IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: 14508/2016P

In the matter between:

ROCLA (PTY) LTD	**Applicant**
and	
THE ZULULAND DISTRICT MUNICIPALITY	**1st Respondent**
THE SPEAKER OF THE MUNICIPAL COUNCIL OF THE ZULULAND DISTRICT MUNICIPALITY	**2nd Respondent**
THE MUNICIPAL MANAGER OF THE ZULULAND DISTRICT MUNICIPALITY	**3rd Respondent**
ZULUCRETE (PTY) LTD	**4th Respondent**
THE MEC FOR FINANCE, KWAZULU-NATAL PROVINCE	**5th Respondent**
CONRITE WALLS (PTY) LTD	**6th Respondent**
PREFERRED PRE-CAST & PROJECTS (PTY) LTD	**7th Respondent**
ALLIED CABLE TRENCHING (PTY) LTD	**8th Respondent**

HEXAGON TECHNOLOGIES AND
PROJECT ENTERPRISES (PTY) LTD **9th Respondent**

ORDER

The following order issues:

1. The decision taken by the first and/or third respondents on 22 July 2016, to award tender number 002/2016 for the management of two pre-cast concrete plants in Ulundi and Vryheid and the manufacture of ventilated improved pit latrine toilets for the first respondent's rural sanitation programme to the fourth respondent (the impugned decision) is declared invalid and is reviewed and set aside.
2. Any contract the first respondent may have concluded with the fourth respondent pursuant to the impugned decision is declared invalid and of no force and effect and is set aside.
3. The first respondent is directed to award tender number 002/2016 to the applicant.
4. The first respondent is directed to pay the costs of the application on the scale as between attorney and client.
5. The counter-application of the sixth respondent is dismissed with costs.

JUDGMENT

GORVEN J

[1] The applicant, the fourth and the sixth to ninth respondents responded to a call for tenders advertised by the first respondent. The project was to manage two pre-cast concrete plants at Ulundi and Vryheid and to manufacture pre-cast concrete ventilated improved pit latrine toilets (VIPs) at the plants over a three-year period (the project). Two envelopes were to be submitted. The first contained technical proposals. Ten bids were received. The second contained financial proposals. Of the initial ten, only the applicant, the fourth respondent and the sixth to ninth respondents submitted these.[1] The project was awarded to the fourth respondent on 22 July 2016 (the impugned award).

[2] The applicant appealed to the Municipal Bid Appeals Tribunal (the Tribunal). The appeal was opposed by the first and fourth respondents. The Tribunal held a hearing in which those three parties participated. The Tribunal requested them to respond in writing to a list of questions which arose during the hearing. The applicant made submissions. The first respondent also did so on 27 September 2016. It asserted that paragraph 50A of its Supply Chain Management Policy (SCMP) was *ultra vires* the Municipal Supply Chain Management Regulations (the Regulations) promulgated under the Local Government: Municipal Finance Management Act (the MFMA).[2] As a result, it claimed that the Tribunal had no power to determine the appeal. This was refuted in further submissions put up by the applicant. The fourth respondent furnished its

[1] I will deal later with the status of the sixth respondent's tender.
[2] Local Government: Municipal Finance Management Act 56 of 2003.

submissions on 26 September 2016. It claimed that the procedure required by the SCMP to appoint the Tribunal was not followed. Accordingly, the Tribunal was not properly constituted and could not decide the appeal. The applicant did not see this submission until after 26 October 2016 and was accordingly unable to respond.

[3] After this, the Tribunal signed an award (the first award) dated 17 October 2016. The issues raised by the first and fourth respondents in their written submissions were rejected. The order was:

'(i) the Appeal succeeds;

(ii) the award to ZuluCrete (Pty) Ltd is set aside;

(iii) any contract which may have been concluded between the Municipality and ZuluCrete (Pty) Ltd, be and is hereby cancelled;

(iv) the entire bidding process is to start *de novo*.'

