



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case no.s: 20599/21 & 4517/22

Before: The Hon. Mr Justice Binns-Ward

Hearing: 16 November 2022

Judgment: 19 January 2023

In the matter between:

MA-AFRIKA HOTELS (PTY) LTD

Applicant

and

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY

Respondent

JUDGMENT

[1] In 2013, the applicant, Ma-Afrika Hotels (Pty) Ltd, sold a property in the District Six area of Cape Town to the respondent, the Cape Peninsula University of Technology ('the

CPUT'). The applicant had conducted a hotel business there. After the sale the applicant continued to administer the property, mainly as a residence for students enrolled at the CPUT but also as a hotel. The property consists of a number of apartments. The majority of them are used for student accommodation for 10 months of the year and the rest for hotel purposes. The apartments ordinarily used for student residential purposes are made available to supplement the hotel's accommodation during the time that they are not required for housing the students. The contractual framework for those arrangements was a lease in terms of which the applicant rented the premises from the CPUT and an agreement in terms of which the CPUT compensated the applicant for providing and administering the accommodation for its students there.

[2] When the time approached for the applicant's lease to expire through effluxion of time, the CPUT advertised a request for proposals in respect of the future administration of the property. The CPUT's primary interest in this regard was the continued operation of the premises for student accommodation. The applicant was one of the parties that submitted a proposal in response to the request. It and two other parties which had also responded, one of which was @ Baobab Hospitality (Pty) Ltd ('Baobab'), were shortlisted to submit tenders to operate the property for student accommodation and hotel purposes for the ensuing 10-year period. The tender in question was labelled as tender no. PUR 5500/9. In the event, only the applicant and Baobab submitted tenders.

[3] The applicant was informed during September 2021 that its tender had been unsuccessful. After learning that Baobab had been awarded the tender, the applicant investigated the possibility of concluding a business partnership with that company. Its investigations turned up that Baobab did not appear to have met the qualifying criteria for the tender contract as it did not have the required experience or a binding contractual relationship with an established hotel group. Baobab's representation to the CPUT that it had such a

contractual relationship had been the basis upon which it had been considered as qualified to undertake the tender contract.

[4] The CPUT came to appreciate the difficulty with Baobab's tender only when the applicant drew the facts to its attention during December 2021. At that stage the CPUT had yet to conclude the contemplated contract with Baobab. The applicant then instituted proceedings under case no. 20599/21 in which it sought an order interdicting the CPUT from concluding a contract with Baobab pending the final determination of proceedings to be instituted by the applicant to impugn the award. The applicant indicated that such proceedings would be instituted after it had received information that it had formally requested in terms of the Promotion of Access to Information Act 2 of 2000 from the CPUT and the latter's agent, Purchasing Consortium Southern Africa NPC. Sher J made an order on 14 December 2021 setting that application set down for hearing on an expedited basis on 24 March 2022. The order provided that, pending the adjudication of the application, the CPUT would not conclude or implement a written agreement with Baobab pursuant to the award to it of the tender and that the applicant would remain as the lessee of the property on the same terms and conditions then in place until 30 June 2022 or such later date as the parties might agree, or the court might order.

[5] On 7 March 2022, after Baobab had failed to respond to various enquiries directed to it by the respondent, the CPUT decided to abort the process of concluding a contract with Baobab and rescinded its award of the tender to that company. The applicant had by that time taken the view that as the only properly qualifying tenderer it was entitled to be awarded the tender contract. CPUT decided, however, to put out a fresh tender invitation. It is accepted by the applicant that this evinced a purported cancellation by the CPUT of the tender process in tender no. PUR 5500/9. The applicant submitted a tender in response to the fresh tender invitation. When doing so it made it clear, however, that its submission was

without prejudice to what it maintained were its rights in the purportedly cancelled process in tender no. PUR 5500/9.

[6] The application pending under case no. 20599/21 was overtaken by these developments, and the application was consequently postponed *sine die* by Hlophe JP in chambers without a hearing. The applicant in the meantime instituted a fresh application in case no. 4517/2022. The notice of motion in the latter matter was divided into two parts. Under Part A the applicant sought interim relief pending the determination of the relief sought by under Part B.

[7] It sought orders in the following terms in Part B (as amended):

5. Reviewing and setting aside the decision of the respondent on or after 7 March 2022 to cancel the tender process under tender number PUR 5500/9.
- 5A Reviewing and setting aside the decision of the respondent on or after 7 March 2022 not to award the tender to the applicant as the student accommodation and hotel building operator of the premises under tender number PUR 5500/9 (“*the decision*”) after the respondent rescinded the award of the tender to @Baobab Hospitality (Pty) Ltd on 7 March 2022.
6. Substituting the decision of the respondent with a decision awarding the tender under tender number PUR 5500/9 to the applicant.
7. Directing the respondent to pay the costs of this application and the costs of the application under case number 20599/21, such costs to include the costs of two counsel where so incurred.
8. Further and/or alternative relief.

The relief sought in terms of paragraph 5 was inserted into the notice of motion by an amendment effected during the hearing on 16 November 2022 (with the originally numbered

paragraph 5 thereupon becoming 5A). (The central object of the application is apparent from the following statement in the applicant's replying affidavit, deposed to on 17 May 2022: '*[t]he failure by CPUT to award the tender to Ma-Afrika after the rescission of the award to Baobab on 7 March 2022 is the decision that Ma-Afrika seeks this Honourable Court to review, set aside and substitute it with a decision awarding the tender to Ma-Afrika*'.)

[8] On 15 June 2022, by agreement between the parties, an order was taken postponing the application for hearing before me on 16 November 2022 and fixing a timetable for the filing of the record of decision in terms of Uniform Rule 53 and the exchange of papers. The order also provided that the applicant would remain as the lessee of the property '*on the same terms and conditions currently in place between the Applicant and the Respondent with effect from the date of [the] order until 31 March 2023*'.

[9] This judgment is therefore concerned with the substantive relief sought in terms of Part B of the notice of motion and the costs of the undetermined, and otherwise redundant, application in case no. 20599/21. The CPUT's answering affidavit in case no. 4517/2022 enjoined the court to also have regard to the content of its answering papers in case no. 20599/21 to appreciate its defence in case no. 4517/22.

[10] The review application has been brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The applicant relied on the following grounds in support of its application:

1. That the CPUT had failed to make a decision to award the tender to Ma-Afrika after rescinding the award to Baobab. The applicant indicated that its application was founded on s 6(2)(g) of PAJA in this regard.
2. That the CPUT had failed to comply with Regulation 13 of the Preferential Procurement Regulations, 2017. The applicant contended that in the context

of the applicant having made an acceptable tender the CPUT had not been entitled to cancel the tender and, upon a proper construction of the regulation, had been obliged to award it to Ma-Afrika as the only compliant tenderer. The applicant indicated that its application was founded on s 6(2)(b) of PAJA in this regard.

