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**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE.**

**CASE NO:6752/2021**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 25/05/2023

**AJP SEMENYA M.V**

In the matter between:

**NGARAGA PROPERTIES** : **APPLICANT**

And

**MEMBER OF THE EXECUTIVE COUNCIL** : **FIRST RESPONDENT**  
**RESPONSIBLE FOR EDUCATION,**  
**LIMPOPO PROVINCE**

**HEAD OF THE LIMPOPO DEPARTMENT** : **SECOND RESPONDENT**  
**OF EDUCATION**

**LION MATCH PRODUCTS (PTY) LTD** : **THIRD RESPONDENT**

**MOLEBOPEN** : **FOURTH RESPONDENT**

**JUDGMENT**

Delivery: The judgment shall be handed down electronically by email to the parties' legal representatives. The date of hand down shall be deemed to be the **25 MAY 2023 at 10:00**.

**SEMENYA AJP:**

[1] The applicant, Ngaraga Properties (Pty) Ltd, launched this review application in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), against the decision of the Limpopo Provincial Department of Education to award a tender in Bid number L[...] to the third respondent. The tender was for the manufacturing, warehousing, packaging and distribution of sanitary pads for girls in quintile 1-3 public schools. The tender was for a period of three years. The applicant seeks, in the main, an order in terms of which the Department's decision is declared to be unlawful and invalid and is set aside. The application is opposed by the first, second (the Department), and the third respondent. The fourth respondent elected to abide the decision of the court.

[2] The salient facts in this application are that on the **2 October 2020**, the Department advertised a tender in the Limpopo Provincial Tender Bulletin and E-Tender. The Terms of Reference, which are most relevant for the adjudication of the issues between the parties, are contained in clause 5.1.2, clause 6 and clause 8. The requirements in clause 6 are said to be mandatory. Clause 6.2 required tenderers to submit a complete set of samples of sanitary pads during the evaluation process.

[3] In terms of clause 6.3, the tenderers were mandated to submit detailed information regarding the infrastructure where the pads will be manufactured. This was to include the tenderer's production capacity, equipment and human resources using verifiable tangible evidence such as the following-

- (a) Number and size (s) of manufacturing plant(s)
- (b) Number and size(s) of warehouse(s)

- (c) Number and capacity of production machinery including packaging.
- (d) Distribution monitoring systems as well as quality assurance and quality Control.
- (e) Closed vehicles to be used for the distribution of stock from the manufacturing plant(s) and District Warehouse in the Province.
- (f) A list of a Project Management Team with contact details of a person designated as a project manager and assistant project managers indicating their full names, telephone and/or cell numbers as well as email addresses for ease of communication....”

[4] In terms of clause 6.5 the Bid Evaluation Committee (BEC) was required to conduct mandatory inspections in loco at the premises of the pre-qualified tenderers during the functionality evaluation stage. The visit was for the purposes of verifying the tenderers’ infrastructure and capacity mainly on items which are similar to those in clause 6.3.1 (see paragraph [3] above). It is therefore not necessary to repeat them. In clause 6.6.4 bidders were required, as an additional attachment, to submit audited Annual Financial Statement (AFS) for the previous two (2) financial years.

[5] The BEC met on the **19 November 2020** in order to evaluate the eighteen bid documents that were received. It also agreed on the evaluation criteria that will be employed in the evaluation of the Bid document submitted by bidders. The criteria agreed upon was for the following:

- (a) Screening on mandatory administrative compliance;
- (b) Functionality Evaluation process;
- (c) Price and
- (d) Broad-Based Black Economic Empowerment Status Level of Contribution.

[6] Under Evaluation and Functionality in clause 8, it is stated that:

“ 8.1. Tenderers will be evaluated first on functionality. The total percentage mark was to be **100%** in accordance with the following criteria:

8.1.1. tender that fails to score **60%** in respect of functionality will be deemed to be non-responsive and will not be considered for further evaluation.

8.1.2 Points scored by the qualifying Tenderers will not be taken into consideration for price and Broad Based Black Economic Empowerment (B-BBEE) evaluation unless in a case where there is a tie.”

[7] Bidders were also to be assessed on their track records, financial capacity and implementation delivery plan and manufacturing plant. On track records, bidders were required to supply the Department with letters from organisations, including government departments, State organs and private sectors, to whom they have been distributing sanitary pads for the past three (3) years. It is stated that any bidder who submits false letters would be disqualified. Different marks were allocated according to the financial value of the distributed pads.

