

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 523/2016

In the matter between:

**SWAZILAND PUBLIC PROCUREMENT
REGULATORY AGENCY (SPPRA)**

Applicant

and

SWAZILAND GOVERNMENT TENDER BOARD

1st Respondent

**THE CHAIRMAN OF GOVERNMENT TENDER
BOARD N.O**

2nd Respondent

**THE NATIONAL COMMISSIONER OF
POLICEN.O**

3rd Respondent

**THE PRINCIPAL SECRETARY OF MINISTRY
OF PUBLIC WORKS & TRANSPORT N.O**

4th Respondent

**THE PRINCIPAL SECRETARY OF MINISTRY
OF FINANCEN.O**

5th Respondent

**THE CENTRAL TRANSPORT ADMINISTRATION
C/O MINISTRY OF PUBLIC WORKS &
TRANSPORT N.O**

6th Respondent

THE ATTORNEY GENERAL

7th Respondent

Neutral Citation: *Swaziland Public Procurement Regulatory Agency (SPPRA) v Swaziland Government Tender Board & 6 Others 523/2016* [2016] SZHC 64 (06th April 2016)

Coram: M. Dlamini J

Heard: 23rd March 2015

Delivered: 06th April 2016

even if the value of the goods or services exceeded E200 000 threshold, the respondents could use the limited tender procurement process by virtue of the use of “or” instead of “and” in Rule 41 of 2008 Regulations – regulations are an integral part of the Act. The Act is rendered nugatory in the absence of the public procurement regulations. - the mere fact that a tender process is not open, does not per se turn it into a suspicious or tainted process. - urgent applications are part and parcel of the procedures adopted by courts as means of discharging justice expediently and lawyers are trained in this regard. After all they are paid for this by their clients. I do not think that a lawyer, by keeping his candle burning prejudice. This is not the prejudice envisaged by law in order to warrant a cost order. -

Summary: The applicant, under a certificate of urgency, sought for an order reviewing and setting aside first and second respondents’ decision of granting fifth and sixth respondents the authority to use limited tender procurement process in favour of the third respondents. It also prayed for an interdict against fifth and sixth respondents from exercising the authority granted by first and second respondents.

Parties

[1] The applicant is a parastatal body established in terms of section 9 (1) of the Public Procurement Act 2011 (the Act). First respondent, like applicant, is also established by the same Act under Section 25 although

it is a fully fledged government entity. Second respondent is the Chair of first respondent.

- [2] Third, fourth and fifth respondents hold fort in government entities viz. Swaziland Royal Police, Ministry of Finance and Ministry of Works and Transport respectively. Sixth respondent is another government department mandated to control and regulate government motor vehicles. The seventh respondent is the legal representative of Government and the Counsel for respondents.

Contentions by the parties

The applicant

- [3] The applicant averred that in November 2015 it was alerted that respondents were engaged in the procurement process. It then approached the respondents with a view to advising them of the procedures to be taken in terms of the Act. Applicant later received a correspondence from fourth respondent advising it that the respondents were guided by Regulation 41 of the Public Procurement Regulation of 2008 (2008 Regulations). Applicant insisted that respondents should comply with the Act. This fell on deaf ears as the respondents were adamant with proceeding with the procurement process.
- [4] Applicant deposed that it was contrary to the provisions of the Act for respondents to engage in the procurement process without its mandate as an agency. It ought to have been engaged in the process. This was especially so because respondents were utilising the limited tendering procurement processes.

Prayers

[5] On the basis of the above circumstances, the applicant prayed as follows:

- “3.1 That the decision by the 1st Respondent of allowing the 5th and 6th Respondents to utilise the limited tender procurement method be reviewed and set aside.*
- 3.2 Declaring that the 1st, 5th and 6th Respondents are in contravention of the Public Procurement Act, 2011 read together with Section 61 of the Public Procurement Procedures issued by the Applicant on the 24th February 2016.*
- 3.3 That the 5th and 6th Respondents be interdicted from continuing with the purported procurement process in respect of the procurement of vehicles for the Police, Defence, Correctional Services and the Kings Office.”*

The Respondents

[6] In answer, fifth respondent deposed that there were no irregularities committed by respondents in the tender process at hand. The reason was that as there were no regulations in terms of the Act, the respondents correctly complied with the available regulations, which were 2008 Regulations. Fifth respondent also pointed out that it was impracticable for the applicant to discharge its mandate under the Act in the absence of the relevant regulations. Respondents could not therefore seek authority from the applicant without the necessary regulations. In the absence of the regulations, the only regulations that could be relied upon were the 2008 Regulations.