3. That the decision of the CPUT not to award the tender to Ma-Afrika after it rescinded the award to Baobab was not rationally related to the information before it as Ma-Afrika's tender satisfied all the mandatory requirements in the tender invitation. In this regard, the applicant relied on s 6(2)(f)(ii)(cc) of PAJA.

[11] PAJA is the legislation enacted to give effect to the right entrenched in s 33 of the Bill of Rights giving everyone the right to administrative action that is lawful, reasonable and procedurally fair. An application for judicial review in terms of PAJA is tenable only if the impugned decision (or failure to make a decision) constituted 'administrative action'. The import of the term 'administrative action' is determined by the statutory definition contained in s 1 of the Act:

“**administrative action**” means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;
 or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;
 - (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;
 - (cc) the executive powers or functions of a municipal council;
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
 - (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating

- Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
- (ff) a decision to institute or continue a prosecution;
 - (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
 - (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
 - (ii) any decision taken, or failure to take a decision, in terms of section 4 (1).'

The definition has been described as cumbersome¹ and unwieldy², justifiably so.

[12] It is well-recognised that distinguishing what falls within the ambit of 'administrative action' from what does not can often be a difficult undertaking. It has been remarked more than once that there can be no all-embracing test,³ and the question is one that the courts have to decide on a case-by-case basis.⁴

[13] In *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) in para 33, the Constitutional Court closely analysed the defined meaning of 'administrative action' by an organ of state when exercising a public power or performing a public function in terms of any

¹ *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43 (13 May 2005); [2005] 3 All SA 33 (SCA); 2005 (6) SA 313, at para 21.

² *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69, at para 33.

³ Cf. e.g. *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] ZASCA 94 (19 July 2010); 2010 5 SA 457 (SCA); [2010] 4 All SA 561 at para 40 and the observations of Lord Nicholls of Birkenhead in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] UKHL 37 (26 June 2003); [2003] 3 All ER 1213 (HL); [2004] 1 AC 546 (a matter in which it was accepted that a distinction might be drawn between a 'core public authority' and a 'hybrid public authority', the latter exercising both public and non-public functions). Lord Nicholls said, in para 12, that there could not be a single test for determining whether a function was a public one. He proceeded: '*There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.*'

⁴ See, for example, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11 (10 September 1999); 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 at para 143 and *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) at para 113. In *President, RSA v SARFU* loc. cit. it was held that '*the boundaries ... will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration*'.

empowering legislation⁵ and determined⁶ that it was characterised by the concurrent incidence of all of the following seven elements: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the exclusions listed in the definition.

[14] The CPUT disputed that its decisions in relation to the procurement of a new service provider for the provision and administration of student accommodation at the property constituted administrative action within the meaning of the term in PAJA. It also denied that it was an ‘organ of state’ as defined in PAJA or for the purposes of s 217(1) of the Constitution, which provides that ‘*[w]hen 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*’.

[15] The CPUT argued that its contentions found support in this court’s judgment in *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* [2014] ZAWCHC 148 (8 September 2014). That matter concerned an application by the unsuccessful bidders for a tender contract to provide security services to various campuses of the CPUT to review and set aside the decision of the CPUT to award the contract work to the successful tenderers. The application was heard by Dlodlo J who held (at para 49) that the business of ensuring the safety of CPUT’s staff, students and property was ‘domestic’ (as distinct from public or governmental) in nature. The learned judge expressed the view that because the CPUT had not been acting in terms of any express provision of the Higher

⁵ See para (a)(ii) of the definition of ‘*administrative action*’ in PAJA (quoted in para above).

⁶ Adopting Langa CJ’s analysis in *Chirwa v Transnet Limited and Others* [2007] ZACC 23 (28 November 2007); 2008 (4) SA 367 (CC); 2008 (3) BCLR 251; [2008] 2 BLLR 97; (2008) 29 ILJ 73, at para 181.

Education Act 101 of 1997 ('HEA') when it invited tenders for security services at its various campuses,⁷ its decision to appoint the successful tenderers had not been a public function and consequently was not administrative action susceptible to judicial review under PAJA. Consistently with that conclusion, Dlodlo J also held (at para 52) that s 217 of the Constitution was not applicable to the procurement because in transacting its domestic business the CPUT did not function as an organ of state (as defined in para (b)(ii) of s 239 of the Constitution⁸) and it was in any event not an 'institution identified in national legislation' within the meaning of s 217(1).

[16] The applicant argued, however, that the judgment in *Eden Security Services* was clearly wrong in its conclusions and should not be followed. It relied on the finding to that effect by Chetty J in *Mzanzi Fire and Security (Pty) Ltd v Durban University of Technology and Others* [2022] ZAKZDHC 12 (3 March 2022); [2022] 2 All SA 475 (KZD); 2022 (5) SA 510. *Mzanzi* likewise involved an application by an unsuccessful tenderer for the review and setting aside of a decision by the Durban University of Technology ('DUT'), also an institution of higher learning under the aegis of the HEA, to award a tender contract for the provision of security guarding services at its various campuses. In that matter the court held that the procurement of security services by an institution of higher education heavily funded by the state was integral to the facility's functioning as a public educational institution contemplated in terms of s 29 of the Constitution. Guided by the 'pointers' identified in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3 (21 February 2017) 2017 (3) SA 242 (CC); 2017 (6) BCLR 700; [2017] 7 BLLR 641

⁷ The CPUT was brought into being by virtue of a decision in terms of s 23(1) of the HEA by the then Minister of Education in November 2003 to merge the Cape Technikon and Peninsula Technikon into a single public higher education institution with effect from 1 January 2005.

⁸ 'any other functionary or institution –

(i)...

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

at para 74 for ascertaining whether any conduct entailed the exercise of public power,⁹ Chetty J concluded that the procurement of security services by the DUT was of a public, not a domestic, character. In finding the DUT's decision to procure security services to be 'administrative action' within the meaning of PAJA, the learned judge had reference to the broad constitutional and legislative framework within which the institution was established and operated. Differing from Dlodlo J, he did not consider the absence of an express empowering provision to contract for the services to be significant.

[17] I am not aware that the judgment in *Eden Security Services* has been followed in any later case. The judgment has, however, attracted some criticism from the academic commentators that, with respect, I think is well-founded.

