

✓ 21/12/2017.

1

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

Case Number: 89232/2015

(1) REPORTABLE: <del>YES</del> NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED YES/NO
21.12.2017
DATE
SIGNATURE

In the matter between

**Mabotwane Security Services CC**

**Applicant**

and

**Pikitup Soc (Pty) Ltd**

**First Respondent**

**Fidelity Security Services (Pty) Ltd**

**Second Respondent**

**Invula Quality Protection (Pty) Ltd**

**Third Respondent**

and

In the matter between

Case number: 11547/16

Mabotwane Security Services CC

Applicant

and

Pikitup Soc (Pty) Ltd

First Respondent

Sidas Security Guards (Pty) Ltd

Second Respondent

---

## JUDGMENT

---

**Carelse J:**

### Introduction

[1] During 2012, the applicant, Mabotwane Security Services CC (Mabotwane) was awarded a fixed-term contract with the first respondent, Pikitup SOC (Pty) Ltd (Pikitup) from 1 July 2012 until 30 June 2015, which was extended from 1 July to 30 September 2015, and, again, from 1 October to 30 November 2015, pursuant to Regulation 32 of the Supply Chain Management Regulations (SCM). During May 2015, Pikitup invited bids by way of a tender document with number PU446/2014 (the first tender). From inception, the project required a budget of approximately R100m. Pikitup however, was only able to allocate an amount of R78 674 000.00. As a result of the shortfall Pikitup would not have sufficient security guards at its garden sites, which it regarded as unsafe. Notwithstanding its budget shortfall, Pikitup elected to proceed with the tender process, whilst it undertook a parallel process in an attempt to secure the budget shortfall.

[2] Prior to the finalisation of the evaluation process and pertinently prior to any recommendation by the Bid Evaluation Committee (the BEC) of a preferred bidder, Pikitup elected to cancel the first tender process for the following reasons: despite various endeavours by Pikitup, as at October 2015, it had failed to secure the budget shortfall and, based on a report by Sizwe Ntsabula Gobodo, an auditing firm, a number of material deficiencies in the tender process were found to exist. As a result hereof, the accounting officer took a decision not to award the tender to any of the tenderers but instead elected to cancel the process.

[3] Soon after cancelling the first tender, Pikitup published a second tender under tender number PU12/2015 (the second tender) for the provision of security services. Shortly thereafter, around 4 November 2015, the applicant launched an urgent application consisting of a Part A and Part B, under case number 89232/15 (the cancellation application) which was set down for hearing on 17 November 2015 in respect of the relief sought in Part A only.

[4] In Part A of the cancellation application, the applicant sought an order *inter alia*: to restrain Pikitup from awarding the second tender and further from appointing any security provider through any procurement process other than appointing the applicant, pending the finalisation of Part B of the cancellation application. In Part B of the cancellation application the applicant sought an order *inter alia*: reviewing and setting aside of the second tender, reviewing and setting aside of the first tender and remitting it back for reconsideration of the first tender.

[5] Pikitup gave an undertaking in relation to Part A of the cancellation application that it would not proceed with the second tender. I revert to the reasons for the cancellation of

the second tender later in the judgment. In view of Pikitup's undertaking an order removing the matter from the roll with costs reserved, was granted.

[6] Mabotwane's contract was due to expire in June 2015, but it was extended until November 2015. This resulted in the impasse that by the end of November 2015, Pikitup would have had no guarding services. Pikitup proceeded to appoint the second respondent in case no 11547/2016, Sidas Security Guards (Pty) Ltd (Sidas) under reference number DPM012-2015, for the provision of physical security services for a period of 12 months, which was renewable.

[7] This appointment gave rise to a second application (the Sidas application) in which the applicant seeks an order *inter alia*: reviewing and setting aside of the appointment of Sidas and a declaration that any resulting contract entered into between Pikitup and Sidas is invalid and unenforceable.

[8] Prior to the hearing of this matter and before another court, Pikitup sought a consolidation of both the cancellation as well as the Sidas applications. On 19 May 2017 consolidation of the applications was granted. The primary relief the applicant seeks is a review brought under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). I pause to mention that no interdictory relief is sought in the Sidas application.

[9] I propose to deal with the issues arising in this case under four main headings, firstly, the cancellation of the second tender, secondly, the cancellation of the first tender, thirdly, the Sidas application and, fourthly, the issue of costs.