[7] The fifth respondent further pointed out that the procurement was at an advanced stage. On the averment that the respondents have failed to comply with the very 2008 Regulations, respondents contended that

there are instances where the threshold could be exceeded in terms of the Act. Fifth respondent repeatedly pointed out that it did seek and received authority to use the limited tender method from first respondent. Fifth respondent also challenged the effectiveness of the SPPRA Circular No.1/2016 (2016 Procedure) and its retrospective effect.

Reply

- [8] The applicant in reply maintained its averments in the founding affidavit. It challenged respondents' authority in relying on the 2008 Regulations. It pointed out that it is only applicant who has authority to grant any deviation from the threshold on limited tender method. It re-emphasised its regulatory mandate on public procurement.

Principles of Public Procurement

- [9] Procurement has been defined by **P. Bolton**¹ as:

"...the function of purchasing goods and services from an outside body."

- [10] Generally, buying goods and services from a third party often, by government, entails significant sums of public funds as costs for sizeable volumes. It has been observed that officials involved in the purchases may become prone to corruption. Corruption was found to:

*"undermine the attainment of value for money in government contracting, the fair treatment of contractors and the use of procurement as a policy tool."*²

- [11] It is for the purpose of constraining corruption that modern governments have promulgated legislation together with regulations as guidelines for

¹ Grounds for dispensing with public tender procedures in Government contracting [2006] PER 7at page 2

² *ibid* page 2

public procurement. Various authorities mention five basic general principles regulating public procurement, viz. “fairness, equity transparency, competitiveness and cost effectiveness.” Expatiating on the principles, **P. Bolton** authored:³

“...this means that organs of state should make use of competition when procuring goods or services. They should shop around and attract the maximum number of contractors who will participate in such competition. The aim should be the attainment of value for money, meaning, public money should be spent in an effective and efficient manner. Those who participate in competitions should also be treated fairly and without bias. In principle, no preference should be afforded to different contractors; all contracting parties should have equal access to competition; some contractors should not be afforded more time for the preparation and submission of quotes or tenders than others; and the same information should be made available to all contracting parties. Government procurement procedures should further be transparent, meaning public open. Thus, organs of state should not contract behind closed doors, government contracts should, as a rule, be advertised.”

[12] He further clarified:

“By nature, a public call for tenders is open, it assists in the prevention of fraud and favouritism, and it ensures that the maximum number of contractors is approached to compete for a contract. Organs of state can also compare prices and quality and can contract with whoever offers the best deal. Most legislation therefore proceeds on the basis that procurement takes place by way of tendering.”⁴

[13] As often said, every general principles or rule has an exception. **P. Bolton** propounds on the exception:

“At all three levels of government, the requirement for the use of public tender procedures is not without exception.”⁵

³ see page 1 of n¹

⁴ see n¹

⁵ See page 5 of n¹

[14] The learned author expounded on exception and stated that, for instance, if “*it is impracticable to invite competitive bid, for example, in the case of “emergencies” or a “sole supplier”*”⁶. He then explained:

*“In such instances, procurement may take place by other means, such as price quotation or negotiations, provided that a record is kept of the reasons for deviating from an invitation for competition bids and such reasons are approved by the relevant authority.”*⁷

[15] The author observed that, “*but no suggestions are made as to what kind of reasons would justify the deviation. There is therefore a wide discretion in this regard.*”⁸

Our jurisdiction

[16] Turning to Swaziland, the Legislature promulgated the Act in 2011. This Act establishes both the applicant and the first respondent.

Establishment and Powers of applicant and first respondent under the Act.

