IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Holderness, AJ)

[Reportable]

Case number: 15599/16

In the matter between:

ABET INSPECTION ENGINEERING (PTY) LTD Applicant

and

THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LTD First Respondent

VUMELA INDUSTRIAL CONSULTANCY (PTY) LTD Second Respondent

JUDGMENT

HOLDERNESS, AJ

INTRODUCTION

[1] This is an application for the judicial review and setting aside of a decision by the first respondent ('PetroSA') to award a tender to the second respondent ('Vumela'). The applicant ('Abet') also seeks an order setting aside the contract concluded between PetroSA and Vumela, pursuant to the tender being awarded ('the contract'), and an order that the tender instead be awarded to it. This final relief was set out in Part B of the application. The basis for the review, in a nutshell, is that Vumela did not attach two certificates, required by the tender conditions, to its bid.

[2] In terms of Part A of the application, Abet sought urgent interim relief that, pending the hearing of the final relief in the second part, the contract be suspended, and that Vumela be prohibited from rendering any services for PetroSA in terms thereof. The matter was set down for hearing on Friday, 2 September 2016. After the matter was postponed and a timetable agreed upon for the filing of further papers, Abet abandoned the relief sought in terms of Part A, and agreed to an expedited hearing of the review application.

THE FACTS

[3] The facts relevant to the relief sought are straightforward and are largely common cause. It is convenient to first set out the relationship between Vumela and Parsons Brinkerhoff Africa ('PBA'), the relevance of which will soon be apparent, and then to detail the procurement process followed by PetroSA in the awarding of tenders for goods and service.

The acquisition by Vumela of the Quality Services division of PBA

[5] On 15 February 2016 Vumela purchased the Quality Services ('QS') division of PBA, as a going concern ('the sale agreement'). Vumela took over not only the assets and employees of PBA, but the entire PBA system, including the same technical manager and technical signatories. Vumela was granted the right to use the PBA trademark, and so to effectively trade as PBA, for a period of six months after the sale.

[6] The effective date of the sale agreement was 29 February 2016. The tender was advertised four days later, on 4 March 2016. It was accordingly not possible for Vumela to obtain the certificates required to be submitted with its bid, in its name, prior to the closing date for the tenders, which was 31 March 2016.

PetroSA's Bid Evaluation Process

[7] PetroSA invited service providers to submit tenders for tender number CTT13150 for the "*Provision of Statutory QC (Quality Control) and AIA (Approved Inspection Authority) Inspection Services for Onshore, Offshore (FA Platform and Orca), Special Projects (Local and International/ Major), Turnarounds and Shutdowns for PetroSA*" ('the tender'). The tender was published in order to procure statutory QC and Approved Inspection Authority ('AIA') inspection services for certain of its installations and maintenance programmes. Bidders had to submit bids electronically via PetroSA's E-Procurement Portal.

[8] Bids had to be submitted in accordance with the Draft Consultancy Agreement. Clause 1.3 of the Special Conditions of Contract reads:

"*The Consultant shall ensure it maintains it's [sic] SANAS accreditation to SAN 10227 and ISO 17020 through-out the duration of the Contract. Petro SA shall be immediately advised of any major finding emanating from a SANAS audit and provided with proof that these have been closed to the satisfaction of the SANAS auditors. Suspension of the Consultant's SANAS accreditation shall result in immediate cancellation of this contract*."

[9] The South African National Accreditation System ('SANAS') accreditation requirement was also raised at the Scope Clarification Meeting held on 15 March 2016. The importance of the service providers being properly accredited by SANAS was made clear to all bidders.

[10] Twelve bids were submitted. PetroSA's evaluation process has two phases. The first phase is referred to as the disqualification phase, when each bid is assessed to see whether it complies with the relevant tender requirements. This first part of this process is described as the technical evaluation, when the team must determine whether bids meet the documentary and technical requirements prescribed by the applicable tender documentation.

[11] During the second phase, technically compliant bids are commercially evaluated with regard to each bidder's proposed price and empowerment credentials. This is referred to as the commercial evaluation.

[12] The purpose of the desktop evaluation, which is the first step in the technical evaluation, is to determine whether bids contain all the requisite information and documentation. According to Ms Sebothoma ('Sebothoma'), Head Legal Counsel for PetroSA and the deponent to the answering affidavit filed on its behalf, the desktop evaluation involves a degree of investigation, and is often followed by the further investigation of select bids. The purpose of the desktop evaluation is to eliminate any obviously non-compliant bids, and to allow PetroSA to address any ambiguity or uncertainty about the status or meaning of a particular bid. Select bidders may also be subject to due-diligence investigations.