### **The parties in the cancellation application**

[10] Mabotwane is the erstwhile service provider of security services to Pikitup. Pikitup



is a state owned company, wholly owned by the City of Johannesburg, subject *inter alia* to the Municipal Laws and Regulations/Policy, which includes the Municipal Finance Management Act (MFMA) as well its Supply Chain Management Regulations/Policy (SCM). The applicant manages 266 security guards. The second and third respondents, Fidelity Security Services (Pty) Ltd (Fidelity) and Imvula Quality Protection (Pty) Ltd (Imvula) respectively, are both security service providers and two of the three shortlisted bidders in regard to the first tender. Fidelity filed an answering affidavit and only seeks costs relating to the urgent cancellation application. Imvula does not oppose the relief sought in the cancellation application.

#### **The parties in the Sidas application**

[11] The parties are Mabotwane and Pikitup. Sidas is cited as the second respondent and has elected to abide the decision of this court.

#### **Common cause facts**

[12] A summary of the background facts, which are largely common cause, is the following. The contract between Mabotwane and Pikitup was not cancelled but as I have alluded to, expired by the effluxion of time. The procurement of goods or services by an organ of state requires compliance with applicable legislation, read with the SCM Regulations/Policy. Pikitup is required to properly plan and accurately estimate the costs for the provision of services. Pikitup's operations are funded on the basis I shall revert to. Pikitup is wholly owned by the City, together with various other municipal owned entities (MOE), for the delivery of the various categories of municipal services. Pikitup delivers services directly to residents and the City charges the residents for

services and recovers the money directly from residents through its billing system. Pertinently, Pikitup does not derive income directly from residents but rather from the City.<sup>1</sup>

[13] The City approves a consolidated three-year income and expenditure budget around May/June of each financial year. The budget is based on information furnished by the City's core departments as well as from the MOE's and makes approvals for the next financial year. Such approval is for the *actual budget* and for subsequent financial years. The City approves *estimated budgets*<sup>2</sup> and the possibility of revising of the budgets exists but there are no guarantees that revision will take place.<sup>3</sup>

[14] The budget is important to the extent that it constituted the funds that are made available by the City to Pikitup. Pikitup is limited to the budget amount it receives. Pikitup submitted a written request for the estimated costs of approximately R100m. Pikitup's budget was approved in June 2015 in an amount of R78 674 000, 00, in respect of the financial year end 2015/2016, as well as the estimated budgets for the financial years 2016/2017 and 2017/2018 and 2018/2019 (3 months).<sup>4</sup> On 5 and 6 July 2015 Pikitup published an invitation for bids for security services for a three year period under the first tender.

[15] The evaluation of the bids received follows through from September 2015 until October 2015. Three final competitors were identified, the applicant, Fidelity and Imvula. The bids submitted were for the amounts R110 171 366.18 by Mabotwane,

---

<sup>1</sup> Consolidated answering affidavit page 1409 para 70,71,73

<sup>2</sup> Consolidated answering affidavit page 1410 para 74

<sup>3</sup> Consolidated answering affidavit page 1410 para 76

<sup>4</sup> Consolidated answering affidavit page 1419 para 88

R130 383 793.26 by Fidelity and R133 849 644.68 by Imvula. It bears mentioning that the tenders all exceeded the budget approval amount of R78 674 000.00. One of the BEC members, Mr Nkadimeng, was delegated to seek an additional R 27m. However, an amount of R9m was made available, leaving a shortfall of R18m. It was eventually recommended that the BEC enter into negotiations with the preferred bidder in the light of the budget shortfall. Pikitup submits that negotiations with the preferred bidder, with the view to reduce the scope of the services, were not considered as an option.<sup>5</sup> This is not disputed by the applicant. Although the BEC's evaluation yielded Mabotwane as the best bid, BEC finally did not resolve to award the tender to it. Again, this has not been challenged. Pertinently and undisputedly, it is not the BEC that awards the tender: the Bid Adjudication Committee (BAC) is tasked to make the final decision. It is not disputed that no decision to award the tender to the applicant was made. On 14 October 2015 before a final decision was taken by the BAC, Mabotwane's attorneys wrote a letter to Pikitup, stating the following;

"We are acting on behalf of our above named client that is Mabotwane. Our instructions are that it came to our client's knowledge that Pikitup is in the process to cancel the above tender which our client finds it very difficult . . ."