[17] Section 9 (1) reads concerning applicant:

“There is hereby established the Swaziland Public Procurement Regulatory Agency.”

[18] At the same time, section 25 stipulates with regard to the first respondent:

⁶ *ibid.*

⁷ *ibid*

⁸ *ibid*

“There is hereby established the Swaziland Government Tender Board, which shall be the highest approvals authority for the Government of Swaziland.”

Powers

- [19] Section 10 of the Act expounds on the powers of the applicant. Section 9(2) which is a summary of applicant’s powers provides that:

“The Agency (applicant) shall serve as an independent regulatory body, with responsibility for policy, regulation, oversight, professional development and information management and dissemination in the field of public procurement.”(my own)

- [20] Section 25, however, promulgates as regards first and second respondents:

“...which shall be the highest approvals authority for the Government of Swaziland”.

- [21] It also stipulates that first respondent:

*“...shall have unlimited level of authority, but shall have no authority over any procurement which falls within the level of authority of any subsidiary Tender Board or officer.”*⁹

- [22] To have a better understanding of first respondent’s unlimited level of authority, one must read section 25 together with section 24. This section relates to approvals authorities. Subsection (3) clarifies who approval authorities are. Firstly, these are Chief Executive Officer (CEO) and controlling officers. Secondly, appropriate Entity Tender Boards, who are established under the supervision and authority of the applicant. Unlike the CEOs and controlling officers of entities or departments, the Tender Boards enjoy unlimited approval powers of tenders. Where therefore the value of goods or services to be procured

⁹ Section 25 (2) of the Act

exceeds their level of authority, the first respondent is clothed with power to grant approval.¹⁰ It is for this reason therefore that section 25 (2) provides that the first respondent has no authority over any procurement which fall “*within the level of authority of the subsidiary tender board or officer*” while at the same time it enjoys an “*unlimited level of authority*”¹¹ to approve procurement of goods and services where public funds are to be utilised.

Issue

[23] The bone of contention as raised by applicant is asserted in its founding affidavit as follows:

“21. *Having brought all these facts to the attention of the 1st and 5th Respondents, it became clear that the decision to use limited tendering procurement method for procurement of vehicles had been taken. This decision is in direct contravention of the Public Procurement Act of 2011.*”

[24] The applicant then expatiates the above averment as follows:

“24. *I submit that the Public Procurement Act of 2011 clearly gives the Agency the authority to provide further guidance on the interpretation of the Act and, the Act is clear on how an entity can deviate from the procurement processes in that the entity needs to apply to the Agency.*”

[25] In support of its mandate, it refers the court to section 9 (2) and section 10 (c). The applicant then concludes:

“The preferred methods of procurement shall be open tendering for goods, works and non-consulting services...”

¹⁰ See section 24 (3) a, b, and c of the Act

¹¹ Section 25 (2) of the Act

“28. *The operative word on the above Section is Open Tendering and the Act provides that where there is a deviation from the Act such deviation should be on application to the Agency.*

29. *I submit that without consultation and involvement of the Applicant, the 4th Respondent has proceeded with the procurement process. I am advised that the procurement process is at an advanced stage and this is to the prejudice of the Swazi Nation at large.”*

[26] The applicant submitted another ground for the prayers sought. It contended that it was in direct contravention of the Act for the respondents to invoke the 2008 Regulation. Further, even if for a second, the court may find otherwise, the respondents failed to comply with that very 2008 Regulation in the preference of limited tender process.

[27] On the above, the question for determination is whether firstly, the respondents were entitled at law to invoke the 2008 Regulations. Secondly, were the respondents obliged to obtain authority from the applicant for purposes of utilising the limited tender process? Thirdly, did the respondents violate the 2008 Regulation, if they were in law entitled to invoke the same?

Common cause

[28] It is not in issue that respondents used the limited tender process for procuring motor vehicles as goods. It is common cause that the respondents did not approach the applicant for purposes of obtaining authority for the limited tender procurement process. It is not in dispute that there are no public procurement regulations under the Act.

