THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 316/2015

In the matter between:

SAAB Grintek Defence (Pty) Ltd	**Appellant**
and	
South African Police Service	**First Respondent**
State Information Technology Agency (Pty) Ltd	**Second Respondent**
National Commissioner of the South African Police Service	**Third Respondent**
Minister of Police	**Fourth Respondent**
Minister of Public Service and Administration	**Fifth Respondent**

Neutral citation: *SAAB Grintek Defence v South African Police Service* (316/2015) [2016] ZASCA 104 (5 July 2016)

Coram: Mpati P, Cachalia, Theron & Wallis JJA & Victor AJA

Heard: 4 May 2016

Delivered: 5 July 2016

Summary: Constitutional law – tender – cancellation of – decision to cancel made in exercise of executive authority – decision not constituting administrative action – reasons for cancellation not offending principle of legality.

ORDER

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

The appeal is dismissed with costs, which shall include the costs consequent upon the employment of two counsel.

JUDGMENT

Mpati P (Cachalia, Theron and Wallis JJA and Victor AJA concurring):

[1] This appeal is against an order issued by the Gauteng Division of the High Court, Pretoria (Makgoba J), dismissing the appellant's application to set aside a decision of the first respondent, the South African Police Service (SAPS), to cancel a tender. On 13 February 2009 the second respondent, the State Information Technology Agency (SITA), acting on behalf of SAPS, published a Request for Bids in respect of an integrated mobile vehicle data command and control solution (command solution) to be procured by SAPS. Following the evaluation of bids received the appellant, SAAB Grintek Defence (Pty) Ltd (SAAB) and another bidder, Britehouse, were shortlisted as potential suppliers. However, the tender was republished on 3 September 2010. The appellant submitted a bid and was again shortlisted, together with Britehouse. The validity period of the tender was 90 days, calculated from its closing date, which was 4 October 2010. The validity period was thus to expire on 4 January 2011.

[2] On 2 February 2011 SITA advised SAAB that the validity of its bid had expired on 4 January 2011. It requested SAAB to extend the validity period of its bid by 90 calendar days 'as from the date of expiry'. SAAB acceded to the request with the result – according to the unanswered allegation in the founding affidavit – that

the validity period of its bid was extended to 4 April 2011. Further periods of extension were agreed upon. On 25 August 2011 and 8 October 2011 the Bid Evaluation Committee and Ms Thenji Mjoli, SITA's Executive: Supply Chain Management, respectively, recommended to the Recommendation Committee that the tender be awarded to SAAB. On 4 November 2011 the Recommendation Committee resolved to recommend likewise to the Procurement Committee. Price negotiations were thereafter conducted at the instance of SITA and in a letter dated 17 November 2011 SAAB offered certain discounts on its tender price. Three further extensions, each for a period of 60 days, were requested by SITA – and presumably acceded to – during the first of which (on 16 February 2012) the Procurement Committee recommended to SITA's Board of Directors that the tender be awarded to SAAB.

[3] By 26 June 2012 SAAB had not received any indication from SITA or SAPS concerning the outcome of the tender. On that day it caused a letter to be sent to, amongst others, the third and fourth respondents, expressing its belief that the implementation of the command solution 'will improve the efficiency and effectiveness of SAPS in the fight against crime and corruption'. In a letter dated 9 July 2012, Lieutenant General Ngubane (Ngubane), the Divisional Commissioner: Technology Management Services of SAPS, acknowledged receipt of SAAB's letter and advised that 'the necessary attention and feedback will be provided in due course'. The administrative secretary in the office of the Ministry of Police also responded on behalf of the fourth respondent by letter dated 17 July 2012, informing SAAB that the matter had been referred to the third respondent 'for further attention'. However, on 8 August 2012, Ngubane wrote to SAAB in the following terms:

'2 You are hereby advised that the above-mentioned tender was cancelled by SAPS in a letter addressed to SITA on 28 May 2012.

3 The reasons for cancellation were due to the time lapse in the evaluation process and the need for SAPS to review its business processes.'

On 20 August 2012 SITA informed SAAB that it would not be issuing requests for extension because the tender was 'due to be cancelled'.

[4] It is not in dispute that the letter of cancellation dated 28 May 2012, referred to in Ngubane's letter of 8 August 2012 addressed to SAAB, was received by SITA on 4 June 2012. The letter was signed by Lieutenant General N S Mkhwanazi (Mkhwanazi), acting National Commissioner of SAPS and addressed to SITA's Chief Executive Officer. It reads:

'The Integrated Mobile Vehicle Data for Command and Control tender . . . was published through SITA on 2010-08-02 and closed on 2010-10-30. The tender evaluation process commenced on 2010-11-01 but to date it has not been completed.