[16] On 16 October 2015, the Managing Director took a decision to cancel the first tender. On 19 October 2015, Mr Dekker, on behalf of Pikitup, wrote to Mabotwane informing it that no acceptable tenders were received and that Pikitup would re-advertise. On 20 October 2015 Mabotwane sent a request to Pikitup for documentation. Pikitup undertook to respond within 30 days, in terms of the Regulations. After a further

---

<sup>5</sup> Consolidated answering affidavit page 1433 para 124 - 128



letter from the applicant's attorneys, Mr Dekker on behalf of Pikitup responded as follows:

'Your client is in possession of information that was not made public but known only to officials within Pikitup. How the information came into your possession and the effect thereof and the regularity of tender proceedings is likely to be a matter of evidence in adjudication. Clearly there was unlawful disclosure of information and or interference at some point and as previously stated this itself is grounds for cancellation.'

**The cancellation application.**

[17] I turn now to deal with the cancellation of the second tender. Mabotwane has not formally withdrawn the relief sought in respect of the second tender. However, in its heads of argument Mabotwane gave notice that it no longer persists with the relief for the review and setting aside of the second tender.

[18] Pikitup submits that resulting from a breach of its confidential information which had found its way into the hands of Mabotwane, it was unable to verify the integrity of the second tender. As a result thereof, on 10 November 2015, Pikitup's attorneys' wrote to Mabotwane informing them that it has elected to cancel the second tender and re-advertise a new tender. Pikitup proposed to the applicant that there was no need to persist with the relief sought to review and set aside the second tender, but this elicited no response.

[19] Mabotwane however, refused to withdraw the urgent application and insisted on the parties filing answering affidavits and informed them that the matter was set down for the hearing of Part A of the cancellation application, on 17 November 2015. In my view, having regard to the undertaking as well as the indication by Mabotwane that it was no longer pursuing the relief sought relating to the second tender, Pikitup, in my view



correctly, submits that the relief has become moot. All that remains in respect of Part A is the issue of costs, to which I will revert later in the judgment.

[20] Next, I turn to deal with the decision to cancel the first tender. I have already alluded to the reasons for the cancellation.

[21] The relief sought is twofold: firstly, the review and setting aside of the decision to cancel the first tender and secondly, the remittal of the first tender for reconsideration.

[22] In its consolidated answering affidavit Pikitup raises a point *in limine*, that the decision to cancel the first tender does not constitute administrative action as defined in PAJA. In argument it became apparent that Pikitup's arguments were not directed at whether or not the decision to cancel was reviewable in the circumstances, but, whether or not Pikitup was entitled to cancel the first tender, without having afforded the tenderers an opportunity to make submissions. The nub of Pikitup's argument was that the decision to cancel was not administrative but executive and for that reason not subject to judicial review in terms of PAJA. The Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd*<sup>6</sup> has held that a decision taken by an organ of state (the Municipality) to cancel a tender does amount to an administrative action. In *Nambiti*, the Municipality issued a tender inviting companies to bid for the provision of IT services. After the tenders were submitted but before the adjudication process the Municipality decided to cancel the tender and re-advertise for the reason that no need for the services any longer existed. Nambiti was one of the bidders and dissatisfied with the decision to cancel.

---

<sup>6</sup> [2016] 1 All SA 332 (SCA).

[23] In *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others*<sup>7</sup> the SCA held because of ' . . . the long delay in the tender evaluation process, SAPS could not continue with the tender as its business requirements had changed and had to be reviewed since those specified in the tender no longer addressed its 'current' business requirements. . . .<sup>8</sup> As in *Nambiti*, the Supreme Court of Appeal in *SAAB* held that on the facts of the matter, the decision to cancel did not constitute administrative action.

[24] On the other hand the applicant relies on the judgment in *Logbro Properties CC v Bedderson NO and Others*<sup>9</sup> in support of the contention that the decision to cancel the tender is reviewable in terms of PAJA. In *Logbro* a tender for the sale of property in Kwa Zulu Natal was at issue: the tender board decision not to award the tender was based on three years having passed with resultant increased prices. The decision making process was reviewed and referred back for reconsideration.

[25] In *Logbro*, the Supreme Court of Appeal held that, applying the *audi alteram partem* principle, the tenderers must be informed prior to cancellation of the tender as they may want to make submissions. It is only then that a cancellation of the tender can properly be considered and made.

