

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

CASE NUMBER: 820/05

In the matter between:-

ROAD MAC SURFACING (PTY) LTD

APPELLANT

and

**MEC FOR THE DEPARTMENT OF TRANSPORT
AND ROADS, NORTH WEST PROVINCE**

1ST RESPONDENT

**THE CHAIRPERSON OF THE NORTH WEST
TENDER BOARD**

2ND RESPONDENT

THE NORTH WEST TENDER BOARD

3RD RESPONDENT

GODIRELA CIVIL

4TH RESPONDENT

SILVER BLUE ENGINEERING & PROJECTS

5TH RESPONDENT

MMILA PROJECTS (PTY) LTD

6TH RESPONDENT

TAU PRIDE PROJECTS (PTY) LIMITED

7TH RESPONDENT

AND

CASE NO: 821/05

In the matter between:

RAUBEX (PTY) LTD

APPELLANT

and

**MEC FOR THE DEPARTMENT OF TRANSPORT
AND ROADS, NORTH WEST PROVINCE**

1ST RESPONDENT

**THE CHAIRPERSON OF THE NORTH WEST
TENDER BOARD**

2ND RESPONDENT

THE NORTH WEST TENDER BOARD

3RD RESPONDENT

ROUCOM SYSTEMS

4TH RESPONDENT

TAU PRIDE PROJECTS (PTY) LTD

5TH RESPONDENT

AND

CASE NO: 822/05

In the matter between:

**STAR ASPHALTERS/KGOTSONG CIVILS
JOINT VENTURE**

1ST APPLICANT

ROAD MAC SURFACING (PTY) LIMITED

2ND APPLICANT

and

**MEC FOR THE DEPARTMENT OF TRANSPORT
AND ROADS, NORTH WEST PROVINCE**

1ST RESPONDENT

**THE CHAIRPERSON OF THE NORTH WEST
TENDER BOARD**

2ND RESPONDENT

THE NORTH WEST TENDER BOARD

3RD RESPONDENT

J & J ENTERPRISES CC

4TH RESPONDENT

TAU PRIDE PROJECT (PTY) LIMITED

5TH RESPONDENT

MMABATHO

**FULL BENCH CIVIL JUDGMENT
LEEuw J, HENDRICKS J & MAJIEDT AJ**

J U D G E M E N T

LEEuw J:

Introduction:

[1] This is an appeal and cross-appeal by the parties in the three matters under case numbers 820/05, 821/05 and 822/05. All three matters were argued together in the Court *a quo*. In each application, the same counsel appeared on behalf of all Applicants. The Respondents were represented by different counsel in each case. In view of the fact that identical issues arose in each application, one judgement, consolidating all three cases, was handed down by Landman J.

[2] For convenience, I shall consider each case separately when dealing with the merits. The legal issues will be considered together where they may be relevant to each case argued. I will also deal *ad seriatim* with each case in the order in which they were considered by Landman J in the Court *a quo*.

Case No 820/05 : Background Information:

[3] The Applicant in the Court *a quo*, (“Road Mac Surfacing”), was one of the companies which submitted tender documents in response to an

invitation by the Department of Transport and Roads of the North West Provincial Government (“The Department”). There are three tenders involved, namely; Tender Numbers NW276/03, NW277/03 and NW278/03. They all pertained to road constructions at different areas within the North West Province.

- [4] With regard to Tender No NW276/03, the tenders by Road Mac Surfacing and the Sixth Respondent (“Mmila Projects”) were presented to the Departmental Procurement Committee (DPC) on recommendation by the Departmental Tender “Technical Evaluation Committee” (TEC).
- [5] Road Mac Surfacing was not considered despite the fact that it scored the highest points. The reason was that it was committed in other projects from tenders awarded to it by the Department. Mmila Projects was awarded the tender because they were not involved in any work or projects for the Department, as well as the fact that they qualified in terms of the objective criteria outlined in the Preferential Procurement Policy Framework Act 5 of 2000 (“The PPPFA.”) I will come back to this aspect later.
- [6] As regards tender No NW277/03, Road Mac Surfacing, the Fifth Respondent (“Silver Blue Engineering”) and two other companies were shortlisted for consideration. Their tenders were presented to the DPC. Silver Blue Engineering was successful despite the fact that Road Mac Surfacing had scored the highest points. The Department’s reason for awarding the tender to Silver Blue

Engineering was that in addition to other factors, it is a women owned enterprise.

[7] As far as Tender No NW278/03 is concerned, Road Mac Surfacing's tender was not considered at all; the reason being that the Department had set a price envelope. Road Mac Surfacing's price was below the 15% set out in the price envelope; and its tender was considered as being non-responsive because of the 22% variance from the engineer's estimate set out in the price envelope. The tender was awarded to the Fourth Respondent ("Godirela Civil") because in addition, it was also a women owned enterprise.

[8] The following orders were handed down by Landman J: In respect of Tender Number NW276/03:

8.1 "1.1 It is declared that

(a) the award of Tender number NW276/03 to the sixth respondent is vitiated by a gross irregularity committed by officials of the first respondent;

(b) the tender ought to have been awarded to the applicant;

(c) the first respondent is liable for damages, if any, suffered by the applicant flowing from the failure of the first respondent's officials to award the tender to the first applicant."

8.2 A similar order was made in respect of Tender No NW277/03;

8.3 The application to review and set aside Tender number NW278/03 was dismissed and the first respondent ordered to pay two thirds of the applicant's costs, including the costs of two counsel, and further including the costs incurred on 14 July 2005.

[9] Road Mac Surfacing appeals against that part of the judgement and orders under **“case number 820/05 only in so far as it relates to the award of Tender No NW278/03 in which the application to review was dismissed and the First Respondent was ordered to pay two thirds of the Applicant's costs,”**

[10] There is a cross-appeal by the Department, based on the grounds that Landman J erred:

“1. In finding that the award of Tender Number NW276/03 is vitiated by a gross irregularity committed by officials of the Applicant;

2. In finding that the tender ought to have been awarded to the Respondent (Road Mac Surfacing);

3. In finding that for the Applicant to rely on the objective criterion it must be:

(a) recorded in the preferential procurement policy;

(b) listed or ascertained from the tender documents;

4. In finding that the tender process will not be fair if decisions are made on the basis of criterion which are not disclosed to tenderers.