In view of the time lapse on the evaluation of this tender and till to date with no outcomes South African Police Service has decided to cancel the tender.

The South African Police Service business requirements has changed and currently SAPS is reviewing the business requirements specification. The requirements as they are on this tender are no longer addressing the current business requirements for SAPS and therefore are being revisited and updated.

. . . .'

On 29 August 2012 SAAB sent a letter to SITA expressing concern 'regarding the sequence of events' culminating in the cancellation of the tender, particularly the fact that it was only informed of the decision almost three months after it had been made. On 25 September 2012 SAAB, through its attorneys and in terms of s 5(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), requested written reasons from both SITA and SAPS for the 'purported' cancellation. It also sought, in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), copies of their respective records relating to their decisions.

[5] No responses were forthcoming from SITA or SAPS to the requests in terms of PAJA and PAIA and, on 26 April 2013, SAAB launched an application in the North Gauteng High Court, Pretoria, seeking the following order:

'1 Reviewing and setting aside the decision of the first respondent [SAPS] purportedly to cancel bid number RFB 822/2010 ("the tender");

2 Reviewing and setting aside the decision of the second respondent [SITA] not to award the tender to the applicant;

3 Directing the second respondent [SITA], alternatively the first respondent [SAPS], within one (1) month of the date of the order to award the tender to the applicant and to conclude a contract with the applicant on the same terms and conditions contained in the tender, provided that this shall not preclude the parties from jointly agreeing to amend such terms and conditions;

4 Directing that the cost of this application be paid by any respondent opposing the application; and

5 Granting further and/or alternative relief.'

It was alleged in the founding affidavit that the decisions (impugned decisions) sought to be set aside in prayers (1) and (2) constituted administrative action as contemplated in s 1 of PAJA. It was alleged further that even if the impugned decisions 'were not to constitute administrative action, they certainly constitute the exercise of public power and are thus subject to the principle of legality'.

[6] Two grounds of review were relied upon as a basis for the orders sought. The first ground was based on s 3(1) of PAJA, which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Because the Bid Evaluation Committee had recommended that the tender be awarded to SAAB alone, 'it is plain that SAAB's rights were materially and adversely affected', so it was alleged in the founding affidavit. That being so, at the very least SAAB had a legitimate expectation that 'in the event that SAPS and SITA were contemplating cancelling and not awarding the tender, SAAB would first be given an opportunity to make representations'. It is not in dispute that SAAB was not afforded any such opportunity prior to SAPS's decision to cancel the tender. The second ground of review was based on the contention that there was no good reason for the impugned decisions and that they were irrational and unreasonable. In support of this reliance was placed on s 5(3) of PAJA, which provides that if an administrator fails to furnish adequate reasons for administrative action it must be presumed in any proceedings for judicial review that the

administrative action was taken without good reason. It was alleged in the founding affidavit that the only purported explanations given by SAPS for its decision to cancel the tender were 'vague references in the letter of [Ngubane] dated 8 August 2012 to "time lapse in the evaluation process" and "the need for SAPS to review its business processes"'. The deponent denied that the 'explanations' contained in the letter dated 28 May 2012 addressed to the Chief Executive Officer of SITA constituted adequate reasons for the 'decisions' to cancel and not to award the tender. The 'decisions' were therefore irrational and unreasonable.

[7] SAAB's application was opposed by the respondents.[1] Ngubane, the deponent to the first to fourth respondents' answering affidavit denied that SAAB had any right to be heard before the tender was cancelled, or that the decision to cancel the tender was taken without good reason. It appears that before the court a quo the question of the validity period of SAAB's bid was raised by the respondents as a ground for opposing the order sought by SAAB. The court found that all the extensions to the bid validity period were sought and granted after the initial bid validity period of 90 days had expired on 4 January 2011. In this regard it said:

'My finding is that once the validity period of the proposals had expired with no extension of the period being arranged before the expiry of the validity period, there were no valid bids in existence and an award could not be validly made. For the reasons set out above the applicant has failed to make out a case for review.'

It accordingly dismissed the application with costs, including costs consequent upon the employment of two counsel. This appeal is with its leave.

