Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: UM 134/2023

In the matter between:-

LICHENRY (PTY) LIMITED Applicant

and

MEC: DEPARTMENT OF PUBLIC

WORKS AND ROADS: NORTH WEST

PROVINCIAL GOVERNMENT First Respondent

MM INDUSTRIES (PTY) LIMITED Second Respondent

CORAM: MFENYANA J

Heard: 21 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **16 November 2023**.

Summary: Reconsideration – Rule 6(12)(c) of the Uniform Rules – urgent application – order granted in the absence of the second respondent – whether the court is in as good a position as the administrator to substitute the decision of the decision-maker.

ORDER

(1) The application for reconsideration of the order of this court granted on 27 July 2023 is refused.

(2) The costs associated with the hearing of the application for reconsideration shall be borne by the respondents jointly and severally, the one paying the other to be absolved.

JUDGMENT

Mfenyana J

[1] This is an application in which the second respondent, MM Industries (Pty) Limited (MMI), seeks reconsideration of the order granted by Dewrance AJ on 27 July 2023. The application is brought pursuant to the provisions of Rule 6(12)(c) of the Uniform Rules of Court.

[2] MMI is the only party that opposes the application. The first respondent, the Member to the Executive Council, Department of Public Works and Roads, North West (the department), has, after its abortive attempts to oppose the application now opted to abide the decision of this court.

[3] At the heart of the dispute is a tender (Tender No.12420A – FA7/ the tender) which was awarded by the department to the second respondent for *inter alia,* the patching of potholes and resealing of a certain road in Makaunyane, North West.

[4] The applicant, Lichenry (Pty) Limited, approached this court on an urgent basis, seeking *inter alia* that the decision of the department, to award the tender to MMI be declared unlawful, reviewed and set aside. Although the record shows that service was effected on both respondents, when the application was heard on 27 July

2023, MMI was in default. The order was thus granted in its absence. The department on the other hand had attended the hearing solely to seek a postponement of the matter. When that postponement was refused, the matter proceeded unopposed.

[5] The reasons for MMI's default are set out extensively in its affidavit, and are essentially that the application was not served on it. It later transpired that the papers were, in fact, served at an address to which MMI no longer has links.

[6] On 27 July 2023 the court issued the following order:

> *"1. The Applicant's non- compliance with the prescribed requirements pertaining to form, process and time periods is condoned and the matter is heard as one of urgency as envisaged in Rule 6(12) of the Uniform Rules of Court.*
>
> *2. The First Respondent's decision to award tender No. 124/20A-FA7 styled "Pothole patching and reseal of road D604 and Z607 Makaunya" to the Second Respondent is declared unlawful, reviewed and set aside.*
>
> *3. The consequential Service Level Agreement concluded between the First and Second Respondents pertaining to the execution of the tender mentioned directly hereinabove is struck down in accordance with section 8 of Promotion of Administrative Justice Act, 3 of 2000.*

4. *The First Respondent is ordered to award the said tender and contract to the Applicant.*

5. *Upon the date of the granting of this order:*

   5.1 *The First- and Second Respondents are ordered to immediately stop all construction related work and related to said tender.*

   5.2 *The First Respondent is ordered to, upon such cessation, measure all work done by the Second Respondent, either internally or externally, and to place a value upon the work the Second Respondent had so performed.*

   5.3 *Commensurate with the said measurement and valuation, the Second Respondent is ordered to determine the extent-and value of the remainder of the work to be performed under the construction project.*

   5.4 *In the contract contemplated in prayer 4 above, the First Respondent is to incorporate the extent- and value of the remainder of the work to be performed and record as much in the contract the Second Respondent is ordered to conclude with the Applicant.*

6. *Leave is granted to the Second Respondent to issue out of this court or any other competent court, judicial proceedings for the payment of any money that might be due to it for the work it has performed, and nothing in this order is to be construed as binding the authority of the court hearing such an judicial proceeding to quantify any claim the Second Respondent might have against the First Respondent.*

7. *The First Respondent is ordered to pay the costs of this application on the scale between attorney and client."*

[7] In terms of rule 6(12)(c) a party against whom an order was granted in its absence in an urgent application, may by notice, set the matter down for the reconsideration of the order. The rationale behind the rule is that, at the rehearing of the matter, the court is given the benefit of argument from the party seeking reconsideration as the initial application would have been granted in the absence of such a party.