[18] In *JQR Administrative Law* 2014 (3), Professor Danie Brand and Melanie Murcott of the Department of Public Law at the University of Pretoria expressed the opinion that the court's reasoning in *Eden Security Services* in relation to the 'domestic nature' of CPUT's decision-making was 'somewhat superficial'. In their view, '*the court ought to have taken its own advice and considered in more depth whether the procurement at issue was [of] the kind that "entailed accountability"'. By that, I think they had in mind the cumulative effect of the CPUT's character as a public institution of higher education under the aegis of the HEA, the extent to which it was dependent on public funding and the integral character of the*

⁹ The non-exclusive list of pointers given at para 74 of *AMCU* is:

- (a) the source of the power;
- (b) the nature of the power;
- (c) its subject matter; and
- (d) whether it involves the exercise of a public duty.

The *AMCU* judgment proceeded, in para 75, to endorse the following remarks of Langa CJ in *Chirwa* supra, in para 186:

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

procurement of guarding services to the protection of the assets used by the institution to discharge its essential functions.

[19] In similar vein, Professor Geo Quinot of the Department of Public Law at Stellenbosch University wrote in *JQR Public Procurement* 2014 (3) that ‘*it is not entirely clear on what basis, apart from the absence of a legislative source for the action, the court reached the conclusion that the procurement of security services was “domestic in nature”.*’. Quinot proceeded ‘*In dealing with this type of inquiry, the key issue is always one of causality. That is, how does one define the relationship between the goods or services procured and the entity’s obvious general public function in reaching a conclusion that the particular procurement does not fall under the entity’s general public functions, or in the words of the court in [Eden Security Services] ... is “domestic in nature”. In **Transnet Ltd v Goodman Brothers (Pty) Ltd**,¹⁰ a case that the present court also relied on, the SCA held that the purchase of gold watches to present as long service awards to employees was sufficiently closely linked to Transnet’s public function of providing transport services to qualify as the exercise of public power.*’.

[20] As noted, it appears that Dlodlo J’s conclusion in *Eden Security Services* that the procurement of security services was a ‘domestic’ function of the institution, not a public one, was heavily influenced by the fact that the CPUT’s conduct in that regard was not expressly provided for in the HEA or any other statute by which its affairs were regulated. The learned judge appears also to have been guided to a notable degree by the outcome in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94 (19 July 2010); 2010 (5) SA 457 (SCA); [2010] 4 All SA 561. With respect, I incline to the view that his approach in that regard was mistaken on both counts.

¹⁰ [2000] ZASCA 62 (9 November 2000); 2001 (1) SA 853 (SCA).

[21] As to the first point, the Constitutional Court's judgment in *Motau supra*¹¹ illustrates that the absence of an express provision in the applicable governing statute concerning given action by the body concerned is not, of itself, determinative whether it is administrative or executive in character. A proper assessment requires a consideration of the action in issue against the import of the statute examined in its entirety. Because it is a componential element of the exercise, the same considerations apply in determining the question whether any function by an organ of state or any other natural or juristic person is a public or domestic one. I concur in this regard in the view expressed by Quinot (*op. cit.*) with reference to 'causality'. In contrast, Dlodlo J's approach seems to me to have applied the type of bright-line delineation that the relevant higher court jurisprudence, including some of the cases cited in his judgment, has repeatedly described as out of place in the characterisation exercise.

[22] As to the second point, the outcome of the case in *Calibre Clinical Consultants* was, as such cases always are, very much dependent on its peculiar facts. The nature and context of the impugned decision in *Eden Security Services* differed *toto caelo* from those of the decision in issue in *Calibre Clinical Consultants*.

[23] In the latter case a bargaining council, established in terms of s 27 of the Labour Relations Act 66 of 1995, sought proposals from interested parties for the purpose of appointing a service provider to run a wellness programme set up by the council. The programme was funded by contributions by employees in the sector represented by the council and their employers, *not* by the fiscus. The service that was required encompassed the co-ordination of an anti-retroviral management programme, the provision of education and training, the provision of a counselling service, the procurement of pharmaceuticals, and the establishment of a drug distribution service. In a subsequent judicial review challenge to

¹¹ In para 112.

the council's decision to select a bidder for the role, the question arose whether the pertinent decisions of the council constituted 'administrative action'.

[24] The judgment reviewed a range of jurisprudence that served to illustrate that it was the *governmental* character of decisions by institutions, whether public or private, that made them susceptible to judicial review. At para. 41- 42, Nugent JA, writing for a unanimous court, concluded that a bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement, to perform functions in the interests and for the benefit of its members and that it was difficult to see how it could be said to be publicly accountable for the procurement of services for a project that it implemented for the benefit of its members rather than the public. The learned judge was unable to find in the implementation of the project any of the governmental features identified in the case law to signify that it should be subject to judicial review. He proceeded that '[w]hen implementing such a project a bargaining council is not performing a function that is "woven into a system of governmental control" or "integrated into a system of statutory regulation". Government does not "regulate, supervise and inspect the performance of the function", the task is not one for which "the public has assumed responsibility", it is not "linked to the functions and powers of government", it is not "a privatisation of the business of government itself", there is not "potentially a governmental interest in the decision-making power in question", the council is not "taking the place of central government or local authorities", and most important, it involves no public money.'.

[25] It must be allowed, however, that one of the other considerations influencing the conclusion reached in *Eden Security Services* was that the fact that the CPUT's procurement decisions are not regulated in terms of s 217 of the Constitution because it does not fall within the limited range of organs of state mentioned in subsection (1) of that provision. That was indeed also one of the considerations to which the court in *Calibre Clinical Consultants*

had regard.¹² But, as the authorities show, determining whether a juristic or natural person exercises a public function or power generally requires consideration of a gamut of factors, none of them by itself determinative, and the weight to be given to each is dependent upon the peculiar features of the given case. In contrast, the judgment in *Mzansi*, however, incorrectly, in my respectful opinion, appeared to conclude that the DUT was an organ of state or institution identified in national legislation within the meaning of s 217(1). *Mzansi* was incorrect in this respect because universities of technology are not ‘*department[s] of state or administration in the national provincial or local sphere of government*’ and none of them is an institution identified for the purpose of s 217 of the Constitution in national legislation.

[26] The CPUT’s counsel submitted that this court was bound in the current matter by the decision in *Eden Security Services*. Mr *Magardie* argued that to permissibly depart from that judgment it was not sufficient for this court merely to have some doubt about its correctness; it had to be able to hold that the earlier judgment was clearly wrong – a higher threshold.¹³ The argument was correct in principle, but it failed to take into account the material factual differences between *Eden Security Services* and the current matter.