[26] In *Logbro* the Kwa Zulu Provincial Government still wanted to sell the property whereas in *Nambiti* and *SAAB* a need for the services tendered no longer existed. In the present matter Mabotwane contends that Pikitup still wanted to procure security services and that it accordingly was obliged prior to the cancellation to afford the tenderers an opportunity to make submissions. I pause to mention that a distinguishing

---

<sup>7</sup> 316/2015[2016ZASCA04; [2016]3ALL SA 669(SCA)

<sup>8</sup> *SAAB* page 18 par 28

<sup>9</sup> 2003(2) SA 460 (SCA)

feature between this case and *Logbro* is that the Kwa Zulu Natal Provincial Government awarded the tender to Logbro. On appeal the court set aside the award and referred the matter back for reconsideration. It was during the reconsideration stage that the Kwa Zulu Natal Provincial Government elected to cancel the tender. In contrast, in the present matter no decision to award the tender was made prior to cancellation.

[27] Applying the above to this case, the decision to cancel the tender, in my view, is reviewable. I derive support for the view I hold from the judgment in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC*.<sup>10</sup> However, the matter does not end there. The crucial issue I am required to determine is whether, on the facts of this case, Pikitup, prior to its decision to cancel, should have afforded the tenderers an opportunity to make submissions.

[28] Pikitup's reasons for cancelling the first tender, in my view, are of such nature that it was entitled to cancel the first tender without affording the tenderers an opportunity to make submissions.

[29] Pikitup submits that it is permissible to cancel in circumstances where the funds budgeted for are insufficient for the total expenditure.<sup>11</sup> In reply, the applicant does not dispute the fact that the first tender was cancelled as a result of budgetary constraints as well as discrepancies found by the auditing firm Sizwe Ntsabulo Gobodo.<sup>12</sup> The reasons given for the cancellation under Rule 53 have not been challenged in reply, so Pikitup submits.

---

<sup>10</sup> [2017] ZASCA 30

<sup>11</sup> Consolidated answering affidavit page 1401 par 59 -61.

<sup>12</sup> Replying affidavit page 1622 para 27-28.



[30] Mabotwane submits that the first tender was cancelled for ulterior purposes. Firstly, the reasons for cancellation were not disputed and neither has any evidence been provided to support the allegation that the tender was cancelled for ulterior purposes or an improper motive. It is in any event not borne out by the facts of this matter.

[31] It is undisputed that the first tender was cancelled as a result of budgetary constraints; that the prices offered by the applicant, Fidelity and Imvula (the final three bidders) were in excess of the approved budget of R78 674 0000.00 and that no award of the tender was made nor a recommendation made by either the BEC or the BAC to award the tender to the applicant.

[32] It is Pikitup's case that Regulation 8(4) of the Preferential Procurement Policy Regulations (PPPFA) is fatal to the applicant's case. When Pikitup took the decision to cancel the first tender, it did so under the auspices of a power preserved to it under its Regulations/Policy. Regulation 8(4) of the PPPFA provides:

'An organ of state may, prior to the award of a tender, cancel a tender if –

- (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
- (b) funds are no longer available to cover the total envisaged expenditure;  
or
- (c) no acceptable tenders are received.'

[33] Mabotwane submits that Reg 8(4)(b) must be interpreted to mean that the funds that were once available have now ceased to be available and it therefore does not assist Pikitup. Pikitup relies on what it submits is a 'sensible' interpretation of the Regulation to the extent that it could never have been envisaged that Municipalities would be compelled to embark on procurement policies that they cannot afford. I agree

that it could never be suggested that Regulation 8(4)(b) prevents it from cancelling because they only have part of the funds available. Originally Pikitup was given an approved budget of R78 674 000,000. It requested approximately R100 million. Notwithstanding the approved budget Pikitup remained hopeful that more funds would become available. This, as I have mentioned, did not happen.

[34] Mabotwane relies on the judgment in *Valozone 268 CC* in which the Supreme Court of Appeal<sup>13</sup> set aside the cancellation of the tender because the cancellation did not fall within the ambit of Regulation 8(4) of the PPPFA. In *Valozone*, the justification for the cancellation was premised on the fear of litigation and it was held that the cancellation did not fall under (a), (b) or (c) of Regulation 8(4).