[8] Before dealing with MMI's averments, it is perhaps apt that I deal with the applicant's averments in the original application, as set out in the founding affidavit.

[9] The applicant's case is predominantly premised on the averment that in awarding the tender to MMI, the Bid Adjudication Committee (BAC) fundamentally changed the tender conditions and criteria to suit MMI, which decision was irrational.

[10] The deponent to the founding affidavit, Mr Johan Henry Heathcote (Heathcote) asserts that the contract awarded to MMI is a six-month contract, and that MMI had already started with the 'works'

to approximately 10% of the awarded tender. He avers that the applicant tried without success to obtain the record of the proceedings as a consequence of which it instituted contempt proceedings to compel the department to provide the record.

[11] According to the applicant, the court was compelled to declare the award unlawful as it should have been awarded to the applicant, and not MMI. The applicant further avers that in terms of the criteria set by the department, the applicant was compliant and its tender was the only acceptable tender which ought to have progressed in terms of the evaluation criteria, and ultimately should have been awarded the tender. The applicant contends that this constitutes exceptional circumstances.

[12] As regards MMI, the applicant avers that it had been disqualified by the *ad hoc* Bid Evaluation Committee (BEC) as it did not satisfy the requirement for functionality and scored 48 points, which is too low. Ultimately, the dispute centres around whether the decision of the BAC to 'revise' the evaluation criteria after the BEC had reached a decision was lawful. It is on that basis that the applicant contends that the BAC changed the criteria to suit MMI, and thus awarded the tender to the latter.

[13] According to the papers, the applicant had been scored as the successful bidder. It was only after the intervention of the BAC that the criteria were changed, which had the effect of elevating MMI to the same score as the applicant. The two bidders, namely, Lichenry and MMI were then evaluated on pricing and, as MMI pricing was lower, its bid was on that basis successful. The applicant avers that this was done purely to make the bid conditions suitable to MMI, which is unlawful and susceptible to be reviewed and set aside.

[14] MMI raised two points in *limine*. First, it raised the defence of *lis alibi pendens* on the ground that the March application is still pending before court. It assails the applicant's decision to withdraw Part B of the March application, which had been set down for 7 July 2023, as invalid on the basis that it was not done with leave of court, and not consented to by all the parties to the application. Thus, MMI avers that the provisions of rule 41 were not met and, as a result, the application instituted by the applicant in March 2023 remains extant, resulting in a multiplicity of applications on the same subject-matter. On that basis, MMI further avers that the order of 27 July 2023 ought not to have been granted, alternatively

the proceedings should have been stayed pending the outcome of the March application.

[15] The second point in *limine* relating to the non-joinder of the accounting officer of the department was not persisted with by the MMI. What it further contended was that there was no urgency in the application and it ought to have been struck off the roll on that basis.

[16] The department, as already indicated, does not oppose the application, and has filed an explanatory affidavit. The essence of it is that it is not open to the department to apply for reconsideration as the order sought to be reconsidered was granted in its presence. Therefore, it makes common cause with the point raised by MMI that the applicant's withdrawal of part B of the application under UM38/23 is irregular as it is not compliant with rule 41 which requires an applicant to seek consent from the opposite party or the leave of court to withdraw the application. As such, MMI contends that the matter is still pending before another court.

[17] Curiously, the department questions the applicant's election to bring a new (urgent) application, which it contends has prejudiced the department as it has not been able to file an answering affidavit to assist the court in considering the urgent application. In support of the relief sought by MMI, the department avers that the granting of the relief sought by MMI is in the public interest as it will afford the department an opportunity to be heard.

[18] However, the explanatory affidavit filed by the department purportedly to assist this court arrive at a just decision made common cause with MMI in the latter's application for the reconsideration of the order granted by this court on 27 July 2023. In effect, the department is seeking to oppose the application through the back door, or introduce such facts which would warrant that the court make an adverse order against the department. This conduct, wittingly or unwittingly puts the department in the centre of the litigation despite the fact that it avowed not to oppose the application.

