



**SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

Reportable

Case No: 447/2018

In the matter between:

**CTP LIMITED**

**FIRST APPELLANT**

**BONGANI RAINMAKER  
LOGISTICS (PTY) LTD**

**SECOND APPELLANT**

**NDABASE PRINTING  
SOLUTIONS CC**

**THIRD APPELLANT**

**and**

**THE DIRECTOR-GENERAL  
DEPARTMENT OF BASIC  
EDUCATION**

**FIRST RESPONDENT**

**THE MINISTER  
OF BASIC EDUCATION**

**SECOND RESPONDENT**

**LEBONE LITHO PRINTERS  
(PTY) LTD**

**THIRD RESPONDENT**

**NOVUS HOLDINGS LIMITED**

**FOURTH RESPONDENT**

**UTI SA (PTY) LTD**

**FIFTH RESPONDENT**

**THE MINISTER OF FINANCE**

**SIXTH RESPONDENT**

**NATIONAL TREASURY**

**TRANSVERSAL CONTRACTING**

**OFFICE**

**SEVENTH RESPONDENT**

**Neutral citation:** *CTP JV and another v The Director-General Department of Basic Education and another* (447/2018) [2018] ZASCA 156 (20 November 2018)

**Coram:** Shongwe ADP, Willis, Zondi, Mathopo JJA, and Mokgohloa AJA

**Heard:** 14 September 2018

**Delivered:** 20 November 2018

**Summary:** Procurement process – Irregularities – Failure to treat bidders equally – Implementation of consensus seeking approach unreasonable – Differential treatment of bidders tainted process and rendered evaluation procedurally unfair

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## ORDER

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

1. The appeal succeeds with costs, including costs of two counsel.
2. The order of the court a quo is set aside and replaced with the following order:

‘(a) The decision of the first respondent to award the tender to Lebone Consortium to provide the printing, packaging and distribution of workbooks to public schools from 1 April 2017 to 31 March 2020 with the option of a further two year extension, is constitutionally invalid.

(b) The operation of the invalidity order is suspended until 31 March 2020 pending the award of a lawful tender by the first respondent.

(c) The first to fifth respondents are ordered jointly and severally to pay the applicants’ costs, including costs of two counsel.’

3. CTP JV’s and Lebone Consortium’s bids should be re-evaluated in terms of the functionality stage by the newly constituted BEC and BAC.

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## JUDGMENT

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**Mokgohloa AJA (Shongwe ADP, Willis; Zondi and Mathopo JJA concurring):**

### **Introduction**

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria dismissing the application by the appellants (CTP JV) for an order reviewing and setting aside a decision of the first respondent, the Director-General Department of Basic Education (DBE), awarding a tender to the third to fifth respondent (Lebone Consortium). The tender was for the printing, packaging and distribution of workbooks to school learners across the country for three years with the possibility of a two year extension.

### **Background**

[2] Lebone Consortium has been the effective incumbent in respect of the provision of workbooks since November 2011. On 13 November 2015, National Treasury invited bids for the tendered work for the period 1 April 2006 to 31 March 2019. This would cover the provision of the workbooks for 2017, 2018 and 2019 school years with a possibility of a further two-year extension. The closing date for bids was 14 December 2015.

[3] The tender documents included special conditions of contracts which indicated that bids would be assessed in a four phase process: first, bidders would be measured for compliance against several mandatory bid requirements; second, the functionality of bidders would be assessed

against a pre-determined set of criteria and sub-criteria, measuring a bidder's ability to perform the tendered work; third, bidders which met the functionality threshold would be allocated a score based on their price and empowerment credentials; and fourth, a recommendation and award would be made.

[4] Clause 2.2 of the special conditions of the contract provided for the evaluation of bids against four weighted functionality criteria: capacity (70%); operation strategy (15%); risk management strategy (10%); and local economic development strategy (5%). Capacity was to be assessed against five sub – criteria: (a) proven experience in printing, binding, packaging and delivery of large volumes of materials; (b) printing capacity; (c) labour capacity; (d) fleet availability; and (e) warehousing equipment. Each criterion and sub-criterion was allocated a weight set out in a table, based on its relative importance (the weighting table). Bidders had to attain a minimum score of 80% for functionality to qualify for further consideration. The unusually high level of the threshold was in recognition of the functional complexity of the tender.

