



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 31304/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
	26 May 2023
	DATE

In the matter between:

SKY METRO EQUIPMENT (PTY) LTD

APPLICANT

And

**THE WHOLESALE AND RETAIL SECTOR
EDUCATION AND TRAINING AUTHORITY
(W&RSETA.)**

FIRST RESPONDENT

**ALTRON TMT (PTY) LTD trading as
ALTRON DOCUMENT SOLUTIONS**

SECOND RESPONDENT

DISCLAIMER

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/ their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the judge or his secretary. The date of judgment is deemed to be 26 May 2023.

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicant brought an application for a review and setting aside of the award of a tender under bid number WRSCM-2021/2022 – 0028 which was awarded to second respondent by the first respondent on 3 February 2022. The applicant contends, *inter alia*, that the integrity of the bid evaluation was vitiated by irregularities and was not in compliance with the Preferential Procurement Policy Framework Act 5 of 2000 (*PPFPA*) as the second respondent's bid did not comply with the tender specifications.

[2] Both first and second respondents have served notices of intention to oppose the application. The first respondent served answering affidavit and heads of argument whereas the second respondent only served its heads of argument and did not serve an answering affidavit.

Background

[3] The first respondent in September 2021 published an invitation to tender for the supply, installation, support and leasing of multifunctional printers (*goods and services*) for a period of 5 years. The period of 5 years was subsequently reduced to 3 years. The services and goods were to be installed at its regions and TVET colleges in South Africa. The tender specification required that “... *the appointed service provider should conform to the following: provision of Centrally managed print solution, Multifunctional devices, provision of maintenance and support of the Solution and devices for the 5-year period and provision of toner cartridges and consumables for the duration of the contract*”.¹

[4] The bid evaluation process had three stages. First, compliance with administrative/mandatory requirements, secondly, technical evaluation for which a bidder should meet 80% threshold to proceed to the next stage and lastly evaluation on pricing and preference points system. The first respondent received eight (8) bids and one (1) was disqualified for failing to satisfy the administrative requirements. Five (5) of the seven (7) bidders including the applicant and second respondent who went through the first stage met the 80% threshold on the technical evaluation stage and proceeded to the final stage. The second respondent’s pricing was the lowest at R5 091 291.73 and the bid was then awarded to it. The applicant’s bid was the second lowest in terms of pricing at R5 645 185.73 and its bid together with the other bidders were unsuccessful.

[5] The applicant was dissatisfied that its bid was unsuccessful and penned a letter on 28 February 2022 to the second respondent relaying its objection to its bid being unsuccessful. In terms of the letter the applicant requested the reasons

¹ Bid specifications, CaseLines 004-032.

for its bid being unsuccessful, a copy of its scorecard, the scorecard of the successful bidder, copies of minutes of the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC). The first respondent provided reasons on 1 April 2022 setting out the procedures that was followed in terms of the stages set out above and furnished the applicant with scorecard for the technical evaluation and the scoring for pricing and preference points. In addition to the aforesaid, the first respondent provided the applicant with the minutes of the BEC and the BAC meetings. The first respondent stated that the said minutes “... *were given in support of the reasons provided to the applicant. However, these documents do not constitute the reason of the first respondent’s decision*”.² (underlining added).

[6] The applicant’s attorneys formally objected on 4 April 2022 to the awarding of the tender to the second respondent on the basis that its bid for multifunctional printers (*printers*) was of a lesser specification in relation to what was required in terms of the tender. The applicant’s attorneys further requested second respondent’s pricing on the printers, the models of the printers offered and further requested that no agreement should be signed with the second respondent until its objection is dealt with. The first respondent replied on 12 April 2022 and stated that there is no basis for alleging that the printers were of a lesser specification, further that all information required by the applicant has been provided and lastly that there is no legal impediment restricting the first respondent to enter into an agreement with the second respondent. The applicant’s attorneys sent another letter on 12 April 2022 explaining that as their client is an expert in the industry it harbours a belief that the second respondent’s

² See First Respondent’s Answering Affidavit Caseline 023-7 at para 18.

printers are not of correct quality as required in terms of specifications and need the information of the model of printers quoted and offered by the second respondent. The first respondent replied on 24 April 2022 that there is no legal basis for the applicant to request the second respondent's documents.

[7] The applicant's attorneys forwarded a further correspondence to the first respondent laying the legal basis for the request that the procurement regulatory framework is prescribed by section 217 of the Constitution of the Republic of South Africa, Act 108 of 1996 (*Constitution*) read with PPPFA in terms of which a bid which do not respond to tender specification should not be accepted. Further that Promotion of Administrative Justice Act 3 of 2000 (*PAJA*) allows the applicant to challenge the procurement decisions which are not in accordance with the legal prescripts. In this regard the applicant persisted with the request for the second respondent's model of printers. The applicant further attached a request for information form prescribed in terms of Promotion of Access to Information Act 2 of 2000 (*PAIA*). In response the first respondent conveyed that the applicant's correspondence referred to PAJA but has failed to demonstrate that its decision implicates the legislative requirement that the decision to award should be reasonable, lawful and/or procedurally fair and besides that their reasons for the request are still unsatisfactory and therefore the first respondent is unable to forward the request to the second respondent for its consent. In addition, if the applicant is of the view that the reasons given were not satisfactory then the applicant may invoke the provisions of section 6 of PAJA and launch legal proceedings. The applicant responded that the second respondent's bid documents form part of the record of the tender and such

documents are not private and consent of the bidder to make such documents available is not required.