[4] On 26 October 2016, two of the three members of the Tribunal signed another award (the second award). The second award revisited and dealt only with the written submissions made by the first and fourth respondents concerning the competence of the Tribunal to deal with the appeal. It dismissed the contention of the first respondent but upheld that of the fourth respondent. The second award tersely stated that 'there was no substantial compliance with the provisions of paragraph 50A(2) of the [SCMP]'. No reasons were given for this finding. It concluded with an order that:

'10.1 The point *in limine* of the [fourth] Respondent is upheld.

10.2 The Tribunal lacks the requisite authority to determine this appeal.'

The first respondent accepted the finding in the second award and regarded the appeal process as at an end. It rejected requests and demands by the applicant to convene the Tribunal properly. Despite submissions to the contrary by the applicant, it held fast to the view that the SCMP was *ultra*

vires the Regulations. It held fast to its view that, as a result, it could not set up a Tribunal.

[5] The attitude of the first respondent ultimately prompted the present application. It is one brought under the Promotion of Administrative Justice Act (PAJA).[3] The relief initially sought a review and, in the alternative, a *mandamus* requiring the first respondent to appoint a Tribunal. This relief was later amended and now reads:

'1. That the decision taken by the first and/or third respondents on 22 July 2016, to award tender number 002/2016 for the management of two pre-cast concrete plants in Ulundi and Vryheid and the manufacture of VIP toilets for the first respondent's rural sanitation programme (the tender) to the fourth respondent (the impugned decision) be reviewed and set aside;

2. That any contract the first respondent may have concluded with the fourth respondent pursuant to the impugned decision be declared invalid and of no force and effect;

3. The first respondent is directed to award tender number 002/2016 to the applicant;

4. Alternatively to paragraph 3 hereof, that the matter be remitted to the first and third respondents reconsideration, with directions to:

4.1 Reject the fourth respondents tender as ineligible;

4.2 Treat the applicant as its preferred bidder;

4.3 Consider whether the applicant has the capability and ability to execute the contract and whether acceptance of its tender would constitute an unacceptable commercial risk, having regard to the matters set forth in paragraph F.3.13 of the Municipality's Standard Conditions of Tender;

4.4 Award the tender to the applicant in the event of the questions referred to in 4.3 hereof being answered in the affirmative.

5. Further alternatively, the matter is remitted to the first respondent for reconsideration and the making of a fresh award.

6. The first respondent is directed to pay the costs of the application.

[3] Promotion of Administrative Justice Act 3 of 2000.

7. The sixth respondent's counter application is dismissed with costs.'

[6] The first respondent initially opposed the application. However, it failed to put up the record of the decision or to furnish reasons as is required by rule 53 of the Uniform Rules of Court. It simply sent a number of email attachments to the applicant, including the second award. These did not comprise the full record. In particular, they did not include the first award or any part of the bid of the sixth respondent. Shortly before the hearing, the first respondent withdrew its opposition. The affidavit covering the withdrawal (the withdrawal affidavit) supports prayers 1 and 2 above. It goes on to submit that the project should be advertised afresh but abides the decision of this court on the entire outcome.

[7] The only party currently contesting part of the relief sought by the applicant is the sixth respondent. It supports prayers 1 and 2 but seeks to strike out certain averments in the founding affidavit and opposes the balance of the prayers. In addition, the sixth respondent instituted a counter-application for the project to be awarded to it.

[8] The applicant, first respondent and sixth respondent appeared at the hearing. During argument, the sixth respondent conceded that it had not submitted a tender. This was done by a consortium, Conloo Construction (the consortium), of which the sixth respondent was one of four members. It was accepted that this non-suited the sixth respondent as regards the counter-application. This concession is correct. If the sixth respondent did not submit a tender, no award of the project can be made to it.