[8] On financial capacity, bidders were required to submit originals of letters signed by accredited financial institutions in which it is confirmed that the bidder has a revolving credit or overdraft account. Different marks were also allocated for different amounts made available to the tenderer.

[9] On implementation delivery plan and manufacturing plant, tenderers were required to furnish proof of the existence of a manufacturing plant equipped with manufacturing equipment/machinery/packing and to provide their numbers. Same were to be verified by the BEC during an inspection *in loco*.

[10] It is common cause that fourteen tenderers were disqualified at an early stage of the evaluation. Of the four remaining tenderers, only the applicant and the third

respondent managed to go up to the functionality stage as two others were later disqualified.

[11] In the reasons furnished to the applicant in terms of Rule 53, the Department stated that the applicant was disqualified in the functionality stage because it did not own the manufacturing plant that the BEC had visited. The BEC visited the manufacturing plant of the applicant on the **2 December 2020** and found that same was owned by a different entity. The applicant avers that the Department's decision to award the tender to the third respondent and to conclude a contract with it is irregular, unlawful and unconstitutional in that the third respondent failed to meet mandatory requirements. Further that the applicant was disqualified because of something which was not a requirement, more so in that the third respondent too did not own the manufacturing plant that it had directed the BEC to.

[12] On grounds of review, the applicant states that the third respondent did not submit its own AFS as required. Furthermore, that the AFS it has presented to the BEC did not fall within the stipulated period as required in clause 6.6.4 of the Terms of Reference. It has instead submitted the outdated AFS of Lion Match Company (Pty) Ltd (the Company) which, according to the applicant, is a separate entity with its own registration number.

[13] On the track record, the applicant avers that the third respondent submitted eight separate documents or letters/invoices, each titled "commercial invoice" with a total value of **R28 961570** of two companies, namely, Brandport Pvt Ltd of Harare, Zimbabwe (Brandport) and Imperial Trade Ventures of Accra, Ghana. The applicant avers that the Department should have rejected these invoices because they were not issued by the third respondent's present and past clients as required, but by the third respondent itself. The first letter was on the letterheads of the Company and was prepared by the Company and signed by one Michael Aronoff on behalf of Baby City Group. The second letter issued by Brandport and sought to confirm that the Company is a trading partner of Brandport, without specifying the nature of the goods they were trading in. In other words, the letter did not confirm that Baby City was supplied with pads as required in the Terms of Reference. Other two letters were issued by Shield Buying & Distribution (Pty) Ltd and Masscash to the

Company. The last two letters were issued by Spar. It is stated in the letters that the third respondent is a supplier in good standing. It too did not specify the type of goods the Company has supplied.

[14] With regard to compliance with clause 5.1.2 of the Terms of Reference, which required bidders to attach a compliance certificate or a letter issued by the South African Bureau of Standards (SABS), the applicant avers that the third respondent submitted two test reports issued by SABS, not to it, but to NSP Unsgaard (Pty) Ltd (NSP Unsgaard) and a letter addressed to the Lion Match Company-NSP Unsgaard by SABS. The applicant submits that the letters were not issued to the third respondent and that the third respondent ought to have been disqualified on that basis.

[15] The applicant states that had the BEC conducted manual counting of the third respondent's capacity as required in terms of Instruction Note No. 4A of 2016/2017 (the B-BBEE) issued in terms of section 76(4)(c) of Public Finance Management Act, it would have found that it did not qualify on the B-BBEE requirement.

[16] The applicant submits that the Department ought to have rejected the track record letters and disqualified the third respondent on that basis in that the letters do not refer to the third applicant but to the Company. They also do not specify the goods they were supplied with. It is further stated that there is no indication that the signatories to the letters were authorised to make the representations contained in the letters. Furthermore, that none of the letters or invoices correspond with any purchase order or appointment letters submitted by the third respondent.

[17] The third respondent denies that it did not comply with the requirements laid down in the Bid document. This view is supported by the Department. With regard to the relationship between the third respondent, Lion Match Company and NSP Unsgaard, the third respondent states that it and NSP Unsgaard are wholly owned subsidiaries of the Company and form part of the same group of companies. It was submitted that the tender was for the Company and its subsidiaries.

