are likely to continue to apply them. It should be borne in mind that if organs of state fail to apply them, awards made by them may be subject to review if it can be shown

that they failed to exercise the discretion granted to them by the impugned regulations. In my view, therefore, it is necessary to declare the impugned regulations invalid, even though this aspect relates to a constitutional matter.

[31] As I have mentioned, the applicant limited the relief sought to that set out above. I enquired from Mr Lopes SC whether, if the award of the contract resulting from the tender were to be set aside and the impugned regulations declared invalid, the applicant required any of the further relief sought. Such relief relates to the reconsideration of the regulations and reconsideration and re-evaluation of the tender. He indicated that no such relief was required. In my view the grant of none of that further relief is warranted. The enabling legislation of s 5(1) of the Act empowers the third respondent to make regulations but does not require him to do so. It would trespass on his discretion if, having set aside the impugned regulations, this court required him to reconsider them. This would amount to an unwarranted interference by a court in a matter which is the preserve of the executive and breach the principle of the separation of the powers. No submission was advanced to the effect that the remaining regulations and the Act would not provide an adequate and workable framework for evaluating tenders and awarding contracts. No submission was advanced or evidence led as to the need to limit the retrospective effect of such a declaration and, if so, how.[17] There is no evidence before me, nor were submissions advanced, as to the likely effect on tenders already sought or contracts awarded pursuant to such procedures. The declaration of invalidity of the impugned regulations would therefore, on the evidence before me, not bring the tendering process to a halt

[17] As is permitted in s 172(1)(b)(i) of the Constitution.

or otherwise affect it. No "dangerous gap" would be left by a declaration of invalidity.[18] It is therefore also not necessary to suspend the operation of any order setting aside the impugned regulations so as to give sufficient time to the third respondent to make replacement regulations.

[32] A similar situation obtains in relation to the reconsideration and re-evaluation of the tender in question. It may be that the first respondent has resources, needs or priorities which differ from those which obtained at the time the contract was put out to tender. For this court to require it to reconsider the tender would likewise amount to an unwarranted interference in the affairs of an organ of state by this court. In any event, the tender could not be reconsidered in its present form since the framework of the first respondent for evaluating it cannot be utilised for the reasons dealt with above. The first respondent must be free to make decisions which rest within its discretion once the award of the contract is set aside. No further order is therefore either necessary or, indeed, desirable.

[33] The applicant employed two counsel, at least in the two appearances in which I was involved and in its heads of argument. The third respondent did so both in its heads of argument and in the appearance before me at the hearing. I am of the view that the matter is sufficiently complex and important to have warranted the use of two counsel by the applicant where that took place and that the costs order should reflect this. The opposition by the third respondent was limited in nature but, since the promulgation of the impugned regulations gave rise to the need for the application, I do not consider that this fact warrants a decrease in his exposure to a costs order.

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[18] *cf Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294, para [56]

[34] In the event, I grant the following order:

(a) The award of the contract under tender number ZDM769/2008 by the first respondent to the second respondent be and is hereby reviewed and set aside.

(b) It is hereby declared that Regulations 8(2) to 8(7) of the Preferential Procurement Regulations, 2001 published in Government Notice R725 of 10 August 2001 are inconsistent with section 2(1)(b) of the Preferential Procurement Policy Framework Act, No. 5 of 2000 and are invalid.

(c) The costs of this application shall be paid by the first, second and third respondents jointly and severally the one paying the others to be absolved, which costs shall include the costs occasioned by the employment of two counsel where this was done.