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

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: M77/2022

In the matter between:

NORTH WEST DEPARTMENT OF HUMAN SETTLEMENTS — **Applicant**

and

KING ASSOCIATES ENGINEERING AND PROJECT MANAGERS CC — **First Respondent**

KHUMOENG KEMISO — **Second Respondent**

SEPHOTI NEO — **Third Respondent**

JUDGEMENT

DIBETSO-BODIBE AJ

INTRODUCTION

[1] This is an interlocutory application by the Applicant, the Department of Human Settlements ("the Department"), in terms of Rule 30A of the Uniform Rules of Court, against the Respondents. The dispute concerns the procedure that the Department should follow in a self-review application and the procedure to be followed by the Respondents in requesting documents and/or a record of the impugned proceedings and/or decision in the main application ("the review application"). The Department seeks an order substantially in the following terms:-

[1.1] Dismissing the Respondents' notices in terms of sub-rules 35(12) and (14) as an irregular step in the absence of a court order in terms of sub-rule 35(13) directing the discovery of the specified documents.

[1.2] Dismissing the Third Respondent's Rule 30A application wherein the Third Respondent basically directed the Department to comply with the notices in terms of sub-rules 35(12) and (14).

[1.3] Compelling the Respondents to file their answering affidavits within 05 (five) days from the date of granting this order.

[1.4] Granting the Department leave in the event of the Respondents failing to comply with prayer [1.3] above, to apply to the above honourable court, on the same papers, duly supplemented as required, for an order that the matter proceed, unopposed.

[1.5] The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, including the costs of senior and junior counsel.

FACTUAL BACKGROUND

[2] The dispute in the review application has its genesis in the award of a tender under Bid No. DH06/16 by the Department to the First Respondent, King and Associates Engineering and Project Managers CC ("King and Associates") during 2016.

[3] Briefly, the tender was for the provision of Project Management Unit ("PMU") services for a period of thirty-six (36) months at a total bid price of R122 654 367.00 (One Hundred and Twenty Two Million, Six Hundred and Fifty Four Thousand, Three Hundred and Sixty Seven Rand).

[4] Following the evaluation and adjudication process on 26 October 2016, the Department appointed King and Associates as the successful bidder for the said tender.

[5] On 31 October 2016, the Department and King and Associates concluded a Service Level Agreement ("SLA") for the amount of R122 654 367.00 and the SLA commenced on 01 November 2016 for a period of three years ending 31 October 2019 ("completion date").

[6] On 23 October 2019, thirteen (13) days before the completion date of the SLA, it is alleged that the Third Respondent, the then Head of the Department ("HOD"), extended the SLA by one month to 30 November 2019. On 28 November 2019, the HOD and the Second Respondent representing King and Associates signed the second Deed of amendment to the SLA whereby the contract was extended on a month-to-month basis pending the decision by Provincial Treasury to formally extend the SLA.

[7] On 23 December 2019, Provincial Treasury approved the extension of the SLA by six (06) months effective from 01 December 2019 to 31 May 2020.

[8] Subsequent to the formal termination of the extended period of the SLA, the HOD had during May 2020 further appointed King and Associates to undertake and perform specialized services for a period of approximately eighteen (18) months beyond the formal extended period.

[9] It is against this backdrop that the Department instituted a review application before this Court on 22 February 2022 to declare the alleged unauthorized extended periods of the SLA to be irregular, unlawful, invalid and unconstitutional in terms of Section 172(1)(a) read with Section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[10] The Department instituted this interlocutory application amidst Uniform Rules of Court notices from the Respondents requesting the Department to produce a myriad of documents including a record of the impugned proceedings and/or decision for the purposes of pleading. Both King and Associates and the HOD would not file their answering affidavits unless furnished with the requested documents alleged to be material information necessary for the purposes of pleading their cases.

[11] On 05 April 2022, the HOD filed a notice in terms of sub-rules 35(12) and (14) requesting the Department to produce a list of specified documents.

[12] On 19 April 2022, King and Associates equally filed a notice in terms of sub-rules 35(12) and (14) and/or Rule 53.