[5] The high monetary value of the tender required a 90/10 preference point system in the third phase, with 10 for Broad-Based Black Economic Empowerment (BBBEE).

[6] A briefing session was held on 2 December 2015. Thereafter on 8 December 2015, National Treasury distributed a functionality score card which was intended to be used in conjunction with the weighting table to determine if bidders met the 80% functionality threshold.

[7] In accordance with Regulation 16A6.2 of the Treasury Regulations<sup>1</sup> and the DBE's Supply Chain Management Policy (SCMP), the process had to first serve before a Bid Evaluation Committee (BEC). The BEC would make a recommendation to the Bid Adjudication Committee (BAC). The BAC in turn would make a recommendation to the Director General (DG) to make the final award.

[8] Out of 11 bids received, only Lebone Consortium and CTP JV met the mandatory requirements. The BEC proceeded to evaluate the functionality of these two bids. Using the weighting table and the score card, the BEC awarded Lebone Consortium a score of 93.2% and CTP JV a score of 62.67%. It excluded further consideration of CTP JV's bid for price and preference and recommended the award of the tender to Lebone Consortium. The BAC did not accept the recommendation and it was suggested that the tender process should recommence. Subsequently, the tender was cancelled on 12 April 2016.

[9] On 29 April 2016, CTP JV launched an application challenging the lawfulness of the decision to cancel the tender. The Rule 53 record and reasons revealed that the BEC had concluded that of the eleven bids, only Lebone Consortium and CTP JV had met the minimum requirements, but CTP JV failed to pass the functionality threshold and has thus been excluded. Upon receiving this information, CTP JV withdrew its application.

[10] In the meantime, Lebone Consortium had filed a counter application challenging the cancellation decision. This counter application was opposed by the DBE and CTP JV. The DBE accepted

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<sup>1</sup> Treasury Regulation, GN R225, GG 27388 of 15 March 2005.

that the tender ought to have been cancelled on the grounds, inter alia, that the application of the scorecard had caused some confusion to the prejudice of CTP JV.

[11] Whilst the decision to cancel the tender and the ensuing litigation proceeding, an ad hoc arrangement was concluded between Lebone Consortium and the DBE to ensure that workbooks would be provided in the 2017 school year.

[12] Lebone Consortium's application was ultimately settled when the parties reached an agreement which was made an order of court on 2 February 2017. The relevant parts of the order read as follows:

- 'i) The cancellation decisions were set aside.
- ii) The tender validity period was extended until 30 April 2017, and the bids by Lebone Consortium and CTP JV were also extended to this time and could be supplemented only to the extent that this was "strictly necessary to demonstrate that any agreements and/ or undertakings which may have expired and/or lapsed due to the effluxion of time arising from the delay occasioned by this litigation, have been extended and/or replaced on a like for like basis, that in anyway adds to or remove from the bids originally submitted in December 2015.
- iii) The bids would be remitted to a new BEC appointed by the DG, comprising people who had "not been previously involved in any aspect of the tender (including in the compilation of the terms of reference for the tendered work; or participating in the committees which previously evaluated the bids submitted in response to the tender invitation)".
- iv) The DG was required to appoint independent advisors with expertise in state procurement to assist the BEC in an advisory role only, including an attorney and an auditor, as well as an independent senior counsel who had not been instructed or otherwise involved in the earlier review proceedings.

v) The BEC would consider the matter on the basis that [Lebone] Consortium and the CTP JV had met the minimum mandatory requirements (Phase 1). It would thus commence with a functionality assessment, based solely on the weighting table - and excluding the scorecard. The 80% functionality threshold remained in place.

vi) The new BEC had to finish its task by 1 March 2017. Thereafter the recommendation would proceed to a new BAC, which would make a recommendation to the DG by 6 March 2017.

vii) The final decision regarding the award of the tender would be made by the DG by 13 March 2017.'

[13] On 1 March 2017 the new BEC forwarded a report to the BAC which recommended that the tendered work be awarded to Lebone Consortium. The BAC met on 1 March 2017 and 3 March 2017, and similarly recommended the appointment of Lebone Consortium. Based on these recommendations, the DG awarded the tender to Lebone Consortium on 12 March 2017. On 13 March 2017, the DG advised CTP JV that its tender was unsuccessful.

[14] On 7 June 2017, CTP JV instituted proceedings in the high court seeking to review and set aside the DG's decision to award the tender to Lebone Consortium. The high court dismissed each of CTP JV's review grounds. With leave of the high court, CTP JV now appeals against that decision.