[8] The applicant then decided to bring an application in terms of Rule 53 of the Uniform Rules of Court for the review and setting aside of the decision to award the tender to the second respondent. This application was also in terms of PAJA as the first respondent also failed to provide adequate reasons as envisaged in terms of section 5 thereof. The application is two-pronged, Part A, in terms of which the applicant sought, *inter alia*, for an order directing the first respondent to provide the bid documents of the second respondent and Part B in terms of which the applicant seeks an order to review and set aside the award granted in favour of the second respondent on the basis that the second respondent's bid did not comply with the tender specifications. The applicant re-iterated its contention that the second respondent's printers were of a lesser specification and the pricing did not coincide with the machine specification required in terms of the tender.

[9] The first respondent replied to Rule 53 application and delivered records related to the tender and included the second respondent's bid documents which the first respondent previously refused to make available to the applicant. To this end the applicant contended that in view of the fact that the first respondent has now delivered the documents requested the relief sought in Part A falls away except that the applicant would persists with the prayer that the applicant be ordered to pay the costs.

Issues in dispute

[10] The issue to be decided are as set out in the Amended Notice of Motion³ and are summarised as follows:

10.1. First, whether the second respondent is entitled to address the court despite having failed to file an answering affidavit. This point was raised by the applicant's counsel from the bar.

³ The two parts in the Amended Notice of Motion are as set out below. (see CaseLines 022-1.)

Part A:

1. *The First Respondent is ordered to produce and file the full record pertaining its decision to award the tender in respect of the appointment of a service provider for supply, installation, support and leasing of multifunctional printers for a period of 5 (five) years for the First Respondent under tender number WRSCM- 2021/022- 0028 (“the tender”, “the decision”, “the award”), to the Second Respondent, including but not limited the copies of:*
 - 1.1 *The minutes of all meetings of the bid evaluation committees under tender number WRSCM- 2021/2022- 0028;*
 - 1.2 *Pricing of the Second Respondent’s proposal under tender number WRSCM- 2021/2022- 0028;*
 - 1.3 *Models of the printers of the Second Respondent’s proposal under tender number WRSCM- 2021/2022- 0028.*
2. *That the parties be authorised to supplement their papers as necessary in respect of Part B after receipt of the full record, specifically the items referred to in prayers 1.1 to 1.3 thereof.*
3. *Costs of the application, only if opposed.*
4. *Further and/or alternative relief.*

Part B:

5. *The following decisions are reviewed and set aside, and declared invalid:*
 - 5.1 *the decision of the First Respondent, dated 3 February 2022, to award bid number WRSCM- 2021/2022- 0028 to the Second Respondent and not to accept the Applicant’s bid due to a low score on the technical evaluation (“the tender award”);*
 - 5.2 *the decision of the First Respondent dated 17 May 2022, dismissing the Applicant’s request for information regarding the Second Respondent’s bid under bid number WRSCM- 2021/2022- 0028 (“the decision”);*
 - 3.2A(i) *the decision of the First Respondent, dated 3 February 2022, to award bid number WRSCM- 2021/2022- 0028 to the Second Respondent and not to accept the Applicant’s bid due to a low score on the pricing evaluation be set aside;*
 - 3.2A(ii) *that the entire tender process under bid number WRSCM- 2021/2022- 0028 and any subsequent contract entered into with the Second Respondent is hereby reviewed and set aside;*
 - 3.2A(iii) *that the entire tender process under bid number WRSCM- 2021/2022- 0028 and any subsequent contract entered into with any service provider stemming therefrom, is hereby reviewed and set aside.*
6. *The Applicant’s bid under tender number WRSCM- 2021/2022- 0028 is remitted to the bid committees of the First Respondent for reconsideration;*
7. *In the alternative to prayers 5 and 6 above:*
 - 7.1 *The Decision is reviewed and set aside and declared invalid;*
 - 7.2 *The bid under bid number MLM/2020-21/MM/005 be awarded to the Applicant based on its bid submitted.*
8. *The costs of this application are to be paid, jointly and severally, by any respondents opposing the relief.*
9. *Further and/or alternative relief.*

- 10.2. Secondly, whether the applicant is entitled to legal costs for having been compelled to bring an application in terms of PAIA for information which could have been availed by the first respondent as requested prior to the launching of the review application.
- 10.3. Thirdly, whether the decision by the first respondent to dismiss the applicant's request for information is reviewable and susceptible to be set aside.
- 10.4. Fourthly, whether the tender required of the bidders to price for 21 of 52 printers and also whether the bid solution required 100% - page coverage,
- 10.5. Fifthly, if the court finds that there were irregularities and that the tender should be set aside then what an appropriate remedy should be.