[8] Five issues were raised by counsel for SAAB for this court's consideration. They are: (1) the validity of the extension of the bid validity period; (2) whether there were valid grounds for the cancellation of the tender; (3) whether the cancellation was procedurally fair (and thus valid); (4) whether the cancellation was substantively valid; and (5) the appropriate remedy (in the event of a successful appeal). In my view, the third issue hinges on the question whether the cancellation of the tender

[1] It is not clear whether the fifth respondent entered the fray before the court of first instance, but did not participate in this court. I shall, however, refer collectively to the remaining respondents as 'the respondents'.

constituted administrative action and was thus susceptible of review in terms of PAJA. Before I consider that question, which I intend to do first, there is the small matter of whether SITA took the decision not to award the tender. This is important in the light of the relief sought by SAAB which asks for a review of 'the decision by SITA not to award the tender' and an order that within one month SITA should award the tender to it and conclude a contract with it on the terms and conditions contained in the tender.

[9] In its founding affidavit SAAB relies on the contents of a letter it received from SITA dated 20 August 2012, as the letter which effectively communicated the decision to it. The letter reads:

'Your bid response to RFB 822/2010 refers.

This serves to notify you that SITA will not be issuing requests for validity extension because the tender is due to be cancelled.'

The respondents' answer to the allegation seems to me to be correct. That answer was, in essence, that what was contained in the letter at issue was not a decision not to award the tender. Rather, it was a decision not to seek a further extension of the bid validity period, which had expired on 4 August 2012. It is not in dispute that SITA received the letter of cancellation (of 28 May 2012) from SAPS on 4 June 2012. I cannot fathom how, in the knowledge that the tender had been cancelled, SITA could still have taken a decision one way or the other relating to the award or otherwise of the tender. I am mindful of the assertion in the answering affidavit that 'it was SITA who had issued the tender and which tender it, SITA, had to cancel'. But there is no evidence in the papers to support SAAB's allegation that SITA had taken a decision not to award the tender to it. There was therefore no basis for the order sought in paragraph 2 of the notice of motion (see para 5 above).

[10] There is, in any event, a more fundamental reason why this relief was inappropriate and why the focus must fall on the actions of SAPS. SITA was established in terms of the State Information Technology Agency Act 88 of 1998 (the

Act). Its function in terms of s 7 of the Act is to provide certain technology-related infrastructure and systems and related services to government departments and certain public bodies. In terms of subsecs (4) and (7) of s 7 a department that wishes to acquire a service contemplated by the Act must acquire it from SITA or, where SITA is unable to provide it, acquire the service 'through' SITA. Nowhere in the Act is it provided that SITA is entitled to award tenders or conclude contracts on behalf of government departments.

[11] Instead, SITA acts in terms of business and service level agreements concluded with departments in terms of s 20 of the Act and is paid a fee for services it renders (s 16(1)). All this is made perfectly clear in the regulations made in terms of the Act,[2] in particular regs 8 and 14. And all doubt is dispelled by reg 14.1, which provides that, after receipt of the recommendation of the Bid Evaluation Committee and the risks reports from that committee and the recommendation Committee, 'the relevant accounting authority must make a final decision on the award of the bid to one or more bidders, as the case may be'. Lastly, reg 14.2 deals with the situation where the accounting authority awards the bid to a bidder other than the one recommended by SITA. All this makes it clear that SITA's role is that of an expert agency facilitating the acquisition of technology services by government departments, but it does not decide whether to acquire the technology, nor does it decide not to proceed with a tender process. That is the function of the relevant department.

[12] I proceed to consider the question whether the decision made by SAPS to cancel the tender constituted administrative action as envisaged in s 1 of PAJA. Administrative action has been defined as '(a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external effect; and

[2] See fn 11 below.

(g) that does not fall under the listed exclusions'.[3] It has been acknowledged that the enquiry to determine whether a particular decision constitutes administrative action is a difficult one.[4] Thus a court faced with a review based on the provisions of PAJA has to undertake a careful analysis of the nature of the action in question so as to make a positive finding whether the decision is of an administrative nature.[5]

[13] In *Tshwane City & others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA); [2015] ZASCA 167 the respondent (Nambiti), which had been providing Systems, Applications and Products in data processing (SAP) support services to the first appellant (the City), submitted a tender along with other tenderers in response to an invitation to tender for the provision of 'on-site and off-site SAP support services for the City of Tshwane'. On 11 December 2012, three months after the invitation to tender had been published, Nambiti was informed that the tender would be cancelled and a new tender issued. Thereafter its services were terminated and a new contractor was employed. This offended Nambiti and, after an exchange of correspondence it instituted proceedings seeking an order, inter alia, reviewing and setting aside the decision of the City, alternatively other respondents, to cancel the tender in that case. The Gauteng Division, Pretoria granted, amongst others, the relief sought in relation to the cancellation of the tender and directed the City to adjudicate and award the tender within a specified period.