Determination

[29] Section 42 (1)¹² provides:

- (1) *A procuring entity **shall** use one of the methods specified in the public procurement regulations for all procurement.* (my emphasis)

[30] This provision's general interpretation, no doubt, suggests that there are a number of procurement methods intended by the Legislature. The section goes further to direct that should anyone wish to know of the various types of the procurement methods, he should have recourse to the public procurement regulations. In other words, the various types of methods for procurement are to be found in the regulations.

[31] Section 42 (2) provides as the preferred method from the various types of procurement to be found from the public procurement regulations two methods viz.:

- “(a) *open tendering for goods, works and non-consulting services.*”
“(b) *request for proposals for consulting services*”.

[32] The case at hand is concerned with “(a)” as the procurement was for goods, that is, motor vehicles. The rationale for the preferred method, that is, open tender is worth iterating. It accords well with the laid down principles of fairness, equity, transparency, competitiveness and cost effectiveness. It ensures that “*the tender process is free from corruption and fraud; and that public moneys do not land up in pockets of corrupt*

¹² Of the Act

*officials and business people”.*¹³ Where for instance, fronting is alleged, it is the duty of the court to consider a finding as it presents a difficulty in that “*the person or entity who stands to benefit financially from the award of the tender is not the one whom it was in fact awarded. The person or entity used as front, ... more often than not does not have the capacity or competence to execute the tender. It amounts to the exploitation of such persons for financial benefit and constitutes a fraud on those who are meant to be the beneficiaries of legislative measures put in place to enhance the objective of economic empowerment of historically disadvantaged people.*”¹⁴

- [33] Having emphasised the importance of open tender method in dealing with public funds, section 42 (2) of the Act, however provides further as a *proviso*:

“...and other methods shall only be used where the procurement meets the conditions for use of an alternative method specified in the public procurement regulations.” (my emphasis)

- [34] *In casu*, it is common cause that the respondents invoked the *proviso* herein by resorting to the “*other methods*,” which was the limited tender process.

- [35] Sub-section (3) thereof re-emphasises the reference to public procurement regulations as follows:

“All procurement activities shall be conducted in accordance with the detailed rules specified in public procurement regulations.”(my emphasis)

¹³ As per Van Zyl in *Esorfranki Pipelines (Pty) Ltd & Another v Mopani District Municipality & Others* (40/13) [2014] ZACA 21; [2014] 2 All SA 493 (SCA) (28 March 2014) at paragraph [26] page 22

¹⁴ *ibid*

[36] What are these public procurement regulations the Act keeps on referring to? Section 2 (interpretation clause) of the Act defines public procurement regulations as “*regulations issued in terms of section 65*”. Section 65 stipulates:

“Public Procurement Regulations

- (1) *The Minister may, on the recommendation of the Agency, issue public procurement regulations to regulate the procurement of goods, works and services by procuring entities.*
- (2) *Where appropriate, different regulations may regulate central government bodies, public enterprises and local government authorities.”*

[37] Now that section 65(1) was not complied with as there were no public procurement regulations published by the honourable Minister on the recommendations of the applicant, which would have obliged the respondents to comply with, the respondents then resorted to comply with 2008 regulations.

Were respondents justified in law to resort to 2008 regulations?

[38] The answer to the above question lies within the Act itself. It appears, as I will demonstrate herein, that the legislature did anticipate that there would be a vacuum in terms of the public procurement regulations. This observation is derived from section 65 (2) of the Act which reads:

“Where appropriate, different regulations may regulate central government bodies, public enterprises and local government authorities.” (my emphasis)

[39] No doubt the respondents herein are part of the central government and they are obviously authorised by section 65(2) to invoke different regulations. The subsection (2) stipulates “*where appropriate*”.

[40] The exigency of the matter renders it “*appropriate*” in terms of the Act for the respondents to use the 2008 Regulations by reason that the Minister has not yet issued the public procurement regulations as envisaged under the Act. At any rate, section 65(1) is not mandatory for the honourable Minister to issue such legislation as the legislature used the word “*may, on applicant’s recommendation, issue*”. I must hasten though to point out that by no means do I suggest that the honourable Minister should be slack in issuing the public procurement regulations. Logic, supported by section 65(2) therefore, suggests that there was nothing irregular or unlawful by the respondents to use the 2008 Regulations. I must mention *en passe* that the 2008 Regulations’s principal Act is the Finance and Audit Act 18 of 1967.