[27] The function of procuring a service provider in respect of the operation of the CPUT’s student accommodation is materially distinguishable from the procurement of security guarding services. It does not necessarily follow because the latter function has been characterised as ‘domestic’ that the characterisation holds good for the former. The pertinent jurisprudence makes it abundantly clear that the questions that arose in *Eden Security Services* and arise in this matter must be determined on a case-by-case basis. The differences between the current case and *Eden Security Services* are such that any contention that the conclusions reached in the latter matter bind the court in the current one is misplaced.

¹² In para 44-45.

¹³ Cf. *Bwanyana v Master of the High Court, Cape Town and Others* [2021] ZACC 51 (31 December 2021); 2022 (4) BCLR 410 (CC); 2022 (3) SA 250 (CC) at para 46.

[28] That the provision of higher education is a matter of national interest of a governmental nature is confirmed by the provisions of s 29 of the Constitution and the HEA. The Act provides for the establishment of both public and private institutions of higher education. The CPUT is a public institution. The financial management of public institutions of higher education is addressed in Chapter 5 of the HEA. It makes provision for the funding of public higher education by the state in terms of a policy to be determined by the Minister after consulting the Council for Higher Education and with the concurrence of the Minister of Finance.

[29] One only has to look at the schedules to the annually adopted Appropriation Acts to see that the CPUT is the recipient of very substantial funding from the National Revenue Fund by way of University Subsidies and ‘block grants and other grant allocations’.¹⁴ The appropriations are made by Parliament by virtue of the requirement in s 26 of the Public Finance Management Act 1 of 1999 that it must appropriate money for each financial year for the requirements of the state. The CPUT’s Institutional Statute¹⁵ appears to acknowledge that the institution has four streams of income viz. state subsidy, student fees, donations and what is referred to in the Statute as ‘Third Stream Income’.

[30] That the provision of student accommodation and matters closely related thereto fall within the public sphere finds confirmation in a number of sources. Section 40(1) of the HEA details the componential makeup of the funding of public higher education institutions. One of the sources expressly provided for is ‘*money received from students ... of the institution for accommodation*’.¹⁶ Unlike the bargaining council in *Calibre Clinical*

¹⁴ The Schedule to the Appropriation Act 7 of 2022 indicates that the CPUT was allocated R10 984 000 in ‘university subsidies’ for ‘academic clinical training grants’, R1 383 331 000 in respect of ‘block grant allocations’, R31 564 000 for ‘capacity development’, R49 168 000 as ‘foundation provision’, and R55 000 000 by way of a ‘university infrastructure and efficiency grant’.

¹⁵ GG 46382 dated 20 May 2022. The Institutional Statute is published in terms of s 33 of the HEA after approval by the Minister.

¹⁶ Section 40(1)(h).

Consultants supra, the CPUT is accountable to the state for the use of its funding. In terms of s 41(2) of the Act, a public institution of higher learning is required to report to the Minister as prescribed in the regulations. The relevant regulations are the Regulations for Reporting by Public Higher Education Institutions¹⁷. These require institutions such as the CPUT to prepare Strategic Plans and related Annual Performance Plans, the latter to be submitted to the Department of Higher Education annually. The Annual Performance Plan must, in terms of reg. 5(2)(h)(ii), ‘*show separately income and budgeted expenditure for student housing*’. The Minister for Higher Education may, in terms of s 42 of the HEA, intervene in the affairs of an institution of higher learning by issuing a directive to its council if he has reasonable grounds to believe that the institution is involved in ‘financial impropriety’ or ‘is being otherwise mismanaged’. This demonstrates the CPUT is accountable in law to the national government in regard to the financial and logistical aspects of its provision of student accommodation.

[31] When searching for the latest allocations made to the CPUT from the National Revenue Fund, I came across a memorandum of agreement between the Ministers of Higher Education and Training, Public Works and Rural Development and Land Reform and the Vice-Chancellor of the CPUT committing to ‘*the transfer of land to enable the rapid development of District Six and the Cape Peninsula University of Technology*’ published in the Government Gazette on 20 September 2019.¹⁸ As already mentioned, the CPUT campus and the property in issue in the current matter are situated in the District Six area, which has historical significance and is a focal point for post-apartheid land restitution. It is significant that the acquisition of properties in the area ‘*suitable for university owned student housing*’ was one of the matters addressed in the agreement, and obviously of particular interest to the Minister for Higher Education and the Vice Chancellor of the CPUT. In my view, this serves

¹⁷ GNR 464 published in GG 37726 of 9 June 2014.

¹⁸ GG 42720, dated 20 September 2019.

as a further illustration that the provision of university owned student accommodation is a matter of public or governmental concern and involvement.

[32] The CPUT is an institution that performs the public function of providing higher education. It was created for that purpose by the national government and its operation is substantially subsidised from the National Revenue Fund. The State's relationship with the institution is founded in s 29 of the Constitution and regulated by the HEA. The constitutional and statutory context leaves no room to doubt that the CPUT is an organ of state as defined in paragraph (b) of the definition of the term in s 239 of the Constitution. The only question is whether contracting for the provision of student accommodation falls within its public functioning.

[33] In my judgment it does. The object of the establishment of institutions such as the CPUT is to provide higher education and thereby to fulfil the constitutional objective that access to further education be made available by the state to everyone. The resources required to establish and operate an institution of higher learning are obviously much greater than those needed to operate schools. It would therefore be impracticable for there to be a university within reasonable proximity of every local community as there are schools. For similar reasons, not every university is able to offer courses in every learning speciality that a student might wish to pursue. A student might live close to one university but need to enrol at another one far away to pursue a particular desired course of study. Institutions of higher learning tend to be situated in the larger towns and cities in the country and students from outside those centres require to be accommodated when they are away from their homes to attend university during termtime. It is to address those obviously incidental requirements for the adequate fulfilment of their intended purpose of providing higher education that student halls of residence are a universally encountered feature of establishments for higher learning. The provision of such accommodation is integral to the central purpose of universities and

other institutions of higher learning. Student residences provide not only necessary material assistance for students in need of accommodation, they also provide a measure of moral support by nurturing a sense of community. That student support services are an aspect of higher education in which the Minister has some governmental interest finds confirmation in s 5 of the HEA.¹⁹ The provision of student accommodation is so closely bound up with the central mission of public institutions of higher learning that it would be contrived to distinguish it from their public functions.

[34] For all the foregoing reasons I am satisfied that the CPUT's decision to procure a service-provider for the provision of student accommodation in issue in this matter by way of a public tender process was conduct vitally connected to its governmental function of providing public access to further education. It represented a means of implementing its constitutional and statutory role, and the consequent tender process was therefore administrative in nature. These are strong pointers towards its decisions in respect of the tender process being 'administrative action' within the meaning of PAJA.

