THE HIGH COURT OF SOUTH AFRICA

KWAZULU–NATAL LOCAL DIVISION, DURBAN

CASE NO: D1464/2020

In the matter between:

MZANSI FIRE AND SECURITY (PTY) LTD	**APPLICANT**
and	
DURBAN UNIVERSITY OF TECHNOLOGY	**FIRST RESPONDENT**
DUT BID EVALUATION COMMITTEE	**SECOND RESPONDENT**
IZIKHOVA SECURITY SERVICES CC	**THIRD RESPONDENT**
DUT BID ADJUDICATION COMMITTEE	**FOURTH RESPONDENT**

JUDGMENT

Chetty J:

[1] The applicant, Mzansi Fire and Security (Pty) Ltd, is a private security company which submitted a tender to the first respondent, the Durban University of Technology ('DUT'), to provide guarding services at its various campuses. In submitting the tender, the applicant was responding to a formal invitation in which DUT endorsed the provisions of the Black Economic Empowerment Programme as well as the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA') as part of its procurement process. The applicant submitted a responsive tender, however the guarding contract was ultimately awarded to the third respondent, Izikhova Security Services CC.

[2] The applicant was informed by DUT that when its bid document was evaluated by the Bid Evaluation Committee ('BEC') in Phase 2 of the process for quality and functionality, it achieved a score of 70.5 percent. In so doing, it failed to meet the minimum threshold of 75 percent in order to progress to the final evaluation stage in which pricing would be considered. The applicant, for reasons that will appear below, challenges the correctness of the scoring attributed to it and relies on an independent report of a firm of auditors in support of its contention that it scored the highest of all the bidders in Phase 2. On that ground as well as the process being tainted with fraud, the applicant contends that it was unfairly disadvantaged in the scoring of the tender and that the awarding of the contract to the third respondent should be set aside. It lodged an unsuccessful appeal against the decision of the BEC. As part of the internal appeal procedure, the applicant was obliged to pay a fee of R200 000.00 to DUT, which amount is non-refundable in the event of the appeal being dismissed. In this court, apart from the applicant seeking relief that the contract be set aside and that it (the applicant) be awarded the contract, the applicant also seeks an order that DUT refund to it the tender appeal deposit of R200 000.00 together with interest calculated from the date when such amount was paid (30 December 2019) to date of payment.

[3] In reply to the contention of the applicant that the tender process was irregular and tainted with fraud, DUT contends that there is no basis for the relief sought by the applicant of it being substituted in place of the third respondent as the successful bidder, alternatively that the matter be referred back to the fourth respondent for adjudication. In the main, the contention of DUT is that the decision which is being challenged is of a

'domestic' nature rather than it constituting 'administrative action' as defined in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). On that basis the decision to procure security services by DUT is not susceptible to review by a court. Allied to this is the contention on behalf of DUT that it is not an 'organ of state' as contemplated in s 239 of the Constitution in that in procuring security services, it was not acting in terms of DUT's empowering statute, and that the focus of the enquiry should be on the nature of the function being performed (procuring of security services) rather than the identity of the function (see *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 141).

[4] The third respondent, which is rendering the security service at DUT's campuses, opposes the application on the basis that there was nothing untoward in the awarding of the contract to it, and that it would be substantially prejudiced if the award of the tender were to be set aside and either awarded to the applicant or referred back to the BEC. Despite the central issues between the applicant and DUT being focused on what is essentially a point of law – that is whether DUT is an organ of state and whether in the procurement of security services, it was performing a domestic function – the third respondent chose to immerse itself in the dispute, and sided with DUT in so far as the principal legal issues are concerned. The third respondent furthermore denies that it colluded or engaged in any fraudulent activity leading to the awarding of the tender to it.

[5] The starting point in determining this application is whether the procurement of security services constitutes 'administrative action' as contemplated by PAJA. In *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA), para 19, Nugent JA took the view that administrative action:

'. . . . is defined as much by the nature of the decision concerned (or the failure to make a decision) as by its source. In that respect it constitutes "administrative action" only if, amongst other things, it was made by -

"(a) an organ of State when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;

or

(b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision . . . .".'

[6] The position adopted by Mr *Pillay SC*, who appeared together with Mr *Kistan* for the applicant, is that DUT is an organ of state by virtue of it exercising a public power when it procured security services in as much as it conducted the tender in accordance with the provisions of the s 217 of the Constitution, as well as the provisions of the PPPFA read with the provisions of the Broad-Based Black Economic Empowerment Act 53 of 2003, as well as the Public Finance Management Act 1 of 1999. In the alternative, it was submitted that even if I found that DUT is not an organ of state, this is not a bar to its decision being administrative action, in the context of the institution performing a 'public function'.[1] In *President of the Republic of South Africa and others v South African Rugby Football Union (supra)* the Constitutional Court provided guidance as to what factors were to be taken into account in determining whether conduct constituted administrative action. The court said the following at paragraph 143:

'Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33.

[1] The definition of 'organ of state' in Promotion of Administrative Justice Act 3 of 2000 is the same as that in s 239 of the Constitution, and that definition *includes a functionary or institution exercising a public power or performing a public function in terms of legislation.* Thus, if DUT is an 'institution performing a public function', it qualifies as an organ of state in terms of the Constitution. The court in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) para 19-21 points out the tautology in the definition of 'administrative action' in PAJA which separately refers to an 'organ of state', on the one hand, and a person, other than an 'organ of state', exercising a public power or performing a public function in terms of an empowering provision, on the other hand.

These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

[7] Correspondingly, PAJA provides that an 'organ of state' is an entity as defined in s 239 of the Constitution. That section defines the concept to mean:

'(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation. . .'

As I understood the further argument of counsel for the applicant with regard to DUT being an organ of state, it was contended that DUT in procuring security services was discharging a duty imposed on it as an institution (university) contemplated in s 20 of the Higher Education Act 101 of 1997 which Act deals with the establishment of public higher learning institutions. This Act, it was submitted, gives substance to the provisions of s 29(1)(*b*) of the Constitution which provides that everyone has the right 'to further education, which the state, through reasonable measures, must make progressively available and accessible'. Moreover, DUT is established in terms of the Institutional Statute: Durban University of Technology, GN 43, *GG* 34953, 20 January 2012 ('DUT's Institutional Statute') under the hand of the Minister of Higher Education and Training. DUT does not deny the submission by the applicant's counsel that the State is its largest benefactor, and it would therefore seem logical that where public funds are employed in the payment of goods and services, such as the provision of security for the students and infrastructure of DUT, such contracts must be concluded in a manner which is fair, transparent and equitable.