[11] In respect of the first issue that the second respondent not be given audience to address the court, the applicant contended that the second respondent has not filed an answering affidavit or opposing papers and to this end the submissions made through its heads of argument and the summary of arguments should not be considered by the court. This is predicated on the submission that the second respondent should present facts in an affidavit upon which legal arguments as set out in the heads of arguments will be based. In support of this argument counsel for the applicant further made reference to Rule 6(5)(d)(ii) of the Uniform Rules of Court which provides that the respondent opposing the application shall deliver the answering affidavit within 15 days after service of notice of intention to oppose. Counsel further referred the court to the unreported judgment of Makhafola J, in *S Maboho and Others v Minister of Home Affairs*⁴ where the court stated at para [13] that "... *Argument is not evidence, and it is*

⁴ (833/2007, 1128/2007 [2011] ZALMPHC 4 (28 November 2011).

*not given under oath. It is merely a persuasive comment made by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence. In casu; the heads of argument do not serve as the answering affidavits of the respondent”.*⁵

[12] The second respondent may however, so went applicant’s counsel arguments, be permitted to address the court without filing an answering affidavit if its submissions would be limited to the arguments on points of law. That notwithstanding, it is expected that summary of the points of law intended to be argued should have first been served on the applicant and filed with the court for the applicant to prepare their response to those points of law.

[13] Counsel for the second respondent retorted that the arguments intended to be advanced are on the basis of the documents which are already before the court and it was therefore unnecessary to serve and file opposing or answering affidavits. Counsel further contended that there are instances where an affidavit need not be served and arguments may be based on the papers filed by other the parties before the court. The applicant replied that the counsel for second respondent should tentatively be accorded audience, but the court must still make a determination if the arguments advanced complies with the Rules of Court and if not, such arguments should be jettisoned and not be considered for the purposes of adjudicating this *lis*.

[14] This court has noted that the Uniform Rules of Court as referred to by the applicant’s counsel requires, in peremptory terms, that the respondent should file

⁵ See para 7 of the Applicant’s Supplementary Heads of Argument, CaseLines 025-32.

an opposing affidavit within 15 days of serving a notice of intention to oppose. The respondent has no option if the intention is to engage with the facts raised in the application but to file an opposing affidavit taking issues with aspect/s of the applicant's case. Where the respondent does not deal with any aspects of the averments in the applicant's papers such failure may ordinarily be construed as amounting to an admission of averments made by the applicant.

[15] This court having permitted the second respondent to argue and as fortified by the heads or argument the court found that the arguments raised by the second respondent engaged with the facts in the papers presented by the parties. Further that such approach is inconsistent with the provisions of the Rule 6(5)(d)(ii) which is couched in peremptory terms that the second respondent should have filed an answering affidavit. If the intention was only to raise points of law Rule 6(5)(d)(iii) provides, also in peremptory terms, that "*if such party intends to raise any question of law only, such person must deliver notice of intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question*". (underling added). It is noted that the court as a repository of discretion may still allow such arguments provided that the other parties may not be prejudiced. In this case the applicant vigorously contended that the second respondent's submissions should not be considered and no audience be accorded to its counsel. Now that second respondent's counsel has not even requested a postponement to file answering papers, the court is left with no option but to conclude that second respondent is not entitled to the audience of the court and the heads of argument and summary thereof must be struck out with costs.

[16] The second issue in dispute relates to the insistence that the court should award legal costs in respect of Part A as the applicant's counsel submitted that the applicant was compelled to bring an application seeking an order as envisaged in Part A. The prayers in Part A were triggered by the first respondent who instead of providing the applicant with the information requested in terms of PAIA responded that the reasons which were provided by the applicant were insufficient and stated further that if the applicant is aggrieved then provisions of section 6 of PAJA may be invoked. Anyway, so went the argument, the applicant should have been able to challenge the award on the basis of the information already provided by the first respondent.

[17] The applicant contended that the legal bases for the request of the documents were clearly set out in the letters sent to the first respondent which were subsequently elaborated on by the attorneys for the applicant. Further that there were no valid reasons for the first respondent to refuse the request to make such documents available to the applicant. In addition, the documents requested were not private documents and the first respondent did not need to seek consent from the second respondent for such documents to be made available.

[18] In addition, so went the applicant's argument, if the court accepts the defence by the first respondent that the applicant should have exhausted the internal remedies it must be noted that there were attempts to exhaust the said internal remedies but same could not be done and what was left for the applicant was to approach the court. The relief from court would have in any event provided a proper redress unlike exhausting internal remedies. In the alternative the court is requested to grant condonation for non-compliance with the PAIA.

