IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M311/2021

In the matter between:

NALEDI LOCAL MUNICIPALITY	Applicant
and	
ESKOM SOC LTD	First Respondent
SAKELIGA NPC	Second Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS	Third Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	Fourth Respondent
THE MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent
THE MINISTER OF FINANCE	Sixth Respondent
DITSOBOTLA LOCAL MUNICIPALITY	Seventh Respondent
THE PREMIER: NORTH WEST PROVINCE	Eighth Respondent
MAGALIES WATER BOARD	Nineth Respondent
SEDIBENG WATER BOARD	Tenth Respondent

in re:

SAKELIGA NPC	Applicant
and	

D.C. KRUGER ATTORNEYS
P.O.Box 24225,Mafikeng,2745
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THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	Second Respondent
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NALEDI LOCAL MUNICIPALITY	Sixth Respondent
THE PREMIER: NORTH WEST PROVINCE	Seventh Respondent
ESKOM SOC LIMITED	Eighth Respondent
MAGALIES WATER BOARD	Nineth Respondent
SEDIBENG WATER BOARD	Tenth Respondent

FILING NOTICE

Document filed:

1. Applicant's Heads of Argument (Interlocutory Application);
2. Applicant's Practice Note (Interlocutory Application);

Date of hearing: 17th November 2022 at 10h00.

DATED AT MAHIKENG ON THIS THE 02 DAY OF NOVEMBER 2022.

MODIBOA ATTORNEYS INC
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NORTH WEST DIVISION MMABATHO

AND TO: **MAENETJA ATTORNEYS**
Eighth Respondent's Attorneys
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EIGHTH RESPONDENT'S ATTORNEYS

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AND TO: **THE STATE ATTORNEY, MAHIKENG**
1st, 2nd, 3rd 4th, and 7th Respondents' Attorneys
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Received copy hereof on this ___ day of NOVEMBER 2022.

1ST, 2ND, 3RD, 4TH & 7TH RESPONDENT'S ATTORNEYS

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Received copy hereof on this 2 day of NOVEMBER 2022.

FIFTH RESPONDENT'S ATTORNEYS

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M311/2021

In the matter between:

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in re:

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and	

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SEDIBENG WATER BOARD	Tenth Respondent

APPLICANT'S PRACTICE NOTE – INTERLOCUTORY APPLICATION

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1. **NAME AND CASE NUMBER OF THE MATTER:**

   As reflected above.

2. **NUMBER ON THE ROLL**

   Unknown.

3. **DATE OF HEARING**

   17th November 2022 at 10h00.

4. **COUNSEL FOR THE APPLICANT:**

4.1. Adv Kenneth Chwaro
Office. (011) 217 5000
Mobile. 083 288 9185
Email. chwarok@gmail.com/ chwaroka@thulamelachambers.co.za

5. **COUNSEL FOR THE RESPONDENTS:**

5.1 Unknown.

6. **NATURE OF THE APPLICATION AND RELIEF SOUGHT:**

6.1 This is an interlocutory application emanating from Naledi Local Municipality ("the municipality") becoming aggrieved by the conduct of Eskom SOC Ltd ("Eskom"), in the main application, to seek additional relief against the municipality in an "explanatory affidavit" filed in response to an application launched by Sakeliga NPC ("Sakeliga") without having sought leave of the above Honourable Court to do so as is required in terms of rule 24(2) of the Uniform Rules of Court.

6.2 The municipality also seeks further and/or alternative relief to its main relief as contained in paragraph 1 of the notice of motion in the interlocutory application more importantly costs thereof.

7. **IS THE MATTER PROCEEDING:**

The matter is proceeding as scheduled.

8. **ESTIMATED DURATION OF ARGUMENT:**

1 hour.

DATED AT MAHIKENG ON THIS THE 02nd DAY OF NOVEMBER 2022.

MODIBOA ATTORNEYS INC
Applicant's Attorneys
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AND TO: **MAENETJA ATTORNEYS**
Eighth Respondent's Attorneys
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1st, 2nd, 3rd 4th, and 7th Respondents' Attorneys
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AND TO: **TIRO ATTORNEYS**
Fifth Respondent's Attorneys
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Shasons Centre, MAHIKENG
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Received copy hereof on this 2 day of NOVEMBER 2022.

FIFTH RESPONDENT'S ATTORNEYS

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M311/2021

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NALEDI LOCAL MUNICIPALITY	Applicant
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ESKOM SOC LTD	First Respondent
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THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	Fourth Respondent
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MAGALIES WATER BOARD	Ninth Respondent
SEDIBENG WATER BOARD	Tenth Respondent

In re:

SAKELIGA NPC	Applicant
and	
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS	First Respondent

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ESKOM SOC LIMITED	Eighth Respondent
MAGALIES WATER BOARD	Ninth Respondent
SEDIBENG WATER BOARD	Tenth Respondent

APPLICANT'S HEADS OF ARGUMENT:
RULE 30 INTERLOCUTORY APPLICATION

INTRODUCTION

1. This is an interlocutory application emanating from Naledi Local Municipality ("the municipality") becoming aggrieved by the conduct of Eskom SOC Ltd ("Eskom"), in the main application, to seek additional relief against the municipality in an "explanatory affidavit" filed in response to an application launched by Sakeliga NPC ("Sakeliga") without having sought leave of the above Honourable Court to do so as is required in terms of rule 24(2) of the Uniform Rules of Court.

