**IN THE HIGH COURT OF SOUTH AFRICA,**
**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **YES** |
| **Of Interest to other Judges:** | **YES** |
| **Circulate to Magistrates:** | **NO** |

Case No.: A138/2016

In the matter between:

**MEC FOR PUBLIC WORKS AND INFRASTRUCTURE, FREE STATE PROVINCIAL GOVERNMENT**

Appellant

and

**MOFOMO CONSTRUCTION CC** Respondent

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**CORAM:** DAFFUE, J *et* LEKALE, J *et* HANCKE J

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**JUDGMENT BY:** DAFFUE, J

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**HEARD ON:** 31 OCTOBER 2016

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**DELIVERED ON:** 24 NOVEMBER 2016

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## I INTRODUCTION

[1] This is an appeal to the full bench against the whole judgment of Mocumie J (as she then was) handed down on

22 April 2016.

[2] This appeal turns in essence around the claim of an organ of state that the court *a quo* erred in not setting aside the appointment of a contractor and/or contract entered into consequent upon an improper and invalid procurement process.

## II THE PARTIES

[3] Appellant is the MEC for the Department of Public Works and Infrastructure, Free State Provincial Government. I shall refer herein to appellant as the Department to prevent any misunderstanding.

[4] The respondent is Mofomo Construction CC ("Mofomo"), a contractor and the successful party in the court *a quo*.

## III THE JUDGMENT OF THE COURT *A QUO*

[5] The court *a quo* found that, consequent upon a proper and valid procurement process undertaken by the Department, a valid and binding contract was entered into between the parties.

[6] It also dismissed the Department's counter-application in which it sought the review and setting aside of the appointment of the contractor and/or contract entered into on the basis that no valid and competitive tender process

was followed.

## IV THE GROUNDS OF APPEAL

[7] On 31 May 2016 the court *a quo* granted leave to appeal to the full bench, costs to be costs in the appeal.

[8] The Department relies on the following grounds of appeal:

> "1. The court *a quo* erred in finding that the respondent has established a clear right on the basis of the agreement concluded between it and the appellant.
>
> **1.1** First, the purported contract is contrary to the law.
>
> **1.2** Secondly, the offer to contract itself was subject to two conditions, which were not complied with.
>
> **1.3** Thirdly, by virtue of the unchallenged averments in the answering papers, final relief was incompetent in law.
>
> 2. Additionally, the court *a quo* ought to have found that the offer relied upon by respondent had been withdrawn prior to acceptance.
>
> 3. The court *a quo* ought to have found that the counter-application succeeds on non-compliance with tender law principles."

## V BRIEF HISTORICAL BACKGROUND

[9] It is deemed appropriate to state the following background for a better understanding of the dispute between the parties.

[10] The previous Head of the Department ("HOD") is Mr M Gasela ("Gasela"). He was replaced on a date not apparent from the application papers by Mr M Seoke ("Seoke").

[11] Bids were invited by the Department during 2015 for several classrooms to be built at various schools throughout the Free State Province. One such school is Ntswanatsatsi Primary School in Cornelia.

[12] On 11 November 2015 Gasela informed Mofomo in writing that its bid in respect of DPWFS (T) 044/2015 for R4 429 596,08 had been accepted subject to:

> "1.1 Entering into a JBCC series 2000 edition 4.1 Code 2101 (March 2005) which will have to be obtained by yourself and brought along to the Department for signature prior to site handover;
> 1.2 Provision of a 10% Construction Guarantee for R442 959,61 by yourselfves to the Department."

[13] According to the application papers Mofomo's bid in respect of contract DPWFS (T) 047/2015 in respect of the Likubu Primary School in Kroonstad for R3 367 997, 65 has been accepted as well by Gasela on even date, subject to similar conditions.

[14] Mofomo was one of the entities contracted to do similar work for and on behalf of the Department.

[15] According to the undisputed evidence Mofomo's deponent signed the applicable JBCC series contract and handed same to the Department together with the 10% construction guarantee. I say that the evidence is undisputed although the Department's present HOD testified that he could not find any such documentation in the Department's files. I return to this later.

[16] The contact person at the Department *ex facie* the two letters of appointment referred to *supra* is indicated as Ms A Raboroko and her email address and telephone numbers are stated therein.