TENDER 277/03

5. In finding that the award of Tender Number 277/03 is vitiated by a gross irregularity committed by the officials of the Applicant.
6. In finding that the tender ought to have been awarded to the Respondent.
7. In finding that the tender documents do not state that the tender could be awarded to a woman owned company or firm in preference to a tenderer who scored the highest points;
8. In finding that the BBBEEA is a framework law and not prescriptive.

COSTS

9. In directing the Applicant to pay two thirds of the Respondents' costs including the costs of two counsel and further including the costs incurred on the 14th July 2005.”

I will deal with both Appeals and cross-appeals simultaneously.

Submissions:

[11] The Department submitted, in respect of Tender Numbers NW276/03 and NW277/03, that Road Mac Surfacing was already engaged in other projects on behalf of the Department and further that it was justified to award the Tender Numbers NW276/03 and NW277/03 to Mmila Projects and Silver Blue Engineering respectively, because they are women owned companies or enterprises, in addition to other factors considered for that purpose.

[12] The Department relies on Regulation 9 of the Regulations published in terms of the PPPFA, which Act confers, amongst others, the right to Provincial Governments to give preference to certain criteria of persons in awarding contracts with the purpose of advancing them¹. **This Act also gives effect to the provisions of section 217 of the Republic of South Africa Act No 108 of 1996. (The Constitution)**

¹**Award of contract to tender not scoring the highest number of points**

Despite regulations .3.(4), 4.(4), 5.(4), 6.(4) and 8.(8), a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points.

2.

[13] Road Mac Surfacing submitted, (in respect of Tender No NW278/03) that the tender offer as well as the regulations did not provide for the setting of a price envelope and that had it not been for the criteria used, Applicant would have succeeded in winning the tender because it had scored the highest points. It was further submitted that the fact that Godirela Civil is a women owned enterprise cannot constitute an objective criterion. It was argued in the court *a quo* that the Department did not declare the price envelope system in the tender documentation; and further those that the Department failed to interview Road Mac Surfacing before excluding its tender and eventually eliminating it from consideration.

Landman J's Reasons for Judgement:

[14] In evaluating the reasons for awarding the Tender Numbers NW276/03 and NW277/03 to Road Mac Surfacing, Landman J stated that:

²**Section 217 of the Republic of S A Act No 108 of 1996 (The Constitution).**

- (1) When an organ of state in the national provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy for –
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.. [Sub-s substituted by s. 6 of Act No 61 of 2001.]

- (i) The Provincial Treasury Instruction No 11 or Department's Preferential Procurement Policy which must accord with the PPPFA, was neither contained in the Department's records relating to the tender, nor did such document appear in any other records;
- (ii) that although part of the essence of the PPPFA Policy was reflected in the tender documentation and contained in the South African National Standard (SANS) Edition 10396:2003, these were merely guidelines to formulate a procurement policy and not the policy itself.

The Law:

[15] The material parts of the PPPFA which have relevance to this appeal are the following:

“2. Framework for implementation of preferential procurement policy.-(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed;
- (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90

points for price;

- (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
- (c) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
- (d) the specific goals may include-
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994;
- (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
- (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and (emphasis added).

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection 1 (e) must be measurable, quantifiable and monitored for compliance.”

[16] Section 4 of the PPPFA allows the Minister of Finance **“to make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objectives of this Act.”** Such Regulations were promulgated and came into effect on 10 August 2001. Of great importance is Regulation 2 which provides that: **“(1) Despite anything to the contrary contained in any law, these regulations apply to organs of state as contemplated in section 1 (iii) of the Act”**. The Provincial Legislature is included as an organ of state in section 1 (iii) (e) under definitions in the PPPFA. The PPPFA further defines, in section 1 (v), that “Preferential Procurement Policy” means a procurement policy contemplated in section 217 (2) of the Constitution. I have already referred to this section of the Constitution above, which stipulates that organs of state, in this case, the North West Provincial Legislature, is not prevented from implementing its own procurement policies which are in line with those contained in the PPPFA as well as the PPPFA Regulations.

[17] The PPPFA Regulations, which have been made applicable to the North West Provincial Legislature, stipulate the following specific goals under Regulation 17 thereof:

- “(1) The tendering conditions may stipulate that specific goals, as contemplated in section 2 (1)(d)(ii) of the Act, be attained.
- (2) The stipulation contemplated in sub-regulations (1) must include the method to be used to calculate the points scored for achieving specific goals.
- (3) Over and above the awarding of preference points in favour of HDIs, the following activities may be regarded as a contribution towards achieving the goals of the RDP (published in *Government Gazette* No. 16085 dated 23 November 1994:
- (a) The promotion of South African owned enterprises;
 - (b) The promotion of export orientated production to create jobs;
 - (c) The promotion of SMMEs;
 - (d) The creation of new jobs or the intensification of labour absorption;
 - (e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
 - (f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
 - (g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;

- (h) The promotion of enterprises located in rural areas;
 - (i) The empowerment of the work force by standardizing the level of skill and knowledge of workers;
 - (j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
 - (k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organizations.
- (4) Specific goals must be measurable and quantifiable and organs of state must monitor the execution of the contract for compliance with such goals.”