[41] The respondents’ conduct of applying the 2008 Regulations is fortified by the fact that the 2008 Regulations were never repealed upon the promulgation of the Act in 2011. They therefore stand to be applied and *in casu* where there is a vacuum, it becomes “*appropriate*” as per section 65(2) of the Act to apply them.

[42] The applicant’s case fails to tilt the scales of justice further by reason that despite the Act clothing it with powers not only to recommend to the honourable Minister to issue public procurement regulations, but also to “issue public procurement manuals, circulars and instructions on public procurement”,¹⁵ the applicant, since its inception in 2011, failed to do so. I appreciate that applicant averred in its founding affidavit that:

“Further to that Section 61(1) of the Public Procurement Procedures 2016 states that, ‘procuring entities shall not divide procurement requirements

¹⁵ As per section 10 (iii)

which could be procured by a single contract to avoid the use of open tendering or any other procurement method involving competition.’’

[43] Firstly, it is not clear as to the mandate applicant used to issue the said Public Procurement Procedures in the face of section 65 (1) which empowers the honourable Minister for Finance to issue such regulations. The applicant “*formulates*”¹⁶ and then “*recommends*”¹⁷ them to the Minister to issue same in terms of the Act.

[44] Secondly, the said 2016 Procedures were issued only on 24th February 2016. The applicant deposed that the tender processes by respondents came to its attention in November 2015. In fact during the hearing of this matter, applicant submitted that the respondents commenced the tender process in June 2015.

[45] Thirdly, in as much as section 10(b)(ii) empowers the applicant to “*issue public procurement manuals, circulars and instructions*”, the section proceeds to inform on the purpose of these manuals, circulars and instructions as “*to provide further guidance on the interpretation and application of this Act and Public Procurement Regulations issued under this Act.*” The Legislature in its wisdom, repeated the purpose of issuing manuals, circulars and instructions by applicant at section 66 of the Act as follows:¹⁸

“The Agency may issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation of this Act and public procurement regulations issued under this Act.”(my emphasis)

¹⁶ as per section 10 (b) (i) of the Act

¹⁷ as per section 65 (i)

¹⁸

[46] The 2016 Procedures therefore cited by applicant herein, are in view of sections 10(b)(ii) and 66 of the Act, not of any force and effect as would the public procurement regulations which ought to be issued in terms of section 65. They provide as a guide to interpretation of the public procurement regulations which are not in place. In brief, there was no legal basis for the applicant to issue the 2016 Procedures in the absence of the public procurement regulations by reason that there was nothing to interpret as the public procurement regulations were absent. This reasoning could be explained further by reference to the offences clause found in section 62(1) of the Act. The Act penalizes contravention of the provisions of the Act and the public procurement regulations. It certainly does not criminalise violation of the manuals, circulars and instructions. This is a clear demonstration that such documents from the hand of the applicant have no binding effect. There are only there to assist parties into coming to grip with the Act and the public procurement regulations.

[47] Having found that there was no legal basis for the applicant to formulate the 2016 Procedures in the absence of the public procurement regulations, it is unnecessary to make a determination on the effect of the 2016 Procedures further. It is however, apposite to point at one glaring fallacious point that has been raised in this regard, assuming of course that the 2016 Procedure were of any force. When challenged that the 2016 Procedures were of no force and effect in so far as the respondents were concerned as they were only issued on 24th February 2016, the applicant deposed in reply:

“21 I submitted that the procedures can be effected retrospectively, that is if they add an advantage. I submit that there is no prejudice to be suffered by the Respondents since what the Applicant is doing seeks

to protect public funds by ensuring value for money in the conduct of procurement proceedings.”

[48] Turning to the provision sought to be complied with under clause 61 of the 2016 Procedure, it reads:

“procuring entities shall not divide procurement requirements which could be procured by a single contract to avoid the use of open tendering or any other procurement method involving competition.”

[49] The cited clause of Procedure 2016 seeks to prohibit respondents from taking certain action in order to justify the limited tender procurement method. The respondents have attested that the process is at an advanced stage. Obviously, the limited tender process was done before 24th February 2016. How the respondents were expected to comply with a “*principle of procedure*” assuming it is, which was not there prior to 24th February 2016 is not clear. In other words, it is virtually impracticable to expect the respondents to comply with section 61 of 2016 Procedure in June 2015 or immediately thereafter by reason that the 2016 Procedure, if at all they came into force on 24th February 2016, the mischief (if any) had long been committed. To call for a retrospective effect is therefore to be considered as *null* and *void* by reason of impracticability, if for a second the 2016 Procedures were to be taken as binding.

Power of applicant to grant deviation

[50] The applicant further contended that in terms of section 10(b)(v) respondents ought to have applied to it for the authority to deviate from the preferred method of open tender. Section 10(b)(v) provides that the applicant shall:

“consider applications for deviations to public procurement processes, methods and rules in accordance with section 6.”

[51] Section 6 (1) provides:

“(1) A deviation from the use of a public procurement method, rule, process or document may be permitted by the Agency-

- (a) where exceptional requirements make it impossible, impractical or uneconomical to comply with the Act;*
- (b) where market conditions or behavior do not allow effective application of the methods, rules or documents;*
- (c) for specialised or requirements that are regulated or governed by harmonised international standards or practices; or,*
- (d) where national security may be compromised.”*

[52] Section 6(1) having given authority to the applicant to decide on deviation, subsection (2) provides:

“The procedure for applying for and issuing deviations shall be as specified in Regulations.”¹⁹

[53] The said regulations are absent. For this reason, viz. that there was no procedure on how respondents were to apply to the applicant for deviation, the respondents cannot be faulted in the face of the subsisting 2008 Regulations. I draw a correlation from the case presided by **Molemela J.**²⁰ The applicant therein was an unsuccessful tender. Tenders were determined based on score points. A tender had to have a minimum score points of thirty in order to be considered for evaluation. Applicant's tender was found to be responsive, that is, qualified for

¹⁹ Of the Act

²⁰ Haw and Inglis Civil Engineering (Pty) Ltd and The Member of the Executive Council: Police, Roads, and Transport Free State Provincial Government and 11 Others.

evaluation. The applicant was awarded 0 point for plant and equipment. The applicants challenged this score. The reason was that the applicant was vague in so far as stating the type of equipment and plant it had. It was contended that applicant ought to have attached proof of ownership of the plant it had. The court then held:

“The department (first respondent) did not specify before hand the types of documentary proof it would require. This requirement was stipulated by the BEC (first respondent’s internal evaluation board) only during the tender evaluation stage. I therefore disagree with the BEC’s conclusion that the applicant failed to attach proof of ownership or of access to critical equipment.”

[54] The learned judge wisely cited as follows:²¹

“[68] In my judgment, section 217 of the Constitution requires that the material terms and conditions of a public tender, objectively considered, should be such as to enable the person to whom it is addressed, namely a prospective bidder, to know with reasonable and sufficient certainty what is required of him or her in order to submit a valid and acceptable tender. In my judgment, this is a necessary threshold to a fair, equitable, transparent, competitive and cost-effective tender process.” ...

[75] If documents had to be submitted to support the fact that a bidder was capable of being registered as a potentially emerging enterprise, then the invitation should at least have stated what those documents were.”(my emphases)

[55] He proceeded to refer to a portion of that judgment which hits the nail on the head in so far as the present case is concerned:

“[78] In my judgment, having not stipulated any formal requirements that a bidder had to comply with in order to show that it was a potentially emerging enterprise, it was incumbent upon the first respondent to make enquiries, either of the CIDB or the applicant in

²¹ see *n*¹⁴

*order to determine whether the applicant was 'capable' of being registered as a 'potentially emerging enterprise' in addition to having a contractor grading of 7GB. Having not stipulated any formal requirements in this regard, it was hardly fair of the first respondent to reject the applicant's tender out of hand because the applicant did not submit any documentation reflecting that it was capable of being registered as a potentially emerging enterprise. I would have thought that the tender documentation considered as a whole would have alerted the first respondent to the likelihood that the applicant was indeed capable of being registered as a potentially emerging enterprise and have put the first respondent on its enquiry."*²²

[56] Applying the same principle *in casu*, it was incumbent upon the applicant to make the necessary arrangement for the publication of the public procurement regulations which would have informed the respondents of the procedure to be followed when faced with a situation where a limited tender procurement method was necessary owing to national security as averred by third respondent.

[57] The provisions of the Act make it clear through its numerous references to public procurement regulations that for the Act to be applied effectively, the public procurement regulations are very vital. In fact as demonstrated above that almost every section makes reference to the public procurement regulations, it appears to me that the said regulations are an integral part of the Act. The Act is rendered nugatory in the absence of the public procurement regulations.

Threshold

[58] The applicant attached a correspondence from fifth respondent²³ as support of the averment that the amount involved in the tender procurement did not qualify for purposes of a limited procurement

²² see *n*¹⁴

²³ see page 25 of book of pleading

tender. The applicant argued that the respondents contravened the very 2008 Regulations which they aver to have resorted to upon the absence of the public procurement regulations.

[59] I am disinclined to agree with the submissions by the applicant. As correctly observed, the document (that is, authority to commit Government Funds) does not reflect applicant's observations. The authority reads:²⁴

"This letter serves to provide you with the necessary authority to commit funds for the following:

- i) E168,836,595.40 to purchase vehicles to provide according to the requests of various government ministries and departments.*
- ii) E586,004.00 to purchase two caravans for the King's Office*
- iii) E1,111,328.00 to purchase four caravans for the Ministry of Natural Resources and Energy*
- iv) E308,282.00 to purchase one caravan for the DPM's office*
- v) E12,550.00 to purchase one trailer for the Ministry of Foreign Affairs."*

[60] The reading of (i) above shows that a number of government ministries and departments were given authority to purchase motor vehicles for the total tune of E168,836,595.40. *In casu*, we are concerned with not all the various departments or ministries but with only one department of government viz. the third respondent. As to how much of the E169 million the third respondent would be using, the founding affidavit is silent. If it is applicant's case that the limited tender procurement process employed by respondents is in violation of the 2008 Regulations, the onus rest upon the applicant to establish as to how much of the amount is the authority awarded to third respondent. The founding affidavit is also silent even on the number of motor vehicles intended to be purchased. A person reading the founding affidavit

²⁴ See page 25 of *n¹⁴*

cannot even therefore make an estimate of the costs of the motor vehicles.

[61] During the hearing, it was contended that the respondents ought to have stated the value of the tender authority. I do not agree. The cardinal rule is that he who asserts must prove. This rule must find more force *in casu* because the applicant, in terms of section 11(2) is empowered to “*have access to all information, documents, records and reports belonging to a procuring entity in respect of any public procurement process*”. It is not clear as to why applicant failed to exercise such authority in order to have full information on the respondents’ procurement process before approaching the court.

[62] There is however a legal approach to the question of whether respondents violated the 2008 Regulations. Section 24 (1) and (2) of the Act reads:

“(1) *The function of the approval authority (which includes first and second respondent) shall be to ensure that procurement is conducted in accordance with this Act and public procurement process in accordance with subsection 24 (2) and public procurement regulations.* (my own)

(2) *Public procurement regulations shall define the stages of the procurement process which require the prior authorisation of the relevant approvals authority.”*

[63] Section 25 of the Act empowers the first and second respondents to grant authority for purposes of procurement. The authority to do so is unlimited in terms of the value of the goods or services. I have also pointed out that owing to the absence of the public procurement

regulations, the respondents were justified in reverting to the 2008 regulations.