[17] The particular site was handed over to Mofomo who started with construction work to such an extent that a first progress payment in the amount of R209 453,34 was requested and eventually received on 24 December 2015. The contact person at the Department in respect of this payment is a certain Mr Thabo Koko of the Kroonstad offices.

[18] On 15 December 2015, according to the Department, a Contractors Development Programme Meeting was held at the offices of the Department. Although Mofomo's name is indicated on the attendance list, nobody signed the register on behalf of Mofomo and its deponent denied that he was aware of the meeting and/or attended same. It is not alleged in any of the two affidavits filed on behalf of the Department that Seoke and/or Mr Keyter ("Keyter"),

apparently an engineer and senior employee in the Department, attended this meeting. In fact, not a single name of any employee of the Department features on the attendance register.

[19] On 23 February 2016 Mofomo sought a second interim payment as is apparent from the payment certificate issued for the amount of R370 341,59. It must be remembered that it is not the Department's stance that the work was not undertaken.

[20] On 11 February 2016 Seoke in his new capacity as HOD of the Department (who apparently succeeded Gasela, the author of the letter of appointment three months earlier), withdrew Mofomo's appointment in writing. The first two paragraphs of the letter read as follows:

> "1. We refer to our letter dated 11 November 2015 in which your offer relating to the above matter was accepted, as well as the consultative meeting held by the Chief Financial Officer of this Department on 15 December 2015 with contractors.
> 2. Subsequent to a perusal and scrutiny of applicable legislation and policies, the Department realised that the process leading up to acceptance of your offer and your appointment failed to comply with government procurement legislation and policies and is therefore unlawful making any agreement null and void. The Department intends to commence anew with proper procurement processes." (emphasis added – the Department did not rely on non-fulfilment of the

suspensive conditions at that stage.)

[21] The grounds of appeal alleging that the Department's offer to Mofomo was withdrawn before acceptance or that the offer was subject to two conditions which have not been complied with are not supported by the contents of the letter of 11 February 2016.

[22] Mofomo was not instructed to stop any works as mentioned further in the letter as it did not attend the meeting of 15 December 2015, it being unaware thereof. By the time the parties entered into correspondence during February 2016 and just before the litigation ensued, Mofomo had already completed approximately 11% of the works, which is not denied.

[23] Following the correspondence between the parties Mofomo eventually launched its application, seeking the Department to be interdicted and restrained from embarking upon any procurement process in respect of the applicable project and also "from performing any further unlawful acts of repudiation relating to the contract between applicant and respondent pertaining to such works,……"

[24] The application was not only opposed by the Department, but a counter-application was filed, claiming the following relief:

> "That the appointment of the applicant and/or contract

> entered into, if there is any, in respect of the construction of three additional grade R classrooms at Ntswanatsatsi Primary School at Cornelia, Free State Province on 11 November 2015 be declared to be invalid, unlawful and unenforceable."

It also sought costs of the counter-application in the event of opposition.

[25] The matter was heard on 7 April and on 22 April 2016 the court *a quo* delivered judgment.

## VI EVALUATION OF THE COURT *A QUO'S* JUDGMENT AND THE SUBMISSIONS OF THE PARTIES IN LIGHT OF THE AUTHORITIES

[26] Adv N A Cassim SC, who appeared with Advv B Mene and N Khooe on behalf of the Department before us on appeal attacked the judgment of the court *a quo* by following a two-pronged approach. Firstly, he submitted that Mofomo did not prove that a contract was ever entered into between it and the Department and/or if such a contract was entered into, that it was not lawful and binding. Furthermore, it is clear from the letter of acceptance dated 11 November 2015 that acceptance of the tender was subject to two conditions, i.e. the signing of the JBCC contract and the delivery of a 10% construction guarantee whilst Mofomo had failed to prove compliance. Mr Cassim's second point of attack related to the alleged invalid tender procedure followed by the Department. I shall deal *infra* with the submissions made in this regard.

[27] In considering the main and counter-applications it is required to consider the requirements enunciated in **Plascon-Evans Paints**. I also wish to refer to the following *dictum* by Heher JA in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA), quoting from para [13]:

> "[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit,

> he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (emphasis added.)