[19] I deem it prudent to first deal with the points of law raised by MMI. First, a party cannot compel the other to proceed with a matter it has no intention to proceed with. It is also 'not ordinarily the

function of the court to force a person to proceed with an action against his will… subject to an appropriate order as to costs…'.[1]

[20] What rule 41 envisages is that a party may include a consent for costs in its notice of withdrawal. If no such consent to pay costs is embodied, the other party may apply to court on notice for an order of costs.[2] Having made no such application, this contention by MMI lacks merit.

[21] Moreover, MMI's complaint about lack of urgency does not take the matter any further. The matter was dealt with as one of urgency, the court having found it to be so. No benefit can result from a finding to the contrary nor is this court in a position to adjudicate on that issue. Besides, and subject to the peculiar circumstances of each case, considerations of convenience and fairness play an important role when the court exercises its discretion to entertain a matter on an urgent basis. The basis relied on by the applicant to justify urgency was that any relief that it may be afforded in due course would be a hollow victory as the contract was for a period of six months. If there could be any merit to the applicant's contention, it should, in my view, follow that the matter

[1] *Levy v Levy* 1991 (3) SA 614 (A) at 619F – 620C.
[2] Rule 41(c).

ought to be dealt with without delay. This point also has no merit and it falls to be dismissed.

[22] Turning to the merits, MMI avers that the applicant did not demonstrate any unlawfulness on the papers, and by its own admission, cannot assert any lawfulness. It further denies that the BAC had changed the tender conditions and criteria. It decries the incompleteness of the record of the decision which it states, is prejudicial to all the parties in this matter. Thus, it contends that the setting aside of the award is premature. The second respondent further contends that the court is not in a position to determine unlawfulness or non- compliance with any prescribed process, and cannot at this stage substitute the decision of the decision-maker with its own. On that basis it avers that no ground exists for the applicant to be awarded the tender. Notably, the second respondent avers that there is nothing in the incomplete record available, which indicates that the applicant had submitted a compliant bid and so, should have been awarded the tender.

[23] It appears that where the crux of MMI's opposition lies, is in the fact that the BAC did not accept the decision of the BEC to award the tender to the applicant, as it found it wanting. Curiously though,

MMI does not provide any explanation for this contention or how and in what respects the applicant's tender was found wanting. What is apparent is that neither the applicant's nor MMI's tender submissions were made available to the court at the initial hearing of the matter as they were not included in the record provided by the department.

[24] The purpose of rule 6(12)(c) is well- established and that it is designed to afford an aggrieved party mechanism to revisit and redress imbalances and the injustices flowing from an order granted in the absence of such a party.[3]

[25] In *ISDN Solutions (Pty) Ltd v CSDN Solutions CC & Others* 1996(4) (SA) 484 (WLD) the court observed, in relation to the rule:

> *"The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order. Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an*

[3] *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 267.

order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto... . The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended."[4]

[26] A party relying on this rule may file an affidavit in support of its application for reconsideration.[5] In *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) the court held that in such circumstances the other party has an opportunity to file an answering affidavit.[6] In the present case, MMI filed an affidavit in support of the reconsideration application. That

[4] Paragraph 486H-487B.
[5] *Oosthuizen v Mijs*, ibid.
[6] Paragraph 9.

was followed by a replying affidavit by Lichenry. In addition, MMI filed an affidavit in reply to the applicant's replying affidavit. The rule does not provide for further affidavits to be filed, save with the leave of the court on good cause shown.

[27] From the incomplete record, the results of the BEC indicate that at the final stage of the evaluation, of the four bidders who submitted bids, the applicant scored the highest points. This is after MMI had been disqualified on functionality. Attached to the founding affidavit is the evaluation report from the BEC further stipulating that the BEC recommended the applicant as the only bidder who qualified at the final stage of the evaluation process. It was upon receipt of the recommendation that the BAC opted to revisit the functionality requirements and resolved as follows:

> "The committee discussed on the functionality criteria of Company work experience were it requires that bidders attach as a proof, the letter of appointment and the final completion certificate OR completion certificate for projects that reached completion within 12 months prior to the advertisement of the tender. The committee felt that the criteria is unfair on part of final completion and completion certificates. An expert opinion was sought

> from the outside engineers (consultants) and it was confirmed that the Final completion and completion certificates are one and the same."