[8] The applicant contends that this exercise of public power creates the gateway for the application of PAJA to any of the contracts concluded by DUT. DUT however adopts the contrary view and contends that when it contracts for services, it is not exercising a public power and such actions are not subject to judicial review under the ambit of PAJA.

At the same time it is not disputed that the tender invitation affirms DUT's endorsement of the Black Economic Empowerment programme as well as the provisions of the PPPFA. DUT's retort is that none of the aforementioned legislative enactments apply to it since DUT is not 'identified' therein, and therefore the provisions of s 217 of the Constitution do not apply.

[9] Mr *Madonsela SC*, who appeared with Ms *Pudifin-Jones* for the first, second and fourth respondents, conceded that there are instances where DUT would contract for goods and services, and where it would in such circumstances be acting as an organ of state. However, the procurement of security services is not one of those instances, and therefore the award of the contract in question falls outside the purview of judicial review and accountability. The provision of security at university campuses is intended to safeguard the personal safety and well-being of students who are enrolled to study at such institutions. The university bears an obligation to ensure that reasonable measures are taken to protect students studying at the institution. Failure to do so would render the institution liable, at the very least, on grounds of negligence. Moreover, the institution also has an interest to ensure the protection of its assets and infrastructure from damage. To this end, even when students are no longer physically present on the campus, security guards remain to protect the infrastructure from vandalism or theft. This much is conceded by DUT which admits that the provision of security at its campuses is 'tense and fraught', citing the example in 2019 when the Student Representative Council brought the academic program to halt, demanding that the University and residences be shut down because of their unhappiness with the security company engaged by DUT at the time. The third respondent's heads go further and contend that in terms of s 7 of DUT's Institutional Statute and s 12 of the Constitution, DUT 'was entitled to protect itself from all forms of violence from either public or private sources'. It contends however that in so doing, DUT was exercising a domestic power when contracting for guarding services.

[10] I now turn to the primary ground(s) of opposition by DUT, that the awarding of a security tender to a private security company is not reviewable in terms of PAJA, as this does not constitute administrative action. The foundations for this opposition lay four-square in the decision of *Eden Security Services CC and others v Cape Peninsula*

University of Technology and others (17703/2013) [2014] ZAWCHC 148 (8 September 2014). It is necessary to briefly set out the facts in *Eden* as they bear much similarity to the facts in the present case. The first applicant, Eden Security Services CC, had been providing security services for over five years, since July 2008, at the campuses of Cape Peninsula University of Technology ('CPUT'). The latter put out a public tender in 2011 for the provision of physical guarding services at campuses. The first applicant submitted a bid which was unsuccessful, resulting in the award subsequently being challenged in terms of PAJA. CPUT contended that PAJA was not applicable as the award of the tender did not amount to administrative action and that the procurement of guarding services was not subject to public procurement. CPUT contended that it was not an organ of state and the matter fell outside the scope of judicial review. The court at paragraph 23 cited (with approval, it would appear) the decision in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA) as authority for the statement that 'ordinarily a tenderer has a Constitutional right to procedural fairness'. Dlodlo J concluded that CPUT did not fall within the ambit of s 217 of the Constitution, and as a result, could not be considered to be an organ of state for the purposes of the definition of administrative action.

[11] The court in *Eden* reached that conclusion despite having the benefit of the decision in *Calibre Clinical Consultants* which considered whether the actions of a Bargaining Council (established in terms of the Labour Relations Act 66 of 1995) to appoint a service provider to administer a wellness program for employees in the road-freight industry, constituted administrative action. The committee assigned by the Bargaining Council appointed a service provider, however the appellants brought an application to set that decision aside on various grounds. A dispute arose as to whether decision by the Bargaining Council constituted 'administrative action' for the purposes of PAJA. Nugent JA at paragraph 24 noted that Courts in England:

'. . . have always looked 'to whether the conduct in question has features that might be said to be "governmental" in nature'. While at one time the source of the power that was exercised by the body concerned was considered to be determinative, the authors of *De Smith's Judicial Review* observe that in more recent times courts have considered that to be too restrictive. They go on to say:

"Since 1987 [the courts] have developed an additional approach to determine susceptibility [to

judicial review] based on the type of function performed by the decision-maker. The 'public function' approach is, since 2000, reflected in the Civil Procedure Rules: CPR. 54.1(2)(a)(ii), defines a claim for judicial review as a claim to the lawfulness of 'a decision, action or failure to act in relation to the exercise of a public function'.'"

[14] Nugent JA in *Calibre* undertook an analysis of a number of English decisions in which the courts considered whether they had the necessary public law jurisdiction to review the decisions of certain bodies whose decisions were considered to be governmental in nature. Reference was made to *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853 (CA) ([1993] 1 WLR 909; [1992] EWCA Civ 7) at 867*b*, which held that conduct of the Jockey Club was not susceptible to public-law review, even though 'the Jockey Club's powers may be described as . . . public they were in no sense governmental'. Similarly in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249 (QB) ([1992] 1 WLR 1036) at 254*d-f* the court held that '[t]o attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question.' In *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and Another* [2004] 1 AC 546 the court offered the following guidance in addressing this question:

'What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'.

[15] In *Cronje v United Cricket Board of South Africa* 2001 (4) SA1361 (T) the court concluded that the United Cricket Board was a voluntary association whose activities were wholly unconnected to the State. Its powers were contractual, not statutory in origin, and its functions were private and not public. It was also a private and not a publicly funded institution. On that basis it could not be said that the United Cricket Board was performing a public function susceptible to judicial review. It was pointed out by Nugent

JA in *Calibre* that our courts have looked to the presence or absence of certain features in determining whether the conduct concerned was governmental in nature. Nugent JA stated the following at paragraph 38:

'What has been considered to be relevant is the extent to which the functions concerned are "woven into a system of governmental control", or "integrated into a system of statutory regulation", or that the government "regulates, supervises and inspects the performance of the function", or it is "*a task for which the public, in the shape of the state, have assumed responsibility"*, or it is "linked to the functions and powers of government", or it constitutes "a privatisation of the business of government itself", or it is *publicly funded*, or there is "potentially a governmental interest in the decision-making power in question", or the body concerned is "taking the place of central government or local authorities", and so on.' (My italics).