[18] The abovementioned factors are amongst those covered by the PPPFA, the Constitution and other legal instruments referred to hereunder. Furthermore, the Public Finance Management Act No 1 of 1999 (PFMA) regulates the financial management in both the national and provincial governments, so as to ensure efficient and effective management of its revenue, expenditure, assets and liabilities. In terms of the PFMA, the accounting officer of the Department must maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive

and cost effective in accordance with section 38 (1) (a) (iii) thereof.³ **Furthermore, in terms of section 18 (2) (a) of the PMFA, the “Provincial treasury must issue Provincial Treasury Instructions not inconsistent with this Act.”**

[19] In compliance with the PFMA, the Provincial Department of Finance and Economic Development issued a Provincial Treasury Instruction No 11 (Treasury Instruction) implementing section 38 (1) (a) (iii) of this Act . The Treasury Instruction, which became effective from 1 April 2005, provides that all provincial department accounting officers must apply the “Supply Chain Management” with the purpose of giving effect to the provisions of the Constitution, the PFMA, PPPFA, the Broad Based Economic Empowerment Act No 53 of 2003 (BBEEA), Policy Strategy to Guide Uniformity in the Procurement Reform Processes in Government, PPPFA Regulations, and Treasury Regulations and Policies. Prior to 1 April 2005, the North West Provincial Government procured services and supplies through the North West Tender Board which was established in terms of Act 3 of 1994.

[20] With regard to policies, the Treasury Instructions provides that:

“2.8.1 The National Treasury may issue procurement policies

³ Section 38(1)(a)(iii) provides:

(1) The accounting officer for a department, trading entity or constitutional institution –
(a) must ensure that department, trading entity or constitutional institution has and maintains –
(iii) an appropriate procurement and provisioning system which is fair to equitable, transparent, competitive and cost-effective;

2.8.2 The provincial treasury may issue procurement policies provided that they are not in conflict with the national policies.

2.8.3 An accounting officer may issue procurement policies that may not be in conflict with the national or provincial policies.”

[21] The effect thereof is that in this instance, the North West Provincial Treasury did not issue any procurement policies but chose instead to adopt the PPPFA and its Regulations, which have become binding on the Department by virtue of the PFMA. Through the Treasury Instruction, the Department is instructed to facilitate the process of transformation in awarding tenders, and it further stipulates the legal instruments or mechanisms that must be applied in order to achieve its goals and objectives, which must be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective, as contemplated in section 217 (2) of the Constitution. See *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*, 2002 (3) SA 265 (CC) or 2002 (9) BCLR 891 par [7]. Compare *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paragraphs [35] and [61]. I am of the view that the Department has adopted the Supply Chain Management which prescribes to the administrative officers or bodies to apply the instruments mentioned in the Treasury Instruction as its procurement policy. These statutory provisions cannot be regarded as framework legislation in the strict sense.

Analysis of Issues:

[22] Landman J, held the view that “**objective criterion**” is one which:

- (a) is not listed in paras (d) and (e) of s 2(1) of the PPPFA. See the remarks of Musi AJ as he then was in **Pelatona Projects (Pty) Ltd v Phokwane Municipality and 14 Others** (unreported NCD 691/04) at para 31;
- (b) is objective in the sense that it can be ascertained objectively. Its existence or worth does not depend on someone’s opinion;
- (c) bears some degree of rationality and relevance to the tender or project.”

[23] He further held the view that for the Department to rely on an objective criterion it must be “**(a) recorded in its preferential procurement policy and (b) listed or ascertainable from the tender documents.**”

With regard to Tender No NW276/03:

[24] Landman J was also of the view that the fact that Road Mac Surfacing was already committed to work on a departmental project, is an objective criterion which would have been a legitimate ground for awarding a tender to a tenderer who did not score the highest point. But, because of failure on the part of the Department to disclose this factor in the tender documents, the “**Department bound itself to accept the highest ranked tender**”. Reference was made

to the case of *Grinaker LTA and Another v Tender Board (Mpumalanga) and Others* [2002] All SA 336(T) at par 40.

With regard to Tender NW277/03

[25] Landman J held the same view as in Tender Number NW276/03 above in respect of Tender Number NW277/03 in as far as the Department's failure to disclose the objective criteria in the tender documentation is concerned. He held the view that the fact that Silver Blue Engineering **"is a women owned company/firm is capable of objective assessment,"** save for the fact that this objective criterion was not listed as such in either the Preferential Procurement Policy or the tender documentation.

[26] In the Answering Affidavit filed on behalf of the Department, the Department conceded to the allegation made in the Founding Affidavit on behalf of Road Mac Surfacing, that it was obliged to comply with the provisions of section 217 (1) of the Constitution, section 3 (2) (a) of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) and section 2 of the PPPFA.

[27] In addition, the Department explained to Road Mac Surfacing, in respect of Tender Numbers NW276/03 and NW277/03, that the following factors were taken into account during the evaluation process:

- Current commitments of the preferred Tenderer with the Department
- Percentage held by Black Owned Entities
- Women Owned Enterprises
- Geographic Location – North West Based Enterprises

- Price
 - Political Consideration (ie Priority Projects to be implemented in needy areas)
- New Entrants to projects sized between R2 and R10 million
- Capacity of Contractor
- Available Budget from the Department.”

[28] The Department, in awarding the tender to Silver Blue Engineering, relied amongst others, on the BBEEA. Landman J held that the BBEEA is a framework law and not prescriptive because it requires a subordinate instrument to be created and published so as to “bring its goals to life”. According to him, **“had codes and charters⁴ been published in terms of the Act they could be taken into account, but none have been promulgated.”**

[29] Road Mac Surfacing’s case was not based on the Department’s failure to disclose the objective criterion in the tender documentation, but rather that **“the fact that they are a women owned enterprise does not constitute an objective criteria to justify the award of the tender to the Fifth Respondent (Silver Blue Engineering) in view of the fact that the criteria above is not a criteria in addition to those criteria contemplated in paragraph (d) of sub-section (1) of section 2 of the Preferential Procurement Policy Frame Work**

⁴Section 12 of the BBEEA provides:

Transformation Charters – The Minister must publish in the Gazette for general information and promote a transformation charter for a particular sector of the economy, if the Minister is satisfied that the charter –

- (a) has been developed by major stakeholder in that sector; and
- (b) advances the objectives of this Act.

Act.” In other words, if my interpretation of the submission is correct, Silver Blue Engineering were awarded additional points based on the same criterion, which criterion already existed in section 2 (d) of the PPPFA.