[9] The fifth respondent deposed to an affidavit so as to place relevant facts before the court. She put up a copy of the first award. She stated that one of the chairpersons of the Tribunal had complained to her that, after the first award was signed, an official in the Provincial Treasury had put pressure on the Tribunal. This official claimed that the Tribunal members

had not been appointed in consultation with the third respondent. This was said to afford grounds for a review of any award made by the Tribunal. The chairperson who conveyed this to the fifth respondent was of the view that, because the Tribunal had 'handed down'[4] an award, it was *functus officio* and could not make any further decisions.[5] It had later come to the attention of the fifth respondent that the second award had been signed by the remaining two members of the Tribunal. This affidavit was the first intimation to the applicant of the first award.

[10] It will be useful to provide some background to the matter. Since inception, the first respondent has developed and provided low cost housing and rural sanitation to communities within its area. During 2010, it put out to tender the establishment, management and use to manufacture VIPs of two pre-cast manufacturing facilities in Vryheid and Ulundi. The VIPs and other pre-cast concrete products manufactured there would be used in these developments. The applicant unsuccessfully tendered for this project. It was awarded to the sixth respondent around September 2010 for a three-year period (the 2010 contract). When this period elapsed, no new tender was advertised for the management of the plants and the manufacture of VIPs. The sixth respondent continued to do so well beyond the expiry date of the 2010 contract. The applicant strenuously objected to this. Only in January 2016 did the first respondent advertise a call for tenders for the project. It is this process which led to the impugned decision.

[11] The tenders of the consortium and the seventh and eighth respondents were all rejected as a result of their failure to submit their annual financial statements. The tender by the ninth respondent was, after re-evaluating functionality, allowed to proceed to the second evaluation

[4] I will deal with this issue later.

[5] The chairperson referred in this regard to *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) (*Kirland* CC).

stage. The consortium quoted R188 million, the fourth respondent R191 million, the applicant R212 million, the eighth respondent R248 million, the seventh respondent R350 million and the ninth respondent R376 million.

[12] When the present application was launched, the applicant's attorneys sought, and were given, an undertaking that the impugned decision would not be implemented pending the adjudication of this application. Despite this, in June 2017, the first respondent contracted the sixth respondent to provide VIPs for the sum of R4,3 million. This was done without invoking a competitive bidding procedure. The applicant objected and required an undertaking that this contract would not be proceeded with. No such undertaking was forthcoming. The first respondent admitted having contracted, claimed that this was because service delivery would otherwise be adversely affected and indicated that the procurement had taken place through the Harry Gwala Municipality.

[13] The applicant then applied urgently to interdict the continuation of this contract. The day before the application was to be heard, a brief affidavit was delivered by the first respondent. It stated that the contract had been completed. This was the first time this had been communicated to the applicant, despite the applicant having sought the undertaking. The application was struck from the roll for lack of urgency and the applicant was ordered to pay the costs.

[14] The first substantive issue is the relief reviewing and setting aside the award to the fourth respondent. As mentioned, all of the parties agree that this should be done. There may, however, be an obstacle in the way of granting any of the relief sought. The order made by the Tribunal in the first award purports to set aside the award and to direct the first respondent to begin the bidding process *de novo*. It is necessary to determine the effect of this order. If this has legal effect, the application is moot.

[15] The starting point is the powers of such a Tribunal to deal with issues placed before it. This is dealt with in the SCMP. Section 50A(3) thereof reads:

'The powers, duties and functions of the Municipal Bid Appeals Tribunal, and matters incidental thereto, are set out in the Rules which are appended to this Supply Chain Management Policy and marked Appendix A.'

The powers include the following:

'8.8.1 The Tribunal –

. . .

8.8.1.2 must make a final binding decision to confirm, vary or set aside the decision of the Bid Adjudication Committee or the Municipal Manager;

8.8.2 If the award is varied or set aside, the Tribunal must make any order it considers appropriate regarding the manner in which the matter is to be resolved.'

It is clear that the Tribunal has the power to make a 'final binding decision' varying or setting aside an impugned decision. If it does so, it must make an 'order it considers appropriate regarding the manner in which the matter is to be resolved.'