[28] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom. See **Minister of Land Affairs and Agricultural v D & F Wevell Trust** 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his or her case in the founding affidavit. That affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his or her founding affidavit. See **Director of Hospital Services v Mistry** 1979 (1) SA 626 (AD) at 635H – 636D.

[29] There is no indication in the papers as to Seoke's background, in particular where he was employed before he became the HOD of the Department. Apparently he has no personal information as to the processes embarked upon in order to eventually award bids to Mofomo. He had to rely on second-hand information, i.e. allegedly obtained from

perusing the Department's files. In my view it would be totally inappropriate to rely on Seoke's evidence, in particular in so far as Mr Cassim in his oral argument made an unfortunate comment that Mofomo and employees of the Department were possibly guilty of shenanigans and even fraudulent conduct. Nowhere in the papers is it alleged that Gasela and/or any other employee(s) of the Department and/or Mofomo committed fraud and/or any other misconduct. I would have expected the Department to obtain first-hand information by means of an affidavit of Gasela and/or Ms Raboroko and/or Mr Koko referred to *supra*. If these employees were indeed involved in any wrongdoing during the procurement process, it should have been stated and detailed evidence should have been provided which is not the case. The Department also failed to obtain an affidavit of the Chief Financial Officer and/or Keyter, the engineer. Although the court *a quo* did not make mention of the lack of evidence of these persons, I shall during my evaluation *infra* consider the failure to produce the best evidence.

[30] Mr Cassim relied on **Goldblatt v Freemantle** 1920 AD 123 at 129 where the court found that when parties expressly agreed that an arrangement made between them verbally should be reduced to writing, no contract was entered into between them in the absence of proof that the written contract was signed by both. Of course, as set out in **Goldblatt** at 130, a contract may be inferred from conduct, but every enquiry of this kind depends upon its own facts.

Mr Cassim submitted further that Mofomo had to prove all the essentialia of the contract relied upon, also where the Department pleaded a negative.

[31] In *casu* the direct evidence indicates that Mofomo presented the Department with a signed JBCC contract as well as the 10% construction guarantee whereupon the site was handed over and contract works started in accordance with the bid awarded to it. Mr Cassim was not satisfied with Mofomo's version under oath and insisted that it should have provided proof of a JBCC contract, signed by both parties, and that a guarantee was in fact issued on its behalf. Bearing in mind the relief sought by Mofomo and the conduct of the parties since 11 November 2015, it was in my view not necessary to provide further proof. The *ipse dixit* of Mofomo's deponent and managing member was sufficient *in casu.* If the Department wanted to put Mofomo's evidence in contention, it should have presented the evidence of those employees that were intimately linked to the project, to wit Gasela, Koko, Raboroko and Keyter. I would have expected the Chief Financial Officer in particular to testify under oath in this regard. Instead the Department preferred to rely on the second-hand evidence of somebody, apparently an outsider at the relevant time, who perused certain unidentified files after the event. This is exactly what the Supreme Court of Appeal warned against in **Wightman** *supra.* Having read the affidavit of Seoke, it is uncertain whether the Department opened a file for each and every separate project and if that was the

case, what exactly was contained in the applicable file(s).

[32] The mere fact that the Department allowed Mofomo to perform as it did and to receive at least the first *interim* payment is indicative that the Department was satisfied that a proper *vinculum iuris* existed between the parties. The letter of appointment is an acceptance of the offer made by Mofomo when it tendered for the contract. This constituted an agreement. See **Jicama 17 (Pty) Ltd v West Coast District Municipality** 2006 (1) SA 116 (C) at paras [9] to [11] and para [14] of the court *a quo*'s judgment. It was nowhere contended by any of the Department's employees directly involved in the tender process that any of the suspensive conditions had not been met. Prior to the institution of the legal processes herein, it was not the Department's case that the contract was not valid and binding because of the non-fulfilment of any suspensive conditions.