[13] On 19 April 2022, the Department served both King and Associates and the HOD with a Rule 30A notice in response to their notices above indicating that in the absence of a court order, Rule 35 was not automatically applicable in motion proceedings.

[14] On 26 April 2022, the HOD delivered her second notice in terms of Rule 30A stating firstly, that the Department's review application was irregular and non-compliant with the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") as the review application was issued outside of the 180 days period as required in terms of PAJA and the Department failed to apply for condonation. Secondly, that the Department ought to have but failed to institute the review application in terms of Rule 53 so as to be in the position to disclose the record of the decision sought to be reviewed. Finally, that the Department failed to furnish the documents requested on 05 April 2022.

[15] On 12 May 2022, the HOD abandoned the contents of paragraph 1 of her Rule 30A notice and any reference to the period of 180 days in which PAJA reviews are to be instituted but insisted that the Department undertake to comply with sub-rules 35(12) and (14) notice by noon on 13 May 2022.

[16] On 16 May 2022, the Department instituted this interlocutory application with the relief sought as alluded to under paragraph 1 above. Suffice to say that in essence, the Department is requesting for the dismissal of the notices by the respondents in terms of sub-rules 35(12) and (14) for non-compliance with sub-rule 35(13). The Department further sought relief for the dismissal of the HOD's application in terms of Rule 30A, and King and Associates' counter-application.

[17] Having opposed the interlocutory application, the Respondents' position and posture remained unchanged in as far as their demands in terms of Rule 30A and counter-application are concerned.

[18] The nub of this interlocutory application lies not so much in the merits or demerits of the issues at hand but in the interpretation and application of the Uniform Rules of Court. At play is Rule 35 dealing with discovery, inspection and production of documents and in particular the application of sub-rules 35(12) and (14) read with sub-rule 35(13), self-review under the principle of legality read with Section 172(1) of the Constitution and the application of Rule 53 to a self-review application.

WHY SELF REVIEW?

[19] Perhaps it is appropriate to deal with the fundamentality of self-review by an organ of state as opposed to a judicial review by private (natural or juristic) persons. Unlike in the latter scenario where the applicant seeks to review the administrative decision by an organ of state which it is alleged to be invalid, in self-review, it is now clear according to a plethora of legal authorities including the Constitutional Court that, until the administrative decision alleged to be invalid is brought before the court for review, it remains valid and enforceable. The decision exists in fact and it has legal consequences that cannot simply be overlooked. This means, therefore, that an organ of state is not only entitled but also constitutionally obliged to apply for the review of its own decision.

APPLICATION OF RULE 35 TO APPLICATION PROCEEDINGS

[20] It is apparent from the general reading of Rule 35 that it cannot be disputed that the rule was originally intended to be applicable to action proceedings. Sub-rule 35(1) provides that any party to 'any action' may require any other party thereto… to make discovery… of all documents

and tape recordings relating to any matter in question in such 'action'… As aptly stated by Molahlehi AJ as he then was-

"… The issue of discovery, inspection and production of documents are in general, governed by the provisions of Rule 35 whose main focus in this regard is on action proceedings."[1]

[21] The doorway for discovery of documents during application proceedings was in 1965[2] when sub-rule 35(13) was introduced and since then the sub-rule remined in its original form having not been amended or substituted and, this is attributed to the fact that in general, discovery does not apply to application proceedings as a matter of course. As it is stated-

"… In application proceedings we know that discover is a very, very rare and unusual procedure to be used and … it is only in exceptional circumstances, … that discovery should be ordered in application proceedings"[3]
Sub-rule 35(13) provides:-

"The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications"

[22] The rider or proviso "in so far as the court may direct" is the subject of contention in this interlocutory application. The Department contends that it is irregular for the Respondents to serve a demand under sub-rules 35(12) and (14) before an order of court has been made under sub-rule 35(13).