[13] The commercial evaluation follows. Where procurement in excess of R1,000,000 is involved, the evaluation team conducts the commercial evaluation in terms of the 90/10 preference-point system, in terms of which each bidder is awarded a total score out of 100 points. A bidder may score a maximum of 90 points for price, with the cheapest bidder scoring the highest number of points and the other bidders beings allocated fewer points based on their comparative prices. The remaining ten points are allocated on the basis of each bidder's empowerment profile.

[14] Once it has concluded that exercise, the evaluation team finalises its recommendation to the PetroSA Procurement Committee (the 'PPC'). Before the PPC considers the recommendation, it is reviewed by several of PetroSA's functionaries, in accordance with the procurement policy and the procurement procedure. In relation to tenders such as the tender under review, where the Rand value of the contract awarded is in excess of R5,000,000, the PPC has the delegated authority to make the final award.

[15] In terms of clause 8 of the tender notice, PetroSA was not obliged to accept the lowest or part of all of any bid submitted.

[16] The process described above was duly followed prior to the awarding of the tender to Vumela. It bears mentioning that Abet does not seek to impugn PetroSA's procurement policy or process. PetroSA in turn avers that its procurement system complies with Section 217 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') in that contracts awarded by it are awarded in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Publication, evaluation and award of the Tender

[17] The tender notice required bidders to provide the supporting documentation required by PetroSA. The contract period was for one year, three years or five years, with the option to extend the agreement for a further two terms of three years each, at the sole discretion of PetroSA. The closing time and date for the submission of bids was 12h00 on 31 March 2016.

[18] During the evaluation of the bids, it became apparent to PetroSA that it had to enquire into Vumela's accreditation with SANAS, as it was a requirement of the tender that each bidder had to submit a copy of its SANAS accreditation certificate.

[19] Vumela's bid included a document setting out its business profile. This document stated that Vumela is a *'Government Approved Inspection Authority'*

compliant with *'the ISO 17920 standard'* and '*SANS 10227'*. The bid included a SANAS accreditation certificate which had been issued not in the name of Vumela, but to PBA.

[20] Vumela's bid included a letter dated 14 March 2016, addressed to it by PBA, confirming the sale of its QS division to Vumela and its entitlement to use the PBA trademark for a period of six months, with effect from 1 March 2016. The letter further served to inform PetroSA that *'as part of the transition process, Vumela has engaged with SANAS and the Department of Labour (DoL) regarding their application for accreditation as per SANS 17020 and SANS 10227. Further to this, the PBA accreditation is valid until the 31st of July 2019.'* The further correspondence exchanged between the relevant parties regarding Vumela's SANAS accreditation is dealt with hereunder.

[21] Abet and Vumela had to pass two further tests: a due-diligence investigation by the Evaluation Team, and a further due diligence investigation by an independent firm of auditors and accountants, Morar Inc ('Morar'). Both bidders were found to be technically compliant with the tender's requirements, and competent to perform the services required by PetroSA. After Morar had performed the due diligence of Abet and Vumela, it concluded that both Abet and Vumela possessed the necessary qualifications and technical ability to perform the services. There ended the technical evaluation.

[22] Abet and Vumela's bids thereafter proceeded to the commercial evaluation phase. In terms of this evaluation, Vumela submitted the cheapest bid, with a total price of R33,390,571.76, resulting in a score of 90 points for price. The total price for Abet's

bid was R44,366,366.56, resulting in a score of 60.42 points for price. Both Abet and Vumela scored 10 points for their B-BBEE status levels. Vumela was the top-ranking bidder, scoring 100 total preference points to Abet's 70.42

[23] On 20 May 2016 the Evaluation Team finalised the submission and duly recommended to the PPC that the tender be awarded to Vumela. Between 20 May 2016 and 27 May 2016, the submission was reviewed by several of PetroSA's office bearers On 2 June 2016 the submission was considered by the PPC. In view of the fact that Vumela had acquired the QS division of PBA as a going concern, the PPC resolved to award the tender to Vumela, on condition that the Group Supply Chain Manager and Sebothoma confirmed, after reviewing the sale agreement, that Vumela had indeed acquired PBA's QS division.

[24] The sale agreement was reviewed and found to be valid and legally enforceable, and PetroSA was therefore satisfied that Vumela had duly acquired the business as a going concern.