[14] On appeal to it this court said the following (para 31):

'Until the tender was issued the City was entirely free to determine for itself what it required by way of SAP support services. The evidence showed that it had decided that it did not want those services on the conditions set out in [the first tender]. In other words it decided to deal with its requirements for SAP support services on a different basis. That was a decision it could have reached at the very outset and Nambiti would have had no grounds for complaint. I cannot think that because it thought initially that a fresh contract on the basis of

[3] *Minister of Defence and Military Veterans v Motau & others* 2014 (5) SA 69 (CC); [2014] ZACC 18 para 33.
[4] Ibid paras 36 and 103.
[5] *Sokhela & others v MEC for Agricultural and Environmental Affairs (KwaZulu-Natal) & others* 2010 (5) SA 574 (KZP) paras 60–61, quoted with approval in *Motau*, above fn 2 para 34.

[the first tender] was desirable and then, on reconsideration changed that view, the decision to cancel [the first tender] constituted administrative action. While there are instances where a decision not to do something may constitute administrative action, as in the case of a failure to issue a passport or an identity document, inaction is not ordinarily to be equated with action. Even less so is it administrative in nature. Administration is concerned with the implementation of policies and functions of government after those policies and functions have been determined, usually through the political process or as a result of actions by the executive. A decision not to procure certain services does not fit into that framework.'

And further (para 32):

'But the second aspect seems to me, if anything, clearer. A decision not to procure services does not have any direct, external legal effect. No rights are infringed thereby. Disappointment may be the sentiment of a tenderer, optimistic that their bid would be the successful one, but their rights are not affected. There can be no legal right to a contract, and counsel did not suggest that there was.'

The court accordingly held that 'the decision by the City to cancel the tender was not administrative action and was not susceptible of review in terms of PAJA.'[6]

[15] Well before the date of hearing of the present appeal, the *Nambiti* judgment was brought to the parties' attention. The parties were invited to file additional heads in this regard, should they so wish. We are grateful to counsel for their supplementary heads of argument. Counsel for SAAB submitted that this court's conclusion that the decision of the City in *Nambiti* was not administrative in nature was incorrect and that, to the extent necessary, it should be overruled. For this submission counsel relied on two previous decisions of this court, the first of which being *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA); [2002] ZASCA 135. In that case a tender for the sale of a prime property was awarded to one tenderer by the KwaZulu-Natal provincial government whilst the appellant's tender was rejected. The appellant challenged the decision to award the tender on the ground that the successful tenderer had not complied with the tender conditions. The challenge prevailed and the award was set aside. The Natal

[6] Paragraph 34. An application for leave to appeal to the Constitutional Court was lodged in which this finding was expressly challenged, but leave to appeal was refused.

Provincial Division of the High Court ordered the assets committee (the committee) of the province to reconsider the appellant's tender and others that had been compliant with regard to the tender conditions. One of the conditions stipulated in the tender document was that the province could withdraw a property or properties from the tender at any stage without giving reasons. The committee decided not to award the tender because of the increase in property values in the intervening two years since the court order and decided to recommend a call for fresh tenders. The appellant's challenge to have this decision set aside failed on the basis that the province, in reconsidering the tender, was entitled to take into account new factors, including the increase in property values.

[16] On appeal to this court counsel for the respondent contended that the tender conditions the province had stipulated gave it a contractual right to withdraw the property from the tender, which it could exercise 'without having to pass the scrutiny of lawful administrative action'. However, this court held as follows:

'Even if the conditions constituted a contract . . . its provisions did not exhaust the province's duties towards the tenderers. Principles of administrative justice continue to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly.'[7]

The key words in that passage are 'in the tender process'. The decision taken by the committee was the final stage of a tender process. That was necessarily the case in the light of the court order that had referred the tender back to the committee for reconsideration. The issue between the parties was whether, in fulfilling that obligation, the committee was bound by circumstances as they had existed when the original decision was taken or whether it could take account of changed circumstances that had arisen in the interim. This court confirmed the committee's view that it was entitled to take changed circumstances into account. It remitted the matter to the committee on the basis of the procedural fairness of its decision-making process.

[7] Paragraph 7.