[35] The CPUT contends, however, that its cancellation of the tender process when it rescinded the award to Baobab was executive action, not administrative action. It relies on the judgments in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty)* [2015] ZASCA 167 (26 November 2015); [2016] 1 All SA 332 (SCA); 2016 (2) SA 494 (SCA) and *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* [2016] ZASCA 104 (5 July 2016); [2016] 3 All SA 669 (SCA) in support of its argument. The CPUT also relied on various terms of the invitation to tender in which it reserved to itself the right not to accept the lowest or any tender submission and, in the event that it did not conclude a contract with the successful tenderer, the right to award the tender to another tenderer or to issue a fresh invitation to tender. Similar terms featured in the

¹⁹ See s 5(2)(g), which identifies 'student support services' as one of the aspects of higher education on which the Council for Higher Education may be requested to advise the Minister.

invitation to tender in *Nambiti* and appear to have been regarded by the appeal court in that case to be of some significance in limiting the susceptibility of the decision to cancel the tender to challenge on review by an aggrieved tenderer.

[36] Nambiti Technologies (Pty) Ltd was contracted to the City of Tshwane Metropolitan Municipality ('the City'), to provide computer technology support services ('SAP support services') for a three-year period ending in December 2012. As the contract approached its expiry date, the City advertised an invitation to tender for the continued provision of the services. Nambiti was one of the entities that responded to the invitation. In mid-December 2012, two months after the issue of the invitation to tender, and after the submitted tenders had been opened, the tenderers were informed that the tender was being cancelled and that a fresh invitation to tender would be issued.

[37] The cancellation of the tender occurred in the following circumstances. In early November 2012, a new chief information officer ('CIO') was appointed by the City. Pursuant to recommendations that he made to the City's procurement committee, the CIO was instructed to consider the use of other SAP support services providers used by different organs of state and to appoint them in line with reg. 32 of the municipal supply chain management regulations made in terms of Act 56 of 2003,²⁰ alternatively to fast-track and finalise the extant tender. The CIO initially favoured fast-tracking the finalisation of the extant tender process but, after reviewing whether that would best serve the City's interests, he ultimately concluded that the better course would be to cancel the tender and advertise a fresh tender with suitably altered contract specifications. In the meantime, presumably in terms of reg. 32, the City appointed EOH Mthombo Limited ('EOH'), which was already the

²⁰ Published under GNR 868 in GG 27636 of 30 May 2005, as amended in GNR 31 in GG 40553 of 20 January 2017. Regulation 32 permits a municipality, subject to certain stipulated conditions, to procure services or goods under a contract already secured by another organ of state.

equivalent service provider to the City of Johannesburg, to take over the rendering of the services from Nambiti with effect from 20 December 2012.

[38] Nambiti thereafter instituted review proceedings in March 2013, in which it claimed orders (i) reviewing and setting aside the City's decision to appoint EOH to render the services, (ii) reviewing and setting aside the City's decision to cancel the tender and (iii) directing the City without delay to invite new tenders in respect of the provision of on- and off-site SAP support services. The judgment of the court of first instance in effect resuscitated the cancelled tender and compelled the City to adjudicate and award the tender within two months of the order. Tenderers were permitted to adjust their tariffs upwards or to withdraw their tenders, but otherwise the process was to continue as if the tender had never been cancelled.²¹ By the time the matter was ripe for hearing on appeal the tender contract period was on the verge of expiry, and it was evident that the issue had consequently become moot for practical purposes. The appeal court nevertheless entertained the appeal in the exercise of its discretion because it considered that the matter raised questions of general importance.

[39] The appeal court interrogated whether the cancellation of a tender before its adjudication constituted administrative action. It reasoned on the facts that the City's desire to procure the SAP support services had been '*always provisional. That follow[ed] from the terms of the advertisement of the tenders, which contained the caveat that "the lowest or any tender will not necessarily be accepted"*'. ... *the standard conditions of tender ... provided even more explicitly that the City "may cancel the tender process and reject all tender offers at any time before the formation of a contract"*'. It held that in cancelling the tender '*the City was doing no more than exercising a right it had reserved to itself not to proceed to procure those particular services on the footing set out in that tender*'.²²

²¹ Nambiti (SCA) at para 4.

²² Id. para 25.

[40] In *Nambiti* (SCA), the court also held that a decision not to procure services does not have any direct, external legal effect because no rights are infringed thereby. Wallis JA remarked in that connection *‘Disappointment may be the sentiment of a tenderer, optimistic that their bid would be the successful one, but their rights are not affected. There can be no legal right to a contract and counsel did not suggest that there was.’* The learned judge responded to Nambiti’s counsel’s submission that Nambiti nevertheless had a reasonable expectation that its tender would be considered by stating *‘But that expectation was dependent on there being an ongoing tender process, where principles of just administrative action are of full application. Once the entire tender was cancelled any expectation that the tenders submitted by tenderers would be adjudicated ... fell away.’*²³

[41] Central to the appeal court’s decision in *Nambiti* was its characterisation of the decision to cancel the tender before its adjudication as executive, not administrative, action. The court’s view in this regard was summarised as follows (in para 43):

‘A decision as to the procurement of goods and services by an organ of State is one that lies within the heartland of the exercise of executive authority by that organ of State. We live in a country of finite resources at every level of government. Decisions by organs of State on how their limited resources will be spent inevitably involve painful compromises. A decision to spend money on support systems for computer technology will divert those resources from other projects such as the construction of roads or the provision of rubbish collection in residential areas. The Constitution entrusts these decisions to elected bodies at all three tiers of government. In turn the elected representatives at every tier select the executive that is required to carry out the chosen programme of government. It is an extremely serious matter for a court to intervene in such decisions. But for it to do so by compelling the organ of State to

²³ Id. para 32.

enter into contracts and acquire goods and services that it has determined not to acquire, or at least not to acquire on the terms of a specific tender, is something that, if open to a court to do at all, should only be done in extreme circumstances. These issues are among those comprehended by the broad doctrine of the separation of powers.’

[42] The appeal court’s judgment in *Nambiti* has attracted academic criticism in certain respects,²⁴ notably its restrictive approach to the adverse effect on rights component of the definition of administrative action. Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* 3ed.²⁵ note that the approach adopted in *Nambiti* (SCA) does not fit well with that articulated by Nugent JA in *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43 (13 May 2005); [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA) at para 23 and subsequently endorsed more than once by the Constitutional Court²⁶:

‘While PAJA’s definition purports to restrict administrative action to decisions that, as a fact, “adversely affect the rights of any person”, I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction

²⁴ See in this regard Helena van Coller, *2016 Annual Survey s.v. ‘Administrative Law’* at pp. 58-64 and Geo Quinot, *JQR Public Procurement* 2015 (4) and *JQR Public Procurement* 2016 (3);

²⁵ At p. 314.