2. The municipality also seeks further and/or alternative relief to its main relief as contained in paragraph 1 of the notice of motion.

3. In its "explanatory affidavit", Eskom sought to support, piggyback and supplement Eskom's cause of action and also seek an additional relief against the municipality, a co-respondent, under circumstances where Eskom did not seek leave of the Court to join the fray with Sakeliga, as the applicant, against the municipality as provided for in rule 24(2) of the Uniform Rules of Court.

4. Following this conduct, the municipality issued a notice contemplated in Rule 30A of the Uniform Rules of Court complaining about the conduct of Eskom and calling upon it to comply with rule 24(2) failing which an application to strike out the "explanatory affidavit" would be pursued.[1]

5. Eskom has since filed an answering affidavit explaining that it never intended to seek any orders against the municipality in the main application but will do so, if advised, in a separate action or application .[2]

6. In the result, the municipality did not intend to pursue the application as the offending conduct has been addressed in the answering affidavit filed on behalf of Eskom in this interlocutory application.

7. With the offending conduct being out of the way and in an effort to prevent unnecessary incurring of costs, the municipality proposed to collapse the necessity of having this interlocutory application being argued separately from the main application, with the costs of the interlocutory application being reserved for argument with the main application.

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[1] Record, pp 129-133
[2] Record, p226-244

8. Sakeliga did not agree with the proposed route and insisted on the interlocutory application being heard separately.

BRIEF BACKGROUND

9. On 26 May 2021, Sakeliga caused an application to be issued out of the above Honourable Court in terms of which it sought a variety of extraordinary orders against the municipality and other provincial and national departments, under the rubric of intervention in terms of section 139 of the Constitution.[3]

10. In its wisdom, Sakeliga directed its wreath against the Ditsobotla Local Municipality and the Naledi Local Municipality.[4] Eskom is cited as a co-respondent[5] in the main application under the suggestion that the need for intervention in these municipalities is partly as a result of the two municipalities' failure to pay their respective Eskom accounts.

11. The municipality as well as the national and provincial respondents cited in the main application are opposing the relief sought by Sakeliga and to that extent, have filed comprehensive opposing affidavits dealing with the factual and legal bases of opposing Sakeliga's case.

12. In providing what it considers as relevant factual information on the position of the municipality's indebtedness to it, Eskom supports the relief that Sakeliga is seeking against the municipality but, in paragraph 207 of its " Explanatory Affidavit" sought to request the above Honourable Court to grant an order

[3] Record, p12, para 18
[4] Cited as the fifth and sixth respondents respectively
[5] As the eighth respondent

compelling Naledi Local Municipality to meet its constitutional , statutory and contractual obligations and that the court grants a just and equitable order which ensures justice to Eskom.[6]

13. It is the additional relief that Eskom seeks against the municipality that prompted the filing of a notice in terms of rule 30A calling upon Eskom to comply with rule 24(2) prior to seeking an additional relief against a co-respondent. In essence, the notice sought to alert Eskom of its impermissible stance of seeking relief against a co-respondent under circumstances where leave to proceed with such a stance was not obtained, akin to what rule 24(2) provides for.

SUBMISSIONS

14. We submit that the failure by Eskom to obtain leave to seek an additional relief against a co-respondent is an irregular step in the application brought by Sakeliga and where Eskom was cited as a co-respondent with the municipality.

15. On a proper perusal of the notice of motion as amended, Sakeliga does not seek relief against the municipality which "ensures justice to Eskom" or which compels Naledi Local Municipality to comply with any constitutional, statutory and contractual obligations.

16. In the absence of a procedure contemplated either in rule 24(2) or rule 13, Eskom cannot be permitted to seek orders against a co-respondent and based

[6] Record, p127

on the contents of its own " explanatory affidavit" and not the founding affidavit filed by the applicant.

17. A rule akin to what is required of Eskom is rule 24(2) of the Uniform Rules of Court, which provides as follows:

> " **(2) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly or, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such a manner and on such terms as the court may direct**"

18. We submit that the application brought by Sakeliga must be decided with reference to the case made out by Sakeliga in its own papers and not with the assistance of Eskom. The attempt by Eskom to supplement the case for Sakeliga and even proceed to seek an order directed against the municipality cannot be countenanced.

19. In the matter of **Globul Roads (Pty) Ltd v Premier of the North West Province and Others** [7] the court eschewed the conduct almost similar to what Eskom intends doing in the present application, where the review application was brought against the department but in its answering affidavit, the

[7] Case No: 1620/2011 (Unreported Judgment handed down on 17 May 2012, copy annexed, marked "A"),

department attempted to supplement the grounds of review propounded by the applicant against it and its co-respondents, the court stated the following:

> "**[11] What the Department cannot do is to prosecute a review in proceedings where it is a respondent against another respondent. Rule 53 does not permit this procedure and nor can the same be done where an applicant pursues a review in terms of Rule 6, the normal motion application. This is what the Department sought to do in this application. The impracticality and unfairness of pursuing such an approach have been amply illustrated in Mr Kemp's submissions.**
>
> **[12] In the result I decline to adjudicate this matter on the basis presented by the Department.**"

20. We submit that Eskom, as a co-respondent with the municipality, is seeking to prosecute a case brought about by Sakeliga without having sought leave of the above Honourable Court to do so. This attempt is impermissible, impractical and unfair since the municipality cannot, without leave of the Court, file any response to an affidavit filed by a co-respondent.