[17] Thus, in *Logbro* the tender process was to continue to its conclusion, which involved a decision whether or not to award the tender on its merits. It was a tender for the sale of immovable property, so it was highly relevant that the process should generate a favourable price. If no tenderer offered an adequate price the only proper decision by the committee would have been to recommend that the tender not be awarded to anyone and the property not be sold. The issue was whether, in reaching that decision, the committee was bound by the prices for land applicable when the original award was made, or had to take account of the increase in prices that had occurred in the interim.

[18] The distinction between *Logbro* and *Nambiti* is this: In *Logbro* there was a tender process that had progressed to the stage where a decision had to be made whether to award the tender. In *Nambiti* there was a decision that the services reflected in the tender were no longer required and the tender process was terminated. A decision as to procurement of goods and services by an organ of State, this court said in *Nambiti*, is one that lies within the heartland of the exercise of executive authority by that organ of State.[8] It observed further that 'it is always open to a public authority, as it would to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender'.[9] Counsel accepted that SAPS's decision to procure was taken in the exercise of executive authority. He accepted that without the regulations the decision not to procure any more would have been taken in the exercise of executive authority. Counsel's contention was that with the regulations in place the polycentric character of the decision to cancel the tender had been reduced to the level of administrative action. The regulations referred to are the Preferential Procurement Regulations[10] (Procurement Regulations), particularly reg 8(4), (quoted in para 23 below) and the General Regulations[11] promulgated in terms of s 23 of the Act, particularly reg 14, which is headed 'Award of Bids'.

[8] Paragraph 43.
[9] Paragraph 26.
[10] Preferential Procurement Regulations, 2011, GN R502, *GG* 34350, 8 June 2011.
[11] Published under GN R904 in *GG* 28021 of 23 September 2005.

[19] It appears that there is a contradiction in the meaning of the term 'bids' as used in reg 14 and that defined in the definition section. In my view, the term 'bids' as used in reg 14 must mean 'tender' and not 'an offer' as set out in the definition section of the regulations. It seems to me, then, that the two sub-regulations (reg 8(4) of the Procurement Regulations and sub-regulation 14.3 of the General Regulations[12]) relied upon by counsel for SAAB deal with two separate situations. Sub-regulation 14.3 of the General Regulations deals with a situation where there is a successful bidder, meaning that a decision has been taken to award the tender to a bidder or bidders, but has yet to be communicated to the successful bidder or bidders. In the present matter no decision to award the tender had been taken and the sub-regulation, therefore, was not applicable.

[20] As to reg 8(4) of the Procurement Regulations, it must be emphasised that the authority to control and manage the police service vests in the National Commissioner of Police.[13] That authority necessarily includes the power to decide what is and what is not required for the efficient and effective performance, by the police service, of their functions.[14] It is inconceivable that the decision of SAPS to cancel the tender, which would otherwise have been taken in the exercise of executive authority, could, by virtue of a regulation, suddenly change character and become one of an administrative nature. In any event, the regulation certainly does not purport to confer a power on SAPS, in this instance, which it otherwise did not have. All that the regulation does, in my view, is identify in broad, but not exclusive, terms the circumstances in which an organ of State may, in the exercise of its discretion, cancel a tender. It does not seek to constrain the executive decision-

[12] Sub-regulation 14.3 reads: 'An accounting authority may, before notifying the successful bidder or bidders of the award of the bid, cancel the bid if-

(a) Due to changed circumstances, the need for the information technology goods or services in question no longer exists;
(b) The total envisaged expenditure exceeds the available funding stipulated in the business case for the bid and additional funding cannot be obtained;
(c) No acceptable bids were received; or
(d) The procurement process did not comply with the applicable legislation or its integrity has been otherwise compromised.'

[13] In terms of s 207(2) of the Constitution the National Commissioner exercises control over and manages the police service. The Commissioner's powers and duties are set out in s 11 of the South African Police Service Act 68 of 1995. Section 11(1)*(g)* authorises the Commissioner to 'perform any legal act or act in any legal capacity on behalf of the Service'.

[14] The decision to cancel the tender was made by Mkhwanazi in his capacity as acting National Commissioner.

making power of an organ of State to determine what goods and services are required to fulfil its public obligations. I therefore disagree with the submission that SAPS's decision to cancel the tender constituted administrative action. It follows that I am also unable to agree with the contention on behalf of SAAB that *Nambiti* was wrongly decided on this point.

[21] When SAPS, as an organ of State, took the decision to procure the command solution and later to cancel the tender relating thereto, it did so in the exercise of executive authority. Its decision to cancel the tender, therefore, was not susceptible of review in terms of PAJA. This conclusion renders it unnecessary for me to consider the next contention by counsel, rooted in the second decision of this court he relied on, namely *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA),[15] that this court erred in *Nambiti* in concluding that a decision to cancel a tender does not have a direct, external legal effect on any legal rights.