[16] The Tribunal thus had the power to grant the order contained in the first award. If the first award has legal effect, the impugned award would already be set aside, any contract arising from it cancelled and the matter remitted to the first respondent to begin the process again. In those circumstances, none of the relief sought in this application can be granted unless the first award has been reviewed and set aside.[6]

[17] This raises a vexed question. At what point can it be said that an award signed by the Tribunal has legal effect? If the first award has legal effect, this would have rendered Tribunal *functus officio*. In that case, the second award would have had no legal effect as the Tribunal would have lacked the power to issue it.

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[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).

[18] In order to obtain clarity on what took place factually, an explanatory affidavit was procured from one of the chairpersons of the Tribunal. He clarified that awards are not handed down by the Tribunal as is the case of judgments of courts. It is the function of the Provincial Treasury to 'publish' the award to the parties. This is done by informing the parties to the appeal of the awards which have been made. The chairperson confirmed that the first award was signed by all three members of the Tribunal. As is the practice, it was then delivered to the Provincial Treasury. The fifth respondent's affidavit makes it clear that, after the first award was signed and forwarded, a Treasury official approached the Tribunal. After that intervention, the second award was signed, delivered to the Treasury and communicated to the parties to the appeal.

[19] What is abundantly clear from the papers is that the first award was never distributed or 'published' to the parties. If this had been done, the applicant, as one of the parties, would have received a copy before finding out about it in the affidavit of the fifth respondent. Equally clear is that the second award was distributed to the parties. It is this which ultimately gave rise to the present application.

[20] The SCMP is silent on the issue of when it can be said that the Tribunal has made a 'final binding decision'. The point at which an award has legal effect must therefore be determined without reference to the SCMP. The applicant submitted that this question was answered in *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* (*Kirland* SCA).[7] In that matter, two officials in the Health Department made different decisions on applications to build and operate two private hospitals. The superintendent-general (the SG) decided to refuse them (his first decisions) and instructed staff to draft letters to that

[7] *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute (Kirland* SCA*)* 2014 (3) SA 219 (SCA).

effect. The letters were prepared but never signed or sent. The SG was then placed on sick leave for six weeks. The person appointed to act in his absence approved the applications. The letter approving them was sent to the respondent. On his return, the SG purported to withdraw the approvals. It was common ground that the approvals were flawed because the replacement had simply followed the instructions of the MEC to do so and had not applied her own mind to the applications, as she was obliged to do.

[21] The Supreme Court of Appeal held that, because the SG's first decisions to refuse the applications had not been communicated to the respondent, they were not final and were subject to change.[8] It was therefore open to the replacement to grant the applications. Despite the flaws in their having been granted, those approvals had to stand because they had not been reviewed and set aside.[9] It was not open to the SG to withdraw them because he was *functus officio* once the decisions of the replacement had been communicated.

[22] In arriving at this conclusion, the Supreme Court of Appeal relied on two sources of authority. The first was *President of the Republic of South Africa & others v South African Rugby Football Union & others*.[10] Here it was held:

'In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in writing. Section 84(2)*(f)* does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry but the method usually employed, as in the present case, is by way of promulgation in the *Government Gazette*. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could

[8] *Kirland* SCA para 15.
[9] Based on the principles established in *Oudekraal Estates* fn 6 above.
[10] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 44.

have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation.'[11]

This, of course, deals with legislation governing commissions, including promulgation in the *Government Gazette*. It deals, also, with Presidential decisions which must be reduced to writing. But this does not apply to awards made by the Tribunal. These are governed by general principles. The second authority relied on in *Kirland* SCA, more directly applicable to the present matter, is the general proposition of Professor Cora Hoexter: [12]

'In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.'

Kirland SCA was taken on appeal but this approach was not contradicted by the Constitutional Court.[13]

[23] The first respondent submitted that the first award of the Tribunal has legal effect. It reasoned that the first award amounted to a 'decision' as contemplated in PAJA and has validity until set aside. A decision is defined as:

'[A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

[11] References omitted. A reference was to the dictum to similar effect in the matter of *Rajee v Zeerust Town Council* 1938 TPD 283 at 290.
[12] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 278.
[13] In *Kirland* CC.