[19] The counsel for the first respondent in response contended that the applicant failed to appreciate the distinction between request for reasons for the decision versus record of the decision. In terms of the correspondence between the parties the applicant commenced by stating that it objects to the rejection of its bid and also requested reasons why its bid was rejected and the details of the documents which were considered to award the bid to the second respondent. In this regard the first respondent prepared a reply and first explained the process from the receipt of the bids until an award is made. That, in this case, the complete process was undertaken and the second respondent's bid was the lowest.

[20] The counsel for the first respondent averred that the applicant did subsequently submit request for information in terms of PAIA but failed to exhaust internal remedies as envisaged in terms of section 74 of PAIA pursuant to the first respondent refusing to avail the requested documents. The information requested by the applicant cannot be classified as the reasons for the decision taken by the first respondent as such information is the record of decision. The reasons for the decision having already been provided by the first respondent in reply under the letter dated 1 April 2021 when the first respondent explained the process and provided scorecards and minutes of the committees. The latter documents were not part of the reasons but were just provided to the applicant. If the applicant required the documents the applicant should have just launched a Rule 53 application without which the applicant would not have been able to have access to the documents requested. In any event the applicant failed to provide persuasive reasons underpinning the basis why such information

should be availed. If such bases came forth the first respondent would have had to approach the second respondent to obtain its consent to provide the applicant with the requested documentation.

[21] The counsel for the first respondent proceeded and further asserted that the applicant thereafter launched these proceedings in terms of Rule 53 of the Uniform Rules of Court but still had Part A which related to a recourse in terms of PAIA. The application in respect of Part A should therefore be dismissed since it was not preceded by the applicant having exhausted internal remedies in terms of section 74 of PAIA but also because Rule 53 provided an automatic remedy to the applicant's plight if second respondent's bid documents were not availed by the first respondent. The said documents were in any event provided in compliance with Rule 53 and Part A of the notice of motion was never necessary.

[22] This court notes that with regard to the legal principles applicable to legal challenges of decisions taken by the state organ reference should be made to the provisions of section 217 of the Constitution and further in terms of the provisions of PPPFA. The applicant has stated that having perused the scoring of the second respondent it is highly probable that the printers which were offered by the second respondent were of lesser specifications and the second respondent's bid may have not ergo been in terms of the specifications set out by the first respondent. The first respondent having stated that from the information provided the applicant was able to launch the legal proceedings they may wish to commence. This reaction was not helpful and unreasonable. Such dismissive propensities especially by the state organs was frowned upon by the full bench in

Paul v MEC for Health, Eastern Cape Provincial Government and Others;
Mbobo v MEC for Health, Eastern Cape Provincial Government and Others;
*Ncumani v MEC for Health, Eastern Cape Province and Others*⁶ (*Paul's judgment*) where the court held that ordinarily requests to access information

"... are regarded with disdain and are consequently ignored. This attitude by the state functionaries has resulted in ordinary South Africans having to resort to the courts, burdening court rolls with court applications which are largely unopposed. This burdens the fiscus with unnecessary costs orders in circumstances where scarce resources are severely challenged by competing needs. The time may have arrived for costs orders in deserving cases to be made against the respective officials who unnecessarily force ordinary citizens, many of whom may be poor, to go to court to enforce a right that is enshrined in the Constitution and incontestable."

[23] The preliminary view of the applicant for the challenge was that the second respondent's bid to the tender did not comply with the tender specifications as the printers were of less quality. Just on this basis alone it is clear that the applicant needed the bid documents to properly couch and substantiate their claim, lest their view is based on conjecture and suppositions. The least the first respondent could have done was to request consent from the second respondent if, contrary to the stance of the applicant, such consent was required. There is no indication by the first respondent that in reacting to the application in terms of Rule 53 the first respondent sought and obtained the consent of the second respondent to make available the second respondent's bid documents. The attempt to differentiate between the reasons for the decision and the record for decision is a non-starter in this context. In any event on proper reading of section 11(3) of PAIA the reasons for the request appears to be irrelevant.⁷

⁶ (5031/2018; 5108/2018; 5689/2018) [2019] ZAECMHC 18; [2019] 3 All SA 879 (ECM) (29 March 2019).

⁷ The section provide that "... A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by – (a) any reasons the requester gives for requesting access; or (b) the information officer's belief as to what the requester's reasons are for requesting access".

[24] The applicant could not be expected to challenge the decision to award the tender to the second respondent unless they had sight of the bid of the second respondent. A party would ordinarily not make sense of the scores of the bidders and minutes of the committees unless records upon which the score and meeting were convened are made available to such a party. The assertion that the scorecards and the minutes were given to the applicant as a favour is condescending and contemptuous to the rights which are enshrined in the Constitution relative to, *inter alia*, fair and transparent procurement of goods and services in the public sector and if anything, the courts should frown at such conduct.

[25] Where a party request information in terms of PAIA and the holder of information refuses to provide information or is presumed to have refused such a public body is ordinarily enjoined to direct the requester to a body to whom an appeal should be lodged if a party wishes to challenge the decision to refuse. This will help avoid unnecessarily frustrating bidders and minimise burdening the courts with frivolous applications.