[35] In my view on a proper interpretation of Regulation 8(4)(b), Pikitup's budgetary constraints fall within its the meaning. The facts in this case are distinguishable from the facts in *Valozone 268 CC* to the extent that the reason for cancelling the tender in this case falls squarely within the meaning of Regulation 8(4)(b) of the PPPFA, whereas in *Valozone 268 CC* the reason for cancelling the tender fell outside the ambit of Regulation 8(4) of the PPPFA.

[36] The crux of Mabotwane's case concerns the application of the *audi* principle, in respect of which the Supreme Court of Appeal in *Logbro* held that "... the committee before deciding not to award the tender in 1997 should have given the appellant an opportunity to make representations, at least in writing, on the significance of the price increase."<sup>14</sup> In *Valozone 268 CC* the Supreme Court of Appeal held '...It is however, a requirement of a

---

<sup>13</sup> Par [17 and [18]

<sup>14</sup> *Logbro* para [23]

fair, equitable and transparent procurement system in terms of s 217 of the Constitution that a tender properly issued, may not be cancelled without good reason.<sup>15</sup> In my view *without good reason* envisages a situation where a cancellation does not fall within the ambit of Regulation 8(4) of the PPPFA.

[37] I do not understand the decision in *Logbro* to mean that there is always a right to a hearing in the event of a cancellation. There may well be circumstances in which it will be necessary to afford a party a hearing particularly as was the case in *Logbro* where the appellant was entitled to persuade the committee that its 1995 offer would be more advantageous, than a call for fresh tenders.

[38] Pikitup submits that under subparagraph 5.4 of its Supply Chain Management Policy (SCM) it enjoys the right to cancel any tender at any time before the award is made based on the same grounds as those set out under Regulation 8(4) of the PPPFA. I agree.

[39] Pikitup correctly submits that Regulation 8(4) empowers it to expressly cancel a tender where it does not have the budget. Because the cancellation of the tender falls within the parameters of Regulation 8(4) of the PPPFA, there is no requirement to afford the parties a hearing before cancelling the tender. There is no requirement in the Regulations that if there is a decision to cancel in terms of Regulation 8(4) of the PPPFA, the tenderers must be afforded a hearing prior to cancellation. In any event there is no challenge to the Regulations. Since the budgetary constraints have not been disputed, the cancellation falls within the ambit of Regulation 8(4)(b), thereby lawful, and justifiable.

---

<sup>15</sup> *Valozone* supra [16]



### **The Sidas application**

[40] On 26 November 2015, Pikitup appointed Sidas under reference number DPM 012-2015, which Mabotwane seeks to review. Mabotwane submits that the award to Sidas is tainted with ulterior motives and that Regulation 32 of Pikitup's SCM Regulations/Policy should have been applied. Further, that the appointment of Sidas was made contrary to the provisions of paragraph 33 of Pikitup's SCM Policy and in particular to par 53.3, which provides:

'53.3.1 The accounting officer may or delegate negotiate the final terms of the contract with bidders identified through a competitive bidding process, as preferred bidders , provided that such negotiations:

53.3.1.1 does not allow any preferred bidder a second or unfair opportunity;

53.3.1.2 is not to the detriment of other bidders;

53.3.1.3 does not lead to a higher price than the bid as submitted

.....

53.3.4 The direct negotiation is using the mechanism in the case of emergency, and the details regarding the recording of emergencies noted under the heading for emergency procurement."

53.3.4 Urgent and Emergency Procurement provides as follows:

"53.4.1 When the user department identifies an emergency it must either involve the SCM unit or the accounting officer, or the CFO by contacting them. The emergency is to be certified by the manager of the user department as an emergency and submitted to the SCM unit for processing;

.....'

[41] Section 8 of Pikitup's SCM Policy pertinently requires the procurement process to be transparent, all bidders must receive equal treatment, be cost effective, efficient, competitive, fair, open and there should be value for money.

[42] Simply put, the main complaint of the applicant is that Pikitup should have approached more than one service provider for pricing in order to ensure competitiveness and transparency.<sup>16</sup> Instead, Pikitup negotiated with only one service provider, Sidas. As a result Mabotwane submits, Pikitup disregarded the requirements of s 217 of the Constitution, to the extent that Pikitup did not want to be bound by an open tender process, they simply appointed Sidas in an amount exceeding the first tender. The applicant further submits that it is only after an open competitive tender process that one may enter into direct negotiations.<sup>17</sup> Negotiating directly, in an open tender process is contrary to the provisions of paragraph 33 of Pikitup's SCM Policy, so the applicant submits.