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly'.

The first respondent sought authority from *Plover's Nest Investment v De Haan.*[14] Here, a letter drafted by an official who had not made, and could not make, the decision in question, incorrectly conveyed the decision actually made. This was held to be a mere clerical act and did not constitute administrative action which would substitute the actual decision of the council.

[24] In dealing with the necessary elements of administrative action, *Plover's Nest* accepted the seven main elements identified by Prof Hoexter, summarising these as:

'(a) A decision; (b) by an organ of State (or natural or juristic person); (c) exercising public power or performing a public function; (d) in terms of any legislation (or an empowering provision); (e) that adversely affects rights; (f) and has a direct, external legal effect; and (g) which does not fall within one of the listed exclusions (eg legislative, executive and judicial functions).'[15]

As can be seen, *Plover's Nest* is entirely distinguishable from the present matter. It is the 'direct, external legal effect' with which we are concerned here, not whether or not a decision had been made. According to *Kirland* SCA, a decision only has external legal effect when communicated to those affected by it. I am in respectful agreement with this approach.

[25] The position is thus clear. Because the first award was not made known to the parties to the appeal, it had no legal effect. The decision of the Tribunal in the first award could be revisited and changed by the

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[14] *Plover's Nest Investment v De Haan* [2015] ZASCA 193 (30 November 2015).

[15] *Plover's Nest* para 19. The reference is to Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 197.

Tribunal because it was not final. There is no dispute that it was sufficient for two of the three members to make binding decisions on the part of the Tribunal. It is accordingly the second award which has legal effect. This means that the Tribunal has not set aside the impugned decision or ordered that the bidding process begin *de novo*.

[26] This means that the impugned decision stands until set aside. As I have mentioned, the first respondent refused to establish a properly constituted Tribunal. As a result, as an alternative to the review, the applicant initially sought a *mandamus* to require it to do so. This is no longer persisted in due to the inordinate delays caused mostly by the obstructionist and dilatory conduct of the first respondent. I do not consider it appropriate to grant that kind of relief as a result and as a result of the considerations set out below. In any event, the first respondent has not opposed the review relief on the basis that the applicant must exhaust this internal remedy.

[27] The reviewing and setting aside of the award to the fourth respondent is sought pursuant to s 6 of PAJA. If successful such a review requires a declaration of unlawfulness.[16] This declaration is made in terms of s 172(1)*(a)* of the Constitution.[17] Section 172(1) reads:

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

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

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

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

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

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[16] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency, & others* 2014 (1) SA 604 (CC) para 25.

[17] Constitution of the Republic of South Africa, 1996.

[28] The first issue is whether the parties correctly agree that the impugned decision should be set aside. I deal with this because the concession is not made by the fourth respondent, even though it has not entered the lists. I do not propose to go into much detail. One of the requirements to qualify for being considered was previous experience in manufacturing pre-cast concrete VIPs. The fourth respondent claimed to have five years' experience in doing so. It put up a letter in support. It contended that this was signed by both the fourth and sixth respondents. The letter purports to appoint the fourth respondent in 2013 as a subcontractor for the 2010 contract awarded to the sixth respondent. In it, the sixth respondent ostensibly requires the fourth respondent to manufacture five VIPs per day over three years. In its affidavit, the sixth respondent vigorously denied having sent that letter. It correctly pointed out that the letter is not on its letterhead. This is contrary to the policy of the sixth respondent. Also, the signature purporting to be that of a director of the sixth respondent is not that person's signature. The fourth respondent has not challenged what the sixth respondent has said in this regard. If the contention of the sixth respondent is correct, the putting up of the letter by the fourth respondent was fraudulent. It is also the only basis put up in the bid of the fourth respondent to support its claim of experience. Both of these aspects would disqualify it for the award of the project.