[33] Notwithstanding the above findings there can be little doubt that the bid documents detailed the obligations to be imposed on a successful bidder and Mofomo *in casu.* On all probabilities full details of the contract works would have been provided failing which it would be impossible to submit a bid. Furthermore, the JBCC contract is a standard contract used in the construction industry. Insofar as the JBCC contract might have been a more detailed document than the rights and obligations contained in the bid documents, all that might have happened in the event of

signature by both parties was that the JBCC contract would supersede the agreement brought about by the acceptance of Mofomo's bid. See **Jicima** *supra* with reference to **CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd** 1987 (1) SA 81 (AD) at 92A – E and see also **Command Protection Services (Gauteng) v SA Post Office** 2013 (2) SA 133 (SCA) at para [12]. Insofar as Brand JA found in the last-mentioned judgment at para [25] that the acceptance of the particular tender was not unconditional, but was intended by the respondent and accepted by appellant as a counter-offer, I am of the view that the present matter is distinguishable. There was nothing further to negotiate and Mofomo merely had to present the Department with a signed JBCC contract and construction guarantee which it did. On all probabilities that contract was also signed by the HOD at the time. The Department also received the construction guarantee as stated under oath, otherwise Mofomo would not have been allowed to start with contract works and draw the first progress payment.

[34] Seoke did not have the power to revoke and repudiate the decision of Gasela as he clearly did in his letter of 11 February 2016. The Department was under a duty to approach the court for the review and setting aside of the earlier decision. Neither the HOD, nor the MEC could ignore, revoke and/or repudiate the decision on the ground that it was an invalid administrative action. An

administrative decision must be treated as though it is valid until a court pronounces authoritatively on its invalidity. See **Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another** [2015] 2 All SA 657 (SCA) at paras [14] and [15] and **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute** 2014 (3) SA 219 (SCA) at para [32]. In its counter-application the Department was called upon to disclose the entire process followed prior to the appointment of Mofomo, the reasons for its decision and all relevant documents. In the process the Department as an organ of state seeking to repudiate its own administrative action disobeyed the essential requirements for a review application. The Department had to prove invalidity to the court *a quo*, but failed to do so.

[35] Section 217 of the Constitution is the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of State procurement processes. It reads as follows:

> "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.
>
> 2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for - (a)

> categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> 3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented." (emphasis added.)

[36] In order to comply with s 217(3) the legislature adopted the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA"). "Acceptable tender" is defined in s 1 of the PPPFA as "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". In **Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and others** [2005] 4 ALL SA 487 (SCA) at paragraph [19] Scott JA pointed out that the definition of "acceptable tender" must be construed against the background of s 217 of the Constitution and continued as follows: "In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values."

[37] A tender process implemented by an organ of state is an "administrative action" within the meaning of the Promotion of Administrative Justice Act, 3 of 2000, ("PAJA"). See: **Logbro Properties CC v Bedderson NO and Others** 2003 (2) SA 460 (SCA) para [5]. Therefore Mofomo was entitled to a lawful and procedurally fair process. Furthermore, it is well established that the executive in all spheres are

constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. See: **Sapela Electronics** supra at para [11].

[38] The proper legal approach pertaining to procurement processes was set out in the following *dictum* by Froneman, J in **Allpay Consolidated v Chief Executive Officer, SASSA** 2014 (1) SA 604 (CC) at para [22] which I quote:

> "[22] This judgment holds that:
>
> a. The suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment 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, 3 of 2000 (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."

[39] Froneman J continued in **All Pay** *supra* at paras [28] and [29] to summarise the approach to be followed by a court considering a review application and I quote: "The proper approach is to establish, factually, whether an irregularity occurred. Then 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 requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established." Once this exercise has been completed the court must consider the practical difficulties which may flow from declaring the administrative action constitutionally invalid, bearing in mind the just and equitable remedies provided for in the Constitution and PAJA.

[40] In **Bel Porto School Governing Body and Others v Premier, Western Cape** 2002 (3) SA 265 (CC) Chaskalson CJ stated at para [89] for a decision to be justifiable, ".... it should be a rational decision taken lawfully and directed to a proper purpose." Ponnan JA, relying on **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) expressed himself as follows: "It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given." See **Minister of Home Affairs v Somali Association of South Africa** 2015 (3) SA 545 (SCA) at

para [18]. Nugent JA pointed out in **Minister of Home Affairs and Others v Scalabrini Centre** 2013 (6) SA 421 (SCA) at para [65] that: "… an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary - which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."