[15] CTP JV's grounds of appeal are four-fold: (a) material irregularities in the scoring process; (b) failure to consider senior counsel's opinion; (c) failure to have an independent senior counsel appointed and available to assist the BEC; and (d) improper involvement of Mr Subban. Each of these grounds will be considered later.



## The Law

[16] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is s 217 of the Constitution which provides that:

### ‘217 Procurement

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

[17] The framework within which the policy must be implemented is prescribed in the Preferential Procurement Policy Framework Act 5 of 2000 (the Procurement Act) and the Public Finance Management Act 1 Of 1999 (the PFMA).

[18] The proper approach to tender reviews was established in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others*<sup>2</sup> as follows: ‘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

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<sup>2</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others* [2013] ZACC 42; 2014 (1) SA 604 (CC) (*ALLPAY 1*) para 28 – 29.

question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.’

### **The consideration of the bids by the new BEC**

[19] The newly constituted BEC was chaired by Dr Whittle who was the Deputy DG of the DBE. He was assisted by five high-ranking officials, two from the DBE and three from other national departments. The BEC met on four occasions (on 20 February 2017, 22 February 2017, 24 February 2017, and 28 February 2017). Dr Whittle at the first meeting noted that the BEC was comprised of very experienced supply chain management people. He noted further that this indicated the seriousness with which the DG and the Minister were approaching this matter and that auditors and attorneys were present to ensure a transparent and fair process.<sup>3</sup>

[20] In accordance with the court order, the BEC’s evaluation process had to commence with scoring the functionality of the competing bids, (i.e. Lebone Consortium and CTP JV). The court order also retained the 80% functionality threshold.

[21] From the onset, the members of the BEC were uncertain about how to proceed with the scoring. This difficulty was compounded by the exclusion of the second scorecard which had provided values to guide the allocation of a score for any criterion or sub-criterion. The weighting

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<sup>3</sup> Minutes of meeting held on 20 February 2017.

table, standing alone, indicated the relative importance of each line item, but gave no guidance to individual members of the BEC regarding the allocation of a score.

[22] In order to solve this problem, the BEC resolved to first score the bids individually, allocating ‘raw scores’, and thereafter they would discuss their scores and have an opportunity to adjust them. This approach was described by one member of the BEC as ‘bringing it to the team level’.

[23] The BEC’s chosen modus operandi as reflected in the minutes of the meeting of 24 February 2017, was as follows:

‘4.1 The Chairperson indicated that the Committee would commence by checking the scores allocated for both bidders (CTP Limited JV and Lebone Consortium) and see if there were huge discrepancies.

- (a) The Committee should give the total score and if there were huge discrepancies the Committee would take a discussion on individual marks on the score sheets.
- (b) It was suggested that the Secretariat should record the scores and give the aggregates scores to both bidders. Based on the scores given then a discussion would take place.
- (c) It was indicated that the Committee should first agree if they would work on consensus or average. The Committee agreed to work on consensus and not aggregate; the notes would form part of the recommendation.
- (d) If there were outliers, explanation should be provided on how the evaluator arrived at those scores. If scores are fairly closely clustered it would be an easier discussion.

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- (f) CTP JV was scored at 80 points and Lebone Consortium was scored at 92.6 points.
- (g) There was a general consensus that Lebone Consortium was the first

bidder to score the minimum required points on functionality.

- (h) The Committee took a discussion on individual scores (per functionality criterion) for CTP JV.'

[24] According to this methodology, the consensus seeking process began with the five scoring members of the BEC revealing their overall raw scores for each bidder, and an average was taken for each. It is recorded in the BEC minutes that in the initial round of scoring and averaging, each member of the BEC scored CTP JV as follows: 80; 84; 75; 87, and 74, with the average score of the required threshold of 80%. Lebone Consortium was scored as follows: 92; 89; 89; 97; and 96, with the average of 92.6%. After further discussion and moderation of CTP JV's bid, the BEC members changed their scores as follows: from 80 to 81, from 84 to 78, from 75 to 77, from 87 to 85, and 74 remained unchanged. The average score of the CTP JV's bid was thus reduced from 80% to 79%. This resulted in CTP JV failing to meet the functionality threshold. No similar moderation was done in respect of Lebone Consortium bid, which was considered functionality compliant on the initial raw scoring process on account of the very high scores awarded by all members of the BEC.