[25] Shortly thereafter, the Evaluation Team became aware of two errors in its recommendation relating to the returnable commercial bid analysis, and an error in the formula. These errors appear to be common cause and were not cited as irregularities by Abet. After the errors had been corrected Vumela's total contract price increased by approximately R6,329,000, to R39,719,571.76. Abet's contract price remained unchanged. Notwithstanding the increase in Vumela's price, it was still significantly cheaper than Abet. After Vumela's bid price had been revised, it was R4,646,796.32 less than Abet's original bid price of R44,366,366.56. Vumela therefore remained the

top-ranking bidder, scoring 100 points to Abet's revised 89.47 points. The recommendation was duly revised, and subjected to the same procedure outlined above. The revised submission was considered by the PPC on 30 June 2016. The PPC accepted the recommendation in the revised submission, including the increase in PetroSA's total contract price, as well as the review of the sale of business agreement between PBA and Vumela, and resolved to award the tender to Vumela.

[26] On 11 July 2016, PetroSA received an email from Vumela, annexing a SANAS certificate issued to Vumela, in terms of which Vumela was certified as being duly accredited with effect from 17 March 2016. Further annexed was a letter addressed to Vumela by the Chief Inspector of the DoL dated 7 July 2016 informing Vumela that, with effect from 17 June 2016, it had been awarded *'in-service inspection authority approval'* under the Occupational Health and Safety Act Act 85 of 1993 ('OHASA') and the PER promulgated thereunder. A certificate evidencing the accreditation by DoL was also annexed.

[27] On 14 July 2016, pursuant to the award of the tender, PetroSA and Vumela concluded the contract. On 18 July 2016, Abet was informed by PetroSA that its tender was unsuccessful. On 19 July 2016 Abet addressed an email to PetroSA pointing out that Vumela did not have a SANAS certificate as at the closing date of the tender. On 20 July 2016, Ms Gaca, on behalf of PetroSA, responded by referring to the right of Vumela to utilise the trademark of PBA until 30 August 2016, and confirming that the SANAS accreditation which was provided in the tender under the name of PBA was accepted.

[28] On 30 August 2016, the application for review was launched.

SANAS Accreditation and certification

[29] In terms of section 4(1)(c) of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 19 of 2006, SANAS is established as the "*only national body responsible for carrying out ... accreditation of inspection bodies*". SANAS is responsible for maintaining an "*internationally recognised accreditation system*" and for promoting "*the competence and equivalence of accredited bodies*".

[30] As part of its bid, Vumela submitted PBA's accreditation certificate for Inspection of Pressure Equipment, which was issued by SANAS ('the AIA certificate'), and PBA's certificate issued in terms of the Pressure Equipment Regulations, adopted under the OHASA, which was issued by the Department of Labour (DoL) ('the PER certificate').

[31] In its bid document, Vumela specifically disclosed, under the heading **'RE: SANAS Accreditation of Vumela Industrial Consultancy',** that:

> *'As part of the transition process, Vumela has engaged with SANAS and the Department of Labour (DoL) regarding their application for accreditation as per SANAS 17020 and SANS 10227. Further to this, the PBA accreditation is valid until the 31st of July 2019.'*

[32] Vumela further invited PetroSA to contact Donovan Muller from its offices should any further clarity be required regarding the accreditation. At the time of submitting its bid, Vumela had already applied for the AIA certificate. It could not apply for the PER certificate before it had been issued with the AIA certificate.

[33] As explained by Sebothoma, the purpose of requiring bidders to be accredited by SANAS was simple: to ensure that the ultimate service provider would have the requisite capacity and be appropriately skilled to perform the services required by PetroSA

[34] The Tender Questionnaire required each bidder to "*provide a copy of its SANAS accreditation certificate*", and provided that "*tenderers will be eliminated from further evaluation for failure to submit a SANAS accreditation certificate*". PetroSA explained that this was not because of the importance of the certificate itself, but because of the importance of the accreditation as an inspection body from South Africa's sole accrediting authority. The process in relation to the evaluation of Vumela's SANAS accreditation is set out in detail by Sebothoma.

[35] PetroSA contends that it was correct not to disqualify Vumela's bid at the initial desktop and technical stage of evaluation, when the Evaluation Team merely had to 'tick the boxes', rather than evaluate whether there was adequate compliance. It was only at the next stage of evaluation that detailed inquiries would be made on issues raised during the initial stage of evaluation. Examples of the issues raised included checking references of the two other responsive bidders in relation to their experience in the petrochemical and chemical industries, and Vumela's claims made in respect of

the SANAS accreditation. It is apparent that the Evaluation Team performed similar tasks in relation to the other bids that appeared to contain defects or omissions, but which were not liable for immediate disqualification.

[36] On 11 April 2016 the Evaluation Team investigated Vumela's claim of accreditation by SANAS, noting in particular that it had to be "*assessed for compliance*" by the accreditation authority. The Evaluation Team proceeded to make the necessary inquiries relating to whether or not Vumela was accredited by SANAS.