[18] It is not in dispute that the third respondent submitted the AFS which fell outside the period stated in the Terms of Reference. It further not in dispute that the statements it has submitted are those for other entities and not of itself. The third respondent and the Department contends that those statements were required only as additional attachments and were not meant to disqualify the tenderers. On this, reliance is based on the words such as 'should' and 'may,' which the Department chose to use in the Terms of Reference. This statement cannot be correct. The AFS are required in terms of clause 6.6.4 and the entire clause is headed 'MANDATORY ADMINISTRATIVE REQUIREMENTS'. The contention that they were not a material requirement is therefore without merit.

[19] The third respondent incorrectly stated that the AFS was a requirement which was meant to prove that the group of companies is financially viable. The correct position is that it is the tenderer, being the third respondent, and not the group of companies which was supposed to prove its financial capacity. On the outdated financial statements, the third respondent states that the relevant financial statements were not available as they could not be audited due to the delays caused by the onset of covid-19.

[20] On the issue of the track records, the third respondent states that this is one of the requirements which was not meant to be strictly complied with. According to the third respondent, this requirement was meant to prove that the tenderer had the ability to provide sanitary pads in sufficient volumes to meet the requirements of the tender. The third respondent contends that the fact that the letters are on the Company's letterheads is a non-issue as the letters have been signed by or on behalf of the relevant customers. Furthermore, that many other letters it has submitted were on the letterheads of the third respondent's clients. The third respondent contends that it is in any event a subsidiary of the Company. According to the third respondent, the fact that the Department was to verify the accuracy of the letters issued by the tenderers, as well as the use of the words 'should' and not 'must', is indicative of the fact that the letters are not a strict requirement.

[21] The argument proffered by the third respondent in respect of the track record has no merit. The requirement was meant to satisfy the BEC that the tenderer will

have the capacity to supply sanitary pads to the Department. It required evidence from the tenderer's other customers in that regard. It follows that this requirement cannot be regarded as immaterial in view of the large amount of money involved in this tender.

[22] On the SABs records as required in clause 5.1.2, the third respondent states that it is not a serious setback that it has submitted a report addressed to NSP Unsgaard as this entity is a subsidiary of the Company. The third respondent submits that although the tender was in the name of the third respondent, NSP Unsgaard is the company which manages the plant in which the sanitary pads are manufactured. This must be seen in light of the fact that the Department disqualified the applicant on the basis that it did not own the plant which was visited by the BEC. Similarly, the third respondent ought to have been disqualified on that basis.

[23] The third respondent regards the applicant's complaint in respect of the Department's failure to comply with Instruction Note No. 4A of 2016/2017 (the B-BBEE) issued in terms of section 76(4)(c) of Public Finance Management Act as technical in nature. The applicant contends that, had the Department done manual verification of the third respondent's B-BBEE credentials, it would have noticed that the third respondent had submitted the certificate of the Company instead of that of its own. The Constitutional Court in *Allpay* (see below) at paragraph [51] made it clear that the purpose of the Broad-Based Economic Empowerment Act 53 of 2003 make it clear that broad and sustainable involvement by black people is required. The Department and third respondent cannot be allowed to downplay the importance of this crucial element of government procurement systems.

[24] It is the third respondent's case that should this court find that the irregularities complained about by the applicant do exist, it should conclude that non-compliance thereof does not amount to grounds of review under PAJA. The Department and the third respondent seem to agree among themselves that the irregularities complained of relates more to formalities than to substance. The third respondent furthermore deny any form of fraudulent misrepresentation on its part in respect of its capacity to deliver. According to the third respondent the merely fact that it has relied



manufacturing plant of NSP-Unsgaard in itself is not proof of fraudulent conduct on its part.