[22] The conclusion that the cancellation of the tender did not constitute administrative action disposes of SAAB's contentions based on PAJA. But it advanced its argument on the basis that these grounds overlapped with its contentions based on the principle of legality. The two differ, firstly, because the circumstances in which the principle of legality will demand procedural fairness in the decision-making process - in the sense of the rationality of the process by which the decision is made – are not the same as under PAJA.[16] Secondly, the level of scrutiny for irrationality under the principle of legality is a low hurdle requiring only a rational connection between the action and the reasons given for it,[17] while unreasonableness under PAJA requires that the decision be one that a reasonable

[15] Paragraph 23.
[16] *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC) paras 49 and 50; *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) paras 68 and 69.
[17] *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC); [2000] ZACC 1, paras 85 and 90; *Democratic Alliance v President of the Republic of South Africa & others* 2013 (1) SA 248 (CC); [2012] ZACC 24 para 27

decision-maker could not reach.[18] But in this case even if the decision by SAPS is measured against the higher unreasonableness standard, in my view and for the reasons that follow, it met that standard.

[23] I propose to consider next the fourth issue mentioned in para 8 above, namely, the question whether there were valid grounds for the cancellation of the tender. For present purposes I shall assume, without deciding, that the extension of the bid validity period after it had expired on 4 January 2011 was valid, because that was the point at which counsel commenced their argument. This issue revolves around the principle of legality and the starting point, for present purposes, is reg 8(4) of the Procurement Regulations which reads:

'An organ of State may, prior to the award of a tender, cancel a tender if –

(a) Due to changed circumstances, there is no longer a need for the services, works or goods requested; or
(b) Funds are no longer available to cover the total envisaged expenditure; or
(c) No acceptable tenders are received.'

As can be seen above, the letter of 8 August 2012 from Ngubane to SAAB (quoted in para 3 above) by which SAAB were advised of the cancellation of the tender, refers to the one of 28 May 2012 (quoted in para 4 above) addressed to the Chief Executive Officer of SITA. The two letters must therefore be read together. This is because SAPS dealt with SITA and it was thus appropriate for it (SAPS) to communicate its decision to SITA. It is fair to assume that SAPS would have understood that SITA, as the entity that dealt directly with SAAB, would advise the latter of the cancellation. In my view, the contents of the letter of 8 August 2012 are merely a shortened version of the contents of the previous one of 28 May 2012 addressed to SITA. The full reasons for the cancellation are contained in the earlier letter.

[18] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others 2004 (4) SA 490 (CC)* para 44.

[24] Apart from the ground of procedural unfairness, which has been dealt with effectively above, except for the argument that a rational process required a hearing before the decision was made to cancel the tender, three other grounds of review which, it was argued, can be accommodated under the principle of legality, were raised on behalf of SAAB. These were that (1) the cancellation was procedurally irregular; (2) the reason for the cancellation was unlawful; and (3) there were no substantive grounds for the cancellation. I shall deal with them in turn and conclude with the rationality argument.

Procedural irregularity

[25] The submission on behalf of SAAB was that SAPS and the other respondents did not have a discretion to cancel tenders as and when they chose. They may only to do so, so the argument continued, when this is permitted by the relevant regulatory framework, namely reg 8 of the Procurement Regulations and regulation 14 of the General Regulations. I have already concluded above (para 14) that sub-regulation 14.3 of the General Regulations had no application in the present matter. Similarly, sub-regulation 14.4, which requires the accounting authority, among other things, to record the reasons for cancellation of a bid in terms of sub-regulation 14.3, was not applicable; so also sub-regulation 14.5, which requires the public body concerned to institute appropriate investigation in consultation with SITA, in this instance, where the cancellation is in terms of sub-regulation 14.3*(d)*.

[26] It was further contended in SAAB's heads of argument that there was no compliance, on the part of SAPS, with the requirements of reg 8(5) of the Procurement Regulations, which stipulates that '[t]he decision to cancel the tender in terms of sub-regulation (4) must be published in the *Government Tender Bulletin* or the media in which the original tender invitation was advertised'. The decision to cancel was not published as required, so it was argued. The respondents did not deal with the issue of non-compliance with the requirements of reg 8(5) in their heads of argument. This is not surprising because the point was never raised in the affidavits. This court may of course consider a point of law not pertinently raised by

an appellant in its motion papers, provided it is covered by all the relevant facts that are before court.[19] It was not suggested before us that all the relevant facts were before court for us to consider the point without prejudicing the respondents. There is therefore no basis for considering it. In the result, the ground of review based on procedural irregularity must fail.