[30] The BBEEA, despite the fact that it is a legislative framework for the promotion of black empowerment, provides that **“any person applying this Act must interpret its provisions so as –**

- (a) to give effect to its objectives; and**
- (b) to comply with the Constitution”;**

[31] I am of the view that the absence of transformation charters does not prevent the Department from implementing the objectives of the BBEEA because section 3 of the BBEEA enjoins the Department to give effect to its objectives. ⁵

⁵**2. Objectives of Act.-** The objectives of this Act are to facilitate broad-based black economic empowerment by –

- (a) promoting economic transformation in order to enable meaningful participation of black people in the economy;
- (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
- (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
- (d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
- (e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and
- (g) promoting access to finance for black economic empowerment.

[32] The Department extensively explained and has outlined in its Answering Affidavit, the factors which were considered by the Tender Evaluation Committee, when it came to a conclusion that Silver Blue Engineering's position as a women owned enterprise, fell within the purview of its objective criteria. These factors, outlined in the Answering Affidavit, remained unchallenged by Road Mac Surfacing, in that no Replying Affidavit was filed in response thereto.

[33] I agree with Landman J in as far as the definition of objective criteria is concerned but I do not agree with his finding that the objective criterion ought to have been reflected in the tender documentation together with the Department's Preferential Procurement Policy. The reasons being that:

33.1 The specific goals for which a point may be awarded are clearly specified in the PPPFA and its Regulations. These were disclosed in the invitation to submit a tender as contained in Annexure E to SANS 10396 : 2003. This document formed part of the tender documentation and deals with the guidelines to be considered in "implementing Preferential Construction Procurement Policies using targeted procurement procedures."

33.2 The objective criteria are those goals which are not specified and not contained in the PPPFA and which would usually become apparent when the tenders are

considered and weighed against each other. Musi AJ in the case of *Pelatona Projects (Pty) Ltd v Phokwane Municipality and 14 Others supra.* at paragraph 31, in interpreting the provision of section 2 (1) (f) of the PPPFA, states that:

“This section has two interlinked requirements. Firstly the criteria must be objective criteria, other than those mentioned in subsection (d) and (e). Secondly the objective criteria should justify the granting of the tender to another tenderer. There must therefore be a causal nexus between the two. The additional objective criteria must, in my view, be discernable from the information made available to the decision maker (first respondent). If this is not the case it would mean that the decision maker may look criteria or information which was never asked from the tenderers. The decision maker will therefore look at information other than that put before it. Such a decision would detract from the fairness of the process. It may well lead to subjective factors being taken into consideration. It is well known that when subjective factors walk in the door rationality flies out of the window. The objective criteria justifying the awarding of the tender to a tenderer other than the one with the lowest tender should not cause the process to lose the attributes of fairness, transparency, competitiveness and cost-effectiveness. See **Metro Projects CC** supra at paragraph 13. I now turn to look at the reasons for the decision, mindful of the fact that my task is not usurp the functions of administrative agencies, neither should I cross over from review to appeal. See **Logbro Properties** supra at paragraph 21 and 22.”

- 33.3 I do not entirely agree with this view expressed by Musi AJ. (as he then was) Disclosing the objective criteria in the tender documentation would in my view, not make room for the Department’s officials to consider other factors not evident from the documentation presented, thus defeating the objective process of assessing the tenders under consideration. I agree with counsel for the Department, Mr Pistor, that in their ordinary dictionary meaning, “**goals**” are distinguishable from “**criteria**”, the

latter having more to do with “principles, standard, a thing it is judged by” whereas a “goal” is “a mark set to be reached” and “object or effort or ambition.”⁶ It was therefore not a statutory requirement that criteria be stated in the tender documents.

33.4 I have already alluded to the fact that Road Mac Surfacing, in their founding papers have stated that the Department was obliged to comply with the section 217 (1) of the Constitution, section 3 (2)(a) of PAJA and section 2 of PPPFA in considering the tender. From this allegation, I assume that Road Mac Surfacing was fully conversant with the contents of the provisions thereof.

33.5 Section 3 (2)(a) of PAJA provides that “A fair administrative procedure depends on the circumstances of each case.” The Department has explained and furnished reasons to Road Mac Surfacing in writing, as to why it was not successful in its tender proposals. The provisions of PAJA as well as the provisions of section 217 of the Constitution read with section 2 of the PPPFA were fully complied with. Even if the provisions of the PPPFA and the Regulations did not form part of the Tender documentation, some of those provisions were contained in SANS 10396 : 2003. Full reasons for the decision taken were subsequently made available to

⁶Concise Oxford Dictionary 5th Edition p 290 and 526 respectively.

Road Mac Surfacing in accordance with section 5 of PAJA.

[34] In the application for Review in the Court *a quo*, the grounds for review by Road Mac Surfacing, amongst others, were that the fact that Mmila Projects “**were not currently committed on projects under implementation by the First Respondent is not an objective fact and/or criteria that justifies the award of the tender.**” A similar allegation was raised in respect of the tender awarded to Silver Blue Engineering. Road Mac Surfacing did not rely on the Department’s failure to disclose such fact in the tender documents as a ground for review.

[35] I agree with Counsel for the Department, Ms Gutta, that the Court *a quo* only had to make a finding on whether or not the abovementioned factor fell within the objective criteria in addition to those contemplated in the PPPFA.

[36] In the circumstances, I find that the Learned Judge in the Court *a quo* misdirected himself by making a finding that the objective criteria ought to have been stated in the tender documentation, which was not a matter to be decided by him and therefore overstepped by coming to such a finding.

Did the Department establish an objective criteria?

[37] In view of the fact that it was found by the Court *a quo*, that the

Department has established the objective criterion in respect of Tender Numbers NW276/03 and NW277/03 and NW278/03, and that the establishment of an objective criterion by the Department would have been sufficient to exclude Road Mac Surfacing from being granted the tender, despite attaining the highest points, it is therefore, not necessary to traverse this issue further. I am satisfied that with regard to the question as to whether or not the Department has succeeded in establishing an objective criterion, Landman J is correct and can therefore not be faulted in that regard.

[38] With regard to the Department's failure to establish its own Procurement Policy, from the exposition on the law above, it is evident that such failure does not prevent the Department from using the Acts and Regulations put in place for that purpose. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs supra*. After all, Regulation 2 of the PPPFA *supra* is binding on the Department.