21. If Eskom is desirous to litigate against the municipality on its own, it can launch its own fresh application and seek the additional relief that it seeks against the municipality in its explanatory affidavit, in that separate application or action, if it is advised to do so. This much was only clarified in the answering affidavit that was filed on behalf of Eskom.

22. In the premises, we submit that to the extent that Eskom seeks any order against the municipality and as expounded in paragraph 207 of its explanatory

affidavit, such relief falls to be struck out as impermissible due to the failure by Eskom to obtain prior leave to seek such a relief against a co-respondent.

23. To the extent that the above Honourable Court finds that there was no need to comply with rule 24(2) as it does not apply to motion proceedings, it is submitted that a prayer for a further and/or alternative relief places the inherent powers of this Court at play to determine, on the consideration of prejudice to the parties, whether Eskom was entitled, without having sought leave to do so, to seek additional relief against a co-respondent following its filing of an explanatory affidavit.

24. In **Leibowitz and Others v Schwartz and Others**[8] the court explained its inherent powers in the following terms:

> **" The Court has inherent powers to grant relief where an instance upon exact compliance with a rule of court would result in substantial injustice to one of the parties.**
>
> **The Court must, m my view, similarly, have power to grant relief where it is concerned not with a rule of court but with a rule of practice even in a case it seems to me with great respect where the rule of practice has been declared by the appellate division."**

25. It is therefore submitted that the prejudice which Naledi stands to suffer should the relevant paragraph in Eskom's explanatory affidavit be left untouched is immense, especially under circumstances where the municipality did not have an opportunity to refute the allegations made by a co-respondent.

[8] 1974 (2) SA 661 (T) at 662D

CONCLUSION

26. We therefore conclude that:

26.1. Our procedural law does not countenance a situation where a respondent is permitted to seek an order against another co-respondent without prior leave and authority of the Court;

26.2. In the absence of a specific rule addressing such irregular step undertaken by Eskom, the municipality was entitled to raise an objection with reference to a rule akin to rule 24(2) dealing with actions; and

26.3. The above Honourable Court has inherent jurisdiction to regulate its process and in terms of the common law, including coming to the assistance of a party like the municipality, under circumstances where Eskom sought to piggyback on the case made out by Sakeliga, supplements same and seek relief different from the one sought by Sakeliga against the municipality.

27. To the extent of the striking out of the relief sought and encapsulated in paragraph 207 of Eskom's answering affidavit, the municipality is entitled to its costs.

O.K. Chwaro
Counsel for the applicant (Naledi Local Municipality)
Thulamela Chambers, Sandton
01 November 2022

IN THE NORTH WEST HIGH COURT
MAFIKENG

CASE NO.: 1620/11

In the matter between:

GLOBUL ROADS (PTY) LTD	Applicant
and	
THE PREMIER NORTH WEST PROVINCE	First Respondent (Misjoined)
MEC FOR PUBLIC WORKS, ROADS AND TRANSPORT NORTH WEST PROVINCE	Second Respondent
THE HEAD OF DEPARTMENT OF PUBLIC WORKS ROADS AND TRANSPORT	Third Respondent
DOWN TOUCH INVESTMENTS	Fourth Respondent

JUDGMENT

LANDMAN J:

Introduction

[1] Globul Roads (Pty) Ltd ("the applicant") seeks to review and set aside a tender awarded to Down Touch Investments, the fourth respondent ("Down Touch") by the MEC for Public Works, Roads and Transport North West Province, the second respondent. The Head of Department of Public Works Roads and Transport is the third respondent. I shall refer to the second and third respondents as "the Department". The first respondent, the Premier North West Province, was previously held to have been misjoined in this application and is no longer a party to the proceedings.

The history of the matter

[2] The background to this matter is important. It may be summarized as follows:

(a) The Department invited tenders for the construction or rehabilitation of the P34/2, the road between Koster and Lichtenburg. The Department later cancelled the contract.

(b) In June 2011 it invited fresh tenders (PWRT 71/11) for the construction or rehabilitation of portion of this road.

(c) This application concerns the portion of the road termed "Contract B" (KM 0#53 to KM 85).

(d) On 5 August 2011 the new tender was awarded to Down Touch.

(e) The applicant had also tendered but had been excluded during the process.

(f) On 27 September 2011 the applicant launched this application, consisting of two parts, against the four respondents.

(g) The first part of the application, brought on the basis of urgency, was for an interdict restraining Down Touch from proceeding with the construction of the road relating to contract B, pending a review of the decision to award the tender to Down Touch.

(h) This court upheld the Premier's objection of misjoinder and dismissed the first part of the application for lack of urgency.

(i) Down Touch's contract was thereafter suspended by the Department.