[25] Most of the debate during moderation of CTP JV's bid related to the fleet availability and warehousing equipment sub-criteria of capacity requirement. Some members expressed concern that some of the motor vehicles that would be used by CTP JV due to their age and size, were not suited for the tender requirements. As a result CTP JV's score on fleet availability was brought down by almost one full point. As regards warehousing requirement, some members of the BEC found that CTP JV did not have the full complement of warehouse equipment and after

discussions, the scores on this criterion were reduced from 9.4 to 8.4.

[26] I now return to appellants' grounds of appeal.

**Material irregularities in the scoring process and deviation from the implementation guide**

[27] CTP JV contended that in terms of the court order, the BEC was required to use the weighted functionality scorecard provided in the special conditions when scoring bids for functionality with the qualification threshold of 80%. There was therefore no need to resort to a moderation or consensus-seeking process. Initially when the BEC considered and scored bids, and before moderation, CTP JV had attained an average score of 80% and Lebone Consortium received an average score of 92.6%. Thus both bidders met the stringent 80% functionality requirement. The BEC was thus obliged to have assessed both bids on price and BBBEE in terms of the court order and Regulation 5(7) of the Procurement Regulations which provides that each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system.

[28] CTP JV submitted further that the moderation process in any event did not achieve consensus because two of the five BEC members still gave CTP JV a score over 80%. The BEC, CTP JV argued, ought accordingly to have reverted to the original average score of 80%. Indeed, Lebone Consortium's original average score was the basis upon which it was judged to be functionally compliant. This, CTP JV stated, was unreasonable and unfair particularly in that the BEC only pursued a moderation of raw scores allocated to CTP JV and did not do the same in respect of Lebone Consortium bid. CTP JV maintained that its exclusion

from an assessment on price and B-BBEE was procedurally unfair and unreasonable, and rendered the tender process unfair and uncompetitive, contrary to the provisions of s 217 of the Constitution.

[29] Whilst reluctantly conceding that the use of the consensus approach led to the unequal treatment of the bidders, Lebone Consortium argued that the BEC was free to establish its own process. It followed this approach in order to overcome the problem caused by the absence of a scoreboard.

[30] Regarding the deviation from the implementation guide, it has to be noted that this guide is not legislation but a policy. The objects of a policy are to achieve reasonable and consistent decision making, to provide a guide and a measure of certainty to the public.<sup>4</sup> It is trite that when the government makes a policy, its officials are not entitled to simply ignore it, but must act in accordance with it. They can only deviate from it if there is a reasonable basis for such deviation in which case that basis should be clearly articulated.<sup>5</sup>

[31] The relevant parts of implementation guide are contained in paragraphs 11, which reads:

‘11.1.4 Score sheets should be prepared and provided to panel members to evaluate the bids.

11.1.5 The score sheet should contain all the criteria and the weight for each criterion as well as the values to be applied for evaluation as indicated in the bid documents.

11.1.6 Each panel member should after thorough evaluation independently award

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<sup>4</sup> *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 47; [2014] ZACC 37

<sup>5</sup> *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC) paras 99 and 127.

his/her own value to each individual criterion.’

In summary the implementation guide stipulates a process of evaluating functionality in terms of which each member must assess and score the bids independently, following which an average of the scores must be calculated.

[32] CTP JV contended that when the BEC opted to evaluate its bid on a consensus basis at a team level, it departed from the provisions of the implementation guide which required the members of the BEC to score the bids independently and to award their own scores. It maintained that the consensus-seeking approach by the BEC was a rescoring designed to remove CTP JV from contention and to favour Lebone Consortium. This, the contention proceeded, was done despite a very significant price discrepancy between the two bids bringing the competitiveness and cost-effectiveness of Lebone Consortium bid into question. CTP JV submitted that since the approach adopted by the BEC did not in fact reach its desired purpose of achieving consensus, the BEC should have reverted to the original average score of 80%.

[33] Lebone Consortium submitted that it would have been irrational to revert to the first round scores, as this would have taken away the BEC’s entire focus on consensus-seeking as a laudable outcome. No one was compelled to make these changes, which were explicitly based on the recognition that this raw score was inaccurate (either because it was too high or too low). The fact that there were still differences of opinion did not indicate that the consensus-seeking process was a failure, it merely indicated that it had gone as far as was possible. It would be irrational to ignore the fact that members had freely acknowledged that their raw

scores were wrong, or out-of-kilter with those of their colleagues.