Unlawful reasons for cancellation

[27] SAAB's contention was that one of the reasons proffered in Ngubane's letter of 8 August 2012[20] addressed to it and the letter from SAPS dated 28 May 2012[21] and addressed to SITA was, at the relevant time, patently bad in law and thus vitiated the decision to cancel the tender. SAAB relied on *Patel v Witbank Town Council* 1931 TPD 284 in support of the proposition that if one of a multiplicity of reasons given for a decision is bad the entire decision must be set aside. But that depends upon there being a multiplicity of reasons of which one or more is bad. In the present matter the alleged bad reason appears in the two letters just referred to, as well as in a document containing reasons for the cancellation – I shall refer to these as 'the compelled reasons' – delivered on behalf of SAPS and SITA on 3 September 2013 following an order of court directing them to do so: it is the time lapse in the tender evaluation process. The contention was that 'the presence of this central reason, which is not sanctioned by the Procurement Regulations or the [General Regulations]' was bad in law. The primary question, though, is whether the issue of the time lapse in the evaluation process constitutes a stand-alone reason. I think not. As I have suggested above, the two letters must be read together.

[28] In the first paragraph of the letter of 28 May 2012 Mkhwanazi, on behalf of SAPS, referred to the date upon which the tender evaluation process commenced, namely 1 November 2010 and said that up to the date of the letter (a period of almost one and a half years) the process had not been completed. I may mention

[19] *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285E-H; See also *Logbro v Bedderson NO & others* 2003 (2) SA 460 (SCA); [2002] ZASCA 135 para 23; and *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA) paras 13 and 14.
[20] Quoted in para 3 above.
[21] Quoted in para 4 above.

that in the Invitation to Bid it was emphasised that the command solution was sought as an 'immediate requirement with an option to extend [it]'. In the second paragraph Mkhwanazi continued that in view of the lapse of time in the evaluation process with no outcome until that date, SAPS had decided to cancel the tender, not merely because of the lapse of time, but because during that period (para 3 of the letter) SAPS's business requirements changed and, by the time of the cancellation, were no longer those that were specified in the tender, the processing of which was yet to be completed. SAPS were therefore reviewing their 'current' business requirements specification. When the letter of 28 May 2012 is read sensibly and as a whole, as it must be[22] (and even read together with the letter of 8 August 2012), the true reasons for the cancellation of the tender become clear. The time lapse in the evaluation process is clearly not a stand-alone reason for the cancellation of the tender but, read in the context of the letter as a whole, it becomes clear that as a result of the delay in the tender evaluation process, SAPS could not continue with the tender as its business requirements had changed and had to be reviewed since those specified in the tender no longer addressed its 'current' business requirements. Whether SAPS contemplated putting out a fresh tender after it had reviewed its business requirements specification is not clear from the papers.

[29] Except for a lengthy introductory part setting out what had occurred during the period from the commencement of the tender process until the decision to cancel the tender was made and the inclusion of 'additional reasons', the compelled reasons are no different from those contained in the letters of 28 May 2012 and 8 August 2012. The two 'additional reasons' were: that '[i]t was considered prudent to cancel the bid to avoid fruitless and wasteful expenditure of public funds' and that the tender had in any event lapsed 'when it was not timeously extended and no decision to award the bid was taken before it lapsed'. In the answering affidavit the respondents also made the allegation that in the '2012/2013 Plan the [command solution] had not been allocated funds but was being financed out of the criminal justice system'. It was submitted on behalf of SAAB that it was impermissible for SAPS to rely on new reasons for its decision for the first time in their answering papers and that a

[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

decision-maker is bound by the reasons given at the time of the decision, on the basis of the information then before it. In this regard reliance was placed on an *obiter dictum* in *National Lotteries Board & others v South African Education and Environment Project* 2012 (4) SA 504 (SCA); [2011] ZASCA 154 para 27.

[30] It is not necessary for me to express any view on the issue as I am prepared, for present purposes, to ignore the 'additional reasons' that are not contained in the letter of 28 May 2012, although the reference to the avoidance of 'fruitless and wasteful expenditure' is implicit in the reasons given in that letter. As the respondents asserted in the answering affidavit, it is well-known ('trite') that information technology is developed, updated and replaced regularly. This was fully explained in the affidavit of Mr Willem Frederick van Wyk (Van Wyk) which was filed without objection and to which there was no response. To purchase out-dated technology or technology that is soon to be updated would amount to fruitless and wasteful expenditure. As I have held above, however, on a proper reading of the letter of 28 May 2012 the reasons for the cancellation of the tender become clear. It follows that the time lapse in the evaluation of the tender was not a separate or bad reason for the cancellation and this ground of review must accordingly also fail.