[29] If that were not enough, the applicant points to certain features of the financial statements put up by the fourth respondent in support of its tender. These show that the fourth respondent only registered in 2013. It could therefore not have had five years' experience by 2016. For the two financial years prior to February 2016, the only revenue source was from 'rendering of services'. If it had manufactured the VIPs that it claimed it did as subcontractor, its revenue would conservatively have been

R5.4 million per year. In fact, its revenue amounted to R394 952 for the later year and R104 725 for the earlier. It only incurred employee costs of R59 243 and R16 022 respectively for those two years. There are numerous other deficiencies which ought to have been immediately apparent to the first respondent. I do not propose to detail them all. It is clear that the impugned decision must be reviewed and set aside. Paragraph 1 of the relief sought must be granted.

[30] Once a declaration of unlawfulness has been made under s 172(1)*(a)* of the Constitution, the provisions of s 172(1)*(b)* are triggered. This empowers a court to grant an order which is just and equitable.[18] It has been held that the content of a just and equitable order for review matters is provided by s 8(1) of PAJA.[19] The relevant parts read:

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

. . .

(c) setting aside the administrative action and –

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

(ii) in exceptional cases -

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

. . .

(f) as to costs.'

[31] I am aware that I am not confined to these options. Section 8(1) of PAJA grants a wide discretion to make an order which is just and equitable. What is clear is that prayer 2 must be granted setting aside any contract which might have been concluded pursuant to the impugned

[18] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) paras 81-83.
[19] Ibid.

decision. The real question before me is whether to remit the matter for reconsideration in whole or in part or to substitute the impugned decision with one awarding the project to the applicant.

[32] The outcome of this question depends on the existence or otherwise of factors making this an exceptional case. These have been summarised in the following terms:[20]

'The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

The application of the exceptional case test guards against a court falling foul of the separation of powers doctrine.[21]

[33] There are a number of matters to consider. Although more than three years have passed since the impugned award was made, the first respondent has not said that a tender will not be awarded. The first respondent has the two manufacturing plants. It has made a commitment to the manufacture of pre-cast concrete VIPs for housing and rural projects. It went so far as to attempt to re-advertise the tender whilst this application was pending. In the withdrawal affidavit, it makes no mention of any supervening circumstances which affect this commitment. In fact, in the withdrawal affidavit, it argues that 'the Tender itself should be sent out to

[20] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 (CC) para 47.
[21] *Trencon* para 94.

re-advertisement.' This signals its intention to proceed with the project. Prior to its withdrawal of opposition, it supported the impugned award. If this application had not resulted in the impugned award being set aside, the fourth respondent would have been entitled and obliged to go ahead with the project. It can therefore safely be accepted that the project will proceed.

[34] The first respondent submits that the process should begin again because the entire process was flawed. The only averments made in support of this submission are:

'10. In light of the nature of the allegations regarding the irregularities the First Respondent cannot guarantee that the impugned conduct on its part was not a feature of the tender adjudication process from the date all bids (being responsive and non-responsive) were received in response to the invitation to tender.

11. The First Respondent's view is that the rights of all of the bidders who participated in the Tender are affected by the impugned conduct and decision.'

This provides no facts in support of its bare assertion that the entire process was flawed. The applicant responded by pointing out, without challenge, that the only irregularities alleged in the papers are those raised by the applicant. These disqualify the fourth respondent and the consortium. There are at least two major irregularities in the bid of the consortium. It failed to put up financial statements of any members of the consortium. In addition, no members of the consortium other than the sixth respondent had any of the required experience.

[35] The case is earlier made out that none of the other parties could be awarded the tender. The only one which qualified was the ninth respondent. But its price was R376 million, more than one and a half times that of the applicant, whose price was R212 million, only slightly higher than that of the fourth respondent. Accordingly, the applicant is the only tenderer to whom the tender can be awarded.

[36] This brings into focus the capacity of the applicant to perform its obligations. It has stated, without challenge, that it is the leading manufacturer of pre-cast concrete products for infrastructure. It does so through an extensive network of factories throughout South Africa, Namibia and Botswana. Its statement that the financial and technical capabilities of the applicant are beyond dispute has also not been challenged. The financial statements put up support this. Its quote is the lower of the two compliant tenderers. It is in the ballpark of the quotes of the non-compliant tenderers. If the tender is to be awarded, it is a foregone conclusion that is must be to the applicant. This much was also conceded in argument by the first respondent.