[26] This court finds that notwithstanding the observations alluded to above the applicant has problems which beset the approach it took when invoking the provisions of PAIA. The provisions of the PAIA were considered by the full court in *Paul's* judgment⁸ where the court made the following observations. First, that “[O]ne of the things which stand out in section 11 is that compliance with procedural requirements of PAIA is not optional. If any of the procedural requirements is not complied with, the requester is not entitled to the record”.⁹

⁸ See note 6 above.

⁹ Ibid, at para [10].

Secondly, unlike the usual procedure set out in Rule 6 of the Uniform Rules of Court in which Form 2(a) is used to commence motion proceedings, PAIA prescribes its own specific form of the notice of motion for section 78 court applications, in terms of Rule 2 and 3.¹⁰ The notice of motion should, *inter alia*, stipulate if there was compliance with section 74 in terms of which internal remedies would have been exhausted.¹¹ Thirdly there is also a tendency to “... confuse PAIA applications with applications in respect of PAJA. These two types of applications are different and should not be conflated or confused. PAIA applications must comply fully with PAIA and any provisions or procedure under PAJA are of no assistance in the pursuit of relief under PAIA”.¹² Finally, it must also be clear from the application whether the information was availed in terms of section 25¹³ or whether refusal to provide such information is deemed in terms of section 27¹⁴ of PAIA. Non-compliance with the PAIA and the rules is therefore fatal to the application.¹⁵ Despite this assertion this court is of the view

¹⁰ Ibid, note 6, at para [33].

¹¹ See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Company Ltd and Others* 2014 (5) SA 138 (CC) at 127 *et seq* where reference was made of the parties having to exhaust internal remedies before launching the review process.

¹² See *Paul*'s judgment at para [43]. The confusion becomes apparent when reference is made of section 5 of PAJA and at the same time requesting information in terms of PAIA.

¹³ Section 25 of PAIA provides that “(1) *Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the information officer to whom the request is made or transferred, must, as soon as reasonably possible, but in any event within 30 days, after the request is received –*

(a) *decide in accordance with this Act whether to grant the request; and*

(b) *notify the requester of the decision and, if the requester stated, as contemplated in section 18(2)(e), that he or she wishes to be informed of the decision in any other matter, inform him or her in that manner if it is reasonably possible.*

(2) *If the request for access is granted ...*

(3) *If the request for access is refused, the notice in terms of subsection (1)(b) must –*

(a) *state adequate reasons for the refusal, including the provisions of this Act relied upon;*

(b) *exclude, from such reasons, any reference to the content of the record; and*

(c) *state that the requester may lodge an internal appeal, complaint to the Information Regulator or an application with a court, as the case may be, against the refusal of the request, and the procedure (including the period) for lodging the internal appeal, complaint to the Information Regulator or application, as the case may be.”*

¹⁴ Section 27 of PAIA provides that “*If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request”.*

¹⁵ “*Rule 3(1) of PAIA rules requires an application contemplated in section 78 of PAIA to be brought on notice of motion that substantially correspond with the form of notice of motion annexed to the rule. Therefore, the wanton use and adaptation of Form 2(a) annexed to the Uniform Rules is in violation of*

that access to justice should ordinarily not be sacrificed at the altar of strict procedural formalities and as such where warranted flexibility should be accommodated and defining hallmark should rather be substantial compliance with the Act.

[27] A party who seeks a redress in terms of a specific statute is enjoined to ensure that the requirements set out in that statute are met before the redress could be sought in terms thereof. The applicant has in this instance failed to bring the application within the four corners of PAIA and to this end Part A of the application is unsustainable. In any event the required documents have been provided in terms of the provisions of Rule 53 of the Uniform Rules of Court. As such, Part A was unnecessary as it sought to duplicate what Rule 53 caters for. In the end, in view of the lack of prospects of success on the merits of the claims in Part A the prayer for legal costs would not be successful.

[28] The court has observed that the counsel for the applicant contended that the applicant made “... *every effort to comply with all internal remedies, in so far as they were available and had no other choice but to bring the current application and specifically insert PART A thereof*”¹⁶. At the same time the applicant contends that the relief it could have obtained by exhausting internal remedies would in any event “... *not provide the Applicant with the relief that is equivalent to the relief that a Court can grant upon review making judicial review the only option available to the Applicant*”.¹⁷ The applicant appears to have been approbating and reprobating and in this direction the applicant subtly

PAIA and the PAIA rules. There is no legal basis for granting any relief in an application brought on notice of motion in terms of section 78 where the form of the notice of motion is not in substantial compliance with the prescribed form”. See Paul’s judgment at para [58].

¹⁶ See Applicant’s Heads of Argument on CaseLines 025 – 10, at para 22.