[39] I have pronounced on the issue of failure to disclose the Provincial Procurement Policy as well as objective criterion in the Tender documentation, in view of the fact that counsel on behalf of the parties hereto were allowed, in this Court, to make submissions on this aspect, even though it was not a ground of review in the Court *a quo*.

[40] I accordingly find that in respect of Tender Numbers NW276/03 and NW277/03, the Court *a quo* erred in finding that a gross irregularity

was committed by the officials of the Department. This finding therefore affects the ancillary orders granted in favour of Road Mac Surfacing in respect of the award of the tender and damages, which stand to be set aside.

Was it appropriate to award damages?

[41] Section 8 (1) of PAJA provides that:

“8 Remedies in proceedings for judicial review (1). The court or tribunal, in proceedings for judicial review in terms section 6 (1) may grant any order that it just and equitable, including orders -

- (c) setting aside the administrative action and –
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
- (ii) in exceptional cases -
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
- (e) granting a temporary interdict or other temporary relief;
- (f) as to costs”

[42] The question to be determined is:

- (i) Whether or not a claim instituted for damages can be

successful, in a case where tenderers offer to tender in response to an invitation by the Department, when its tender is not accepted; and

- (ii) Whether an order for damages can be made *mero motu* by a Court adjudicating a review matter under the auspices of section 8 (1) (c) of PAJA.

[43] The first question was extensively dealt with in the case of *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA). The Court held that such claim was untenable. The claim brought by the Applicant in this case was based on the State Tender Board Act No 86 of 1968, in which the Court held that its provisions, read in conjunction with section 187 of the Constitution of the Republic of South Africa Act No 200 of 1993 (“Interim Constitution”) did not justify the conclusion that a tenderer’s loss of profits could be recovered for breach of its provisions.

[44] Recently, the Supreme Court of Appeal had opportunity to decide on this issue in the case of *Stenkamp NO v Provincial Tender Board*,

⁷217 Procurement

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

(2) Subsection (1) does not prevent the organs of State or institutions referred to in that subsection from implementing a procurement policy providing for – (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in ss (2) may be implemented.’

Eastern Cape 2006 (3) SA 151 (SCA). Similarly, in this case, the Appellant sued the Provincial Tender Board for damages suffered by the Company, which damages were allegedly occasioned by it in having set aside a tender. The Appellant had succeeded in setting aside the tender awards of the successful tenderer at the Ciskei High Court. He did not succeed in his action for damages in the High Court as well as on appeal to the Supreme Court of Appeal. It is not necessary to restate the factual and legal submissions raised in that Court save to state that such a claim cannot succeed. The following concluding remarks of Harms JA are apposite:

“Weighing up these policy considerations, I am satisfied that existence of an action by tenderers, successful or unsuccessful, for delictual damages that are purely economic in nature and suffered because of a *bona fide* and negligent failure to comply with the requirements of administrative justice cannot be inferred from the statute in question. Likewise, the same considerations stand in the way of the recognition of a common-law legal duty in these circumstances.”

See *Steenkamp v Provincial Tender Board, Eastern Cape supra*
at par [46]

[45] In the present appeal before this Court, Road Mac Surfaces did not seek an order for damages from the Court *a quo*. The Court, having made a finding in favour of Road Mac Surfaces, *mero motu* made a declaratory order wherein the Department was made liable for damages that Road Mac Surfaces may have

suffered. Although section 6 (10 (ii) (bb) of PAJA *supra*, provides that an order for compensation may be granted by a Court, exceptional circumstances must be established before such an order can be made.

[46] I am of the view that it was inappropriate, in the circumstances of this case, to make such an order.

Costs

[47] With regard to the costs order in respect of Tender Numbers NW276/03 and NW277/03, the Court *a quo* ordered the Department to pay two thirds of Road Mac Surfacing's costs, including the costs of two counsels. No reasons were given for making such a cost order.

[48] In this appeal, the Department is substantively successful in that the orders in the Court *a quo* are to be set aside. I am of the view that costs should follow the result. With regard to the costs of the 14 July 2005, the Court *a quo* did not make any pronouncement with regard to whether or not the matters were urgent. I am of the view that in this case the successful party should be awarded costs in its favour, including the costs of 14 July 2005.

With regard to Tender NW278/03 : Analyses of Issues

[49] I have alluded to the fact that Road Mac Surfacing submitted that, in

addition to the fact that Godirela Civil was a woman owned enterprise, the Department did not have a right to set a price envelope because there are no regulations which provide for the setting of such price envelope. In his oral submissions to the Court *a quo*, Mr Coetzee for Road Mac Surfacing, raised the point that the Department acted wrongly by not inviting Road Mac Surfacing for an interview before excluding its tender. This submission was based on a clause in Annexure E of SANS 10396 : 2003, which states under E.3 Price review, that “Every tenderer who has tendered unrealistic financial parameters should be interviewed to ascertain whether there is a valid reason for this. If there is no valid reason, the tenderer should be eliminated from further consideration.” Road Mac Surfacing relies on these guidelines to make its case.

[50] Furthermore, in its founding papers, Road Mac Surfacing alleges that: **“Notwithstanding the allegation that Black Top Surfaces was the highest ranked tenderer, the tender was awarded to the Fourth Respondent (Godirela Civil) on the basis that they are a women owned enterprise”**. Road Mac Surfacing further states that **“I in any event deny that Black Top Surfaces would have been the highest ranked tenderer had the Applicant’s tender not been considered to be a non responsive tender.”** The Department submitted that the purpose of the price envelope was to exclude those tenders who, in its opinion would not be capable of completing their contracts.