[43] On or about 2 February 2016, Mabotwane launched a review application seeking an order setting aside the appointment of Sidas by Pikitup for the provision of physical security services on an interim basis. It is not disputed that Pikitup's decision to appoint Sidas was a deviation from the ordinary competitive process. The appointment of Sidas was made in terms of Regulation 36 of the Supply Chain Management Regulations.

[44] The nub of the applicant's complaint in the Sidas application is that the appointment of Sidas on an interim basis in the context of the relevant legislation is impermissible and amounts to an award through the back door.

---

<sup>16</sup> Section 8 of the SCM Policy see paragraph 39

<sup>17</sup>

[45] In Part A as well as Part B of the cancellation application, Pikitup repeatedly stated that it cannot operate without security services. It refers to industrial action in the form of protests and strikes where lives were at stake, so Pikitup submits. None of these allegations were disputed in reply to the cancellation application.

[46] Pikitup submits that it was entitled to deviate from its competitive bidding processes only in limited circumstances and only in terms of the provisions of its SCM Regulations/Policy. Pikitup further submits that it was open to invoke either Regulations 32 or 36 for the reasons I will revert to.

### **The Legal Framework**

[47] Regulation 32 provides:

‘a supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state only in the event that:<sup>18</sup>

43.1 the contract has been secured by that organ of state by means of a competitive bidding process applicable to that organ of state;

43.2 the municipality or entity has no reason to believe the contract concerned was not validly procured;

43.3 there are demonstrable discounts or benefits for the municipality or entity to do so; and

43.4 both the other organ of state and the service provider have consented to the anticipated procurement in writing.’

---

<sup>18</sup> Regulation 32(1)(a) to (d) of the SCM Regulations.



[48] Regulation 36 permits the SCM Policy to allow the Accounting Officer to dispense with the official procurement processes established by the policy to procure any required goods and services through any convenient process, which may include direct negotiations, but only *inter alia* in an emergency<sup>19</sup>. Having regard hereto Pikitup correctly submits that deviations are permitted provided the deviations accord with Regulation 32 or 36 of the SCM Regulations. Similarly, Clause 14 of Pikitup's SCM Policy provides:

**"14 DEVIATION FROM OFFICIAL PROCUREMENT PROCESSES**

14.1 The Accounting Officer may dispense with the official procurement processes established by the policy to procure any required goods or services through any convenient process, which include direct negotiations, but only

14.1.1 For emergency procurement

14.1.2 For an urgent procurement

14.1.3 . . .

14.1.14 In any other exceptional case where it is impractical to follow the official procurement processes."

Clause 15 of the SCM Policy provides:

**"15 DISPENSING WITH OFFICIALLY ESTABLISHED PROCUREMENT PROCESSES**

15.1 Official procurement processes shall only be dispensed with and any convenient process used which may include direct negotiations if justification

---

<sup>19</sup> Regulation 36(1)(a)(i) to (v) of the SCM Regulations

exists and the necessary approval has been obtained within the framework of the Delegation document;

15.2 Pikitup will use limited bidding only in the following exceptional circumstances:

15.2.1 Where Pikitup applied the competitive (open) bidding process, but the bids received were non responsive, thus the time required to go out on the same process has elapsed;

...

15.10 In any other exceptional circumstances where it is impractical or impossible to follow the official procurement processes."

The SCM Policy expressly provides that in appropriate circumstances Pikitup can enter into direct negotiations to the extent that it does not compromise the fairness of a given tender process.

#### **"15.11 DIRECT NEGOTIATION**

15.11.1 Direct negotiations shall only be permitted after approval by the Accounting Officer or the delegate and shall be conducted in such a manner that none of the stakeholders is advantaged or prejudiced. Thus care should be taken to ensure that such a process does not allow the bidder concerned a second (unfair) opportunity and is not to the detriment of any other bidder:

Direct negotiations may only take place under the following circumstances:

- a. In cases of urgency due to unforeseen circumstances where lack of planning or negligence did not play a role and where following the standard competitive bidding process or the process prescribed for urgency would not be in Pikitup's best interest. (see underlining)
- b. ....