[25] The constitutional and legislative framework within which administrative action may be taken in the government procurement process is found in section 217 of the Constitution of the Republic of South Africa, the Procurement Policy Framework Act 5 of 2000 and the Public Finance Management Act 1 of 1999. Section 217 of the Constitution provides that when an organ of state in the national, provincial and local sphere of government contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

[26] In **Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another 2016 (3) SA 1 (SCA)** (Eskom Holdings) it was stated that:

“Proper compliance with the procurement process is necessary for the process to be lawful. Strict rules of compliance have been laid down by the Constitutional Court. In **Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others [2013] ZACC 42; 2014 (1) SA 604** (CC) para 39 the court approved the dictum of this court in *Premier, Free State & others v Firechem Free State (Pty) Ltd 2000 (4) SA 413; [2000] ZASCA 28* (SCA) para 30, where Schutz JA said:

*“One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of the tender. . . that would deprive the public of the benefit of an open and competitive process.”*

[27] The Department and the third respondent are of the view that the application is non-sensical and is without merit. Firstly, they maintain that the applicant's case rests on immaterial and inconsequential irregularities, which do not constitute a ground of review. Secondly, the Department maintains that it has already appointed the third respondent who has, up to this stage, performed in terms of the agreement to its satisfaction. The Department argue that public interest will be served if the contract is allowed to run its course to completion.

[28] On the issue of materiality, it was stated in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC)** (Allpay) at paragraph [28] that there is no reason to conflate procedure and merit under the constitution as it used to be before this dispensation. It went further to state that the proper approach is that of establishing whether the irregularity factually exists, and if it does exist, to legally evaluate the irregularity in order to determine whether it amounts to a ground of review under PAJA.

[29] The court in Allpay went further to state that under the constitutional dispensation, courts are no longer required to formally draw a distinction between 'mandatory' or 'peremptory' provisions on the one hand, and directory ones on the other. The court went further to state, with reference to what has been stated in **African Christian Democratic Party v Electoral Commission and Others 2006 (3) SA 305 (CC)** (ACDP) at paragraph [25], that the test is whether what the applicant did, constituted compliance with the statutory provisions, when viewed in the light of their purpose.

[30] The Department and the third respondent repeatedly stated in their answering affidavits that the irregularities relied upon by the applicant are in respect of requirements which are not mandatory and are therefore inconsequential. It is their argument that failure to comply with the said requirements did not render a bid non-responsive. This argument stands to be rejected based on the principle laid down in Allpay. The court further stated that the suggestion that inconsequential irregularities are of no moment conflated the test for irregularities and their import and that the assessment of the fairness and lawfulness of the procurement process must be in

terms of the provisions of PAJA and independent of the outcome of the tender process.

[31] The argument made by the Department that the third respondent has carried out its obligations in terms of the contract, after its appointment, stands to be rejected. The question is whether at the time of the evaluation there was sufficient facts before the BEC and the BAC that the third respondent is compliant with the Terms of Reference of the tender. The Department was not permitted to take a chance on this aspect. Doing so will amount to unfairness on the part of the public in general and the competitors specifically.

[32] The Court in *Allpay* (at paragraph [24]) stated that one of the roles of procedural requirement is to ensure even treatment of all bidders and that the purpose of a fair process is to ensure the best outcome. On the facts of this case, the information provided by the Department as the reason for disqualifying the applicant is that the latter did not own the plant in which the pads were manufactured. The applicant argues that if this is a disqualifying factor, same should have been used to disqualify the third respondent who is manufacturing pads in the plant owned by SNP Unsgaard. As stated in *Eskom Holdings* above, it is a requirement of proper procurement procedures that all competitors should be treated equally. I agree with the applicant's argument in this regard.

[33] All parties in this matter agree that the purpose of the requirement for AFS was to determine whether the tenderer is financially viable to can carry its responsibilities to the end. The applicant argues that the third respondent failed in this regard as it submitted the outdated financial statements of other entities. I find this submission to be valid. Department should not have relied on those statement as proof that the third respondent is financially viable. In this regard there is no satisfactory explanation other than that they are members of the same group. It is the third respondent, as a tenderer, whose AFS was supposed to be scrutinised.

[34] In the same way as the financial statements, it can be accepted that the purpose of the samples and the SABS requirements was to ensure that the girl learners will be provided with good quality pads. It is common cause that the third respondent

submitted letters addressed to SNP Unsgaard in its bid. Failure to satisfy this requirement should not be regarded as immaterial and would, in my view, not be in the interest of the learners.

[35] The applicant has correctly stated that the third respondent, though a subsidiary of the Company, remains a separate and distinct legal entity from the parent company. It is indeed so that liabilities, governance and taxation are separate from those of the Company. The principle of fairness, in my view, dictates that competitors should know exactly who they are competing with. This will assist them in determining the strengths of their competitors to enable them to decide on whether to proceed with the bid or not. It therefore follows that the third respondent's argument that the Department was correct in assessing it on the financial statements, track records and manufacturing plant of the Company and NSP Unsgaards, which is a subsidiary of the Company, because they belong to the same business entity has no merit.