[51] Landman J’s view, with regard to the price envelope, is to the effect

that in order to arrive at an objective establishment of a realistic price, **“it must relate to prevailing prices at the time the tender is awarded and must be informed by an expert. That “merely using an aggregate of the tenderers submitted may not be an objective means of arriving at a realistic price.”**

[52] This reasoning cannot be faulted. To state that the price envelope was not disclosed in the tender documentation would defeat the purpose of calling for tenders as this would also make room for manipulation of the tender prices submitted by the tenderers, and might also prevent the object of competitiveness which is a feature peculiar to tendering procedures. Compare *South African Post office Ltd v Chairperson, Western Cape Provincial Tender Board and Others* 2001 (2) SA 675 (C) at 688 G – H.

[53] With regard to the Department’s failure to call Road Mac Surfacing for an interview, in accordance with SANS 10396 : 2003, Landman J held the view that the Department committed a procedural error, in that it should have consulted with Road Mac Surfacing in order to establish whether or not it had an explanation for the low prices tendered. But he also held that Road Mac Surfacing was not prejudiced by such failure, especially in view of the fact that it does not take issue with the correctness of the engineer’s price or the premise on which the price envelope is based. Furthermore, **“Road Mac Surfacing does not state in its papers as to what it would have said at the interview.”**

[54] Section 33 (1) of the Constitution enjoins that all administrative action must be lawful, reasonable and procedurally fair. The same requirement is stated in section 3 (2) (a) of PAJA. The following remarks of Conradie JA in *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 at par 13 are apposite: **“Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.”** (emphasis added). See also *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) and the cases therein referred to.

[55] To state that Road Mac Surfacing does not disclose in the Court papers as to what it would have said at the interview is an issue that need not have been disclosed to the Court *a quo* since, by so doing, it would be overreaching into the administrative function of the Department.

[56] In the case of *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC): at 931 par 180 Sachs J said the following:

“The judicial function simply does not tend itself of factual enquiries,

cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic, and political questions requires. Nor does it permit the kind of pluralistic public interventions,, which are part and parcel of parliamentary procedure. How best to achieve the realization of the values articulated by the Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of the Courts.”

He goes further to state in paragraph [181] that

“... The role of the Courts is not effectively to usurp the functions of the Legislature, but to scrutinize the acts of the Legislature”

[57] It is not the function of a Court of Review to usurp the functions of an administrative body, but rather to “ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision” per Chaskalson CJ in **Bel Porto School Governing Body and Others v Premier, Western Cape and Another** 2002 (3) SA 265 (CC) at par 85 – 87 (292 C). Compare **S v Lawrence**; **S v Negal**; **S v Solberg** 1997 (2) SACR 540 at par [42]

[58] Although I agree with Landman J that the Department’s officials committed a procedural error by not inviting Road Mac Surfacing for an interview before rejecting its tender proposal, I am of the view that such failure on the part of the Department constituted a procedural unfairness in that Road Mac Surfacing have not had the opportunity to explain why its tender price was too low and may even have persuaded the Department to reconsider its tender together with the others. Compare **Logbro Properties CC v Bedderson NO and Others**

supra and remarks of Cameron JA at paragraph [23] – [26].

[59] I am of the view that failure to afford Road Mac Surfacing an opportunity to present its case at an interview, adversely affected the tender process of an essential element of fairness in that the tenders were not equally evaluated.

Did Road Mac Surfacing suffer any prejudice?

[60] In its Founding Affidavit, Road Mac Surfacing avers that its tender price was R3 634 791.13 with 93.4 points, Black Top Surfacing tender price was R4 169 910.88 with 77.3 points and Godirela Civil's tender price was R4 725 027.58 and the points awarded unknown. Road Mac Surfacing did not raise the procedural irregularity in its founding papers; this issue was only raised during argument in the Court *a quo*. This explains why Road Mac Surfacing was constrained to argue that it had been adversely affected or prejudiced by such irregularity. No basis has been laid in the founding papers.

[61] On the other hand, Godirela Civil has filed an affidavit showing the prejudice it may suffer if the tender contract awarded to it were to be set aside or cancelled, in view of the fact that it had already borrowed money for the project and that cancellation would result in serious adverse financial implications. Road Mac Surfacing did not dispute or gainsay these allegations in that it did not file a Replying Affidavit. Compare *Rajah & Rajah (Pty) Ltd and other Others v Ventersdorp Municipality and Others* 1961 (4) 402 (AD) and *Manong & Associates v*

Director General : Department of Public Works and Others [2004] 1 All SA Law Reports p 673 (CPD).

[62] I am therefore of the view that setting aside the tender would be academic in the circumstances. I am of the view that the costs should follow the result. _

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Case No 821/05 : Background Information :

[63] The Applicant (“Raubex”) was one of the companies which submitted tender documents in response to an invitation by the Department for the upgrading of road P25-1 between Tweelingpan and P34-5, in the Bophirima Region within the North West Province.

[64] Raubex was not successful and the tender was awarded to the Fourth Respondent (“Roucomm Systems”) which is one of the companies that had submitted tender documents, along with twelve (12) others.

[65] According to a document compiled by the Department’s Project Manager, (Tau Pride Projects), Roucomm Systems’ tender price, which was corrected, amounted to R28 888 612.57, which was R2 198 439.70 above the engineer’s estimate (Price envelope) whereas the corrected price of Raubex amounted to R26 032 321.80.

[66] Furthermore, Raubex accumulated 99 points whereas Roucomm Systems corrected points awarded, were reflected as 89.91.

Raubex was as a result ranked number 1. According to Raubex, Roucomm Systems was eliminated on the basis that the contract exceeded its capabilities. Tau Pride Projects further indicated that the average tender price was used as the bench mark for the evaluation of responsive tenders on the project, instead of the engineer's estimate which was considered to be too low.

[67] Raubex, Roucomm System and BR Tsimba were shortlisted and their tenders submitted to the Departmental Procurement Committee (DPC). Roucomm Systems were awarded the tender, based on their maximum participation resource goal of 89 points. Furthermore, with regard to the objective criteria, the DPC considered the fact that Roucomm Systems is a North West based Enterprise and a new entrant to the project as well as having a maximum participation as a Black Economic Empowerment entity. Although the first letter did not make mention of the fact that Roucomm Systems was given an opportunity as a "new entrant," a second letter was faxed to Raubex explaining why this aspect was now included as one of the factors which was taken into account when awarding the tender.