¹⁷ Ibid, at para 23.

requested condonation without more by just stating that “[I]f the Applicant has not complied with PAIA (which is denied), then the Applicant seeks condonation for any non-compliance”,¹⁸ (underlining added). Further that “[I]n so far as this Honourable Court finds that the Applicant should have complied with section 74 of PAIA, the Applicant humbly seeks condonation in this regard”.¹⁹ Even more startling the applicant submitted that “The Applicant has thus been wholly successful in respect of Part A, and costs should be awarded in the Applicant’s favour”.²⁰

[29] In view of the nonchalant approach by the applicant regarding the request for condonation there is no basis to give the request further attention by this court and the request for condonation is bound to fail.

[30] The third issue for determination which relates to the question whether the decision by the first respondent to dismiss the request for information is reviewable and susceptible to be set aside is closely linked to the foregoing discussion on PAIA. The applicant having requested the said information in terms of PAIA but failed to exhaust internal remedies disqualified the applicant from succeeding with the said relief. In the premises the request to review and set aside the said impugned decision not to avail documents is unsustainable and falls to be dismissed.

[31] The fourth issue for determination is the centre piece of the irregularities upon which application for the review and setting aside of the award is predicated. The basis of the irregularity argument is two-legged. First, failure by

¹⁸ See Applicant’s Replying Affidavit on CaseLines 024-9, at para 11.9.

¹⁹ *Ibid*, at para 14.3.

²⁰ *Ibid*, CaseLines 024-5, at para 7.4.

the second respondent to price for central print solution in respect of all printers and secondly, failure by the second respondent to quote for 100%-page coverage.

[32] With regard to the first leg of the irregularity argument counsel for the applicant contended that the award to the second respondent was irregular as the bid submitted by the second respondent did not comply with the bid specifications issued by the first respondent. The contention is predicated on the submissions, first, that whilst the first respondent invited the public to tender for the provision of centralised print solution for 52 printers the second respondent made provision for a solution only for 21 printers hence its price was the lowest. Specifically that the second respondent has “... *failed to cater for a software licence for all of the printers and only catered for 21 (twenty one) out of the 52 (fifty-two) thereof to have software*”.²¹ The applicant further contended that the bid by the first respondent seems to suggest that there is no need for the software in respect of the rest of the printers as they are standalone and is, so went the argument, lopsided and unsustainable since all printers requires the software and in fact comes with software built in.

[33] The counsel for the first respondent contended in reply that the information in the tender documents were clear and the applicant would have noted that ordinarily printers which are standalone do not require the centralised print solution. In this regard the applicant should have been able to decipher that in fact only 21 printers do require a centralised print solution. It was not only the second respondent who was aware of this position as Nashua Kopano also made a bid for 21 printers in respect of the centralised print solution and this assertion

²¹ See Applicant’s Heads of Argument CaseLines 25-6, at para 10.

was not disputed by the applicant. The first respondent's specification did distinguish between different types of multifunctional devices needed, namely,

33.1 *“Printer 1 is a day-to-day high-volume printing and scanning for the regional offices. The first respondent required 21 of these printers. (underlining added).*

33.2 *Printer 2 is described as a high-quality low volume device for printing of certificates issued to learners which would be stationed at the first respondent's head office and only one printer was required. (underlining added)*

33.3 *Printer 3 is described as a desktop printer used in TVET colleges as a standalone device. The first respondent required 31 of these printers”²², (underlining added).*

[34] These descriptions are referenced and are in paragraph 49.4 of the first respondent's answering affidavit. The applicant in its replying affidavit did not specifically deny the averments in this paragraph and one can assume that same is admitted. These descriptions are further delineated in para 3.4 of the tender specifications where it is stated, *inter alia*, under printer 2 that “[O]ne printer per TVET college is required for the 31 colleges ...”²³

[35] The second leg of irregularity argument is based on the applicant's contention that the tender specifications required of the bidder to provide 100%-page coverage for A4 printing or imaging and the second respondent only priced for 5%-page coverage hence its price was the lowest. The bid, so counsel for the

²² See First Respondent's Answering Affidavit, CaseLines 023-20 at para 49.4.

²³ See Bid specifications CaseLines 020-50

applicant proceeded, was therefore not in accordance with the specifications and the award was therefore irregular and is susceptible to be set aside in terms of PAJA.

[36] The applicant further contended that, as an alternative argument, due to inability to make an exact determination on the page coverage the applicant then decided to provide 100%-page coverage and if there be another explanation then it meant again that *“the First Respondent’s bid specification was not clear resulting in prejudice to all the bidders”*.²⁴

[37] An alternative further argument is that the *“[T]he First respondent’s bias towards the Applicant is blatant”*²⁵ hence its bid was unsuccessful.