[37] The SANAS Approval Committee met on 14 April 2016 and granted the entity known as "*Vumela Industrial Consultancy (Pty) Ltd*", which had formerly been a division of Parsons, "*unconditional accreditation ... in accordance with ISO/IEC 17020:2012 and SANS 10277:2012*". SANAS initially agreed to change the name on the PBA certificate without changing the accreditation number (LPUP017), effectively transferring its accreditation status to Vumela. This was conveyed to PetroSA by Vumela in an email, dated 19 April 2016.

[38] Notwithstanding the above, when Vumela's application reached the CEO of SANAS, he decided that a new number had to be allocated to Vumela, namely LVUP119. Vumela's position was that it mattered not whether a new number was issued or whether it retained PBA's number, what mattered was that SANAS had decided to accredit Vumela and had conveyed its decision to PetroSA. Significantly, no assessment whatsoever of Vumela was done, and the accreditation was effective retrospectively, with effect from 17 March 2016.

[39] It is common cause that the purpose of the requirement that a bidder had to submit the AIA certificate was to ensure that the tender would only be awarded to an entity that was duly accredited and appropriately skilled to perform the required services. Vumela and PetroSA argued that the purpose of this requirement was achieved by the approach adopted by PetroSA, namely that, arising from its knowledge that Vumela bought PBA's QS division as a going concern, but that as a result of the timing of the tender could not secure the necessary certificates in its own name, it was appropriate to grant it an opportunity to submit same later.

[40] It would therefore appear that during the course of the evaluation process, PetroSA received an unequivocal indication from SANAS that Vumela (not PBA) had been accredited to provide the services required. PetroSA was therefore satisfied that it had the necessary documentation in relation to Vumela's accreditation as a quality-control and approved-inspection-authority services provider, in accordance with the Tender Notice, which provided that –

> "*documentary proof regarding any tender submission will be submitted to the satisfaction of PetroSA when called upon to do so*".

DoL Approval and the PER Certificates

[41] The tender questionnaire indicated that each bidder had to provide "*a copy of its Department of Labour…certificate, proving [it] to be an Approved Inspection Authority'*. This is defined above as the PER certificate.

[42] The purpose of this requirement was to ensure that the tender would ultimately be awarded to a bidder accredited by the Department of Labour as an "*approved inspection authority*" under the OHASA, and the Pressure Equipment Regulations promulgated thereunder. This was important because the inspection services can only lawfully be provided by a duly accredited entity. PetroSA was ultimately provided with Vumela's certificate, effective from 17 June 2016. Vumela's bid did not include this certificate, it included a certificate issued to PBA.

[43] Abet avers that, because Vumela's bid did not include a DoL certificate in its own name, the bid failed to comply with a mandatory and material 'pre-qualification condition' of the tender, and that its bid should therefore have been declared non-responsive. Abet contends further that PetroSA's failure to declare the bid non-responsive amounted to an irregularity in the tender process.

[44] PetroSA placed emphasis on the fact that Vumela could only apply for the PER certificate after it obtained the AIA certificate. It would seem that, following the issuing of the AIA certificate, the PER certificate is a *fait accompli,* and all that is required for the certificate to be issued is an email to the DoL, the SANAS certificate, and requesting that the PER certificate be issued. It appears to have been common cause that no additional requirements have been imposed by DoL in terms of s 7 of the Pressure Equipment Regulations, adopted under the OHASA.

[45] Vumela addressed emails to PetroSA on 8 April 2016 and in May 2016 stating the steps which it had taken, and advising that it was still awaiting the PER certificate.

[46] The PER certificate was sent by DoL to Vumela on 8 July 2016, and Vumela sent the certificate to PetroSA on 11 July 2016. The PER certificate was valid with effect from 17 June 2016, two weeks before the award was made.

[47] PetroSA argued that, in the peculiar circumstances in which Vumela found itself, it was not unfair nor irregular for PetroSA to accept that there was substantial compliance with the requirement, and that the purpose of the requirement was fulfilled, and to the extent that Vumela was treated differently, the different treatment justified.

Vumela's B-BBEE Status

[48] Abet took issue with Vumela's B-BBEE status in its founding papers but appeared, wisely, to abandon this issue during argument.

[49] Vumela submitted, as part of its bid, an affidavit signed by Mr Arvind Magan, stating that, as at February 2016, Vumela was an Exempt Micro Enterprise ('EME') and because it was 100% black-owned, it qualifies for a Level 1 B-BBEE.

[50] It appears that there is no merit to this ground of review and it is accordingly not necessary to deal with it further.

THE LAW APPLICABLE TO PUBLIC PROCUREMENT DISPUTES – THE *ALLPAY* APPROACH

[51] I now turn to deal with the prevailing common law position in matters such as these. In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency, and Others*[1] (*'Allpay'),* the Constitutional Court formulated the correct approach to be followed in procurement matters.