[1]First Bank t/a Westbank v Manhattan Operations (Pty) Ltd & Others (37793/2012) ("Firstrand Bank") at para 6
[2]See Govenrnment Notice R48 dated 12 January 1965
[3]Firstrand Bank at para 17 – quoting from Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 W at 470 D-E

[23] In **Masange: Kebone v Minister of Home Affairs and Another**[4] the court dealt, inter alia, with the procedure to be followed by applicants for discovery of documents in application proceedings as follows:-

"24. It would appear that the application of Rule 35(12) can only be triggered by prior application to court in terms of Rule 35(13).

*25. In **Loretz v Mackenzie 1999(2) SA 72 T at 75 B-C**, the court held that the starting point in the enquiry as to the application of Rule 35(13) is that there is no discovery in applications and that it is only possible for discovery to apply in applications if, in terms of Rule 35(13) a court has been approached to make the rules relating to discovery, or some of them, applicable and makes an order to that effect."*

[24] In **Investec Bank v Bluementhal and others**[5], Surtherland J stated that:-

[7] There is no room for applications to be brought at the same time under Rule 35(13) for leave to procure discovery, and to compel a reply to a Rule 35(14) request.

[8] Accordingly this application is premature and for that reason fatally irregular.

[9] Consequently, the respondents were perfectly entitled to ignore the demand and to oppose this application."

[25] From the preceeding legal authorities, it is clear that the proviso, "in so far as the court may direct" under sub-rule 35(13), comes before all else. In other words, demands in terms of sub-rules 35(12) and (14) become ripe upon an order of court for documents specified to be discovered. Stated differently, the timing for the issuance of notices in

[4]Masange: Kebone v Minister of Home Affairs and Another (Case No. 41235/2020) 330 ZAGPPHC (23 May 2022) ("Masange: Kebone")
[5]Investec Bank v Bluementhal and Others (2011/11222) [2012] ZAGPJHC 21 (5 March 2012)

terms of sub-rules 35(12) and (14) remain premature unless discovery has been directed by the court. It is the order of court which triggers whether or not documents specified, some or all of them, must be so discovered. It is therefore irregular for notices to be issued prior to or simultaneously with the application in terms of sub-rule 35(13).

DO RESPONDENTS QUALIFY FOR DISCOVERY IN TERMS OF SUB-RULES 35(12) AND (14) AS THEY DID?

[26] Ordinarily, the Respondents qualify for discovery of material information for the purpose of pleading which information the Department may be in possession of but that discovery must first be preceeded by an application in terms of sub-rule 35(13). This is essential as the discovery of documents and/or the record of the impugned proceedings and/or decision must be in so far as the court may direct. This is so as affidavits are not supposed to be cumbersome lest the rules relating thereto as outlined in the Uniform Rules of Court would become flouted as everything and anything in a form of discovery is allowed to form part of evidentiary proof, living the standards of affidavits in disarray. One can only imagine what would happen if the discovery of documents were to be left at the disposal of litigants, a flurry of documents in exchange! In such a state, parties would not get enough of discovery, but not only that, fishing expedition would be freely whisked through the window.

[27] It is common cause that the Respondents refused to take heed of the Department's advise to follow proper procedure in terms of sub-rule 35(13). The Respondents remained steadfast in their irregular pattern even as they proceeded to oppose this interlocutory application. I am afraid that, having failed to approach the court in terms of sub-rule 35(13), the Respondents cannot succeed in their quest for discovery of the specified documents in terms of sub-rules 35(12) and (14). It is, therefore, not appropriate at this point to deal with the procedure

followed in terms of these sub-rules. As already alluded to, the procedure in terms of sub-rule 35(13) comes before all else.

DOES THE PRINCIPLE OF LEGALITY AND PAJA APPLY IN A SELF REVIEW APPLICATION BY THE DEPARTMENT?

[28] One of the HOD's allegations against the Department in her notice in terms of Rule 30A is that the Department's self-review application failed to comply with the provisions of PAJA, was instituted outside of the 180 days period as prescribed by PAJA and, the Department failed to apply for condonation. Although the HOD subsequently abandoned this averment, it is apt in the circumstances to also address the issue in relation to the application of PAJA and whether Rule 53 is applicable for the purpose of producing the record as argued by the Respondents.