(j) Down Touch sought to interdict the Department from doing so but the application was dismissed with costs.

(k) The Premier of the North West Province, acting as the MEC for Public Works, Roads and Transport North West Province, was concerned that there may have been irregularities in the tender process and instructed the Acting Head of Department to appoint an independent set of consulting engineers to conduct an audit of the procedures followed and to report on any irregularities.

(l) Nyeleti Consulting (Pty) Ltd ("the Investigating Engineers") were appointed to undertake the audit. The Investigating Engineers stated that it would conduct the investigation in two phases. It has filed a provisional first report and a final first report relating to the first phase.

(m) The Investigating Engineers state that they need to complete phase two of the investigation. It seems that they do not have instructions to do so.

(n) Several sets of affidavits have been filed, mainly because the application consists of two parts.

(o) The applicant has not filed a replying affidavit dealing with Down Touch answering affidavits relevant to the review.

Introduction to the applicant's case

[3] When the application served before me the applicant had indicated in writing, and Mr H Schoeman, who appeared for the applicant, confirmed that:

(a) The applicant sought an order reviewing and setting aside the decision of the Bid Adjudication Committee and of the Head of the Department to award the tender to Down Touch (prayer 1.1).

(b) It no longer persisted with the relief sought in prayer 1.2 of Part B of the Notice of Motion that this court should award the tender to the applicant.

(c) It associated itself with the grounds of review as advanced by the Department and the arguments to be presented in this regard by their counsel.

(d) It would not persist in seeking a cost order against the Department.

(e) It persisted with seeking a cost order against Down Touch.

The Department's stance

[4] In view of the proposal to collapse the applicant's case into that of the Department or vice versa, it is necessary for me to consider the Department's stance in this application, albeit out of turn. The Department had vigorously opposed the application for an interdict. But currently supports the application to review the award, provided that this court does not award the tender to the applicant. The Department supports the review mainly on the strength of the Investigating Engineers' report. The Department does not support some of the grounds relied upon by the applicant.

[5] The Department accepts that employees of the Department have committed irregularities. But it asserts that there is no reason to believe that any official acted with corrupt or criminal intent. The Department also asserts that there was a duty on the part of the Department to fully investigate the matter and draw the court's attention to the flaws in the process. The Department accepts the relevant findings of the Investigating Engineers. Mr H Lever SC, who appeared for the Department, referred to a number of defects in the tender process identified in the Investigating Engineers' report as "irregularities".

[6] Mr Lever submitted that the applicant's tender was not the lowest. There were other deserving tenderers which were worthy of consideration. There were flaws in the early stages of the tender process such as the time allowed for preparation of tenders, comments made at site meetings etc which render the entire tender process unsatisfactory.

[7] Mr Lever submitted that it would be sufficient for the court to simply set the award aside and allow the Department to commence a tender process afresh. This was the remedy in GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works and Others [2003] 4 All SA 902 (D).

Down Touch's response to the Department

[8] Mr K J Koop SC, (with him Mr S Grobler) who appeared for Down Touch, has taken issue with the Department's stance. He submitted that:

(a) The applicant and the Department cannot by sleight of hand, change the applicant baton to the Department as if in a relay race. The application stands or falls with the applicant's case on the

review grounds made out by the applicant in its founding papers according to the rules of engagement governing applications.

(b) Such rules of engagement provide trite principles which govern the determination of opposing contentions in application proceedings. The applicant's case is to be made in the founding affidavit there is no reason to relax this principle. See Director of Hospital Services v Mistry 1979 (1) SA 626 (A) 635H-636B.

(c) Where there is a conflict of admissible evidence on an issue, the respondents' version prevails. In accordance with the well-established principles in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), the respondents' version on the facts is to be accepted in the ultimate analysis of whether the applicant has met, on a balance of probabilities, the test required to succeed in a review unless the respondents' version are so utterly lacking in credibility so as to be dismissed out of hand.

(d) There are a number of reasons why the application baton cannot change from the unsuccessful tenderer to the Department. First, the decision to award the tender to Down Touch was followed by the conclusion of the road reconstruction contract between the Department and Down Touch and its implementation. It is clear from the Department's subsequent conduct that it is eager to have the contract set aside without any of the adverse contractual consequences of repudiating the contract. In short, the Department wants to resile without incurring any contractual liability. Allowing it to set aside the tender based on the defects in its own tender process, will allow it to do exactly that. These defects in its process are entirely of its own making. Down Touch is entirely innocent in respect of such defects. The sole responsible party for

any defect (and Down Touch contends that no sufficiently significant defects mar the tender process) in the Department. The Department cannot rely on its own wrong to advance its position. This much is trite and the case then differs from instances of fraud or stand-alone administrative acts.

(e) The Department has not accepted any liability for the contract it concluded. What it effectively seeks to do is to add as a ground for cancellation of the contract, administrative review based on its own self-proclaimed defective tender process. Section 217 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), was not enacted to create an escape for the State from its contracts. The right of a State organ to review its own tender process is clearly one which only lies at administrative level and is properly confined to cases of fraud or *ultra vires* stand-alone administrative actions. Any other approach would wholly subvert the equation of State liability in contract to those of private individuals and entities.