[38] The first respondent in retort contended that the information provided to the bidders clearly indicates the load of the printing work required by the first respondent and further that the bidder should have been able to assess and conclude that there was no need to provide for 100% page-coverage. The first respondent having stated that *“[P]age coverage is the estimated amount of coverage on a printed page; the amount of ‘ink’ on the page relative to the page size. For example, if a picture is printed that covers the whole page this is considered to be seen as 100%coverage. If a text document, such as a memorandum is printed, coverage may be 10% depending on the line spacing, font size and number of letters etc”*.²⁶ The applicant in its reply confirms that the toner will be impacted by the number of pages to be printed. Counsel for the respondent stated further that it therefore follows that without the exact numbers

²⁴ See Applicant’s Replying Affidavit, CaseLines 024-17 at para 24.11.

²⁵ See Applicant’s Replying Affidavit, CaseLines 024-15 at para 23.9.3.

²⁶ See First Respondent Answering Affidavit, CaseLines 023-23, para 50.3.

of pages being known a party may not be able to quote with military precision for the toner required. This can only be worked out from the historical usage and the information on historical usage was provided to the bidders.²⁷ To this end having to quote for 100% would have been unreasonable and would have amounted to incurring unnecessary expense.

[39] The first respondent's counsel further argued that the legal principles in relation to review and setting aside of the awards and/ or bids requires that a party should be able to demonstrate that there was an irregularity and further demonstrate that such an irregularity was material such that the tender would not have been awarded at all or at least been awarded to the applicant. It being noted, so went the argument, that the applicant is no longer challenging the award on the basis on technical requirements but on pricing to demonstrate the materiality of the alleged irregularity the applicant should have also demonstrated that had the applicant submitted a centralised print solution for 21 printers only and also tendered for 5% paper-coverage the applicant's price would have been the lowest. In principle evidence must be presented to demonstrate that but for the irregularity the applicant would have won the tender. In view of the fact that no evidence has been tendered by the applicant the court will be unable to determine the effect or materiality of the alleged irregularity on the whole tender award and would therefore find no basis to set the award aside.

[40] The first respondent proceeded and contended that the tender specification clearly required that the pricing should have been linked to all the items. The applicant has failed to comply herewith since its pricing was not

²⁷ See Applicant's Replying Affidavit, CaseLines 024-16, para 24.5 and 24.6.

compliant because the pricing was not itemised instead its bid price is reflected as extra. This implies that the first respondent would have been expected to pay extra for the solution.

[41] Legal principles apropos adjudication of legal challenges in terms of PAJA enjoins one should defer to the guidance set out by the Constitutional Court in *Allpay Consolidated Investment Holdings Pty Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*²⁸ (*Allpay*) where it was held that “[T]he 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 under PAJA has been established.”²⁹

[42] It therefore follows that a party must be able to prove factually that there was irregularity and thereafter a determination would have to be made whether such irregularity implicates any of the grounds of review under PAJA.

[43] The Constitutional Court having further stated at para 34 that “An ‘acceptable tender under the Procurement Act is any ‘tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document...’ *The Preferential Procurement Regulations (Procurement Regulations)* define a tender as – ‘a written offer in a prescribed or stipulated

²⁸ 2014 (1) SA 604 (CC).

²⁹ *Ibid*, at para 28.

form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering process or proposals ...’”. Where there is non-compliance the organ of the state has no authority to condone same as such may be construed as offending the doctrine of legality.³⁰

[44] A determination should therefore be made with regard to two arguments raised by the applicant which found the contention for irregularity in the award of the bid to the second respondent. On the first argument on the number of printers which required pricing under centralised printing solution this court finds that the evidence clearly indicates that there were different numbers of printers for different locations required by the first respondent. This was admitted by both parties. This being the case it follows by logic that their requirements/ specifications will be different otherwise there would not have been any differentiation of the printers. There were 21 printers which required centralised printing solution and 31 which were standalone. There is no cogent basis for the applicant to have therefore priced centralised printing solution for all 52 printers. The applicant’s contention that second respondent should have priced for 52 printers is therefore baseless, unsustainable and stand to be dismissed.

[45] The above conclusion is countenanced by the submission made by the applicant who conceded that stand alone printers do not need a central print solution for as long as they are being used as standalone.³¹ With this concession

³⁰ See *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another* (937/2012) [2014] 1 All SA 545 (SCA) at para [18].

³¹ The applicant having stated in the Replying Affidavit on CaseLines 024-13 at para 23.2 that y “[I]t is standard industry practice that the printer has software installed in case the customer wants to make use of the software at a later stage by connecting the printer to more than one computer (i.e. if the

by the applicant its case is therefore determined and further arguments on this aspect need not detain the attention of this court and further analysis is unnecessary. There would not have been a need for the first respondent under these circumstances to purchase a solution for all 52 printers which was not requested and not needed at the time. This would have amounted to wasteful expenditure. In the circumstances it is the finding of this court that the applicant has failed to tender evidence to prove factual irregularity that the provision of the solution in respect of 21 printers was inconsistent with the tender specifications. Having failed to prove factual irregularity there is no basis for the court to proceed and made an inquiry on the second leg set out in the *Allpay*'s case.

[46] The second basis for the irregularity as contended by the applicant relating to the pricing of the page coverage is on the basis that the tender specifications required a 100%-page coverage. This alleged specifications for 100%-page coverage could not be explicitly discerned from the record. The record however does provide the history of usage which was meant to guide the bidders to avoid having the first respondent spending money on goods and/or services which it did not need. The said record shows that the consumption differs from one region to the other hence pricing for 100%- page coverage may have been an unnecessary expense for other regions. To this end the applicant has failed to prove that the tender required 100%-page coverage and to this end it failed to satisfy the first leg set out in *Allpay* case. In the premises the application is bound to fail for lack of evidence of the factual irregularity of the tender and the court cannot be detained to consider the second leg of the inquiry.

printer no longer has standalone use)."

[47] In view of the failure by the applicant to satisfy the first requirement that set out in *Allpay's* judgment ergo *cadit quaestio*. That notwithstanding the applicant's case is plagued with a myriad of shortfalls and pitfalls. First, applicant has failed to satisfy the requirements of the second leg which requires that an inquiry be made to determine which legal ground set out in section 6 of PAJA is implicated. The applicant has failed to engage with the legal evaluation of the irregularity by stating a specific ground upon which it relies at. Instead, the applicant just listed seven grounds³² (as set out in the PAJA) in its supplementary affidavit without clearly linking the said listed grounds with any alleged irregularity.³³ Secondly, the applicant has further failed to provide evidence to demonstrate the materiality of the alleged irregularity as is also required in the *Allpay* case. To this end, as submitted by the first respondent, the applicant should have tendered evidence to demonstrate that had it tendered for the central print solution for 21 printers and for 5%-page coverage its bid would have been the lowest. Thirdly, the applicant has further failed to present a persuasive argument or even evidence to support that the tender should be awarded to the

³² Section 6(2)(iii) of the Promotion of Administrative Justice Act, 2000 ("PAJA") and the principle of legality, as the decisions by the First Respondent to not award the tender to the Applicant for the reasons it did and to award the said tender to the Second Respondent in this matter was biased or reasonably suspected of bias. Section 6(2)(c) of PAJA and the principle of legality, as the action taken by the First Respondent regarding the Applicant's complaint herein was procedurally unfair. Section 6(2)(d) of PAJA and the principle of legality, as the decisions taken by the First Respondent regarding this matter was materially influenced by an error of law. Section 6(2)(e)(iii) of PAJA and the principle of legality, as the decisions taken by the First Respondent regarding this matter was taken because irrelevant considerations were taken into account or relevant considerations were not taken into account. Section 6(2)(f)(i) of PAJA and the principle of legality, as the decisions taken by the First Respondent regarding this matter itself contravenes a law or is not authorized by the empowering provision. Section 6(2)(f)(bb) and (cc) of PAJA and the principle of legality as, the decisions taken by the First Respondent regarding this matter is not rationally connected to the purpose of the provision or the information before the administrator. Section 6(2)(i) of PAJA and the principle of legality as the decisions taken by the First Respondent regarding this matter is otherwise unconstitutional or unlawful.

³³ See para 46 of the first respondent's heads of argument where reference was made of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para [27] where it is stated that "*The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action.*"

applicant and alternatively further that the bid be remitted to the first respondent's committees for reconsideration. Fourthly, the applicant has failed to present cogent arguments and or evidence for the submission that the first respondent was biased against the applicant or even in favour of the second respondent. Lastly, the contention that the specifications were not clear and unfair to all bidders is not supported by evidence as no other bidders came forward to confirm that the alleged statement that there was a lack of clarity on the specifications and they negatively affected them in their bidding.

[48] In the premises the reliefs sought in both Part A and Part B are unsustainable and falls to be dismissed.

Costs

[49] Both parties having submitted that the costs should follow the suit and the court is of the view that there is no basis to deviate therefrom.

Conclusion

[50] In consequence, I make the following order:

1. The application for costs order in respect of Part A is dismissed with costs.
2. The application for condonation for non-compliance with section 74 of Promotion of Access to Information Act 2 of 2000 is dismissed with costs.
3. The second respondent's heads of argument are struck out with costs.
4. The application for prayers sought in Part B are dismissed with costs.

NOKO MV,
ACTING JUDGE OF GAUTENG DIVISION,
PRETORIA

APPEARANCES

Counsel for the applicant : Adv MF Jooste
Centaur Chambers

Attorneys for the applicant : Tamara Klos Attorneys
Umhlanga
c/o Friedland Hart Solomon & Nicholson
Pretoria

Counsel for the 1st respondent : Adv L Segeels-Ncube
Sandton Chambers.

Attorneys for the 1st respondent : Webber Wentzel Attorneys
Sandton.

Counsel for the 2nd respondent : Adv J Berger,
Sandton Chambers.

Attorneys for the 2nd respondent : Ramsay Webber Inc
Sandton,
c/o Andrea Ray Attorneys
Pretoria.

Date of hearing : 14 February 2023.

Date of judgment : 26 May 2023