[41] In **Metro Projects CC v Klerksdorp Local Municipality** 2004 (1) SA 16 (SCA) Conradie JA said the following in para [13]:

> "In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H - 467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. …… 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."

See also in this regard **Premier, Free State and Others v Firechem Free State (Pty) Ltd** 2000 (4) SA 413 (SCA) at para [30] in respect of the requirement that competitors should be treated equally.

[42] In **Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and another** 2016 (3) SA 1 (SCA) the court reiterated at para [38] that fairness in the procurement process is a value in itself and at para [39] that proper compliance with the procurement process is necessary for a lawful process.

[43] Wallis JA considered objectivity in tender adjudication processes as follows in **South African National Roads Agency Ltd v Toll Collect Consortium** 2013 (6) SA 356 (SCA) at paras [20] – [22] (**"SANRAL"**):

> "[20] As to objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, it requires that the evaluation of the tender be undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude. It does not, and cannot, mean that in every case the process is purely mechanical. There will be tenders where the process is relatively mechanical, for example, where the price tendered is the only relevant factor and the competing prices are capable of ready comparison. The application of the formula for adjudicating preferences under the PPPFA may provide another example. However, the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise and the exercise of judgment on the part of the person or body undertaking the evaluation. That cannot be a mechanical process. The evaluator must decide how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the

> evaluation is not objective. Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.
>
> [21] Where the evaluation of a tender requires the weighing of disparate factors it will frequently be convenient for the evaluator to allocate scores or points to the different factors in accordance with the weight that the evaluator attaches to these factors. But the adoption of such a system, without it being disclosed to tenderers in advance, does not mean that the tender process is not objective. If anything, the adoption of the scoring system enhances the objectivity of the process, because, in the event of a challenge to the award of the tender, the basis upon which the evaluation was undertaken emerges clearly.
>
> [22] The prior disclosure of any such points system …..is not ordinarily required, provided that the basic criteria upon which tenders will be evaluated are disclosed……..Disclosure of any such refined process of scoring in relation to a tender evaluation will only be required if its non-disclosure would mislead tenderers or leave them in the dark as to the information they should provide in order to satisfy the requirements of the tender." (emphasis added).

[44] An administrator is bound to the reasons given for his or her decision. See **Transnet Ltd v Goodman Brothers (Pty) Ltd** 2001 (1) SA 853 (SCA) at para [10]. The unsuccessful bidder has the right to reasons in order to enable him or her to decide or determine whether his or her right to lawful administrative action has been violated or not.

[45] If an unsuccessful bidder would have launched review proceedings in this particular instance, the Department would be duty-bound to present the review court with the record of decision, the reasons for the decision and all relevant documents. In *casu*, it is the Department that wanted to have its own decision reviewed and set aside and there was no reason why it should not have provided the court *a quo* with the record of decision, the reasons for the decision and all relevant documents.

[46] The following *dictum* is apposite in this regard and I quote from **Jockey Club of South Africa v Forbes** 1993 (1) SA 494 (AD) at 660D - F:

> "Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record."

[47] The Department did not attempt to explain what has given rise to Mofomo's appointment and the reasons for such

action. As mentioned, no primary and reliable evidence was tendered. The closest approximation to such an enquiry is an allegation of what was not found. It appears that the Department did not play open cards. In paragraph 16.4 of the answering affidavit Seoke referred under oath to "the submission that was made by the officials, which was placed before the bid adjudication committee and which recommended the appointment of the applicant". He failed to inform us who these officials were, whether the submissions were in writing or verbal and what exactly was submitted. He also failed to provide us with the minutes of the meeting of the bid adjudication committee, but we at least know that this committee received submissions and recommended Mofomo's appointment. Surely, it must have been in writing for Seoke to obtain knowledge of this. Seoke failed to identify the members of the bid adjudication committee. The dearth of evidence, especially direct, cogent and reliable evidence, cannot be sufficient to come to the assistance of an organ of state who alleges that an improper procurement process was embarked upon to such an extent that the process could not be regarded as fair, equitable, transparent, competitive and cost-effective as provided for in section 217 of the Constitution read with all other applicable legislation and regulations. The court *a quo* was correct in finding at paragraph [19], while adopting the reasoning of the Constitutional Court in **Kirland** quoted *infra*, that Mofomo was entitled to be told fully, and provided with all relevant documents and evidence, why the contract was regarded unlawful and unenforceable. I refer again to

the test to be applied in application procedure explained in **Wightman** *supra.*