(f) Allowing the Department to effectively become the applicant would also be wholly subversive of the review process and the procedural rights of Down Touch. Indeed, that would interest the entire procedure and the treatment of the evidence (see for example the Department's contention that Down Touch has not refuted Pienaar's evidence. There was never a *lis* between the Department and Down Touch). It becomes virtually impossible to apply Plascon-Evans and must inevitably lead to a proliferation of affidavits. The time within which a review must be brought becomes problematic. The rule of procedure which applies is a simple one. Should a respondent seek more than dismissal of an

application, it must bring its own application supported by its own papers. This the Department did not do.

(g) Even more disturbing is the selective fairness which would be manifest if the Department would have itself sought to set the award aside. On its version of a corrected tender process, it should have awarded the tender for the first part of the road construction to Down Touch. There is no application to set aside the erroneous result of that tender by the Department – that "wrong result" is seemingly perfectly acceptable to the Department.

(h) There is another issue which indicates why an approach in accordance with the rules relating to application proceedings and the *lis* thereby created is imperative. The applicant seeks a review of the tender award with a consequent order that the tender be awarded to it. In the alternative the applicant seeks a referral of the award back to the Department for revision based on the tender documents and bids. The Department contends wishes to have the award set aside and commence *de novo*.

(i) The consequential relief is not similar. A tenderer, which may have been satisfied with another decision on the bid papers, may not be satisfied with a *de novo* process and *vice versa*.

(j) This has made the issue of joinder of all the bidding parties vital to a setting aside of the award. Whatever may have been said about the issue of joinder where the only parties interested were the applicant and Down Touch (because the present award had to go to one or the other) that changed when the applicant was no longer, as it initially contended, the compulsory choice. They are interested parties and need to be joined by the applicant (or by the Department where more than just dismissal of the application is sought).

(b) In short, the bidder which has the lowest price has a very real interest which alternative consequential relief would prejudice. See Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) 659; Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W) and Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others 2005 (4) SA 212 (SCA) 64.

My evaluation

[9] It was entirely proper for the Premier of this Province to have ordered an investigation into the alleged irregularities with regard to the tender process with which this application is concerned. This is mandated by the general principles of good governance, legality and the precepts of the rule of law. Where there is a suspicion that preference has been obtained on a fraudulent basis a state organ is obliged to investigate the complaint and take action. See Viking Pony Africa Pumps v Hidro-Tech Systems (175/09) [2010] ZASCA 23 (25 March 2010).

[10] If an investigation shows a material irregularity the Department would be obliged to disclose this and could then oppose or concede the application to review the award or the Department could itself institute review proceedings. See the observations in Municipal Manager: Qaukeni and Others v F V General Trading CC 2010 (1) SA 356 (SCA) at para 36 where it is said:

> "While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final

> conclusion in that regard. If the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the applicants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fully and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form..."
> (Footnotes omitted.)

[11] What the Department cannot do is to prosecute a review in proceedings where it is a respondent against another respondent. Rule 53 does not permit this procedure and nor can the same be done where an applicant pursues a review in terms of Rule 6, the normal motion application. This is what the Department sought to do in this application. The impermissibility and unfairness of pursuing such an approach have been amply illustrated in Mr Kemp's submissions.

[12] In the result I decline to adjudicate this matter on the basis presented by the Department. Other tenderers need not be joined in view of my finding that the choice is to be made between the applicant and Down Touch.

The applicant's grounds for review

[13] I turn to deal with the applicant's grounds of review. The applicant conceded that it made the mistake of confusing the "Tender Evaluation Report", annexure GR6, as being the outcome of the work of the Departmental Bid Evaluation Committee. GR6, is an advisory report of the independent Consulting Engineers ("the Tender Engineer") who advised on technical aspects of the tender. It was prepared for the Departmental Bid Evaluation Committee. GR6 was considered by that committee in making its recommendation. But it does not constitute their view or decision.

[14] The problem, as Mr Kemp points out, is that, in spite of this concession, the applicant still sought to found the review on the initial grounds. These grounds must therefore be considered to the extent that they survive their mistaken origins.

[15] As I understand the applicant's case, it is that it seeks to:

(a) object to the process in so far as it effects itself;
(b) demonstrate that Down Touch's bid was defective and should have been eliminated; and
(c) rely on the irregularities found by the Investigating Engineers.

(a) Applicant's bid

[16] The Constitution of the Republic of South Africa of 1996 requires that the tender process be in accordance with a system which is fair, equitable, transparent, competitive and cost effective. See section 217(1) of the Constitution. Underbidding in the form of unrealistic low prices presents a serious danger to the integrity of the tender process and the due performance of any contract.

[17] The minutes of the Bid Evaluation Committee shows that the committee considered the applicant's tender to be unresponsive, meaning not to be a genuine and reliable bid, because it was significantly (almost R18 million) below the Tender Engineer's estimate of the costs of a fair and reliable bid. It was legitimate for the Department to exclude bids which were unrealistic having regard to the benchmark established by its Tender Engineer provided that this benchmark is rational, fair and not marred by some irregularity.