²⁶ See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28 (29 November 2012); 2013 (3) BCLR 251 (CC), para 30, *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21 (23 November 2010); 2011 (1) SA 327 (CC) ; 2011 (2) BCLR 207 (CC) para 37, and compare also *JDJ Properties CC and Another v Umngeni Local Municipality and Another* [2012] ZASCA 186 (29 November 2012); [2013] 1 All SA 306 (SCA); 2013 (2) SA 395 (SCA) para 15-20.

with the requirement that it must have a ‘direct and external legal effect’, was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.’
(Footnotes omitted.)²⁷

[43] The essence of the decision in *Nambiti* appears to me to have been that a determination by an organ of state not to acquire goods or services for which it had invited tenders but no longer required, either at all or in the manner originally contemplated, involves a change of policy rather than the implementation of policy. Policy-making decisions are generally characterised as ‘executive’ in nature, whereas decisions made in the implementation of policy are readily susceptible to characterisation as ‘administrative’ in nature.

[44] *Saab Grintek* also concerned an application to review and set aside the cancellation of a tender. In that case the State Information Technology Agency, acting on behalf of the South African Police Service (‘SAPS’), invited tenders for the provision of ‘an integrated mobile vehicle data command and control solution’. After tenders had been submitted, but before their adjudication, the tender was cancelled on the instruction of SAPS. SAPS indicated that SAPS’s ‘business requirements’ had changed during the repeatedly extended period of time (well over a year) taken up by the tender process and the specifications in the invitation to tender were consequently no longer appropriate to SAPS’s requirements. Because of the correspondence between the factual basis of the case and that of *Nambiti*, the appeal court invited the parties to make submissions why the court’s decision in *Nambiti*

²⁷ Hoexter & Penfold *id. loc.cit.* describe the omission in *Nambiti* of any reference to the passage in *Greys Marine* as ‘surprising’. They note, in fn. 716, that in *Saab Grintek* *supra*, at para 21, the SCA ‘held that it was unnecessary to consider the contention, grounded in *Greys Marine*, that *Nambiti* had been erroneously decided’.

should not be dispositive of the appeal from the court of first instance's refusal of the application (on unrelated grounds).

[45] In *Saab Grintek* the appeal court rejected an argument that *Nambiti* had been wrongly decided and that its determination that the cancellation of the tender was not administrative action was in conflict with well-established authority exemplified in the court's decision in *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135 (18 October 2002); [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA).²⁸ The court distinguished *Logbro*, saying (at para 18), '*The distinction between **Logbro** and **Nambiti** is this: In **Logbro** there was a tender process that had progressed to the stage where a decision had to be made whether to award the tender. In **Nambiti** there was a decision that the services reflected in the tender were no longer required and the tender process was terminated. A decision as to procurement of goods and services by an organ of State, this court said in **Nambiti**, is one that lies within the heartland of the exercise of executive authority by that organ of State. It observed further that "it is always open to a public authority, as it would be to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender".'*

[46] Mr Elliot SC, who appeared for the applicant, drew attention, however, to apparently contrary authority in the unanimous decision of the appeal court in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others* [2017] ZASCA 30 (29 March 2017). In that case the cancellation of a tender by the Department of Education for the management and implementation of a school feeding programme was characterised as administrative action. The facts were as follows. The award of the tender contact to some of the tenderers was successfully challenged on judicial review by some of the unsuccessful tenderers. The court ordered the department to consider its decision afresh. On

²⁸ *Saab Grintek* para 15-18.

reconsideration, the bid allocation committee recommended to the head of department that the tender be re-advertised to avoid further litigation. The originally unsuccessful tenderers challenged the head of department's decision to act on the committee's recommendation. They did so on three main grounds, namely:

- (i) that the order of the court in the first review application obliged the head of department to adjudicate and award the tender and did not permit the re-advertising thereof;
- (ii) that the decision was invalid for non-compliance with reg. 8(4) of the 2011 PPFA regulations (the equivalent of reg. 13 of 2017 version of the regulations on which the applicant relies in the current case); and
- (iii) that the decision was irrational.

The court of first instance upheld the challenge on all three grounds.

[47] The appeal court rejected the applicants' contentions in the first review ground concerning the import of the order. It held the order did no more than place an obligation on the appellant to reconsider the tender with due regard to the judgment, and that it did not purport to exclude any legitimate options available to the head of department upon such reconsideration. Without mentioning the earlier decisions in *Nambiti* and *Saab Grintek*, in which an opposing interpretation of the regulation was given, the court in *Valozone* upheld the unsuccessful tenderers' contention that the department's power to cancel the tender was limited to the circumstances stipulated in reg. 8(4) of the procurement regulations, viz. (a) where, due to changed circumstances, there is no longer a need for the services, works or goods requested; or (b) funds are no longer available to cover the total envisaged expenditure; or (c) no acceptable tenders are received, and that the purported cancellation was in breach of those restraints. It also held that the decision to cancel the tender because of a concern about

irregularities in a small number of the tender submissions received when there many acceptable tenders was irrational in the circumstances, especially the pressing need for the feeding programme to be implemented. It therefore upheld the court of first instance's decision on the second and third grounds of review.

[48] A subsequent argument about the apparent conflict between the judgment in *Valozone* and those in *Nambiti* and *Saab Grintek* was addressed in the following terms in *Madibeng Local Municipality v DDP Valuers and Another* [2020] ZASCA 70 (19 June 2020) (in para 17): ‘... the Municipality argued that divergent views had been expressed by this court, on the one hand, in ... **Valozone** ... and on the other, in ... **Nambiti** ... and **SAAB Grintek** This is not correct. The question cannot be determined in the abstract. In **Nambiti** and **SAAB** this court held that the cancellation of a tender by an organ of state prior to its adjudication does not constitute administrative action under PAJA. The ratio common to these judgments was that in such circumstances, the cancellation of the tender constitutes the exercise of executive authority. The court reasoned that the decision of an organ of state to procure goods or services is an executive act and the reversal of that decision, without more, is of the same nature. ... Both these judgments recognised, however, that the position would be different when a public tender is cancelled during the tender process, as would be the case on the Municipality's version. On its case, the Municipality cancelled the tender after the award thereof had been set aside and it was ordered to reconsider the matter. This was also the factual position in **Valozone**. In such a case “principles of just administrative action are of full application” ... or, put differently, principles of administrative justice continue to govern the relationship between the organ of state and the tenderers ... Thus, a decision of an organ of state to cancel a tender after it was awarded, would generally be reviewable under PAJA.’.