[36] In **Corruption Watch NPC and Others v President of the Republic of South Africa and Others 2018 (2) SACR 442 (CC)** the Constitutional Court warned against the invalidation of contracts for inconsequential flaws or irregularities in government procurement contracts. The court went further to state that a fair process does not demand perfection and that not every flaw is fatal. I agree with these sentiments. However, I am of the view that the proven flaws and irregularities in this case are material.

[37] The third respondent was awarded a tender in circumstances where it relied on other entities' documents. Furthermore, one cannot say there was fairness in a case where one bidder is awarded a tender based on something which disqualified its competitor *i.e.* ownership of a manufacturing plant. This court is satisfied that the grounds relied upon by the applicant in this case constitute grounds of review under PAJA. The action taken by the first and second respondents was procedurally unfair (section 6 (2) (c) in that mandatory and material procedure or condition prescribed by the Terms of Reference of the tender were not complied with (section 6 (2)(c) b) of PAJA). The Department failed to comply with the requirements laid down in section

217 of the Constitution. In terms of section 172(1)(a) of the Constitution, this court has no discretion as it is enjoined to declare its conduct unlawful.

[38] Section 172(1)(b) of the Constitution deals with the remedy in case of a declaration of unlawfulness of an administrative action by providing that the remedy should be just and equitable. The applicant submits that there are exceptional circumstances that justify the order that substitute or vary the award of the tender to the third respondent and instead award it to the applicant.

[39] In **State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd [2017] ZACC 40 at [53]** (Gijima) it was held that under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make any order that is just and equitable. The remedial powers are bounded only by considerations of justice and equity. The Constitutional Court in that case concluded that the declaration of invalidity does not necessarily dictates that the party against whom it was made should be deprived of the rights to which- but for the declaration of invalidity- it might be entitled to.

[40] It is common cause that the third respondent has already delivered pads to the satisfaction of the Department. The Department on the other hand, has also carried out part of its obligations. In line with the decision in Gijima, I see no reason why this court should order that this situation should be reversed. The question that remains is what is to be done with the remaining period of the tender. I however agree with the Department that there are no exceptional circumstances which entitles this court to substitute the third respondent by the applicant. There are allegations that the applicant's bid had its own flaws.

[41] I do not agree with the third respondent that there is a dispute of fact which cannot be resolved on papers in this matter. The parties agree on the existence of the facts. They only differ on whether the facts amount to irregularities which are reviewable under PAJA. The point of law raised in this regard is dismissed.

[42] On the question of costs, I find no reason why this court should deviate from the general rule. The applicant, as a winner, should be compensated for being placed out of pocket. The applicant is entitled to costs of the application.

[43] In the result I make the following order:

- i. The decision of the Department of Education, Limpopo Province, to award Bid L[...] (the bid), ostensibly taken 13 January 2021, for the manufacturing, warehousing, packaging & distribution of sanitary pads for girls in public schools: quintile 1-3 for the period: **01 February 2021 to 31 January 2024** (three years) to the third respondent and to conclude a contract with the third respondent on **20 January 2021** in respect of and in pursuance of the award of the bid, are hereby reviewed and set aside;
- ii. The decision to award the bid is remitted back to the Department for reconsideration; and
- iii. The first and second respondent are ordered to pay the costs of this application, including the costs attendant upon the employment of two counsel where applicable, the one paying, the other to be absolved.

**M V SEMENYA**  
**ACTING JUDGE PRESIDENT OF THE**  
**HIGH COURT; LIMPOPO DIVISION.**

**APPEARANCES:**

**Counsel for the Applicant : Adv. MR Maphutha & PE Mohlabi**  
**Instructed by : Moeti Kanyane Attorneys**

**Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents: Adv. T Tshitereka**  
**Instructed by : State Attorneys**

**Counsel for the 3<sup>rd</sup> Respondent : Adv. GD Harpur SC & AJ Devers**

**Instructed by** : Zayeed Paruk Inc.

**Date of hearing** : 12 April 2023

**Date of judgment** : 25 May 2023