[18] Mr Kemp submits that in respect of certain items, the applicant's bid was so significantly under-priced, in comparison with the estimate of the Tender Engineer and those of the other bidders, that it would only have been deliberate. This has been clearly spelt out in detail by Down Touch. I should point out that the under pricing is confirmed by an unsigned report providing reasons for excluding the applicant from the bidding. Although the report has not been signed, it is clear from an accompanying memorandum by the Chief Director of the Department that the report is the view of the then acting Head of Department.

[19] I accept that the benchmark was fairly set by the Tender Engineer. It is true that the Investigating Engineers challenge this. But the Investigating Engineers admit that they are not conversant with the design of the road and site conditions. I must add that no submissions were addressed to me regarding the conduct of the Tender Engineer in setting the benchmark or any subsequent conduct as regards the tenders.

[20] I accept that the applicant's price was below the level pegged as realistic by the Tender Engineer and was considered by the Bid Evaluation Committee to be such that it could not be allowed to compete for the tender. Whether it should have been described as "unresponsive" is another question which need not delay me. However, before a bid which is considered as "unbalanced" and a bid which is considered as being too low, may be rejected, the tenderer must be given an opportunity to explain the price. See Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and Others, Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and Others [2006] ZANWHC 54 (31 August 2006) at paragraphs 49, 54 and 56.

[21] Mr Kemp's answer to this is lengthy. But such is its importance that I record it in full. Mr Kemp submits that:

(a) The applicant has been aware from the outset that its alleged under pricing in its tender has been the focus of its review. The applicant has dealt extensively, in its papers with the deliberate and abusive nature hereof, but the applicant has not provided any explanation of or reason for its deliberate under pricing nor has it answered the detailed averments to this effect. It has chosen not to file a reply at all.

(b) The applicant has elected to rely solely on the failure of the Department to seek an explanation from it as to the under pricing before treating its tender as unrealistic and therefore non responsive. It has elected to advance this argument on the basis that the under pricing was deliberate and that no sound, *bona fide* explanation exists even now. What its response would have been to an inquiry from the Department, is likewise, left up in the air.

(c) This was not the case of an accidental omission or ambiguity or obvious mistake. It was an instance of a deliberate unrealistic low pricing being put up in conflict with competitive principles. A low price which the applicant still seeks to take advantage of as giving it full points for the lowest price. See Metro Projects CC and Another v Klerksdorp Local Municipality and Others 2004 (1) SA 16 (SCA) 13.

(d) In case, the reliance here on this principle is entirely misplaced. The applicant wilfully under quoted for approximately R17 million. It did so on the basis that it will be provided a further opportunity of explaining or amplifying its original tender. This vitiates the applicant's case. If such an opportunity had been

granted under the present circumstances, it will have allowed the applicant to intentionally under quote, and, post the opening of the tenders, provide an opportunity to negate his irrevocable offer by refusing to provide a per item adjustment (the total remaining the same) or refusing to provide an explanation of the under quoting. This is an unfair manipulation of the tender process prejudicing those who filed a duly considered tender (like the fourth respondent).

(e) The applicant has not in its founding, replying (interim) or supplementary affidavits explained how and why it so badly undercut the norms determined by the Tender Engineer. The applicant has nowhere said that the Tender Engineer made a material mistake with regard to their estimate, and nowhere distance themselves from the estimation. In fact, the applicant relies on the conduct of the Tender Engineer, especially as far as the awarding of points is concerned, for purposes of obtaining the relief it seeks here. If the Tender Engineer was accordingly correct in their estimate (which they clearly were if regard is had to the fact that well known entities such as Tau Pele, Reubex, etc quoted circa R93 million) then the applicant was clearly wrong. If the applicant was correct then the Tender Engineer was wrong. It cannot be both ways.

[22] Road Mac Surfacing (Pty) Ltd (*supra*) where Leeuw J (as she then was) said at paragraphs 60 – 62:

> "[60] In its Founding Affidavit, Road Mac Surfacing avers that its tender price was R3 634 791.15 with 93.4 points, Black Top Surfacing tender price was R4 169 910.83 with 77.3 points and Goduka Civil's tender price was R4 725 037.58 and the points awarded unknown. Road Mac Surfacing did not raise the procedural irregularity in its founding

papers: this issue was only raised during argument in the Court a quo. That explains why Road Mac Surfacing was constrained to argue that it had been adversely affected or prejudiced by such irregularity. No such has been laid in the founding papers.

[61] On the other hand, Godfrey Civil has filed an affidavit showing the prejudice it may suffer if the tender contract awarded to it were to be set aside or cancelled, in view of the fact that it had already borrowed money for the project and that cancellation would result in serious adverse financial implications. Road Mac Surfacing did not dispute or gainsay these allegations in that it did not file a Replying Affidavit. Compare *Ralph S. Ralph (Pty) Ltd and other Owners v Yeoman Shipbuilding and Others* 1961 (4) 402 (AD) and *Maxwell Associates v Director General: Department of Public Works and Others* [2004] 1 All SA Law Reports p 673 (CPD).

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

[23] The result is that I find that the Department has committed a material irregularity as regards the rejection of the applicant's tender. I shall return later to consider the consequences of the irregularity.