[29] On the other hand, the Department contends that its self-review application is not made under the auspices of PAJA or Rule 53 but under the principle of legality.

[30] In **State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited**[6] the Constitutional Court demystified the grey area in review applications in cases where organs of state seek to review and set aside own decision, and in that case the apex court had to answer the following question:-

"By what means may an organ of state seek the review and setting aside of its own decision? May it invoke the Promotion of Administrative Justice Act (PAJA)? Or, is the appropriate route legality review?"[7]

[31] The Constitutional Court cautioned that the answer to the said question is not by all means a blanket one in so far as self-review cases by

[6]State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd [2017] ZACC 40 (Gijima)
[7]Gijima at para 1

organs of state is concerned. For instance, the following scenarios were excluded by the Court:-

[31.1] Where an organ of state in a similar position as that of a private person (natural or juristic) seek to review the decision of another organ of state, and

[31.2] Where an organ of state seeking to review its own decision in the public interest in accordance with Section 38(d) of the Constitution.

[32] In as far as these scenarios are concerned, PAJA seems to be the appropriate procedure as was unfolded later by the Constitutional Court in **Hunter v Financial Sector Conduct Authority and Others**[8] as follows:-

"In Gijima this Court held:[9]

"The right to administrative action that is lawful, reasonable, and procedurally fair (Section 33(1)) and the right of everyone whose rights have been adversely affected to be given written reasons (Section 32(2)) are enjoyed by private persons, not organs of state. Therefore, when section 33(3)(a) stipulates that national legislation which provides for the 'review of administrative action' must be enacted, that can only be administrative action that relates to the rights enjoyed by private persons under Section 33(1) and (2).

As a general rule, PAJA must therefore apply unless the review is brought by a public functionary in respect of its own unlawful decision."

[33] In the circumstances, it stands to reason that, the only exception to the application of PAJA is in self-review applications as is the case in the matter before this Court and as the Constitutional Court said in Gijima

[8]Hunter v Financial Sector Conduct Authority and Others (CCT 165/17) [2018] ZACC 31 (20 September 2018) (Hunter)
[9]Hunter at para 49

that 'fundamental rights are meant to protect warm-bodied human beings (including juristic persons) primarily against the State.'[10] By implication this also means that the application of the 180 days period within which the judicial review application must be instituted falls by the way side and need not be considered any further.

[34] In addressing the question which is the gravamen in the interlocutory application before this Court, the Constitutional Court in Gijima stated that:-

"The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision, it simply means that it cannot do so under PAJA'[11] the reason being that organs of state are 'constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'[12] and that, 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution'[13]

[35] Given the said background, the Constitutional Court concluded that 'the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short it is invalid' and that 'The principle of legality may thus be a vehicle for its review' – and the critical question being: 'did the award conform to the legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review'[14]

[10]Gijima at para 18
[11]Gijima at para 38
[12]Gijima at para 38 – A passage quoted from Fedsure Life Assurance Ltd v Greater Johannesburg Trasnsitional Metropolitan Council [1998] ZACC 17 at para 58
[13]Gijima at para 38 – A passage quoted from Affordable Medicine Trust v Minster of Health [2005] ZACC 3 at para 49
[14]Gijima – extracts from para 40

[36] In the circumstances, I am satisfied that the Department's submissions accord with the conclusion in Gijima that its self-review application is one brought under the principle of legality on the basis that as the decision maker it correctly decided to set aside an inherently invalid decision which was not a product of a procurement system which is fair, equitable, transparent, competitive and cost-effective in accordance with the spirit of Section 217 read with Section 172(1)(a) of the Constitution.

THE RESPONDENTS' DEMANDS FOR THE RECORD OF THE PROCEEDINGS TO BE DISCOVERED IN TERMS OF RULE 53

[37] The Respondents contend that the Department ought to have but failed to institute the review application in terms of Rule 53 so as to be in the position to disclose the record of the impugned decision sought to be recovered. The legal authority I was able to find is **Special Investigating Unit and Another v LNG Scientific (Pty) Ltd (GP03/2022) [2022] ZAST 15 (29 June 2022) (LNG)**. I state this realizing that the matter has since become appealable, however, I rely in this case on the analysis of the application of Rule 53 in a self-review application which analysis, in my view, is unassailable.