Clause 15.12 of the SCM Policy provides:

**'15.12 URGENCY AND EMERGENCY PROCUREMENT**

15.12.1 Irrespective of monetary value, an urgent or emergency procurement process will only apply in serious, unexpected and potentially dangerous circumstances where require immediate rectification;

15.2.2 ...

15.2.3 Emergency cases are cases where immediate action is necessary in order to avoid dangerous or risky situations or misery. These are defined as:

15.2.3.1 Threats to human life

...

15.2.3.5 Threat of major consequential expense to Pikitup and the City;

or

...

15.2.4 the standard procurement processes will be bypassed. Pikitup may dispense with the invitation of bids and may obtain the requirement by means of quotations by preferably making use of the list of accredited prospective providers or otherwise in any manner to the best interest of Pikitup . . .



Having regard to Clause 15 of the SCM Policy, whilst compliance with official procurement processes is a general rule, there are these exceptions.

[49] Firstly, because of the review application Pikitup did not want to procure a contract of long duration and opted for a short term contract pending the review application. Secondly, Pikitup did not want to award the short term contract to any of the parties cited in the review application instituted by the applicant. It therefore elected to exclude the applicant, Fidelity and Invula.

[50] Pikitup avers that it considered three options under Regulation 32 of its SCM Regulations. Firstly, whether or not to procure the services of the applicant through the existing contract. Secondly, whether or not to procure the services of Invula through an existing contract. Thirdly, whether or not to procure the services of Sidas through an existing contract. Pikitup rejected the applicant for the following reasons: the applicant was a party to the cancellation application (review); the applicant's first appointment was based on a contract between itself which was due to expire on 30 November 2015 and pertinently the applicant's alleged breach of trust to the extent that the applicant obtained confidential information of Pikitup whilst the applicant was rendering guarding services. Pikitup rejected Invula because it was also cited as a party in the cancellation application (review). Pikitup elected not to appoint Sidas in terms of Regulation 32 because of the existing terms and conditions on which Sidas was rendering services to the City of Tshwane and would have bound Pikitup to the full duration of the contract which it did not want to do.

[51] Pikitup elected not to apply Regulation 32 because it would have given it a limited period of one year and there was a prospect that the cancellation application might take longer than a year. Pikitup submits that it is more expensive to appoint on a limited contract and also did not want to, at the end of the one year, appoint a new contractor if the cancellation application was not yet finalised. None of the foregoing was disputed in reply. It is for these reasons that Pikitup correctly in my view, applied Regulation 36 of its SCM Policy/Regulations in which it applied completely new criteria, not the criteria adopted in the first tender. This is not disputed.

[52] The first tender was cancelled on 16 October 2015 and the second tender on 16 November 2015. The applicant's contract with Pikitup was ending on 30 November 2015. Pikitup literally had 14 days to come up with a new contract to provide physical security services. Given the foregoing it is Pikitup's case that given the risks of not having a security service provider appointed, in order to avert the risks it had to consider alternative procurement processes, within the ambit of its legal framework on an expedited basis.

[53] Pikitup explains that it addressed a memorandum for approval to the accounting officer in the following terms: 'Request for mandate to negotiate with Sidas Security Services for the provision of physical security services,' for a period of 12 months with the option to renew for a further two periods. It is not disputed that on 17 November 2015, the recommendation was approved in terms of Pikitup's SCM Policy, by the General Manager, the Acting Executive Financial Services Manager and the Accounting Officer. Pikitup submits that because it was going to find itself in a dangerous position Regulation 36 makes provision for the deviation from the normal competitive bidding

process to procure services which includes direct negotiations, so Pikitup submits. Its deviation was justified to the extent that the appointment of a service provider post 30 November 2015 was urgent and was an emergency and its SCM Regulations empowered it to deviate from the normal processes, which deviation included emergency negotiations, so Pikitup submits. The procurement chain process is not denied neither is the appointment of Sidas denied pursuant to the chain of command. The complaint by the applicant that there has been no proper compliance with the procedures of the Supply Chain Management Policy, in my view is not sustainable.

[54] Regulation 36 of Pikitup's SCM Regulation/Policy clearly allows the accounting officer to dispense with the official procurement processes established by the relevant policy and to procure any services through any convenient process which may include direct negotiations but only in an emergency situation is correctly submitted by Pikitup.