Down Touch's tender

[24] Down Touch's tender was not eliminated. The applicant's complaints about this tender originated from its mistake as regards the author of the document GR-6. It is contended that Down Touch's bid should have been declared by the Department to be non-responsive because Down Touch did not complete and sign, or failed to comply with the certifying requirements of the following tender forms:

(i) it is not qualified for SCE, but rather they are 7CEPE;
(ii) the schedule of subcontractors, noted "to be supplied by client";
(iii) tax clearance certificate is for good standing.

[25] I turn to consider them individually.

Lack of SCE qualification

[26] The tender invitation provides:

> "Tenderers should have a CIDB contractor grading designation of 8CE or higher.
>
> Tenderers who are registered with CIDB or are capable of being so registered prior . . . for an 8CE class . . . qualify."

[27] As Mr Kemp points out the applicant relies on its belief that Down Touch's bid should have been found to be non-responsive, since it did not have a CIDB grading of 8CE. The applicant asserts that this was an absolute criterion and, should the grading itself not be held by any tenderer, it was to be automatically excluded. The tender criteria, however, state the converse. Furthermore, Down Touch was fully equipped and qualified to perform any road building on this level. The Department knew and recognised this. Down Touch says it has in the past performed several contracts on a 8CE level. The Tender Engineer confirmed this.

[28] It was also submitted that Down Touch applied some time ago for this CIDB grading and has since received this grading. I accept that the code of conduct for all parties engaged in construction procurement published under the CIDB Act (BN127 in Government Gazette 25650 of 31 October 2003) provides the answer. This states that a tender offer or expression of interest of a contractor, who is not registered as contemplated but who is capable of being so registered prior to the evaluation of those submissions, may be evaluated.

[29] I do not find that Down Touch's tender was defective on this account.

Subcontractors

[30] Mr Kemp submitted that a bidder is not obliged to use any subcontractors. No contractual nexus is created between any subcontractor and Department. If the bidder does not list subcontractors, the Department is simply entitled to refuse the late use of subcontractors. The failure to list simply enhances the Department's contractual position. The Department is entitled to "condone" the non-listing where indeed it does not prejudice but enhances its contractual position. This must be correct, not only on the basis of *Minister of Social Development and Others v Phoenix Cash & Carry* – PAIB CC 2007 3 All SA 115 (SCA) that irrelevant or immaterial shortcomings do not disqualify a tender, but also as a matter of logic and principle.

[31] Down Touch indicated that it would provide the names of subcontractors once subcontracts were concluded. In the absence of evidence to the contrary I must accept that its explanation was acceptable to the Department.

Tax clearance certificate

[32] The purpose of requiring a bidder to present a tax clearance certificate from SARS stems from the sound policy that the State should procure goods/services from only those who meet their tax obligations. Mr Kemp submitted that there is also the pragmatic reason that it eliminates the possibility of SARS' seizing progress payment paid to fund the works. This would also apply to assets and supplies needed to complete the project.

[33] The tender documents did not stipulate what form of certificate would suffice. What was required is a certificate that Down Touch's tax affairs were in order. SARS' certificate is on the papers, higher than the required threshold.

[34] In the absence of evidence to the contrary I am entitled to infer that the Department did not find the certificate unacceptable. Again there is no merit in the applicant's complaint.

Findings of the Investigating Engineers

[35] The last leg of the applicant's attack on the award of the tender to Down Touch is founded on the investigating Engineers' findings. I shall assume that the applicant is entitled to add them to its grounds of review in accordance with Rule 53.

[36] However, before continuing, it is necessary to make some observations about the Investigating Engineers' report and findings. The following features are significant:

(a) The report deals also with contract A. But this is easily separated from contract B.

(b) The process and report covers, to an extent, similar the same ground as this review but it is entirely different process.

(c) The Investigating Engineers seem to have conducted a paper audit and do not seem to have solicited input from the tenderers or officials concerned.

(d) The report provides some details and conclusions but it does not always supply the raw material upon which the report is based.

(e) The Investigating Engineers acknowledge that that they do not have experience of the site and the design of the road.

(f) The final report relates to the first phase.

(g) The investigating Engineers acknowledge that, some details of the applicant's tender, as regards technical aspects, will be investigated in the second phase.

(h) The irregularities, which the report identifies, are defects in procedure and may not constitute "gross irregularities" which are required in order to review a decision of an administrative body.

[37] Apart from this there is a practical objection to asking a court to sift through a report of this nature in order to discover whether there is an irregularity and whether it is supported by evidence. See Lipschitz and Schwartz NNO v Markovitz 1976 (3) SA 772 (W). It was for the applicant to identify and incorporate those aspects which relate to and support its case into its Rule 53 affidavit.

[38] The result is that I am not required to deal with the report and I decline to do so, save to the extent that it relates to the grounds of review properly before this court.

The consequences of the gross irregularity

[39] I return to the question which I flagged above. I have found that the applicant has shown that the process of rejecting its bid was procedurally unfair to the extent that it was deprived of an opportunity to compete for and be awarded the tender. In my view the irregularity is not one which can be passed over. It is not a minor slip and does not fall within the category of irregularities mentioned in Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA) at 29 which reads:

"In any event this court in Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another held that (after every slip in the administration of tenders is necessarily to be visited by judicial sanction (para 21). Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not."