[38] In dismissing the application of LNG, Modiba J held that:-

"[12] Uniform Rule 53 is at the disposal of an applicant who seeks to review an administrative decision by an organ of state. In such a case the organ of state is cited as a respondent. The applicant would call on the officer who made the administrative decision to deliver to the Registrar a record of the decision with reasons for the decision. Such an applicant would have set out its grounds of review in cursory terms because as an external party, it would not be privy to the considerations the decision maker made and documents he or she relied on when making the administrative decision. This is prejudicial to it because without the record of the administrative decision, it is unable to properly make out a case to review the administrative decision.

Hence, Uniform Rule 53 makes provision for the applicant to file supplementary grounds of review once the decision maker has filed the record of the administrative decision

[13] The present application being a self-review, the respondents who are the applicants in the review, hardly require the mechanism in Uniform Rule 53 to properly make out their case in the review. The record of the impugned decision is at the disposal of the Department… The respondents have relied on parts of the record of the impugned decision to craft their case in the review. They have gone to the extend of annexing documents that are part of the record to their founding affidavit to the extent they rely on them in support of the relief they seek in the review application. They have made out their case in the founding affidavit by which they stand or fall in the review application. They have no automatic right that an applicant who brings a review application in terms of Uniform Rule 53 to review an administrative decision by an organ of state has to supplement their founding affidavit at a later stage: correctly so because they have crafted their founding affidavit with the record at hand.

[15] An applicant in a self-review application has stronger reasons not to bring the review application following the procedure in Rule 53. Since it does not need the benefits deriving from this rule, it is perfectly within its right to avoid being shackled by the ramifications of Uniform Rule 53."

[39] I cannot agree more with Modiba J's analysis of the application of Rule 53 in a self-review application. This analysis goes against the case advanced by the Respondents in their demand of the record for the purposes of pleading their cases. In the circumstances, I am satisfied that no prejudice will be suffered by the Respondents in as far as non-production of the record in terms of Rule 53 is concerned.

COSTS

[40] The Respondents had an opportunity to access the specified documents via the discovery procedure in terms of sub-rule 35(13) after the Department had succinctly explained the procedure and gave the Respondents an opportunity to remove the cause of complaint but the Respondents failed to seize that opportunity. The Department has successfully made out a case for the relief sought and are eager to have the review application determined. For these reasons, the appropriate cost order is that proposed by the Department with amendments where appropriate. In the premises, the following order is made:

ORDER

1. The Respondents' notices in terms of sub-rules 35(12) and (14) and/or Rule 53 are an irregular step and therefore dismissed.

2. The Third Respondent's application in terms of Rule 30A is dismissed.

3. The Second Respondent's counter application is dismissed.

4. The Respondents shall, within 20 days of the date of this order, file their answering affidavits.

5. The Applicant shall, in the event of the Respondents failing to comply with the order in terms of prayer 4 above, institute an application on the same papers, duly supplemented as required, for an order that the matter shall proceed on an unopposed basis.

6. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, including the costs of senior counsel.

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O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

APPEARANCES

DATE OF HEARING:	**14 SEPTEMBER 2023**
DATE OF JUDGEMENT:	**04 APRIL 2024**
FOR THE APPLICANT:	**ADV P MOKOENA SC** **ADV N MAYET**
INSTRUCTED BY:	**MOKHETLE ATTORNEYS INC**
FOR THE FIRST AND SECOND RESPONDENTS:	**ADV A.D STEIN SC** **ADV B.D HITCHINGS**
INSTRUCTED BY:	**WAKS SILENT ATTORNEYS** **c/o ZISIWE ATTORNEYS**
FOR THE THIRD RESPONDENT:	**ADV K LEFALADI**
INSTRUCTED BY:	**BOKWA LAW INCORPORATED** **c/o SMIT STANTON INC**