[49] Hoexter & Penfold *op. cit. supra*, at p.261, comment on the jurisprudence just reviewed as follows: ‘It seems to us that the diagnoses of administrative action in **Valazone**

and [an unreported Eastern Cape Division judgment] were correct, and that the categorisation of the cancellation of a tender as executive action is best confined to the sort of scenario that arose in *Nambiti* and *Saab Grintek*, namely, where the cancellation of the tender flows from a policy decision that the goods or services that form the subject of the tender or no longer required or no longer meet the needs of the organ of state. This distinction is, in our view, more palatable than the distinction drawn in *DPP Valuers* between a tender that has not yet been adjudicated and one that has (or between a tender that has been awarded and one that has not).'. The learned authors' observations seem to me, with respect, well-made. They accord with my own analysis of the judgment in *Nambiti* (SCA).²⁹

[50] The current case is distinguishable on its facts from *Nambiti* and *Saab Grintek*. In the current matter the cancellation in issue was made after the adjudication of the tender. It is also evident from the content of the freshly issued invitation to tender which, apart from a reduction of the contemplated tender contract term from one of 10 years to nine years, was in substantially the same terms as the original invitation to tender, that the decision to cancel was not informed by any determination by the CPUT that it no longer wished to procure the services in question, or on substantially the same basis as originally contemplated. If it is important to find a comparable earlier case, I think that the facts in *Logbro* supra, afford a better example - although I acknowledge that a distinguishing feature is that the procurement in issue in *Logbro*, being by an organ of state in the provincial sphere of government, was governed by s 217 of the Constitution whereas procurement by the CPUT is not. I do not think that is material, however, as it is clear that the procurement in the current matter did not fall within 'the sort of scenario that arose in *Nambiti* and *Saab Grintek*'.

²⁹ See para above.

[51] For the reasons discussed earlier in this judgment, and after consideration of the body of authority referred to and discussed in Hoexter & Penfold *op. cit.*, at 258-262, I have concluded that the CPUT's decision to cancel the tender was indeed 'administrative action' within the meaning of PAJA, and accordingly susceptible to being impugned in terms of s 6 of the Act.

[52] It becomes necessary then to consider the grounds upon which the applicant has brought its challenge under PAJA. Before doing so, however, something should be said about the CPUT's reliance on various provisions in the 'Request for Proposal' that it contends gave it the contractual right to cancel the tender. The provisions in question went as follows:

2.13 ACCEPTANCE OF TENDERS

CPUT does not bind itself to accept either the lowest or any other tender and reserves the right to accept the tender which it deems to be in the best interest of CPUT. CPUT the right to accept the offer in full or in part or not at all.

2.14 NO RIGHTS OR CLAIMS

2.14.1 Receipt of the invitation to tender does not for any right on any party in respect of the Services or in respect of or against CPUT. CPUT Reserves the right, in its sole discretion, two withdraw by notice to tenderers any services or combination of services from the tender process, to terminate any parties participation in the tender process, or two accept or reject any response to this invitation to tender unnoticed to the tenderers without liability to any party. Accordingly, parties have no rights, expressed or implied, with respect to any of the services as a result of their participation in the tender process.

2.18 RESERVATION OF RIGHTS

Without limitation to any other rights of CPUT (otherwise reserved this invitation to tender or under law), CPUT expressly reserves the right to:

2.18.2 Reject all responses submitted by tenderers and to embark on a new tender process.

2.18.3 The tender awarded will be conditional and subject to successful negotiations and signing of a written contract, failing which CPUT reserves the right to withdraw the tender in to award the same to another bidder without the need to repeat the tender process.

2.24 ACKNOWLEDGEMENTS AND DISCLAIMERS

2.24.1 *This RFP and any Proposals or not legally binding on CPUT. None of CPUT (sic), nor any person purporting to act on behalf of CPUT, or ... makes any representations or provide (sic) any undertakings to tenderers other than to invite tenderers to submit proposals. CPUT intend to use the RFP/Proposal framework as the basis for negotiations with tenders. CPUT reserves the right to alter that framework at its discretion at any point prior to or during the RFP/Proposal process. CPUT reserves the right, exercisable at its indiscretion, to engage other tenderers for provision of student accommodation services.'*

[53] In *Logbro*, the appeal court held that even assuming provisions such as those quoted in the preceding paragraph were of contractual force between the participants in the tender process, they did not exhaust the organ of state's constitutional duties towards the tenderers. The party that issued the tender invitation in that matter was the Province of KwaZulu-Natal. The court held '*[p]rinciples of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation. This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.*'³⁰ (Footnotes omitted.) The effect of that statement was explained later in the judgment as follows: '*The significance of this analysis is that even if the terms the province stipulated for the tender process entitled it to withdraw the Richards Bay property, it could exercise that power only with due regard to the principles of*

³⁰ In para 7-8.

*administrative justice. It could not withdraw the property capriciously or for an improper or unjustified reason’.*³¹

[54] Where the tender is subject to reg. 8 of the 2001 Preferential Procurement Regulations, reg. 10 of the 2011 regulations or reg. 13 of the 2017 regulations, it can be cancelled only within the circumstances permitted in terms of the regulations; see *Valozone supra*, at para 16 and compare *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (26 June 2015); 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 68-69.³² Contractual provisions such as those relied upon by the CPUT would be of no effect to the extent of their inconsistency with the regulations where those applied.

[55] It will be recalled that the applicant’s first ground for challenging the CPUT’s conduct was grounded in s 6(2)(g) of PAJA, which provides that a court has the power to review an administrative action if the action concerned consists of a failure to take a decision. I do not think a case has been made out on this basis. The CPUT did make a decision. When it rescinded the award to Baobab, it decided to advertise a fresh tender. This was one of the options open to it in terms of the ‘Request for Proposal’. Implicit in its decision to advertise a fresh tender were decisions (i) not to make a substitute award under the original tender and (ii) to cancel that process. Whether its decision could bear scrutiny in a review under PAJA would depend on its reasons for making it. But any suggestion that the CPUT had failed to make a decision is misplaced on the facts.

[56] The applicant’s second ground of review, based on s 6(2)(b) of PAJA, which provides that a court has the power to review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, is

³¹ In para 14.

³² For criticism of the contrary view expressed in *Nambiti* at para 28-30, see Quinot, *JQR Public Procurement* 2015 (4).

predicated on the CPUT's alleged non-compliance with Regulation 13 of the Preferential Procurement Regulations, 2017.