No substantive grounds for cancellation

[31] Two issues were raised by SAAB under this sub-heading. The first is 'the alleged lack of a need for the goods' and the second: the alleged change in the evaluation methodology. The second issue, which was mentioned in the introductory part of the compelled reasons, related to a problem that SAPS seemingly had with the methodology adopted by SITA in the weighting of scores during the technical evaluation of tenders. Staying true to what has been said above in relation to 'additional reasons' I shall ignore this issue because it did not form part of the initial reasons contained in the letters of 28 May 2012 and 8 August 2012. The first issue implicates the provisions of reg 8(4)*(a)* of the Procurement Regulations (quoted in para 23 above). It was submitted on behalf of SAAB that there was no evidence in the record delivered in terms of Uniform rule 53 of any changed circumstances of

such a magnitude as to demonstrate that the need for the command solution as described in the tender no longer existed. In the absence of such evidence justifying the cancellation due to the absence of a need for the goods or service SAPS' argument must fail, so it was contended. Instead, said counsel, the record indicated that the subject of the tender remained a priority need for SAPS.

[32] It is true that in his affidavit filed in response to SAAB's further supplementary affidavit, which was filed after the replying affidavit, Van Wyk testified that the respondents' case was not that SAPS will not, in future, include a command solution as part of its future technology solutions. This statement, so the argument continued, makes it clear that SAPS could not and did not contend that it had abandoned the need for a command solution. But this argument ignores the very next clarification to the effect that the case for SAPS had always been that the command solution 'as specified in the Bid, which was the subject-matter of the [tender] no longer addressed the then current business requirements for SAPS'. This means that while SAPS was still in need of a command solution, the one tendered for was no longer required or needed because it was no longer suitable for SAPS's current needs as at the time of the cancellation. I am satisfied that SAPS indeed demonstrated a change of circumstance and that there was no longer a need for the command solution tendered for by SAAB.

[33] In its replying affidavit SAAB acknowledged that in terms of the Invitation to Bid, SAPS would not be bound to procure out-dated technology and would be able to issue a new tender in respect of any component of a solution should a better component be identified. With reference to its letter of 26 June 2012 (referred to in para 3 above) SAAB stated that it reiterated its commitment to provide the latest technology and demonstrated the manner in which it had done so since the submission of its bid. The short answer to this is that the letter referred to was written after the tender had been cancelled on 28 May 2012. In the answering affidavit Ngubane stated that the order sought by SAAB in its notice of motion would force SAPS 'to buy and pay for with public funds something that does not address its current business requirements'. To this statement SAAB countered that at no point

did SAPS set out what its current requirements were and how that differed from what was sought to be procured through the tender. What had been established by SAPS was that its business requirements at the time of the cancellation were no longer as specified in the tender, but it was still reviewing the specifications of its 'current' business requirements. It is not surprising, therefore, that it did not set out what it then required. I conclude that the grounds given by SAPS for cancelling the tender were substantive grounds and that they were covered by reg 8(4)*(a)* of the Procurement Regulations.

Rational decision-making

[34] The question is whether a rational decision-making process in this case demanded that SAAB be afforded a hearing? In my view it did not. When the substantive grounds for cancelling the tender are examined they show that there had been an elapse of time and a need to reconsider SAPS's business requirements. These were executive decisions that involved the internal operational workings of SAPS. The areas on which SAAB contended that it wished to make representations were the decision; the effect of the decision on SAAB (which is no more than a plea *ad misericordiam*); and the extent to which SAAB's tender could still meet SAPS's relevant requirements. In other words they were asking for an opportunity to persuade SAPS to change its mind. In my view, that is not sufficient to show that a rational decision-making process would be deficient unless SAAB was afforded a hearing. Importantly, there were no factual allegations in the affidavits explaining why this would render the decision-making process irrational. There is no merit in the rationality argument.

[35] In the result, the appeal is dismissed with costs, which shall include the costs consequent upon the employment of two counsel.

_____

L Mpati
President

APPEARANCES

For the Appellant:	G Marcus SC (with him S Budlender) Instructed by: Adams & Adams Attorneys, Pretoria Honey Attorneys, Bloemfontein
For the Respondent	S Hassim and K Pillay SC (with them S Baloyi) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein