



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 378/2025

In the matter between:

SMADA SECURITY SERVICES (PTY) LTD

APPELLANT

and

**THE DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

RESPONDENT

Neutral citation: *Smada Security Services (Pty) Ltd v The Department of Justice and Constitutional Development* (378/2025) [2026] ZASCA 90 (24 June 2026)

Coram: NICHOLLS and KOEN JJA and DIPPENAAR, KOOVERJIE and MOOKI AJJA

Heard: 11 May 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 24 June 2026.

Summary: Administrative law — judicial review of an award of a tender at the behest of the successful tenderer — challenge based on an alleged material error of fact — reliance on s 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of the Promotion of Administrative Justice Act 3 of 2000 — whether the decision maker acted on the basis of a material mistake of fact —

whether the appellant established a reviewable irregularity warranting the setting aside of the award.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Muter J sitting as the court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Dippenaar AJA (Nicholls and Koen JJA, Koovertjie and Mooki AJJA concurring):

[1] This appeal concerns whether the Gauteng Division of the High Court, Pretoria (the high court), erred in dismissing an application by the appellant, Smada Security Services (Pty) Ltd, to review and set aside the award of a tender to it by the respondent, the Department of Justice and Constitutional Development. The tender was for the appointment of a service provider to render guarding, protective, and close protection security services at the Department of Justice and Constitutional Development (DOJ & CD), the Office of the Chief Justice (OCJ) and the National Prosecuting Authority (NPA) (the security services) for a period of 36 months in respect of Gauteng Province, Cluster A.

[2] The central issue in the appeal is whether the respondent made a material error of fact and thereby committed a reviewable error under s 6(2)(e)(iii) or s 6(2)(f)(ii)(cc) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in the award of the tender. The high court held that no reviewable irregularity was established. The appeal is with leave of the high court.

[3] By the time the appeal was heard, various issues had become moot. The appellant accordingly did not persist with all the relief sought in its notice of motion. It persisted with an order upholding the appeal with costs and that the order of the high court be substituted with an order in the following terms:

- ‘1. The decision of the respondent to award tender RB2022O4; Appointment of Service Provider(s) for the rendering of guarding, protective and close protection security services at the Department of Justice and Constitutional Development (DOJ and CD), Office of the Chief Justice (OCJ) and the National Prosecuting Authority (NPA) for a period of thirty-six (36) months in respect of Gauteng Province Cluster A (“the Tender”) at the specific rates set out in the letter of award dated 5 April 2023, is declared constitutionally invalid, reviewed and set aside;
2. The respondent is ordered to effect payment to the applicant for all security services rendered in terms of the tender award based on the Illustrative Pricing Guide published by the Private Security Industry Regulatory Authority (PSIRA);¹
3. The respondent is ordered to pay the applicant’s costs, including the cost of counsel on scale C.’

[4] The background facts are not contentious. On 26 October 2022, the respondent published an invitation to tender for security services in all nine provinces. The larger provinces, including Gauteng, were divided into two clusters, A and B. The appellant submitted its bid documents, including pricing schedules for all nine provinces within the bid period during November 2022.² Of relevance are its bids for both Cluster A and Cluster B, Gauteng. The appellant’s pricing schedules were not ‘referenced’ as required by the bid specifications and were not clearly marked as Cluster A and Cluster B, Gauteng on the hard copy bid submitted. In sequence, the pricing schedule pertaining to Cluster B preceded the schedule for Cluster A in the bid. The same rates were applied by the appellant to both pricing schedules, being the 2023 Illustrative Guide published by PSIRA, on its version, as the tender would take effect during May 2023. The number of guards for the respective clusters was different, with Cluster A being for 442 security officers and Cluster B for 379 security officers.

¹ In its notice of motion, it was articulated thus: ‘that the respondent be ordered to effect payment to the applicant based on the tendered prices of the applicant, alternatively based on the Illustrative Pricing Guide published by PSIRA for the duration of the period for which the applicant renders security services to the respondent.’

² Dated 7 November 2022.

[5] The bid request required the bids submitted by the tenderers to be inclusive of all costs and to be strictly compliant with the conditions and specifications in the bid request. Clause 1.9 of the special conditions of the contract provided: 'The bid price must be inclusive of all costs in terms of the PSIRA illustrative pricing schedule and in accordance with areas as determined by the Sectorial Wage Determination guidelines as issued from time to time by the Department of Labour, as well as the running costs, public liability, insurance and equipment'. That wording is substantially mirrored in para 1.9 of the evaluation criteria. The bid pricing schedules were to be marked per province and per cluster and be clearly referenced.

[6] A contract form SBD 7.2 had to be signed by the successful bidder once a bid was awarded and accepted. Electronic copies of the bids were to be provided for verification purposes. The wording 'Cluster A' and 'Cluster B' appeared in the electronic copy of the pricing schedules provided by the appellant, albeit not in the same place nor at the commencement of the schedules.

[7] The respondent evaluated the appellant's bid in the sequence in which it was submitted. The pricing schedules were presented in the following sequence: the first schedule was in the amount of R187 663 593.60, with the second schedule in the amount of R230 239 471.81. The appellant submitted the most competitive bid in respect of Cluster A, Gauteng. On 5 April 2023, the respondent issued a letter of award to the appellant in an amount of R187 663 593.60, made up as follows: Guarding direct cost (D1) R172 625 914.08 and Guarding indirect cost (D2) R15 037 679.52. Pricing for optional services was also provided. The appellant was requested to sign the attached contract form (SBD 7.2) which was already completed and return it to the respondent. The appellant did so on 12 April 2023.

[8] In relevant part, the letter provided:

'I ... (Representative) hereby undertake to render services described to DOJ & CD in accordance with the requirements and task directives bid specifications in DOJ & CD RFB 2022 04 at the quoted price. My offer/s remains binding upon me and open for acceptance by the Purchaser during the validity period indicated and calculated from the submission date of this proposal.

1. The following documents shall be deemed to form and be read and construed as part of this agreement:

Engagement documents, viz

- Bid documents;
- Tax clearance certificate;
- Pricing schedule(s); ...
- Filled in task directive/proposal
 - Preference claims for broad Based Black Economic Empowerment Status Level of contribution in terms of the Preferential Procurement Regulations 2017;
- Declaration of interest;
- Declaration of bidder's past SCM practices;
- Certificate of independent Bid Determination;
- Special Conditions of Contract; and
- General Conditions of Contract.

2. I confirm that I have satisfied myself as the correctness and validity of my proposal; that the price(s) and rate(s) quoted cover all the services specified in the proposal documents; that the price(s) and rate(s) cover all my obligations and I accept that any mistakes regarding price(s) and rate(s) and calculations will be at my own risk.

3. I accept full responsibility for the proper execution and fulfilment(*sic*) of all obligations and conditions devolving on me under this agreement as the principal liable for the due fulfilment of this contract. . .'

[9] The appellant's case is premised on the contention that, after signing the contract, it discovered that the respondent had made a reviewable error in that its tender for Cluster A was awarded to it at what was its bid price of R187 663 592.60 for Cluster B. It contended that its bid for Cluster A should be for R230 239 471.81, as per the second pricing schedule in the sequence of documents submitted. It maintains that the respondent would have established this fact if it had properly scrutinised the bids or clarified the position. According to the appellant, it signed the award in error and approached the respondent with a request 'to rectify its error', namely to change the award to a price of R230 239 471.81. The appellant accepts that the respondent acted bona fide but contends that it was the appellant that made a mistake in accepting the tender award.

[10] The respondent refused to change the price, contending that it had not made any error in evaluating the appellant's bid in the sequence in which it was submitted and that a valid contract had been concluded between the parties. According to the respondent, any price adjustments after the award would fall foul of s 217 of the Constitution and be prejudicial to the other tenderers. Its stance was that the appellant had been awarded the tender for Cluster A at the price reflected in its bid, as its price was the most competitive. At the price of R230 239 471.81, the appellant's bid would not have been the most competitive, and the appellant would not have been awarded the tender.

[11] Thus, the battlelines were drawn. After various unsuccessful attempts at resolving the impasse, the appellant instituted the review proceedings. On advice, it elected not to repudiate the contract in view of a potential damages claim by the respondent, but to pursue a review on the basis that the appellant was prejudiced by the award. It would make substantial losses if forced to provide services at the awarded price and would not be able to pay the employees' remuneration at the relevant PSIRA rates. Ultimately, the appellant rendered security services to the respondent until the contract expired during April 2026 at the rates in the award, as agreed between the parties, as an interim measure pending determination of the review.

[12] The central issue is whether the respondent committed a reviewable irregularity in awarding the tender to the appellant at the prices it did. The respondent, as an organ of state, is required to evaluate tenders strictly in accordance with the terms of the invitation to tender or bid request. Section 217 of the Constitution requires an organ of state to contract for goods or services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. An acceptable tender must, under s 1 of the Preferential Procurement Policy Framework Act 5 of 2000 comply in all respects with the specifications and conditions of tender set out in the tender.³

³ *The Minister of Social Development and Others v Phoenix Cash and Carry PMB CC* 2007 JDR 0181 (SCA); [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982 (SCA) para 1.

[13] It was common cause between the parties that the decision to award the tender constituted administrative action as defined in PAJA.⁴ The proper approach to reviews of this nature is set out in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (Allpay)*⁵ as follows:

'Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.'⁶

[14] Following *Allpay*, the enquiry on review is directed at the lawfulness of the process, not the correctness of the outcome.⁷ It involves the standard of rationality, not correctness. What must be considered is whether the decision is rationally connected to the information before the decision-maker.⁸

[15] In relying on s 6(2)(e)(iii) of PAJA,⁹ the appellant submitted that either relevant considerations were not taken into account or irrelevant considerations were considered, in that the respondent committed a material error of fact in not correctly identifying the pricing schedules, given that they were not marked, and in failing to clarify the position. It relied on the fact that Cluster A required significantly more personnel than Cluster B, that the sites were different, and that the pricing schedules were objectively verifiable at compliant PSIRA rates. The appellant submitted that, at the very least, the respondent was obliged to clarify the position with it.

⁴ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); [2005] 3 All SA 33 (SCA); 2005 (10) BCLR 931 (SCA) para 23.

⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) .

⁶ *Allpay* para 28.

⁷ *Ibid* para 42.

⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 45.

⁹ Section 6(2)(e) in relevant part provides: 'A court or tribunal has the power to judicially review an administrative action if (e) the action was taken – (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;'

[16] In *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another*, this Court held that:

‘[A] court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error . . .’¹⁰

Where a functionary enjoys the power to make findings of fact, mistake as a ground of review is thus confined to situations in which the mistake is made as to an existing material fact, established in the sense of being uncontentious and objectively verifiable.¹¹

[17] On the facts, the appellant did not establish these requirements. It further did not establish that any relevant considerations were not taken into account or that irrelevant considerations were taken into account. The appellant’s bid was evaluated in the format and sequence in which the bid documents, including the pricing schedules, were submitted. The respondent was entitled to consider the bid in the sequence in which the pricing schedules were submitted. Moreover, the appellant’s submissions disregard that the bid was for a composite price, inclusive of direct and indirect costs and profit. It is not for the respondent to interrogate the commercial rationale of any particular bid or to analyse its contents in minute detail to consider whether it includes the applicable PSIRA rates. It was further not required of the respondent to compare the hard copy of the bid documents with the electronic copy, as this was not a bid requirement.

[18] As held by this Court in *Millenium Waste Management v Chairperson Tender Board, Limpopo Province*,¹² allowing post-submission clarifications would undermine the

¹⁰ *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another* [2020] ZASCA 39; [2020] 2 All SA 713 (SCA); 2020 (7) BCLR 789 (SCA); 2020 (4) SA 453(SCA) para 23.

See also quoting with approval *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ) para 12.

¹¹ *Dumani v Nair and Another* [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA) paras 32-33.

¹² *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA); [2008] 2 All SA 145 SCA.

competitiveness and fairness of the tender process. The submission that there was any obligation on the respondent to clarify the pricing schedules with the appellant, thus lacks merit. If there was any factual error, it was made by the appellant by not properly referencing and identifying its pricing schedules in its bid, exacerbated by its conduct in concluding the contract in its terms.

[19] The appellant's contention that the conclusion of the contract (SBD 7.2) is irrelevant does not pass muster. It is common cause that such contract was concluded as part of the finalisation of the award. In terms thereof the appellant confirmed the award in its terms, acknowledged that it would perform the security services at the rates and amounts awarded and acknowledged that it bore the risk pertaining to any mistakes regarding prices, rates and calculations. It cannot avoid these undisputed consequences by attacking the award.

[20] In oral argument it was contended that if the respondent had used the correct facts, Cluster A would not have been awarded to the appellant and that its bid should have been found not to be responsive, and thus reviewable on that basis. However, that case was not made out in the appellant's papers. It accordingly does not require consideration. The appellant cannot be permitted to make out a whole new case in argument on appeal, to which the respondent was not afforded an opportunity to respond.

[21] In relying on s 6(2)(f)(ii)(cc) of PAJA,¹³ the appellant contended that the administrative action was not rationally connected to the information before the respondent, in that the respondent did not consider that the amounts reflected on the pricing schedule did not meet the minimum requirements of the PSIRA rates as specified in the bid requirements.

[22] The high-water mark of the appellant's submissions during the hearing was that, had the respondent properly evaluated the pricing schedules, it would have established that the direct cost component, referring to the wages of the security officers, did not meet

¹³ Involving that 'the action itself- (f) is not rationally connected to (cc) the information before the administrator.'

the PSIRA guidelines as required by the bid calculations. Thus, so the argument goes, there is no rational connection between the respondent's conduct and the purpose of the award. This argument disregards that the appellant was required to provide a composite price in terms of the bid requirements, specifically clause 1.9 of the special conditions of contract, inclusive of all costs. It has already been pointed out that the respondent was not obliged to approach the appellant to verify the pricing schedules.

[23] As previously stated, the appellant failed to establish what existing fact the respondent was mistaken about. There was no indication in the bid documents submitted to the respondent that the appellant intended to bid a price of R230 239 471.81 for Cluster A, Gauteng. Neither was there any indication that the applicable PSIRA rates were not met in the bid price. The appellant's professed subjective intention to submit the higher price for Cluster A was only disclosed after the award was made and accepted. The conduct of the appellant at the time in submitting the tender in the format and chronological sequence which it did, and in confirming the award of the tender by signing the contract form SBD 7.2, militates against the existence of any factual mistake at the relevant time. An undisclosed intention on the part of the appellant cannot be elevated to a material mistake of fact on the part of the respondent.

[24] In assessing the conduct of the respondent and the lawfulness and fairness of the procurement process, it must be concluded that it was compliant with the statutory requirements of s 217 of the Constitution and the requirements of the bid request, viewed in light of their purpose.¹⁴ The respondent's conduct in evaluating the bid as submitted in a competitive process, awarding the bid to the most competitive bid, and its refusal to engage the appellant after the award to alter the price, cannot be faulted. The appellant has not established any irrationality on the part of the respondent. This ground of review must fail.

[25] In summary, the appellant failed to make out a case for review on the grounds relied on and failed to establish a material mistake of fact which is uncontentious and verifiable. The contractual issues between the parties were not before this Court for

¹⁴ *Allpay* para 30.

determination. It follows that the conclusion and order of the high court is unassailable and that the appeal must fail. Costs follow the result. Although the costs of two counsel were sought, in my view only the costs of one counsel is justified.

[26] Even if there had been a reviewable error, the appellant would not have been entitled to the relief sought. The agreement has run its course and terminated by effluxion of time on 8 April 2026. The just and equitable relief sought by the appellant under s172(1)(b) of the Constitution is inconsistent with relief aimed at setting aside the award of the tender. That relief would amount to the enforcement of the agreement at a higher price. Such relief is not what the section envisages; it is neither restitutionary nor justifiably compensatory, as explained by this Court in *Central Energy Fund SOC and Another v Venus Rays Trade (Pty) Ltd and Others*.¹⁵

[27] In the result, the following order is granted:
The appeal is dismissed with costs.

E F DIPPENAAR
ACTING JUDGE OF APPEAL

¹⁵ *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA); [2022] ZASCA 54; 2022 (5) SA 56 (SCA) paras 36-43.

Appearances

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