[48] The mere fact that public bids were not invited through advertisement in the Government Tender Bulletin as a procurement method did not mean that a competitive process was not followed. It is apparent that the Department was entitled to solicit tenders in accordance with notice BN187 of 11 September 2015: Standard for Uniformity in Construction Procurement published in Government Gazette No 39204 in consequence of the Construction Industry Development Board Act, 38 of 2000 ("the CIDB Act"). Sections 4(f), 5(3)(c) and 5(4)(b) authorise the Board to publish and determine the standards fit for procurement in the construction industry. Subsections 4.2.1.1 and 4.2.1.2 deal with the soliciting of bids in accordance with Tables 1, 2 and 3. Table 1, for instance, deals with standard procurement procedures and describes three different ways in which a bid can be procured. Table 3 describes the several methods, procurement procedures and evaluation methods to be followed in respect of different classes of construction contracts. Treasury regulation 16A contains general requirements and must be read with the CIDB regulations and prescriptions as far as standard procurement rules are concerned. Advertisements for bidders to submit bids in respect of construction works contracts in particular shall be placed on the cidb website in terms of these procurement rules. Therefore, unlike as stated under oath and submitted on

behalf of the Department, advertisements in the Government Tender Bulletin were not required. The Department has in any event the authority to deviate from general standards and prescriptions. In **Kwa Sani** *supra* the court found at para [21] as follows:

> "The association submitted that, although a public bidding process admittedly did not take place, this did not necessarily mean that s 217 of the Constitution and the provisions of the MFMA and regulations had not been complied with. It pointed out that regulation 36 of the regulations clearly demonstrates that a public bidding process is not always necessary."

And also at para [27]:

> "Qaukeni is therefore not authority for the proposition that, in all instances where a municipality concludes an agreement with an outside body for the provision of services, a public bidding process is required."

[49] In evaluating the evidence it must also be taken into consideration that Mofomo as an independent contractor and thus an outsider would not know precisely what processes were followed within the Department for the procurement of the particular services. It is precisely for this reason that a record of decision is required from the functionary/organ of state whose decision is to be reviewed and set aside. In *casu* the Department wanted its own decision to be set aside and it was incumbent upon it to place all relevant documents and evidence before the court *a quo* which it manifestly failed to do. Its failure to do so

made it impossible for the court *a quo* to find in favour of the Department, i.e. that its procurement process was not in material compliance with all legal requirements set out in the authorities quoted *supra.*

[50] **Kirland** *supra* was taken on appeal to the Constitutional Court and in **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute** 2014 (3) SA 481 (CC) at para [65] Cameron J held as follows:

> "When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take short cuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what has been done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed."

[51] The effect of the last two sentences of the quotation in the previous paragraph is that the enquiry does not stop simply at whether the appointment was unlawful. The court must upon a declaration of invalidity make an order in terms of s 8 of PAJA, according to what justice and equity dictate. See **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African**

**Social Security Agency and Others** 2014 (4) SA 179 (CC) (the second Allpay judgment) at para [61] and further. In *casu* the Department's simple allegation that no valid tender process was followed is in itself insufficient and it was not even necessary to consider a just and equitable remedy consequent upon a finding of unlawfulness. See **Kwa Sani** *supra*.

[52] There is no merit in any of the grounds of appeal.

## VII CONCLUSION

[53] The above evaluation can lead to only one conclusion and that is that the appeal cannot succeed and should be dismissed with costs.

## VIII ORDER

[54] Consequently the following order is issued:

**1.** The appeal is dismissed with costs.

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**J. P. DAFFUE, J**

I concur.

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**L.J. LEKALE, J**

I concur.

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**S.P.B. HANCKE, J**

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|---|---|
| On behalf of the appellant: | Adv. N. A. Cassim SC<br>with Advocates B. Mene and<br>N. Khooe<br>Instructed by:<br>State Attorney<br>BLOEMFONTEIN |
| On behalf of the respondent: | Adv. S. Grobler<br>Instructed by:<br>Graham Attorneys<br>BLOEMFONTEIN |

/eb