[14] Nugent JA noted at paragraph [40] that 'there can be no single test of universal application to determine whether a power or function is of a public nature'. Whether or not the power or function might be described as 'governmental' in nature is based on whether the exercise of the power entails public accountability. The court at paragraph 40 held:

'It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship.'

Applying those principles, the SCA in *Calibre* found that the procurement of goods and services by the Bargaining Council was *not* a public function, and the services were being procured with funds of individual members and those in the industry, and not the public. On those grounds, Nugent JA reasoned that there was no basis to hold that the Bargaining Council was obliged to account to the public, who were not contributors to its purpose, for the manner in which they spent their resources. Nugent JA held, at paragraph [46] that when managing its wellness fund and procuring services for that purpose, the Bargaining Council was performing a 'quintessentially domestic function in the exercise of its domestic powers', and those decisions were not subject to review.

[15] Dlodlo J in *Eden Security* arrived at the conclusion at paragraph 49 that:

'. . . the business of ensuring the safety of CPUT's staff, students and property is *domestic in nature*. CPUT in inviting tenders for security services at its various campuses was not acting in

terms of any section of the Higher Education Act. In my view when CPUT ultimately appointed the Respondents who were successful tenderers its decision to do so is not a public function and is thus not administrative action which is susceptible to judicial review.' (my italics)

There is, with respect, nothing in the judgment of Dlodlo J from which one can discern the basis on which he arrived at the conclusion that the procurement of security services constituted a 'domestic function' of the University, other than attempting to draw a rigid line between the core duty to provide access to further and higher education and guarding services.[2] At the same time there is nothing in the judgment which points away from a finding that the procuring of guarding services amounts to a 'public function', and there is no justification for the conclusion that s 217 of the Constitution is not applicable to CPUT. Counsel for DUT submitted that the applicant has failed to point out any authority suggesting that *Eden* had been wrongly decided, and invoked support for the decision of Dlodlo J by reference to *Molefe and others v Berger and others* [2020] ZANWHC 43 (15 May 2020) and *Berger v Unknown Individuals trespassing and-or attempting to invade and-or settle on the immovable property known as the remaining portion 331 of the farm Waterkloof 305* JQ (M501/16) [2017] ZANWHC 70 (27 October 2017). However, far from *Eden* being 'consistently applied' as contended for by counsel for DUT in their heads of argument, the applicant's counsel in their further heads of argument point out that *Molefe* is in fact the appeal from the decision in *Berger,* and to the extent that it makes reference to *Eden*, it does so with the following statement: '*It is mind boggling how this case finds relevance in the issue of authority to institute proceedings*.

[16] Mr *Pillay* pointed out in reply that *Eden* was determined based on a concession[3] by the applicant's counsel in that case that CPUT was not an organ of state and had instead voluntarily adopted the PPPFA. The difference between the stance adopted by counsel in *Eden* and those for the applicant before me, is that the latter strenuously contend that DUT is indeed an organ of state and that it exercised a public function when it procured guarding services to protect, not only the assets and infrastructure of the

[2] See the discussion in *G Quinot*, Juta's Quarterly Review of South African Law, JQR Public Procurement 2014 (3).
[3] *Eden Security Services CC and others v Cape Peninsula University of Technology and others* (17703/2013) [2014] ZAWCHC 148 (8 September 2014), para 22.

University, but also the safety and well-being of its students. In so doing, it was discharging its core statutory and constitutional obligation to ensure access to an institution of higher learning.

[17] To the extent that it was inferred that *Eden* was 'consistently applied', I should point out that counsel are duty-bound, as officers of the court, to ensure a fair and just adjudication of disputes before the court. I am not suggesting in the slightest that DUT's counsel intended to mislead the court along the path that *Eden* has been consistently applied. It was perhaps, as Mr *Pillay* suggested in his heads, straining the language to suggest that the decision had been 'consistently applied'. I say nothing further in this regard, save that I am in agreement with Mr *Pillay* that *Eden* cannot be held out as authority for the proposition that a University is not an organ of state.

[18] The decision in *Eden* received commentary in two academic publications. In a note by D Brand and M Murcott, *Juta's Quarterly Review of South African Law*, JQR Administrative Law 2014 (3), the authors state the following:

'The court held that the crucial question in relation to whether or not CPUT was an organ of state was whether it was directly or indirectly controlled by the state. The court then pointed to a number of factors that suggested that CPUT was not controlled by the state, and held that this lack of state control militated against CPUT's procurement decisions being classified as administrative action. The court concluded that institutions like CPUT are excluded from the definition of "organ of state" in s 239 of the Constitution of the Republic of South Africa, 1996, and thus that such institutions were excluded from the ambit of s 217 of the Constitution, which regulates the procurement of organs of state. Accordingly, Dlodlo J held:

"the fact that institutions like the University are excluded from the ambit of section 217 is an indication that their procurement process should not be regarded as administrative action for purposes of section 33 of the Constitution and PAJA. In my view, if I were to hold that CPUT's procurement process was administrative action, clearly the effect would be to override and ignore the Constitution's deliberate exclusion of the University from section 217 and the legislature's deliberate exclusion of the University from the [Public Finance Management Act 1 of 1999 (PFMA)]."

This finding falls to be criticised given that private bodies are capable of performing administrative action, including in the context of procurement, if their conduct is public in nature, and irrespective of the fact that their conduct may not be regulated by s 217 or the PFMA.

Having found that CPUT was not an organ of state subject to s 217 of the Constitution and the PFMA, the court considered whether CPUT was nonetheless performing conduct that was public in nature and regulated by PAJA. The court held that CPUT's decisions in relation to the procurement for the provision of physical guarding services were not public in nature since:

"the business of ensuring the safety of CPUT's staff, students and property is domestic in nature. CPUT in inviting tenders for security services at its various campuses was not acting in terms of any section of the Higher Education Act. In my view when CPUT ultimately appointed the Respondents who were successful tenderers its decision to do so is not a public function and is thus not administrative action which is susceptible to judicial review."

Thus, the court held that CPUT's procurement decisions were not subject to review under PAJA (they did not amount to the exercise of public power), and for this reason could also not be subject to review in terms of the principle of legality. The court's reasoning in relation to the "domestic nature" of CPUT's decision-making was somewhat superficial. In our view, the court ought to have taken its own advice and considered in more depth whether the procurement at issue was the kind that "entailed accountability".'

[19] The second note, *G Quinot*, Juta's Quarterly Review of South African Law, JQR Public Procurement 2014 (3), is critical of the conclusion that the procuring of guarding services would be considered 'domestic action'. The author makes the following observations:

'The court seems to have reached this conclusion on the basis that the particular services procured were aimed at the respondent's internal functioning rather than linked to its external public function of providing education. The court also noted that the respondent was not acting in terms of any section in its general empowering statute, the Higher Education Act 101 of 1997, when procuring the services, which also pointed away from an exercise of public power.

While the court's reasoning in respect of the public function element technically cannot be faulted, it is not entirely clear on what basis, apart from the absence of a legislative source for the action, the court reached the conclusion that the procurement of security services was "domestic in nature". In dealing with this type of inquiry, the key issue is always one of causality. That is, how does one define the relationship between the goods or services procured and the entity's obvious and general public function in reaching a conclusion that the particular procurement does not fall

under the entity's general public functions, or in the words of the court in the present matter, is "domestic in nature".
In *Transnet Ltd v Goodman Brothers (Pty) Ltd,* a case that the present court also relied on, the SCA held that the purchase of gold watches to present as long-service awards to employees was sufficiently closely linked to Transnet's public function of providing transport services to qualify as the exercise of public power."

[20] In support of the contention that Dlodlo J was wrong in his conclusion that the University could not be an organ of state, one should look no further than the Constitutional Court decision in *Harrielall v University of KwaZulu-Natal* 2018 (1) BCLR 12 (CC) para 15, in which the following was stated (albeit in the context of whether costs should be granted in constitutional litigation):
'Here it cannot be gainsaid that the University is an organ of State. It is a public institution through which the State discharges its constitutional obligation to make access to further education realisable.'[4]
See also *Chairperson of the Council of UNISA v AfriForum NPC* (CCT 135/20) [2021] ZACC 32 (22 September 2021) where in facts dissimilar to the present matter, UNISA contended that it was not an organ of state, only to jettison that stance at the Constitutional Court.

[21] Apart from the Constitutional Court's statement on the issue, the conclusion in *Eden* that a University is not an organ of state is at odds with decisions in various other jurisdictions. *Crowie Projects (Pty) Ltd v Durban University of Technology and others* (5612/10) [2012] ZAKZDHC 93 (30 November 2012), recorded that '[t]he first respondent is the Durban University of Technology . . . a state funded university in KwaZulu-Natal established in accordance with the relevant higher education legislation.'

The fact that the University is funded by the State is an important consideration for the question of whether a public power is being exercised when those funds are disbursed.[5] This issue came to the fore in *M&G Media Ltd and others v 2010 FIFA World Cup*

[4] It is noteworthy that this conclusion by the Constitutional Court contained a footnote referring to the provisions of s 29(1) of the Constitution, in which the right to 'further education' is entrenched.
[5] Hoexter *Administrative Law in South Africa* 2 ed (2012) at 4.

Organising Committee South Africa and another 2011 (5) SA 163 (GSJ) where the court considered an application in which the Mail & Guardian newspaper applied for access to certain records relating to the procurement or tender processes of the company responsible for organising the 2010 Soccer World Cup in South Africa. The court found that while the opening and closing ceremonies of the World Cup were not 'inherently governmental' nor 'government-controlled',[6] because public funds are used to pay for them, the Organising Committee acted as a public body, in terms of the Promotion of Access to Information Act 2 of 2000, in paying for those services. The court, at paragraphs 249-250, reasoned that:

'[249] . . . But just because private people or entities can conclude private contracts or carry out private tender processes it does not mean that, when a company enters into a contract, the act of entering into the contract is private.

[250] Tendering processes are not *inherently private*; they can equally be of a public nature. That the LOC might have intended its tenders to be private is of no relevance; the enquiry is not one of intention.'

[22] The above decision places an emphasis on the use of public funds in discharging institutional obligations. Hoexter *Administrative Law in South Africa* 2 ed (2012) at 4 cites *M&G Media* as an of example placing significance on the question of public funding in determining the public nature of its activities. The court added, at paragraphs 259-260:

'[259] In my view the origin of the funds expended by the body in question plays a significant role in guiding a court to the correct conclusion. A body receiving and disbursing public funds is either exercising a public power or performing a public function (spending State money), it matters not which. Government funds are the DNA of government: where such funds are to be found, so too is government.

[260] If the body receives both State and private funds, then it is acting as a public body, at least in respect of the public funds, and to draw too fine a distinction between the public-funded activities and the privately funded activities of the body is to place too much trust in the body's account-keeping practices.'

[23] In *Gardner v Central University of Technology Free State* 2012 JDR 1492 (LC) the court found that it was:

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[6] *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa and Another* 2011 (5) SA 163 (GSJ), para 254.

'. . . *common cause that the CUT is an organ of state* and a public higher education institution. As such, it is an institution whose establishment was funded by, and whose continued operational existence ultimately depended on, public moneys appropriated by Parliament for such purpose. The Act provides that the Minister "must … allocate public funds to public higher education (and, therefore, to public higher education institutions) on a fair and transparent basis". This provision is in line with the Constitutional imperative that "[w]hen an organ of state … contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". Therefore, it seems to follow … that every rand and cent acquired from public coffers for the purpose of promoting and advancing education at all public institutions, including public higher education institutions, must be utilised and expended in a manner that is responsible, fair, equitable and cost-effective.' (my italics)

[2] Cachalia JA in *University of the Free State v Afriforum and Another* 2017 (4) SA 283 (SCA) ('Afriforum'), in a matter which concerned a decision by the University to adopt a new language policy in which Afrikaans and English were replaced as parallel mediums of instruction with English as the primary medium, accepted without any debate that a university is an organ of state.[7] It matters not that the court rejected the argument by Afriforum that the adoption of the new language policy constituted administrative action which resulted in AfriForum persisting with its challenge on the principle of legality. [8]

[26] I am not persuaded that the language policy issue, as it arose in the context of *Afriforum*, is an appropriate comparator to the issue of guarding services. The matter of *Masakhane Security Services (Pty) Ltd v University of Fort Hare* (530/2011) [2012] ZAECBHC 1 (19 January 2012) is particularly relevant as it concerns facts similar to those in the present matter. The applicant in that matter, a private security firm, sought and obtained an order setting aside the University's decision not to consider extending the term of a contract for guarding services. In her judgment, Tshiki J noted at paragraph 16: 'The respondent herein is a learning institution which has been established in terms of the Higher Education Act which provides for the establishment of all higher education institutions in the country. It follows that the respondent is an organ of state and therefore its actions and decisions are subject to review in terms of the Constitution.'

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[7] *University of the Free State v Afriforum and Another* 2017 (4) SA 283 (SCA), fn 6.
[8] *Chairperson of the Council of UNISA v AfriForum NPC* (CCT 135/20) [2021] ZACC 32 (22 September 2021), para 31.

[27] Finally, in as much as DUT and the third respondent place great weight on the decision of *Eden*, which has been shown to have been incorrectly decided in so far as the categorisation of a university not being an organ of state is concerned, it bears noting that in the matter of *Gelyke Kanse and others v Chairman of the Senate of Stellenbosch University and others* [2018] 1 All SA 46 (WCC), which concerned the language policy of Stellenbosch University, and which was decided after *Afriforum*,[9] Dlodlo J (with Savage J) affirmed that a university *is* an organ of state. Dlodlo J held in *Gelyke Kanse* that he was bound by the decision of *Afriforum*, contrary to his earlier finding in *Eden*, even though he made no mention of this aspect in his judgment. In light of these various judgments, it is clear that *Eden* was incorrectly decided in so far as the finding that a university is not an organ of state is concerned.

[28] With the first pillar of DUT's argument dealt with, the question arises whether there are any other grounds of opposition to the relief sought by the applicant, bearing in mind that the approach of DUT has been that the preliminary issue of whether it is an organ of state is dispositive of the entire application. In the course of his argument, I enquired from Mr *Madonsela* whether this was indeed the position. I was informed that allied to the first enquiry of whether DUT is an organ of state (which I affirm it to be) is whether in contracting for guarding services it was carrying out a domestic rather than an administrative action. In other words, when contracting for guarding services was DUT exercising a public power or performing a public function? I should point out that this was a marked departure from the initial stance that DUT adopted in its answering papers and in its heads. All of the authorities referred to me by Mr *Madonsela*, which I have considered below, were not foreshadowed in his heads of argument. I accept that the nature of argument is fluid and counsel may have to veer slightly off course to counter a particular argument. The principle however remains constant – a litigant is bound by the case that it makes out in its papers.

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[9] See *Gelyke Kanse and others v Chairman of the Senate of Stellenbosch University and others* [2018] 1 All SA 46 (WCC), para 1: 'A mention must be made that since application was made in this case at the end of September 2016, the Supreme Court of Appeal handed down judgment in the matter of *University of Free State v Afriforum* 2017 (4) SA 283; [2017] 2 All SA 808 (SCA) on 28 March 2017. The latter judgment is binding on this Court in respect of issues which also arise in the current case by virtue of the doctrine of *stare decisis.*'

[29] In *Association of Mineworkers & Construction Union and others v Chamber of Mines of South Africa and others* [2017] JOL 37396 (CC) ('*AMCU*'), paras 74-77, Cameron J made the following observations in determining whether particular conduct would entail the exercise of public power:

'[74] . . . the predominant focus is on the nature of the power that is being exercised. The question is not so much, who exercises the power, nor even, where does the power come from: *but what does the power look and feel like? What does it do?* Pointers here include:

(a) the source of the power;

(b) the nature of the power;

(c) its subject matter; and

(d) whether it involves the exercise of a public duty.

[75] What do "public function" and "public power" mean? Langa CJ illuminatingly noted in a minority judgment in *Chirwa*:

"Determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a Court must exercise its discretion considering their relative weight in the context."

[76] And in *Grey's Marine*, the SCA correctly stated that "the exercise of public power generally occurs on a continuum *with no bright line* marking the transition from one form to another".

[77] In *AAA Investments*, ... concurring in the majority's order, O'Regan J determined whether a private actor exercised public power by asking whether the decision is "coercive" in effect, and whether the decision is related to a "clear legislative framework". Though the majority took a different path, nothing in its judgment disavows the more general significance of O'Regan J's analysis.' (my italics)

[30] Mr *Madonsela* argued that the provision of security at a university is an 'adjunct' or is 'ancillary' to the core function of enabling access to further or higher education. If that is so he submitted, it places the contract for the procurement of guarding services outside the reach of PAJA. He further submitted that there is no 'coercive governmental power' which dictates to the University how to spend its funds where it contracts for services. Counsel referred to *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC) ('*Motau*') as authority for the view that guarding services were not administrative in nature. *Motau* however concerned the issue of whether the Minister's decision to remove the two respondents from the Board of Directors at Armscor amounted to administrative or executive action. The court at paragraph 39 said:

'As further assistance a number of pointers can be extracted from previous decisions which are helpful in assessing the nature of a particular power. First, it may be useful to consider the source of the power. Where a power flows directly from the Constitution, this could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation.'

[31] As I understood Mr *Madonsela's* argument, and if counsel is correct in this regard, it would take the University's contractual affairs outside of the reach of PAJA, and potentially out of the ambit of s 217 of the Constitution. *Motau* at paragraph 34 impels a reviewing court to '*undertake a close analysis of the nature of the power under consideration*' in determining whether the exercise of the power is administrative or executive (domestic). It also, at paragraph 37, offers a further pointer as to what would be relevant in deciding whether the action was administrative or executive:

'Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. *By contrast, "[a]dministrative action is . . . the conduct of the bureaucracy* (whoever the bureaucratic functionary might be) in *carrying out the daily functions* of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy.' (footnotes omitted, my italics)

Applied to the present matter, it cannot be argued, in my view, that the procurement of

guarding services does not involve the implementation of any policy. It would form part of the '*conduct of bureaucracy… in the discharge of daily functions*'.[10] Furthermore, if DUT is correct in its approach, it would mean that a State-funded institution would effectively remain unaccountable to the public or even the Minister for the amount of money it expends when contracting for services. It cannot possibly be the situation that an institution like DUT can act without constraint when contracting with private parties for rendering services,[11] to the exclusion of s 217 of the Constitution.

[32] I have carefully considered the authorities, in particular *AMCU* and *Motau* and I am unable to agree with the submissions on behalf of DUT, as to do so would imply that an institution, funded by the State and established in terms of statute by the Minister of Higher Education, is essentially a law unto itself, unaccountable to its major benefactor as to how its spends its funding. To the extent that Mr *Madonsela* seeks to restrict his argument only to whether contracting for guarding services can be considered domestic rather than administrative action, if one applies the test postulated by Cameron J in *AMCU*, there is nothing in DUT's Institutional Statute that governs the situation where DUT contracts with private entities for guarding services. DUT is a juristic person like any other – s 2(3) of DUT's Institutional Statute. Section 7(1) makes it clear that the *'Council governs the Institution in terms of the Act and this Statute*.'

[33] Furthermore, if one asks the four questions posed by Cameron J in determining whether the act is administrative action, the first enquiry as to the source of the power is self-evident – it can only be DUT's Institutional Statute. That must however be read together with s 29(1)(*b*) of the Constitution. It would be incorrect, in my view, to contend that there is no governmental or coercive rational as to why guarding services are necessary at institutions of higher learning. By way of analogy, public schools cannot

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[10] *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA), para 24, cited in *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC), para 37.

[11] See *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC), para 44: 'In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers – the source of the power and the extent of the discretion afforded to the functionary – are ancillary in that they are often symptoms of these bigger questions.'

function without perimeter fencing in light of the obligation to ensure the safety of learners. Similarly, guarding services are a necessity to protect learners from bullying as well as external forces. So too is the requirement for water and sanitation. It cannot be argued that the provision of these services is 'adjunct or ancillary' to the right to basic education. They are essential to ensure that the right to a basic education in s 29(1) of the Constitution is realised. By extension, the provision of the same services in universities and institutions of higher learning cannot be considered ancillary to the core function. They are intrinsic towards the realisation of the end goal. DUT itself admits that the SRC brought the University to a halt over a dispute concerning a previous security company. The importance of security guarding services on university campuses cannot be over-emphasised – they not only protect the institution, but also the students. That addresses the third and fourth query posed by Cameron J. In so acting, the University can also be said to be doing so in the public interest as it would serve no one's interest to have universities continuously disrupted by unruly elements, from inside or outside, or for university property (funded by the public purse) to be vandalised or destroyed. Accordingly, I am of the view that the procuring of guarding services meets the test as set out in *AMCU*.

[34] In the present matter there is no denial by DUT that public funds are deployed towards the paying of guarding services. In line with what the authorities have held, it is not possible to draw a line between where public or private funds (if at all) have been utilised in the contracting by DUT of guarding services. DUT has certainly not sought to make such an argument before me.

[35] After careful consideration, I am satisfied that DUT would have been exercising a public power when contracting for the provision of security services. Where tenders are challenged, ultimately, as Jafta JA said in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA), para 4:

'The final Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be "fair, equitable, transparent, competitive and cost-effective".

This was endorsed by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC) para 28 where it was stated:

'Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA.'

[36] Although Mr *Madonsela* submitted that the issues of whether the procuring of guarding services were domestic in nature and whether DUT was an organ of state were issues that were dispositive of the application, for the sake of completeness I touch on the issues of fraud and corruption raised by the applicant, particularly as it concerned the report of the auditors, Ngubane & Company ('the Ngubane report'), who were engaged by DUT to independently review the processes followed by the BEC. The applicant alleges corruption and collusion between DUT and the third respondent in the awarding of the tender. The allegations of corruption are at the level of the BEC having scored the applicant at 70.5 percent in Phase 2 of the tender (quality and functionality). In terms of the evaluation threshold, the applicant failed to achieve 75 percent to proceed to the next phase. However, the applicant contends that three members of the Bid Adjudication Committee ('BAC'), including two persons whom it named, conducted a site visit of the applicant's premises indicating that they were assessing the applicant's ability to discharge its obligations under the tender. It is at this point that a dispute (not necessarily of fact, but interpretation) arises. DUT does not deny that these visits took place. It contends however that they were 'due diligence inspections' (referred to in terms of tender rule 'B7') as opposed to 'B13' inspections, which in terms of the tender rules could only have taken place if the applicant had passed the 75 percent threshold for functionality and quality.

[37] The applicant contends that the site visit could only have occurred if the applicant had indeed passed the 75 percent threshold in Phase 2 of the process. Therein lies the dispute, as DUT contends that the persons who carried out the visit did not have authority to conduct a 'B13' inspection, and in any event, it could not have been a 'B13' visit as the applicant scored 70.5 percent for functionality and did not qualify to proceed to Phase 3.

On this basis, DUT argues that there are no grounds to infer that a 'B13' visit was ever carried out.

[38] The problem for DUT however does not go away with reliance on the *Plason-Evans* rule[12] on the basis of a dispute of fact. A further dispute emerged as there appeared to be two versions of the Ngubane report - one dated 11 November 2019 (introduced by the applicant) and the other referred to as a 'final' report dated 17 November 2019. The applicant contends that according to a report received from a whistle-blower, the applicant was scored at 75 percent for functionality and not at 70.5 percent as DUT alleges. This is not a material dispute as DUT admits the contents of the report dated 17 November 2019, and which record forms part of the review record. The problem for DUT is that it does not ward off the allegations pertaining to the 'B13' site visits with an affidavit from the members of the BAC who were supposedly present when the visit was carried out. In addition, it did not produce an affidavit from any of the personnel of Ngubane & Company who would have first-hand knowledge of the conclusions in their report. Instead, DUT's Vice Chancellor deposed to an affidavit simply denying all of these allegations. There is no explanation forthcoming from DUT that the persons involved in the site visits are no longer available to depose to affidavits or that they may have left the institution.

[39] To the extent that the applicant alleges fraud and corruption in its papers, it is well established that motion proceedings are by their very nature generally inappropriate for the purpose of making findings of fraud. Mr *Madonsela* correctly submitted that fraud is a serious allegation, carrying with it serious consequences, and the potential for reputational harm. For this reason, there must be the clearest evidence of such conduct. Fraud will not be lightly inferred.[13] Despite the questions hanging over the site visit carried

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[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (*Pty*) *Ltd* 1984 (3) SA 623 (A).

[13] See *Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 (W) 220B-C: '[I]t is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up speculative propositions or to raise submissions or to advance arguments of probabilities which might indicate a fraud. What is essential is that there should be hard facts, as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment'.

out by members of the evaluation committee, this in itself is not sufficient to meet the threshold of sufficient proof. Mr *Madonsela* correctly submitted that allegations of fraud should not be recklessly made. This aspect of the applicant's case was perhaps wisely abandoned by Mr *Pillay*. Other than suspicion pointing towards a 'B13' site-visit and a failure by DUT to counter these allegations, there is no further evidence against DUT.

[40] Mr *Madonsela* submitted that as the applicant has framed its case squarely within the confines of PAJA, and the respondents have restricted themselves only to the review application, it is unnecessary for the court to delve into the issue of any other alleged irregularities. The applicant, it was submitted, has not sought to make out a case for a legality review. This court must be mindful not to overstep the mark and adjudicate on matters strictly not before it, or as Mr *Madonsela* cautioned, to enter into a 'frolic of its own'.

[41] Returning to the Ngubane report, much emphasis was placed on the dates attached to the report. For the purpose of this judgment, I will accept that the report is dated 17 November 2019, the date which DUT contends for. Working backwards, the auditors, Ngubane & Company, were appointed on 14 October 2019 to undertake an evaluation of the bid process. It is at this stage that the waters become a bit muddied because the BEC's minutes appear only to have been produced in December 2019. It appears to me that if Ngubane & Company were appointed to review certain processes, these processes would have already taken place by the time they were appointed. In other words, the selection would have taken place prior to 14 October 2019. In an attempt to deal with this aspect, counsel for DUT submitted that the auditors were conducting a review in respect of a 'preliminary evaluation process'. There is nothing in the tender procedures that refers to such a process nor would it be competent for a 'new' procedure to be adopted on an ad hoc basis by DUT. Counsel for DUT was unable to locate any basis for such a procedure in the tender documents, which constitute the rules of engagement.

[42] In light of the submission by Mr *Madonsela* that the issues raised in the Ngubane report relate to the allegations of fraud and corruption, which have essentially been

abandoned by the applicant, it is not necessary for this court to stray beyond the ambit of the review – in other words to confine its determination to whether DUT is an organ of state and secondly, whether in contracting for guarding services, it was performing an administrative act. The third respondent, for its part, threw its weight behind the arguments advanced by DUT in seeking to protect the status of the contract awarded to it. In addition, the third respondent argued that *Eden Security* is good law and must be followed. As far as the Ngubane report is concerned, the third respondent placed in dispute the applicant's contention regarding the incorrect scoring by the BAC and further denies any insinuation of collusive behaviour with DUT.

[43] Mr *Jefferys SC* who appeared for the third respondent contended that if I were to find in favour of the applicant that PAJA applies in respect of the contract for guarding services, there exists a fundamental dispute of fact on the papers and that the matter should be referred to oral evidence. Mr *Madonsela* for DUT was however more pragmatic and contended that the two primary issues which the court was asked to determine were dispositive of the application. If this court was with the applicant in so far as its contention with regard to *Eden Security* is concerned, Mr *Madonsela* accepted that the applicant must prevail. Having found that the applicant must succeed on the two preliminary issues, Mr *Madonsela* conceded that the university could not defend the awarding of the contract to the third respondent. DUT did however argue against the exceptional relief of substitution which was sought by the applicant.

[44] It bears noting that despite there being a dispute as to the 'earlier' version of the Ngubane report, after having the further opportunity to consider the report, Mr *Madonsela* informed the court that DUT concedes that it indeed failed to furnish the court with a 'good' and proper explanation leading to the applicant's exclusion on the basis of the Ngubane report. This concession in my view bolsters the applicant's submission that there was some 'trickery' at hand leading to the applicant's exclusion as the successful tenderer. Moreover, the one aspect which DUT has failed to address, is an explanation for the difference in the scores in Phase 2 in which the applicant was scored by the BAC at 70.5 percent and by the auditors at 84.5 percent. This discrepancy would have been critical to the applicant scoring the highest in Phase

2 of the bid. In addition, there has never been a satisfactory response to the Ngubane report which concluded with regard to Phase 2 that only two bidders were assessed to have scores above 75, namely Excellent Security and Mzansi Fire & Security (the applicant). This would be in direct contradiction to the scoring of the adjudication committee.

[45] The concession by Mr *Madonsela* must also be seen in the light of what counsel submitted was a failing in the affidavit of the Vice-Chancellor of DUT to recognise and uphold the standard required from an organ of state. In this regard Mr *Pillay* contended that the award of the contract to the third respondent could not be allowed to stand and that justice demands that the applicant be substituted in its place. Counsel submitted that the review application was not confined to a PAJA review but was also a legality review. While reference in the papers is made to a legality review, it is done so fleetingly. That was not the thrust of the application. In support of his argument that the court, in light of the findings of the Ngubane report, should order substitution, Mr *Pillay* relied on to *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) ('*Kirland*') where Jafta J at paragraph 43 stated that :

'. . . the Constitution imposes an obligation on officials to act reasonably and lawfully when exercising public power. What occurred here was neither reasonable nor lawful. A decision flowing from such conduct must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside. The uncontroverted evidence on record establishes that the decision to approve the applications was a contravention of the law and the Constitution. Therefore it ought to have been declared invalid and set aside.'

[46] The third respondent resisted any attempt to set aside the contract. However, in light of the conclusion that I have reached, s 8 of PAJA, read with s 172 of the Constitution, empowers a court to prevent injustice by making a just and equitable order. The court in *Kirland*, at paragraph 52, observed that:

'This power enables our courts to regulate consequences flowing from a declaration of constitutional invalidity. This suggests that the need to exercise this power arises if there is a declaration of invalidity or an administrative action is set aside. If there is no declaration of invalidity, generally the exercise of the power may not be triggered.'

[47] I have already answered the two primary questions posed by DUT in the affirmative, that being that DUT is an organ of state and that in contracting for guarding services as it did, it was performing administrative action, reviewable under PAJA. It follows therefore that in awarding the tender, DUT did not act in accordance with the provisions of s 217 of the Constitution and that the award must therefore be declared invalid in terms of s 6(2)(*b*) of PAJA. In *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC), para 85:

'I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.'

[48] Both Mr *Pillay* and Mr *Madonsela* referred to the approach taken by Moodley AJ in *Excellerate Services (Pty) Ltd v Umgeni Water and others* (1738/19P) [2020] ZAKZPHC 41 (17 July 2020) where the court recognised that where unlawfulness is found to have manifested itself in the impugned decision, although the court always retains a discretion to refuse to award a remedy, the default position is that the principle of legality should be upheld and vindicated, and that there must be compelling reasons to override this default position. Both DUT and the third respondent were in unison that the court should not grant the exceptional relief of substitution of the applicant, in place of the third respondent. While the applicant may have been awarded other guarding contracts at DUT, the cancellation of an existing contract has implications for persons much wider than just the third respondent, even though Mr *Madonsela* informed the court that the third respondent was currently on a month-to-month contract. An order of substitution would have a direct impact on scores of employees, the vast majority of whom probably have no idea at all of the present litigation and its potential consequences for their job security. In addition, I am concerned that an order of substitution could carry with it the possibility of exposing DUT and/or its students to risks either in the form of safety to property or persons. See *Millennium Waste*

Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others 2008 (2) SA 481 (SCA) paras 22-23 as to the public interest component in determining a just and equitable remedy.

In the result I am satisfied that an order of substitution is not just and equitable. The applicants sought a rerun of the tender process, or alternatively an order of a supervisory nature in which DUT was to report to this court every month for a period not longer than six months on the rerun of the tender for guarding services, subject to the tenets of s 217 of the Constitution. I am not persuaded that the court should oversee the awarding of contracts. It runs the risk of become a potential witness in the event of litigation arising from that process. The applicant also sought an order declaring that DUT be declared an organ of state for the purposes of s 217 of the Constitution. I am not persuaded that such relief is either appropriate or necessary in the circumstances, in light of what has been said about the findings in *Eden Security.*

[49] The applicant further sought an order in the Notice of Motion that the tender appeal fee of R200 000.00 which forms part of DUT's tender procedure is unconstitutional in that it effectively stymies the right of unsuccessful bidders (particularly smaller and recently emerging businesses) from challenging a decision in relation to tender. Mr *Madonsela* readily conceded the point and declared that there could be no justification for such a provision, which in my view could frustrate the right of a disgruntled bidder from appealing what may be a patently unfair decision. Larger and more established entities may, in such circumstances, have an unfair advantage over new, smaller and emerging business which may not be in a financial position to carry the risk of the significant appeal fee. I am satisfied that the first applicant, as an organ of state, will take the necessary steps to amend its procedures to ensure that they are fair, equitable and transparent and do not place unfair obstacles in the path of a party wishing to exhaust the internal remedy of an appeal.

[50] Lastly, as regards costs, Mr *Pillay* submitted that I should award attorney and client costs against the respondents as their opposition, founded on *Eden Security*, was shown to have been unsustainable. Moreover, Mr *Pillay* contended that the opposition to the

application was nothing more than an attempt to ‘defend the indefensible’ especially in circumstances where the Vice Chancellor of DUT proclaims that the institution is not bound by the Constitution where it contracts for services, and in the process, expends considerable sums of public funds. The grounds of opposition could well have been based on legal advice, which advice has now been found to be wanting.

At the same time, the concession by Mr *Madonsela*, as late as it came, that DUT is an organ of state was also made for the purpose of being taken into account in ameliorating an adverse order for costs. The applicant too cannot escape criticism as they levelled strong allegations of corruption against the respondents, only to dilute their claim to one where they argued at the end that there was ‘something wrong’ in the process followed by DUT in awarding the tender to the third respondent. This should not be construed as glossing over some disturbing features that emerged when one considers how the tender process and awarding of the contract for guarding services unravelled itself in this case. The third respondent cannot escape liability for costs as it chose to throw its weight behind the arguments of DUT which were founded essentially on upholding *Eden Security* as good law. Despite the late concessions by DUT, I am not satisfied that the respondents should be penalised with attorney and client costs. Party and party costs, including that of two counsel, would be fair in the circumstances.

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

1. The decision by the second respondent to award DUT tender 352 to the third respondent be and is declared to be unconstitutional and invalid and is hereby set aside.
2. The declaration of invalidity is stayed for the period of six (6) months from date hereof so enable the first respondent to conduct the procurement process described in paragraph 3 *infra*.

3. The first respondent is directed within 14 days of the date of this order to: -

    3.1. advertise a security tender to fulfil its security requirements as

described by DUT tender 352;

3.2. take any and all necessary steps to conduct and complete a procurement process for its security requirements as described by DUT tender 352, within the period of six (6) months envisaged in paragraph 2 above.

4. The first respondent shall forthwith refund to the applicant its tender appeal deposit of R200 000, together with interest at the legal rate calculated from 30 December 2019, to date of payment.

5. The first and third respondents are directed to pay the costs of the application including that of two counsel, jointly and severally, the one paying the other to be absolved.

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M R CHETTY

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Date of Judgment reserved:	20 October 2021
Date of Judgment delivered:	3 March 2022

Kindly note this judgment is electronically delivered today at 13:20pm