[52] This landmark judgment provides invaluable guidance regarding the process which this court is required to follow in determining whether a reviewable irregularity has been committed, and, if so, the remedy which should follow.

[53] In *Allpay* the Constutional Court expressed its disagreement with the *dictum* of the Supreme Court of Appeal ('SCA') to the effect that it would be prejudicial to the public interest if the law was to invalidate public contracts for '*inconsequential irregularities'.* On the approach of the SCA, an irregularity is inconsequential when, *'on a hindsight assessment of the process, the successful bidder would likely still have been successful despite the presence of the irregularity.*' [2]

[54] *Allpay* held that the proper legal approach is as follows:

> *'(a) The suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment*

[1] 2014 (1) SA 604 (CC)

[2] *Allpay n 2* at para [19]

of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).

(e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

(f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.'

[55] To the extent that it was suggested by the SCA that the public interest in procurement matters requires greater caution in finding that grounds for review existed in a given matter, the Constitutional Court found that such an approach seemed detrimental to important aspects of the procurement process:

'First, it undermines the roles procedural requirements play in ensuring even treatment of all bidder. Second, it overlooks that the purpose of a fair process is to ensure the best outcome.[3]*'*

[56] Regarding the requirement of materiality, the Constitutional Court found that '*the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirement, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.*[4]*'*

[57] Perhaps one of the most decisive findings in the *Allpay* judgment is that any potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with not at the stage when it is determined whether a ground for review exists, but under the just and equitable remedies provided for by the Constitution and PAJA.

[58] The *Allpay* approach also took due account of the move away from the strict mechanical and formalistic approach adopted by our courts previously. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' on the other. Strict compliance with the former was required for the administrative action to be considered valid, and only substantial or even non-compliance if the provisions was directory in nature. The court held that the *'strict*

[3] *Allpay* at paras [23] – [24]

[4] *Allpay* at para [28]

mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision..This is not the same as asking whether compliance with the provisions will lead to a different result.'[5]

[59] A similar approach was adopted by the SCA in *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others*[6], where the Court had to grapple with whether the failure to sign a declaration constituted a basis for disqualifying a bidder. Finding that the bidder should not have been disqualified, Jafta JA stated that "*[i]t seems to me that what is of paramount importance is the nature of the information furnished and not the signature.*"[7]

[60] In support of its arguments that the failure to ensure that Vumela was duly accredited in its own name and provided the requisite certificates before the bid closed constituted material and reviewable irregularities, Abet relied *inter alia* on the decision of the SCA in *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another*[8] *('Moroka').* The central issue in this case was whether the municipality was justifiably entitled to disqualify a tender supported by a copy of a tax clearance certificate when the invitation to tender had called for an original certificate to be provided. This case of course preceded, and has been overtaken by, *Allpay*. Moreover it is distinguishable from the present application, as it concerned non-compliance with a statutory

[5] Emphasis added

[6] 2008(2) SA 481

[7] *Millenium Waste* n 8, para [20]

[8] [2013] ZASCA 186; [2014] 1 All SA 545 (SCA)

requirement, which the Municipality had no power to condone. In the present matter the accreditation requirement is in terms of the tender proposal, and is not a statutory requirement, and the applicable procurement policy provides a power to the PetroSA Procurement Committee to condone non-compliance with policies or procedures. I find myself in agreement with counsel for PetroSA that, in any event, the formalistic approach was effectively overruled by the Constitutional Court in *Allpay.*

[61] Abet further placed reliance on the decision of the SCA in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*[9] *('Metro Projects'),* in which a bidder was permitted by a municipal official to fundamentally increase the competitiveness of its bid after the closing date, by changing the floor area size of the houses it proposed to build. This is very different to the present matter, where Vumela disclosed the transition from PBA and the difficulties with obtaining accreditation in its own name from the outset. There is no suggestion of deception or corruption on the part of PetroSA, only that, as a bidder, Vumela was treated differently and the condonation of the failure to comply with the initial technical requirements constituted a material and reviewable irregularity.

[62] In the recent decision of the SCA in *Aurecon v Cape Town City*[10] *('Aurecon')* irregularities were said to have arisen from the City of Cape Town's ('City') officials' ignorance as to the requirements of the various stages of the consideration and award of

[9] 2004 (1) SA 16 (SCA)

[10] 2016 (2) SA 199 (SCA)

tenders, and, similarly to the case at hand *'did not entail any fraudulent, dishonest or corrupt behavior on the part of the City, any of its official or [Aurecon].'*

[63] The basis for the review was that Aurecon had been afforded an unfair advantage over other tenderers as the final scope of work that formed part of the bid specifications for the tender was based directly on the draft scope of work prepared by the joint venture of which Aurecon was a part, and Aurecon was included in internal City email communication concerning the pending tender. Further complaints were raised relating to the scoring participation, the failure of the Bid Evaluation Committee ('BEC') to meet as a collective to evaluate the functional scoring, the participation of an unauthorised member in the scoring, that a BEC meeting was not properly constituted, that Aurecon was permitted to withdraw a qualification, that the BEC evaluated Aurecon's bid after the bid validity period had expired, and that the BEC's report to the Bid Approval Committee ('BAC') contained factual material errors without which the BAC may not have made the award.

[64] At the risk of this judgment being excessively verbose, I set out the alleged irregularities in some detail, in order to illustrate how the number of and the nature of the complaints which were raised regarding the tender procedure, in contrast to the comparably limited issues raised in the present review.

[65] In *Aurecon,* the court *a quo* found that in view of Aurecon's prior involvement in the preparation of the draft scope of works, the inclusion of its tender rendered the procurement process unfair, and constituted a ground for review under s 6(2)*(c)* of PAJA. The court further found that the BAC's failure to take into account relevant

considerations when it considered Aurecon's tender resulted in the reviewing and setting aside of its decision in terms of s 6(2)(*e)*(iii) of PAJA.

[66] The SCA dealt with each of the alleged irregularities in turn. It found that:

'none of the so-called irregularities constituted irregularities at all. In any event, it is firmly established in our law that administrative action based on formal or procedural defects is not always invalid and that legal validity is concerned not with technical but also with substantial correctness which should not always be sacrificed for form. I do not understand Allpay *to overturn this principle. There the Court pointed out that: "Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.'*

[67] The Constitutional Court recently dismissed an application for leave to appeal against the SCA's decision in Aurecon.

Statutory framework

[68] Section 217(1) of the Constitution provides as follows:

'217 Procurement

> *(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is* ***fair, equitable, transparent, competitive and cost-effective.'*** [11]

[69] In terms of section 1 of the Preferential Procurement Policy Framework Act (the 'Procurement Act')[12] an '*acceptable tender'* is any tender *'which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'* Section 2(1)(b) of the Procurement Act stipulates that an organ of state must determine its preferential procurement policy within the framework provided for therein. In terms of section 2(1)(f) *'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.'* This is the only basis on which a contract may be awarded to a tenderer that did not score the highest total number of points.

Grounds of review

[70] I turn now to deal with the grounds relied upon by Abet for the reviewing and setting aside of PetroSA's decision to award the tender to Vumela.

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[11] Emphasis added

[12] 5 of 2000

[71] Abet contended that the application for final relief fell to be decided in the context of the Constitution, PAJA, the Procurement Act and PetroSA's own policies and procedures.

[72] Ms. Alexander, who deposed to the affidavit on behalf of Abet, submitted that PetroSA's decision to award the tender is subject to review on the following grounds as provided for in term of section 6(2) of PAJA:

'6 Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) ....

(ii) .....

(iii) was biased or reasonably suspected of bias;

(b) ....

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) ....

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) …

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

[73] Abet contends that the events which transpired after the closing date of the tender, including the belated issuing of the necessary certificates, should not have been taken into account by PetroSA, and that by taking such facts into account in treating Vumela's tender as responsive and ultimately awarding the tender to it, PetroSA acted in a manner that is *'unfair, inequitable and untransparent'.*

[74] Abet averred that:

'7.1. By taking into account a SANAS certificate "under the name of" someone else, the First Respondent clearly acted in a biased manner, which was in bad faith, arbitrary and capricious.

7.2 By awarding the QC tender to the Second Respondent in circumstances where the Second Respondent did not have its own SANAS certificate, the First Respondent made a decision that was procedurally unfair and materially influenced by an error of law.'

[75] In its supplementary affidavit, Abet points out that, after considering the sale of business agreement entered into between PBA and Vumela, it could not find any clause to the effect that there would be any transfer of accreditation certificates, or that a certificate could be provided by Vumela in the name of PBA, or that there would be a name change as far as any of these entities are concerned. It went on to say that as a transfer of accreditation is prohibited in terms of the SANAS regulations, such a clause would have been unenforceable.

[76] Based on the above, Abet contended that PetroSA's decision to treat Vumela's tender as responsive, on the strength of a SANAS certificate that was provided *'under the name of'* another entity, was biased (s 6(a)(iii) of PAJA), based on irrelevant considerations (s 6(2)(d)(iii)), in bad faith (s 6(2)(d)(v)), and/or arbitrary or capricious (s 6(2)(d)(vi)). Moreover, the decision was clearly irrational within the meaning of s 6(2)(e)(ii) of PAJA.

[77] In response to the allegations regarding the alleged irregularities, PetroSA

pointed out that the Evaluation Team only determined that Vumela's bid was technically compliant after taking all the relevant steps in the process, including consideration of the unequivocal communication from SANAS regarding Vumela's unconditional accreditation. Put differently, the Evaluation Team did not consider Vumela's bid to be responsive after having conducted the desktop evaluation. It determined that the bid should be investigated. The 'tick' on the questionnaire merely indicated that Vumela's bid contained an accreditation by SANAS under the Accreditation Act.

[78] Lastly, Abet submitted that there existed exceptional circumstances justifying the court to grant the licence, effectively substituting its decision for that of PetroSA's, in terms of s 8(1)(c)(ii) of PAJA. In support of this contention it stated that Abet would be the only remaining responsive tender, and as it has passed its due diligence and is therefore properly qualified and able to perform the necessary functions pursuant to the award of the tender, such award is accordingly a foregone conclusion[13].

Did the failure to provide the necessary certificates prior to the closing date constitute a material and reviewable irregularity?

[79] The purpose of requiring bidders to be accredited by SANAS was to ensure that the service provider, to whom the tender was ultimately awarded, would have the requisite capacity and be appropriately skilled to perform the services required by PetroSA. It is apparent that the requirement for the bidder to provide copies of their

[13] See generally *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC), especially paragraphs 34 to 35

accreditation certificate or risk elimination was not because of the importance of the certificate as such, but because of the accreditation of the entity which would be providing the services by South Africa's sole accrediting authority.

[80] The facts regarding the takeover by Vumela of the QS division of PBA, including all of its employees and assets, were properly disclosed by Vumela to PetroSA when it submitted its bid before the closing date. There was no suggestion that Vumela was deceptive, as may have been argued if it had attempted to pass off PBA's accreditation as its own without disclosing the sale of business agreement.

[81] Subsequent to the closing date and after only two responsive tenders remained, PetroSA conducted further investigation and received an unequivocal indication from SANAS that Vumela, and not PBA, had been accredited to provide the services required.

[82] Abet has failed to set out facts which support its argument that PetroSA acted in a biased manner. PetroSA led evidence of steps taken by its evaluation team to investigate certain aspects of other bids after the closing date and before such bids were declared to be non-responsive.

[83] The most recent judgments in the SCA and the Constitutional Court, dealing with procurement matters enjoin the courts to adopt a purposive approach. By virtue of the assets and the employees which it acquired from PBA, which was duly accredited, Vumela was able to provide the services required by PetroSA, which was the very purpose of the accreditation. Significantly, there was no further assessment undertaken

and Vumela was not required to do anything further to obtain accreditation in its own name for either the AIA certificate or the PER certificate. Accreditation in Vumela's name in due course appears to have been a *fait accompli* therefore at the time of the submission of its bid, and it was accredited by SANAS in its own name prior to the tender being awarded to it, and by DoL prior to the contract being entered into.

[84] I am accordingly satisfied that the purpose of the requirement for the SANAS and DoL certificates to be provided was fulfilled. There is no cogent reason why PetroSA needed to be satisfied that a party was duly accredited before the closing date of the bid. It had to be satisfied before the party to provide services contracted to do so for the purpose of this tender requirement to be fulfilled.

[85] In my view the allegations of *mala fides*, bias and capriciousness on the part of the PetroSA procurement officials are entirely without merit. No factual foundation has been laid to support these allegations. I agree with PetroSA that had its officials acted in bad faith, they would hardly have corrected their own calculation errors.

[86] It appears that, to the contrary, PetroSA acted rationally, and without arbitrariness or caprice. It evaluated the available information and documentation and engaged with various bidders, where necessary, to solicit further information in order to avoid unnecessarily excluding any service providers and thereby diminishing the competitiveness of the process.

[87] I am persuaded by PetroSA's argument that it made its decision for sound reasons. It awarded the tender to Vumela because it was the cheapest, technically and

B-BBEE compliant, bidder. The decision to award the tender therefore cannot be impugned on the basis that it was irrational, arbitrary, motivated by bias or capricious.

[88] Abet placed reliance not only on *Moroka* supra, but also on *Metro Projects* supra. It emphasised that PetroSA and Vumela do not contend that Vumela's lack of accreditation and failure to attach the necessary documents to its tender was merely a *'mistake'* or *'oversight'* that could be corrected. Abet's complaint is based on the fact that Vumela was not registered with or approved by the relevant authorities as at the closing date of the tender, and that its *'accordingly did not meet the tender specifications at the time'.*

[89] In *Metro Projects* supra the SCA set aside the decision to award a tender *inter alia* because the decision had been unfair. Distinguishable from the facts in the present case, in that case a high-ranking official purported to give one of the tenderers an opportunity to augment its bid, not to comply belatedly with the tender requirements, but to submit a more attractive bid after the other bids had been submitted. The augmented offer was first concealed from and then represented to the relevant committee as having been the tender offer. It was accepted on that basis. The court cited the decision in *Logbro Properties CC v Bedderson NO and Others*[14], where Cameron JA referred to the *'ever-flexible duty to act fairly'* that rested on a provincial tender committee. Conradie JA in *Metro Projects* went on to say:

> *'Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it*

[14] 2003 (2) SA 460 (SCA), paras [8] and [9] at 466H-467C

may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'[15] The court held that in the circumstances of the case *'the deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.'*[16]

[90] In the present case there was no deception, nor was Vumela given an undue advantage by being afforded an opportunity to augment its bid in order to make it more attractive to the PPC. The PPC was made fully aware not only of Vumela's transitional status, but of all the issues relating to its accreditation with SANAS and the DoL. If it had refused to give due consideration to these issues and disqualified Vumela's bid without further investigation, it may well have committed a reviewable irregularity.

[91] The question to be answered was succinctly framed by O'Regan J in *African Christian Democratic Party v Electoral Commission*[17] as being *'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of*

[15] Emphasis added

[16] *Metro Projects* supra at [13] and [14], page 21

[17] 2006 (3) SA 305 (CC) at para [25]

their purpose.'[18] In applying the principles enunciated in *Allpay*, if one proceeds from the premise that Vumela did not comply (notwithstanding the fact that it had acquired and was effectively trading as a business which was fully compliant), then the question which follows is was the purpose of the requirement still attained?

[92] To my mind, for all practical purposes, there was compliance. But for the timing of the effective date of the sale agreement, and the closing date of the bid, Vumela would have been duly accredited in its own name. The purpose of the requirement was substantially met, and the non-compliance can therefore not be said to be material.

[93] To find otherwise would be to elevate form over substance. This strict approach no longer finds favour in our law. In *Minster of Social Development and others v Phoenix Cash & Carry-PMB CC*[19] Heher JA, in delivering the judgment of the Court, stated as follows:

> *'Without attempting a comprehensive survey of circumstances which will offend against section 217(1) certain general observations are demonstrated as true by the facts of the present case-*
>
> *...a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of*

[18] Emphasis added, footnotes omitted

[19] [2007] 3 All SA 115 (SCA) at para [2]

compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion. In saying this I do not suggest that the tender board is not entitled to prescribe formalities which, if not complied with, will render the bid invalid, provided both the prescripts and the consequences are made clear. What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of a process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.

It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price.'

[94] Abet did not make any attempt to explain why it contends that the alleged irregularity resulted in the purpose of the conditions not being fulfilled. There is nothing before me to support the formalistic interpretation of the tender documents contended for by Abet.

[95] If Abet's argument is not that the purpose of the requirement was not met, but rather that Vumela was treated differently to other bidders, such an argument would fail because our Constitution embraces substantive equality (taking different circumstances into account) and not formal equality (treating bidders the same regardless of circumstances). As out Constitutional Court remarked, the *'logical corollary of the*

principle that "like should be treated like", is that treating unlike alike may be as unequal as treating like unlike."[20]

[96] It was submitted by Vumela that the only possible basis on which the Court can find the award to be reviewable is if it finds that PetroSA should not have made the award until it was in possession of Vumela's PER certificate. Vumela's contention is that if the award is set aside on this basis, and remitted, then the result of the remittal would be a foregone conclusion, i.e. it would have to be awarded to Vumela again. There is no suggestion that Vumela's PER certificate is defective in any way.

[97] For the above reason Vumela submitted that even if this Court were to find that the award was unlawful, the Court should, in the exercise of its discretion under s 8 of PAJA, decline to set the award aside but merely declare the award to be unlawful.

[98] As I do not intend to make this order, it is not necessary to set out the grounds relied upon by Vumela for an order that the award not be set aside. However, even if I am wrong and the irregularity was material and rendered the process unlawful, I would in the peculoiar circumstances of this case and in the exercise of my discretion, decline to set aside the award.

[99] In conclusion, I am of the view that the failure by Vumela to furnish the AIA and PER certificates timeously amounts to an irregularity, however having evaluated such irregularity and for all the reasons set out above, I find that such irregularity does not amount to a ground of review under PAJA.

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[20] *President of the RSA v Hugo* 1997 (4) SA 1 (CC), fn 63

[93] I see no reason why costs should not follow the result.

Order

[94] In the result, I make the following order:

The application is dismissed, with costs.

HOLDERNESS, AJ
ACTING JUDGE OF
THE HIGH
COURT

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Judgment delivered on:	8 March 2017