[57] Regulation 13, which was in force at the relevant time, provided:

'13 Cancellation of tender

(1) *An organ of state may, before the award of a tender, cancel a tender invitation if-*

(a) *due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;*

(b) *funds are no longer available to cover the total envisaged expenditure;*

(c) *no acceptable tender is received; or*

(d) *there is a material irregularity in the tender process.*

(2) *The decision to cancel a tender invitation in terms of subregulation (1) must be published in the same manner in which the original tender invitation was advertised.*

(3) *An organ of state may only with the prior approval of the relevant treasury cancel a tender invitation for the second time.'*

[58] The implication in this part of the applicant's case was that the CPUT had not been entitled to cancel the tender as none of the circumstances identified in paragraphs (a) to (d) to subregulation (1) had been present and that it had instead been obliged to award the contract to the applicant as the only party left standing that had made an acceptable tender. If the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA') had been applicable, that would indeed appear to be the effect of s 2(1)(f) of the Act.

[59] The PPPFA is, according to its long title, legislation '*[t]o give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution, and to provide for matters connected*

therewith'. Section 217(2) provides that the provisions of s 217(1) do not prevent '*the organ of state or institutions referred to in that subsection*' from implementing a preferential procurement policy. The 'organs of state' referred to in s 217(1) are organs of state '*in the national, provincial or local sphere of government*' and the 'institutions' are '*any other institution identified in national legislation*'. The CPUT is not an organ of state referred to in s 217, nor is it one of those listed in paragraphs (a) – (e) of the definition of the term in s 1 of the PPPFA. Paragraph (f) extends the definition to '*any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and recognised by the Minister by notice in the Government Gazette as an institution to which this Act applies*'. The '*other institutions or categories of institutions*' recognised by the Minister for the purposes of the PPPFA and those identified in national legislation for the purpose of s 217(1) of the Constitution are the public entities listed in Schedule 2 and Parts A and B of Schedule 3 of the Public Finance Management Act 1 of 1999.³³ The CPUT is not one of the entities listed in those schedules. The PPPFA and the preferential procurement regulations made in terms of s 5 of the Act are accordingly not applicable to the CPUT.

[60] The applicant has pointed out that the CPUT's procurement policy provides that '*CPUT will apply the provisions as well as the spirit of the PPPFA and its regulations*'. A policy generally amounts to a set of criteria by which decision-making will be guided, rather than dictated. If asked, the CPUT might be expected to provide cogent reasons for any deviation from its policy in its decision to cancel the tender, and it might be held accountable in terms of s 6 of PAJA if the explanation provided showed that it had breached its constitutional duty to have acted reasonably and procedurally fairly, but the fact remains that the PPPFA regulations do not apply to the CPUT as a matter of law. They therefore did not impose on the CPUT mandatory and material procedures or conditions prescribed by an

³³ See GNR 501 in GG 34350 dated 8 June 2011 and GN 571 in GG 40919 dated 15 June 2017.

empowering provision within the meaning of s 6(2)(b) of PAJA. The applicant has therefore failed to make out a case on the second ground of its application.

[61] The third ground upon which the applicant brought its application was founded was the alleged irrationality of the CPUT's failure to award the tender to Ma-Afrika. It relied in this regard on s 6(2)(f)(ii)(cc) of PAJA, which provides that the court may review and set aside an administrative decision if the action was not rationally connected to the information before the administrator. The decision in question in the current case is the decision of the CPUT not to award the tender to Ma-Afrika after it rescinded the award to Baobab. The information before it was an acceptable tender by Ma-Afrika.

[62] The difficulty with this part of the case is that the applicant did not request the CPUT to furnish its reasons for the decision not to award the tender to Ma-Afrika. The CPUT did not furnish any reasons for its decision in the answering papers. As it bore no onus, it was not required to. In its supplementary answering affidavit in case no. 4517/22, the CPUT listed a number of considerations that it would possibly have to take into account were the court to set aside the institution's cancellation of the tender and remit the matter to it for consideration afresh. It did so, however, not to indicate that any of those considerations had weighed with it when it made the decision to cancel, but only to demonstrate that it would be inappropriate for the court to grant the substitutionary relief prayed for by the applicant.

[63] As described earlier, the CPUT emphasised that various provisions in the tender invitation gave it the right to cancel the tender and also the right not to make an award to any tenderer. Capricious, arbitrary or unreasonable resort to those provisions would, offend against the CPUT's obligations to act reasonably and with procedural fairness. Testing whether its election to exercise any of those options was rational or not cannot be done, however, without insight into its reasons for acting in that way. It is for that very purpose that s 5 of PAJA gives any person whose rights have been materially and adversely affected

by administrative action to request the administrator concerned to furnish written reasons for the action. It was clearly appreciated by the lawgiver that knowledge of the administrator's reasons for making a decision would be necessary in many cases for the subject to be able to establish that its right to administrative justice had been infringed and how to appropriately formulate a challenge.³⁴

[64] In my view, this is such a case. The applicant did not have a right to be awarded the contract when the award to Baobab was rescinded. The mere fact that the applicant's tender was the only acceptable one out of the two that were submitted does not, by itself, establish that the CPUT's election to choose one of the contractually reserved options to cancel the tender rather than awarding the contract to the applicant was irrational. Provided that it acted reasonably in the circumstances, CPUT was entitled rather to cancel the tender and proceed with the intended procurement in terms of a fresh procedure. If its decision was one that an administrator in its position could reasonably have made, it would not be susceptible to being set aside on review. In order for the court to be able to make an assessment whether the decision was reasonable it would need to know the CPUT's reasons for choosing the course it did.

[65] The applicant's failure to adduce any evidence concerning the CPUT's reasons for making the decisions it did means that it has not established a case on its third ground of review. The averments in respect of the applicant's apprehension of bias or hostility on the part of the CPUT were speculative and did not compensate for the identified lacuna in its case.

³⁴ Cf. *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* [2002] ZACC 2 (21 February 2002); 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 159 and *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) at 630F-J, where Southwood J remarked 'The importance of reasons cannot be over-emphasised. They show how the administrative body functioned when it took the decision and in particular show whether that body acted reasonably or unreasonably, lawfully or unlawfully and / or rationally or arbitrarily.'

[66] In the result, the application will be dismissed. In view of the essentially commercial basis for the proceedings, there is no reason why the costs should not follow the result.

[67] As to the undetermined costs in case no. 20599/21, it ordinarily happens that the costs in proceedings in which interim relief is granted *pendente lite* are held over for determination when the outcome of the principal proceedings has been decided; and that they then follow the result in the principal case. I see no reason why that approach should not apply in the current matter.

[68] An order will issue in the following terms:

1. The application in case no. 4517/22 is dismissed with costs, such costs to include the costs incurred in respect of the relief sought in Part A of the notice of motion.
2. The applicant in case no. 20599/21 is ordered to pay the first respondent's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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