[68] In addition to the above, the letter explained that the evaluation process took the following factors into account:

- “• Current commitments of the preferred Tenderer with the Department
- Percentage held by Black Owned Entities
- Women Owned Entities

- Geographic Location – North West Based Enterprises
- Price
- Political Consideration (i.e. Priority Projects to be implemented in needy areas)
- New entrants to projects sized between R2 and R10 Million
 - Capacity of Contractor
- Available Budget from the Department.”

[69] The Department’s explanation in its Answering Affidavit made on behalf of Tau Pride by Mr Lambert Lobelo (“Lobelo”) the Director of Tau Pride Projects, and who was part of the DPC during the adjudication of this tender, is fully stated by him as follows:

“41.2 In order to establish what an acceptable and a reasonable tender price would be in respect of a contract the Departmental procurement committee took as “bench mark” a price as recommended to the committee by the project engineers.

41.3 The committee then, and based on the fact that the average profit margin on contracts of this nature varies between 10% and 15%, took as a reasonable price range (the so-called “price envelope”) a margin of 15% above and 15% below the bench mark”.

41.4 The committee was of the view that a tender price which was below the 15% would not have been an acceptable tender because of the fact that should such a low price be accepted the tender on probabilities might run the risk of not making a profit and therefore there would be a risk for the Department that the contract might not be completed by that specific tenderer. On the other hand a tenderer who has submitted a tender price above the 15% range was considered as too expensive and for that reason not an acceptable tender.

41.5 In some cases it was found that the “bench mark”, compared to the average price of all the tenders, was too low and in such event the average tender price was taken as a “bench mark”. For example in a specific instance sixteen tenders were received. The engineers’ recommendation was the third lowest. In such instance the committee was of the view that the engineers’ recommendation would not be a fair “bench mark”

since quite a number of experienced tenders tendered substantially higher. The committee then took the average tender price.

4.1.6 It is for these reasons that the first seven lines of pages 2 of Annexure “K” to the founding affidavit differ from one case to the other. In the case of the relevant tender I initially issued the said annexure with the incorrect page 2 and therefore subsequently provided an amended page 2.

41.7 The stated consideration process could for obvious reasons not have been revealed in the tender documents, since the reasonable tender price, recommended by the engineers, or the average tender price could not have been revealed before hand. I respectfully say that the relevant committee had to implement an acceptable consideration process in order to establish what an acceptable price would be. Such a process is not required to be made known beforehand. I respectfully submit that the process followed by the committee is fair and reasonable.

41.8 I respectfully say that the aforesaid process of adjudication is perfectly permissible, fair to all tenderers and without any bias.”

[70] Landman J found that the Department was inconsistent in its explanation as to why the average tender price was used instead of the engineer’s estimate; he also held that the Department deviated from the terms of the tender document which were notes to tenders and which required the tenderers to complete a schedule of quantities. This form, which is Form C, was included in the tender documents on submission of the tenders. In its adjudication of the tenders, when preparing the checklist, the Departmental Tender Evaluation Committee agreed that the contractor who had not completed the schedule of quantities (Form C) would be requested to do so upon appointment. It was therefore not clear whether Roucomm Systems was requested to complete Form C.

[71] He held that Raubex obtained the highest points and that its price fell

within the 15% of the engineers price and the average price; and that it complied with the tender conditions and “prima facie offered good value (sic) money.” That its only rival was BR Tsimba which was out on points.

[72] He was also of the view that by invoking the Preferential Procurement Policy and awarding the tender to Roucomm Systems, based on the objective criteria referred to above, it cannot be legitimately employed to override the principle that the tender must be awarded to the tenderer with the highest points. He went further to state that assistance to a new entrant could be an objective criterion but because it was not specified in the tender documents, it cannot be taken into account. He found that the Department committed a gross irregularity in awarding the tender to Roucomm Systems. He accordingly set the tender award aside and declared that it be awarded to Raubex because the Department’s officials committed a gross irregularity in awarding the tender to Roucomm Systems.

[73] I have already expressed the view that failure to disclose the objective criteria cannot be said to be irregular and fatal to the tender process. I am of the view that Landman J’s view cannot be acceptable in this regard.

Was the tender adjudication process fair?

[74] As to whether or not the Department conducted the tender process fairly and consistently, I have already referred to the approach

adopted by our Courts in dealing with issues of this nature *supra*. I may add that the question to be asked is: Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at? See *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at 354 H – 355 A.

[75] In this instance, the Department has extensively explained the procedure and mechanism it applied in deciding on an acceptable tender. It also explained why it deviated from the method initially employed in deciding on estimating the tender price, which in my view was fair, and was applied consistently and in accordance with the laws and policies adhered to by the Department. *See Bel Porto School Governing Body and Others v Premier, Western Cape and Another supra*. Compare *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa supra*.

[76] With regard to the tender awarded to Raubex by the Court *a quo*, Landman J stated the following:

“[69] As the project, to which the tender relates, is expected to take some 11 months to complete, it seems to me that in these circumstances the Applicant should not be left to claim compensation.”

After referring to the provisions of section 8 of PAJA, he went further to state that:

[71] In my view there are exceptional circumstances present which permit this Court to substitute its decision for that of the Department. All the relevant material is available to me. The law, as I have set it out, and the facts permits of no other result than that the tender be awarded to the tenderer which has achieved the highest point. There will be little to be gained and some time lost if the matter were to be remitted to the Department.” He then made an order setting aside the tender awarded to Roucomm Systems and awarded it to Raubex.

[77] I am of the view that there is no legal basis on which the Court *a quo* had to interfere with the administrative function of the Department. I am not persuaded that the Court *a quo* was entitled to set aside the tender awarded to Roucomm Systems and substitute same with an order awarding the tender to Raubex. Here too I am of the view that the costs order should follow the result.

Case No 822/05 : Background Information

[78] First Appellant (“Star Asphalters”) and the Second Appellant (“Road Mac Surfacing”) have jointly filed an appeal against the whole judgement and costs order handed down by Landman J, dismissing the review application in the Court *a quo*.

[79] Star Asphalters and Road Mac Surfacing (the Appellants) submitted tenders to the Department in response to an invitation to tenders for the rehabilitation of Road K3 between K8 and P2-4 in the Eastern

Region of the North West Province. The Fourth Respondent (J & J Enterprises) together with others also submitted tenders for the same project.

[80] J & J Enterprises was awarded the tender. Appellants asked for reasons for the award of the tender to J & J Enterprises and the explanation was furnished by the Fifth Respondent (“Tau Pride Projects”), the Project Manager on behalf of the Department.

[81] The reasons were contained in a similar kind of letter and contents as in Case No 821/05 referred to above. The explanation can be summarized as follows:

81.1 The Project Manager compiled a standard template in which a price envelope was set up, and was to be kept up to 15% above and below the engineer’s estimate. The average tender price was used as the benchmark for evaluating responsive tenders on this project because the engineers estimate was considered to be too low when compared against the average tender prices received by the Department. This approach resulted in more tenders being responsive and evaluated for consideration.

81.2 A corrected page was later sent to Appellants’ Attorneys stating that “the engineers estimate was used as the benchmark for evaluating responsive tenders on this project.”

81.3 The Appellants' tenders were not considered or calculated in view of the fact that they were regarded to be non-responsive tenders as their prices fell outside the 15% price envelope.

81.4 J & J Enterprises was awarded the tender despite the fact that Black Top Surfaces was the highest ranked tenderer in points. J & J Enterprises was said to have been allocated maximum participation resource goal of 90 points coupled with the fact that they were not currently committed in projects under implementation by the Department.

81.5 The tender was further awarded, based on the corrected price of R3 027 394.74, which was R118 834.32 below the engineer's estimate.

[82] Appellants submitted that from information available to them, Black Top Surfaces was the highest ranked tenderer and was recommended, and further that the tender of J & J Enterprises was approximately R700 000.00 more than that of Star Asphalters. I must here pause and state that Black Top Surfaces did not take issue with the Department's decision to award the tender to J & J Enterprises.

[83] It was submitted on behalf of the Appellants in the Court *a quo* that the setting of the benchmark and tender price parameters were never stated as criteria in the documents or the tender invitation, nor was it a specific goal and as such no points ought to have been awarded to

same.

[84] The Department avers that the tender adjudication process was fair and the Department either uses the Consultant's Project estimate or the tender price average because the experience and quality of Consulting Engineer's differ from **"extremely experienced for the established firm, to be (sic) the inexperienced Affirmative Professional Service Providers."** As a result, the application of the 15% price envelope system was considered to assist in the **"deemed risk adjudication and award process."** The Department further explained that it deviated from awarding tenders on the highest points scored because this had the result of awarding too many projects to one contractor which would be overloaded. That Black Top Surfaces would have been awarded 7 out of 10 road seal tenders had the highest point scored formula been applied. It was finally decided that Black Top Surfaces would be awarded three projects only, while the other tenders were awarded at a higher cost, to other tenders; Furthermore, that Black Top Surfaces, being the highest ranked tenderer, was already involved in other contracts for the Department and as such the adjudication committee **"deemed it fair and reasonable to award the contract to a different contractor in order to spread the work to other contractors."**

[85] Landman J, held the view that the Department correctly eliminated the Appellants' tenders and that the Department was entitled to make use of the price envelope. He further held, that the Appellants did not question the use of the price envelope system and as such did

not show any prejudice suffered by them, especially in view of the fact that Black Top Surfaces would probably have been awarded the tender but for the above factors mentioned above. He dismissed the Appellants' application.

[86] I wish to reiterate the fact that the Department has given a substantive explanation with regard to how the DPC came to a decision that J & J Enterprises' proposal was an "acceptable tender." The Applicant could not show any irregularity or unfairness in the adjudicating process for awarding the tender save for taking issue with the price envelope criteria.

[87] I have already expressed a view above, in respect of the price envelope system, and need not repeat same here. I am not persuaded that Landman J misdirected himself in dismissing the Appellants' application and therefore have no reason to interfere therewith.

[88] I accordingly make the following orders in respect of all three cases:

88.1 Case No 820/05

With regard to Tender Numbers NW276/03 and NW277/03:

(a) The appeal is dismissed;

- (b) The cross-appeal is upheld with costs.

- (c) The orders numbered 1.1. (a), (b) and (c) and 1.2. (a), (b) and (c) in the Court *a quo* are set aside and the following substituted therefor:

“The application is dismissed with costs, including the costs of 14 July 2005”.

88.2 In respect of Tender No NW278/03:

The appeal is dismissed with costs.

88.3 Case No 821/05:

- (a) The appeal is allowed with costs.

- (b) Orders 2.1. (a), (b) and (c) in the Court *a quo* are set aside and replaced with the following:

“The application is dismissed with costs including the costs of two counsel. The costs incurred on 14 July 2005 included.”

88.4 Case No 822/05:

- (a) The appeal is dismissed with costs. The Appellants are ordered to pay the costs of the

appeal jointly and severally, the one absolving the other.

M M LEEUW
JUDGE OF THE HIGH COURT

I agree.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

S A MAJIEDT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

In Case No 820/05:

For Appellants	:	Adv W COETZEE with Adv T Henriques
For Respondents	:	Adv N Gutta
Appellants Attorneys	:	Messrs Fletcher's Attorneys c/o Minchin & Kelly
Respondents Attorneys	:	State Attorneys

In Case No 821/05

For Appellants : **Adv W Coetzee with Adv T Henriques**
For Respondents : **Adv C Zwiendelaar**

Appellants Attorneys : **State Attorneys**
Respondents Attorneys : **Messrs Fletcher's Attorneys**
c/o Minchin & Kelly

In Case No 822/05

For Appellants : **Adv W Coetzee**
For Respondents : **Adv P H J PISTOR SC**

Appellants Attorneys : **Messrs Fletcher's Attorneys**
c/o Minchin & Kelly
Respondents Attorneys : **State Attorneys**

Date of hearing : **15 May 2006**
Date of judgement : **31 August 2006**