[64] The question is, regardless of the above, did the respondents contravene the 2008 Regulations by opting for a deviation from the preferred open tender method to the limited tender? It is correct that in terms of the principles of public procurement processes, it is undesirable for a tender of above E200 000 value to be subjected to the limited procurement method. **P. Bolton** states of on this subject:

“Generally, contracts above E200 000 are subject to public (open) tender procedures.” (my own)

[65] However, as already pointed out every general rule has an exception. In our jurisdiction, that exception lies in Rule 41 (3) of the 2008 Regulation which stipulates:

“(3) Limited tendering may be used where –

- a) the goods, works or non-consulting services are only available from a limited number of supplies;*
- b) there is insufficient time for use of open tendering in an emergency situation; or*
- c) the estimated value does not exceed the threshold specified in Schedule 2. (my emphasis)*

[66] Clearly, there is the use of “or” and not “and”. This means that even if the value of the goods or services exceeded E200 000 as the threshold, in terms of Rule 41 (3) (c) the respondents could still use the limited tender procurement process for reasons either falling under subsection (3)(a) or (b) cited above. This finding finds support from the observation by **P. Bolton** that:

*“In certain instances however, a public call for tenders may be inappropriate regardless of the high value of the contract”.*²⁵ (my emphasis)

[67] Before pronouncing on my conclusion, I must mention that the applicant seeks to enforce its powers in terms of the Act. I have already demonstrated that it cannot do so in the absence of the public procurement regulations which gives directions on the procedure to be followed in complying with the Act. The applicant in the present case is not alleging any form of corruption or fraud as it were. I have already demonstrated above that the mere fact that a tender process is not open, does not *per se* turn it into a suspicious or tainted process. Had the applicant’s case been based on fraud or corruption, this court would be bound to assess the matter further. The principle expounded by **Lord Denning**²⁶ applies with equal force in our jurisdiction as well:

*“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...”*²⁷ (my emphasis)

Costs

[68] Counsel for the respondents strongly urged this court to mulct a cost order against the applicant for the reason that it was served with the application and expected to be ready in court with its full set of papers within a very short space of time. I am disinclined to grant costs in this matter.

²⁵ See n¹

²⁶ in *Lazarus Estate v Beasley* [1956] 1 QB (CA) at 712

²⁷ n⁶ at paragraph 25

[69] When the matter first appeared before me, the respondent had not filed their answering affidavits. In other words, the short notice did not put respondents into pressure because they came to court without having done anything except to file a notice to oppose which is a simple standard document. Further, the parties took filing dates by consent. Ample time was subsequently given to the parties. At any rate, even if respondents had to file within a short space of time, this court would not rush into granting them costs. The reason is that, it is part of the lawyers' profession to work against deadlines especially in urgent applications. Urgent applications are part and parcel of the procedures adopted by courts as means of discharging justice expediently and lawyers are trained in this regard. After all they are paid for this by their clients. I do not think that a lawyer, by keeping his candle burning suffers prejudice. This is not the prejudice envisaged by law in order to warrant a cost order.

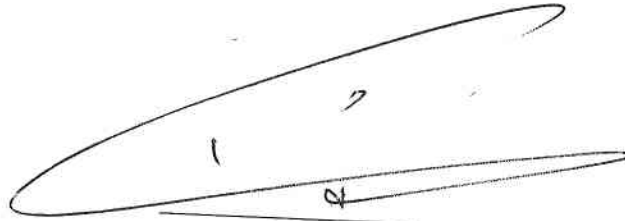
[70] I consider further that the applicant had engaged the respondents before coming to court. Respondent could therefore reasonably expect that the matter might end up in court. I however, appreciate the principle propounded by **AC Cilliers** that "*...a judgement on the merits is a prerequisite for a costs order.*"²⁸ However, in the exercise of my discretion, I am not inclined to grant costs for the reasons advanced herein.

[70] In the totality of the above, it is my considered view that the following orders must be entered:

1. The applicant's application is dismissed;

²⁸ Law of Costs – Service Issue 17 at 1-6

2. No order as to costs.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and a series of smaller, more defined strokes on the right, ending in a small hook.

M. DLAMINI
JUDGE

For Applicant: M. Sibandze of Musa M. Sibandze Attorneys

For Respondents: V. Manana from the Attorney General's Chambers