[55] The applicant submits that the terms of the Sidas appointment demonstrates that Pikitup's contention that its budgetary constraints informed the cancellation of the first tender, is simply not true because Pikitup appointed Sidas at a price of approximately R119m. This is factually incorrect Pikitup submits, as Sidas has only been appointed for a 12 month period (interim period) with the option of renewal and the contract can be cancelled on 10 days' notice. Pikitup conceded that the amount for the first year which was allocated to Sidas is R36m, which is more than the amount under the first tender. The reason for this is when one submits a price for a three year project against a short term project a profit may be derived over the three period, which is not the case in the short term project.



[56] Mabotwane's submission that Sidas was appointed for an ulterior purpose is plainly without merit. Pikitup submits that the 'sole purpose' for it deviating from its ordinary procurement processes was to ensure the integrity of its security. Nowhere in the papers is it alleged that Sidas was the preferred bidder because of an improper relationship and the explanation why Sidas was appointed in my view is illusory. I conclude that the appointment of Sidas was neither irrational nor unreasonable.

### **Costs**

[57] Fidelity seeks the costs relating to Part A of the cancellation application. Fidelity was cited as a party in the cancellation application but no relief was sought against it. Pikitup seeks costs of the hearing on 17 November 2015 in respect of Part A; Part B in the cancellation application and the costs of the Sidas application, including the costs of two counsel on an attorney client scale. The basis for seeking the costs of 17 November 2015 is that, notwithstanding the undertaking given by Pikitup to withdraw the second tender, Mabotwane persisted with the urgent application on 17 November 2015. In my view, given the undertaking by Pikitup, it was not necessary to proceed with the urgent application and Mabotwane, accordingly, must bear the costs of 17 November 2015, including the costs of two counsel.

[58] The costs sought by Fidelity of 17 November 2015, is a slightly different matter. Fidelity seek costs on a party and party scale in respect of Part A of the cancellation application, thus the hearing in the urgent court on 17 November 2015, in terms of Rule 41(1)(c) of the Uniform Rules of Court. Rule 41(1)(c) provides 'If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs'.

[59] Even though no relief was sought against Fidelity in Part A of the cancellation application, it filed an answering affidavit. Fidelity, at best, may have had an interest in Part B of the application. On 17 November 2015, the matter was removed from the roll. Part A of the cancellation application was not withdrawn. The submission that Part A of the application was abandoned which was tantamount to a withdrawal, is misconceived. Since there was no withdrawal of the application the jurisdictional fact required to invoke Rule 41(1)(c), has not been met. The application in terms of Rule 41(1)(c) accordingly, is misconceived and must fail.

[60] Pikitup seeks costs under part B of the cancellation application in the event It is successful. At the hearing of the matter the applicant submitted that it was no longer persisting with the relief relating to the second tender. Pikitup seeks the costs of preparation in relation to the second tender. Pikitup submits that Mabotwane should be mulcted with a punitive costs order because it has pursued 'hopeless' litigation, has refused to disclose the source of the confidential information and further failed to file a confirmatory affidavit in relation to the source of the confidential material. Mabotwane was placed in a position of trust when it came in possession of confidential material belonging to Pikitup. At the very least, a confirmatory affidavit from its employee who found an envelope containing the confidential information, was required. No explanation has been given why this was not done. Under the circumstances this court marks its displeasure with the applicant's conduct in so far as the confidential information of Pikitup is concerned, in ordering punitive costs. Likewise, as for the costs of the Sidas application, no good reason exists for those costs not following the result.

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

1. Part B of the cancellation application is dismissed with costs, including the costs of two counsel, on the scale as between attorney and client.
2. Mabotwane is to pay the costs of part A of the cancellation application, including the costs of two counsel, on the scale as between attorney and client.
3. The costs of 21 June 2017 is to be paid by Fidelity, including the costs of two counsel.
4. The Sidas application is dismissed with costs, including the costs of two counsels on an attorney and client scale.

---

**Z Carelse**  
**Judge of the High Court**

**Appearances:**

**Counsel for the Applicants : Mr Snyman and Mr Makgatho**

**Instructed by : Albert Hibbert Attorneys**

**Counsel for Fidelity : Mr Luthuli**

**Instructed by : Blake Bester De Wet & Jordaan Inc**

**C/O Van Stade Van Der Ende**

**Counsel for Pikitup : Mr Leech and Mr Stubbs**

**Instructed by : Bowman Gifillan Inc**

**Date of judgment : 21 December 2017**