[40] Having said this I must refer to Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA) where it is said:

"[19] The judgment in Millennium Waste pointed out that the difficulty that is presented by invalid administrative acts is that they have often been acted upon by the time they are brought under review (at para 25):

'That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have unacceptable consequences for the public at large in whose interest the administrative body or official purported to act'.

[20] After this had ground I proceed to consider the appropriateness of the learned judge's premise, that it was not appropriate to set aside the decision, because, although the work had begun, it was a 'no-cancellation' contract, which meant the King would not be paid for something it had not done and, presumably, that Moseme would be paid for the work it had completed. I believe that the High Court did not consider fully the implications of the order in the context of a contract that has to be measured. First, each tenderer will weight and price different items differently. Any particular costed item will as a matter of course differ from tender to tender. Then there are items, such as preliminaries and establishment, which as themselves provide no value for the employer and for which each contractor would in principle be entitled. But it goes further. The setting aside of a contract has a number of consequences. The first contractor may not be able to claim under the terminated contract and be left with an enrichment claim, and the employer may not have a claim for defective workmanship. The second contractor may even have a claim for damages against the employer in respect of loss of profit on the extended part of the contract because it has now become contractually entitled to the whole contract.

[21] These problems may not be of any consequence in the case of corruption or fraud, or where the successful tenderer was complicit in the

irregularity. But as said, that is not the case. The learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent bidders. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect administrative process, is not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction."

[41] The question is therefore, should the award of the tender to Down Touch be set aside? See the discussion in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2002 (2) SA 638 (SCA) of the considerations which may be taken into account. Are there exceptional circumstances which justify such an approach? In my view the tender should not be set aside. I say this taking into account the following considerations:

(a) The tender process in question is not tainted with corruption or unlawfulness.

(b) The public interest requires that the road between Koster and Lichtenburg be completed as, in its present state, it disrupts the free flow of traffic and harms the business interests of those reliant upon it.

(c) The first tender was aborted. The second tender has been halted by the Department. The construction or rehabilitation of this road is taking an inordinately long time to reach completion.

(d) If the matter is set aside then either the process will have to be revisited or, should the Department have its way, invitations to tender would be invited *de novo*. This will delay the completion of the road by many months.

(e) Down Touch's price has been found to be realistic.

(f) The irregularity cannot be attributed to Down Touch.

(g) Costs have been incurred and it is most unlikely that there will be a saving in costs if the award is to set aside. The likelihood is rather that the costs of completing the tender will be higher and may well be compounded by a claim for damages by Down Touch.

(h) There is no certainty that the applicant, which does not have the lowest bid, will be selected. The applicant has not explained how it will address a query that its bid was unrealistic. This was not required for this court to find that there was an irregularity but it may well not have an acceptable answer. In such a case the setting aside of the tender will be to no one's advantage.

(i) Down Touch has its machines positioned on site. It has completed a small portion of the project to the satisfaction of the engineer. The work that was required to be done before the project is implemented has been done.

Costs

[42] The applicant has not been successful but it was justified in bringing its application. The Department should pay its costs but the applicant has indicated that it does not seek costs against the Department. Down Touch has been successful. The flaw is not attributable to its conduct. It should not have to bear its costs. The second respondent should pay Down Touch's costs.

[43] As regards the appropriate scale, Mr Kemp submitted that the Department itself initially supported the maintenance of the award. Then it selectively and perversely sought to join forces with the applicant on the basis that it only sought to advance the proper resolution of the matter while, indeed, what it sought was cancellation of the contract. It was contractually not entitled to this relief. This attempt to seize the moral high ground lies ill in its mouth given that such

defects in the tender process, were entirely of its making on its own admission. It now seeks to take advantage of these wrongs but in a very selective way. It says nothing about its failure to award the tender for the first part of the construction contract to Down Touch. That proper resolution is of no matter in its lofty stance. For these reasons, even if the award is set aside and referred back, the Department and the applicant (the authors of the abortive award contract, the tardy and sloppy litigation), should pay Down Touch's costs on an attorney and client scale.

[44] I am not persuaded that costs should be awarded on an attorney and client scale. State organs are under a duty to ensure that the actions of their officials and employees are not tainted by irregularities and should not be penalised by a special costs order where there is *prima facie* justification for their inquiries making.

Order

[45] In the premises I make the following order:

1. Part B of the application is dismissed.
2. The second respondent is to pay the applicant's costs. These costs are to include the costs of two counsel.

A A LANDMAN
JUDGE OF THE HIGH COURT

Date of Hearing	:	03 MAY 2012
Date of Judgment	:	17 MAY 2012
COUNSEL:		
For the applicant	:	Adv H Scholtz
For the first to third respondents	:	Adv H Lever SC
For the fourth respondent	:	Adv K J Kemp SC with him Adv S Grobler
ATTORNEYS:		
For the applicant	:	Botha Coetzer & Smith instructed by Frase Moll & Partners
For the 1st to 3rd respondents	:	State Attorney
For the 4th respondent	:	Smit & Stanton Inc instructed by Pepper Sesele Attorneys (Welkom)