The applicant says this was done solely to ensure that the criteria favoured MMI to the prejudice of the applicant.

[28] A decision to award a tender is an administrative action to which the Promotion of Administrative Justice Act 3 of 2000[7] (PAJA) finds application. That being so, it denotes that it is involves matters of constitutional significance, and in particular, section 33 of the Constitution which enshrines the right to "administrative action that is lawful, reasonable and procedurally fair." As the Constitutional Court (CC) held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), "matters relating

[7] 3 of 2000. Section 6 in relevant part provides:

> (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
>
> (2) A court or tribunal has the power to judicially review an administrative action if—
> (a) the administrator who took it—
> (i) was not authorised to do so by the empowering provision;
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
> (iii) was biased or reasonably suspected of bias;
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
> (c) the action was procedurally unfair;
> (d) the action was materially influenced by an error of law;

to the interpretation and application of PAJA will of course be constitutional matters".[8]

[29] As to the appropriate remedy, section 8(1)(c)(ii)(aa) of PAJA is instructive. It provides that a court seized with judicial review may grant any order that is just and equitable, and in exceptional circumstances, substitute or vary the decision of the administrator. As the provision suggests, exceptional circumstances must exist to trigger the court's intervention to substitute the decision of the administrator for its own.

[30] In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (*Trencon*), the Constitutional Court considered the test that a court should apply in establishing whether exceptional circumstances which justify a substitution order exist. It held that section 8(1)(c)(ii)(aa) must be read within the context of section 8(1). "Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances."[9]

[8] Paragraph 25.
[9] *Trencon*, paragraph 35.

[31] It is perhaps prudent to set out the provisions of section 8(1) which read:

> "***Remedies in proceedings for judicial review***
>
> *(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—*
>
> *(a) directing the administrator—*
>
> *(i) to give reasons; or*
>
> *(ii) to act in the manner the court or tribunal requires;*
>
> *(b) prohibiting the administrator from acting in a particular manner;*
>
> *(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; or*
>
> *(f) as to costs.* "

[32] From a reading of the provision, it seems that section 8(1) in turn must be read with section 6(1). Importantly, the Constitutional Court held that even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution. In such an enquiry, issues of fairness play a vital role. In my view, those issues cannot be considered in a vacuum. The court must consider the whole spectrum of issues attendant in the proceedings.

[33] In this case, the applicant contends in its papers, that the fact that the tender was awarded to MMI when it is clear that the applicant's bid was the only compliant bid, on its own amounts to exceptional circumstances. This could at best be a basis for setting the order aside. It does not, in my view amount to exceptional circumstances, in and of itself.

[34] It is trite that "(i)n our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own

limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator." While this is so, it is a settled principle that the courts are vested with the power of substitution subject to specific jurisdictional factors. This power has been recognised in various decisions by the courts.

[35] In *Johannesburg City Council v The Administrator, Transvaal* 1969 (2) SA 72 (T), the *locus classicus* on substitution, the court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, the court recognised that courts will depart from the usual course in the following circumstances:

> *"(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter…*
>
> *(ii) where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.*

(iii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."

[36] In *Gauteng Gambling Board v Silver Star Development Limited and Others* 2005 (4) SA 67 (SCA) the Supreme Court of Appeal added another consideration, namely, whether the court is in as good a position as the administrator to substitute the decision. In that case, as in *Trencon*, the court found that it was in such a position and ordered substitution. In this regard the court had the following to say about this requirement:

"the court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter."[10]

[37] It was submitted on behalf of the applicant that remittal of the decision to the administrator is not, in the interests of justice, a viable option. Counsel argued that the approach adopted by the respondents is characterised by "secrecy and skulduggery". This,

[10] *Gauteng Gambling Board*, paragraph 39.

he argued is evident from *inter alia* the fact that the department has to date, not provided the tender submission by the second respondent. Counsel further submitted that there are no new facts brought by MMI in these proceedings, to enable this court to reconsider the matter.