[37] It seems to me that I am in as good a position as is the first respondent to award the tender. A further consideration is that the first respondent does not come to the court with clean hands. In the withdrawal affidavit, it still does not want to award the tender to the only party demonstrably able to fulfil it. Not only that, but it attempted to put blame on a previous municipal manager when the applicant demonstrated that, during the course of the dispute, a number of municipal managers have taken steps which prejudiced the expeditious conclusion of the tender and this application. The refusal at the outset to appoint a fresh Tribunal is one such issue. The refusal to acknowledge the clear inability of the fourth respondent to be appointed is another. In those circumstances, there is a very real concern that there might be bias on the part of the first respondent. If the matter were remitted, it may well generate a further application and further delay the delivery of this critical service to the first respondent’s communities. In the light of all of these considerations, it is my view that the test for exceptional circumstances is satisfied. Paragraph 3 of the relief sought must be granted.

[38] The question of costs now comes into focus. Until the withdrawal of the opposition of the first respondent, this application was opposed by it on the basis that there was in place a valid award of the tender to the fourth respondent. The first respondent has engaged in sustained and obdurate obfuscation which might well support an inference that persons representing it have acted in collusion with the fourth respondent. It unlawfully contracted with the sixth respondent to manufacture VIPs at a time when this application was pending. It deliberately failed to disclose to the applicant that the latter contract had been completed despite a pertinent request for an assurance that it would not continue. This resulted in an adverse costs order against the applicant. The first respondent later attempted to put the matter out to tender when the outcome of this application had not been determined. It refused to comply with its obligations to furnish a complete copy of the record of the proceedings leading to the impugned decision. After it failed to do so, when the applicant requested the documents of the sixth respondent forming part of the record, it refused to provide them. As a result, the applicant was obliged to have recourse to the Promotion of Access to Information Act.[22] When it did so, the first respondent did not respond within the 30 day period, requiring the applicant to lodge an appeal. Only then did the first respondent provide these records. In my view, this conduct cries out for an expression of the displeasure of the court. A punitive costs order is appropriate.

[39] As for the sixth respondent, it clearly had no basis on which to seek the relief in the counter-application. This must be dismissed with costs. But it also opposed the relief sought by the applicant that the tender should be awarded to the applicant. It appeared at the hearing and continued to oppose that aspect of the relief. In this it made common cause with the first

[22] Promotion of Access to Information Act 2 of 2000.

respondent. Indeed, it was the only party at the hearing which still actively opposed that relief. It can be counted as fortunate indeed that the applicant does not seek a costs order against it in the main application.

[40] In the result, the following order issues:

1. The decision taken by the first and/or third respondents on 22 July 2016, to award tender number 002/2016 for the management of two pre-cast concrete plants in Ulundi and Vryheid and the manufacture of ventilated improved pit latrine toilets for the first respondent's rural sanitation programme to the fourth respondent (the impugned decision) is declared invalid and is reviewed and set aside.
2. Any contract the first respondent may have concluded with the fourth respondent pursuant to the impugned decision is declared invalid and of no force and effect and is set aside.
3. The first respondent is directed to award tender number 002/2016 to the applicant.
4. The first respondent is directed to pay the costs of the application on the scale as between attorney and client.
5. The counter application of the sixth respondent is dismissed with costs.

GORVEN J

DATE OF HEARING:	6 September 2019
DATE OF JUDGMENT:	30 September 2019
FOR THE APPLICANT:	JA Van der Westhuizen instructed by Weavind & Weavind, locally represented by Mason Incorporated.
FOR THE 1ST RESPONDENT:	I Veerasamy instructed by Stowell & Company.
FOR THE 6TH RESPONDENT:	CB Edy instructed by Prior & Prior Attorneys, locally represented by J Leslie Smith & Company.