[38] The question is whether the applicant has made out a case for the relief that it obtained. That relief had the effect of reversing the decision of the bid committee, and substituted it with the court's decision, on the basis of what was presented by the applicant. This begs a further question whether, in the face of the incomplete record, the court is in as good a place as the administrator, to enable it to step in its shoes and substitute the decision. As the applicant avers, there are no new facts provided by MMI, which the court did not have on 27 July 2023.

[39] Applying the test to the facts of the present case, there is no gainsaying that the decision to change the criteria in as far as the interpretation of the requirement for a final completion certificate *vis-a-vis* a practical completion certificate was introduced by the BAC after a final assessment had been made by the BEC, and

after the applicant had been recommended as the successful bidder.

[40] The resolution by the BAC, post the recommendation of the applicant by the BEC, sought to create a further consideration, by drawing a distinction between a final completion certificate and a completion certificate. There is no dispute about these concepts, which the parties agree, amount to the same thing, and in no way alter the results as assessed by the BEC. What remains an issue, at least, in as far as the applicant is concerned, is why it would be necessary for the BAC to seek clarification on this, as it has no bearing on the assessment, the relevant distinction being between a practical completion certificate and a final completion certificate. The purpose of the opinion sought by the BAC appears to have become, lost in translation. It only muddied the waters.

[41] These are the lengths to which the BAC went in accommodating MMI, and consequently tilting the scales in the latter's favour. It gives off a sense that the decision of the administrator is a *fait accompli.* This requirement, as the court further held in *Trencon*, must, given the doctrine of separation of powers, be considered cumulatively with the question whether the court is in as good a

position as the administrator, to make the decision, and should 'inevitably hold greater weight'. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties.[11]

[42] Save for what appears from the resolution of the BAC, no proper justification was provided for the 'about turn' made by the BAC at the final state of the process. The reason advanced, as I have already found, does not accord with the criteria initially set, and on the basis of which all bidders were evaluated. This had the effect of giving undue advantage to MMI, the second respondent. Whether that was by design or by default does not detract from the principle that administrative action must be lawful, and reasonable and procedurally fair. That it happened at the tail end of the process, at a stage where the other two bidders had been eliminated, as it happened here, only serves to exacerbate the situation.

[11] *Trencon*, paragraph 47.

[43] However, as the Constitutional Court noted in *Trencon*, substitution remains an extraordinary remedy. This, in my view, does not mean that courts should shy away from ordering substitution, when on the facts of a particular case this is imperatively called for. Where the test has been met, the court would, in the exercise of its discretion, be at large to substitute the decision. The present matter is such a case. The threshold set in *Trencon*[12] has, in my view, been met.

Costs

[44] It remains to deal with two issues relating to costs. The applicant sought costs against MMI on a punitive scale. The motivation for this request was predicated on two bases. First, it was argued that MMI has been complicit in the conduct of the department. Secondly, it was submitted that the application was not necessary as MMI provided no new facts to justify interference with the order .

Costs on a punitive scale are not awarded lightly. There must be cogent reasons why a court decides to award attorney and client costs. In the context of the facts of this case, I am not persuaded

[12] In this regard, see also: *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T); *Gauteng Gambling Board v Silver Star Development Limited and Others* 2005 (4) SA 67 (SCA).

that there would be a justification to award costs on the scale as requested by the applicant. The second issue relates to the role of the department in the conduct of the matter. I have already stated in para 18 above that the conduct of the department does not make it an innocent bystander and calls for an adverse finding. In view of this stance adopted by the department I consider that it would be appropriate to order that it should bear the costs associated with the hearing of the application for reconsideration jointly with MMI.

Order

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

(1) The application for reconsideration of the order of this court granted on 27 July 2023 is refused.

(2) The costs associated with the hearing of the application for reconsideration shall be borne by the respondents jointly and severally, the one paying the other to be absolved.

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

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