[34] The question then is whether the BEC's deviation from the implementation guide was justifiable. The DBE justified the deviation on the grounds that the court order excluded the use of the scorecard and therefore only the weighting table could be used. It contended that in complex tenders it is preferable to adopt a consensus rather than averaging approach. The DBE contended further that an approach based on unmoderated scores, and an approach based on averages rather than consensus, is subjective. It claimed that the officials of the BEC were all senior and experienced, this mitigated the dangers of members influencing each other's scores.

[35] Lebone Consortium argued that there was consensus amongst all members of the BEC that it far exceeded the 80% functionality threshold. Given the high score it received, there was thus no realistic possibility that the discussion of its bid would have pushed it below 80%. Thus scrutinizing the individual score of each members of the BEC would have been a foregone conclusion and a waste of time.

[36] The court a quo held that the BEC was not at liberty to do as it may wish. Although there is room for flexibility in matching an evaluation process to the nature of a bid with regard to its value, technical requirements and complexity, the court a quo held that a BEC is always obliged to follow applicable legislative prescription and a process that is aimed at achieving the constitutional objectives of a fair, equitable, transparent, competitive and cost-effective procurement process. It however held that the differential treatment of the two bids was rational, fair and consistent with s 217 of the Constitution.



[37] The court a quo held further that there was no need to revisit the issues of functionality of Lebone Consortium because, given the initial scores awarded to it in the two evaluations, and its historical performance of the tender, it was highly unlikely that it stood, any chance of being disqualified on functionality. The court a quo stated:

‘I agree with the respondents that the choice of procedure for that purpose was reasonable in the peculiar circumstances. The differential approach to the bids has a rational basis and connection to the governmental purpose of objectively evaluating the bids. The approach, albeit unorthodox, was not materially irregular in that the purpose of the tender requirements in relation to the evaluation of functionality was substantively achieved. Moreover, the process followed was fair and open. Such a conclusion does not comprise the “no difference principle” rejected in *All Pay* (1).’

[38] In my view, the approach of the court a quo is at odds and compromises the ‘no difference principle’ rejected in *All Pay* 1. It conflates procedure and merit by considering that it was inconsequential and made no difference to the outcome, by predicting that the result would be a foregone conclusion. It committed the error identified in *All Pay* 1 in that it considered that the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.

[39] As stated in *AllPay* 1,<sup>6</sup> ‘[the approach] undermines the role procedural requirements play in ensuring even treatment of all bidders. . . . it overlooks that the purpose of a fair process which is to ensure the best outcome’. For the court a quo to hold that it was not necessary to subject Lebone Consortium’s bid under moderation because the result would have been a foregone conclusion, compromised the process leading to the bid’s success. Absent any proper evaluation of the bids, it is difficult to

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<sup>6</sup> Fn 2 para 24.

fathom with certainty what course the process might have taken if the process of moderation was applied to Lebone Consortium's bid.

[40] Although there was no suggestion of corruption in the adoption of a consensus-seeking approach adopted by the BEC, it falls short of the standard required. It is not so much the separate incidents taken individually that matters but the aggregate or 'cluster' of certain facts. These are (i) the revisiting of the score card of the CTP JV in regard to the 'functionality test'; (ii) doing so after it had 'passed' (albeit narrowly and not in the estimation of all the members of the BEC); (iii) not redoing the scoring in this regard for the Lebone Consortium (even though all members of the BEC were comfortable with the fact that it had easily satisfied the necessary requirements); and (iv) thereafter disqualifying the CTP JV on the ground that it had failed to meet the functionality requirement. One is left with a residual sense of unease. It cannot be said that, viewed objectively, the exclusion of CTP JV from further consideration on the ground that it had failed the functionality test, was fair in all the circumstances of the case. A high standard is required. Accordingly, the decision to award the tender to Lebone Consortium cannot pass constitutional muster in terms of s 217 of the Constitution.

### **Failure to consider the opinion of Senior Counsel**

[41] The court order directed the DG of the DBE to appoint independent advisors to assist the BEC in an advisory role only. One such advisor had to be an independent senior counsel with procurement expertise. Pursuant thereto, Ellis SC was briefed to give advice on aspects of the process adopted by the BEC. His finding was that there had been material irregularities in the BEC's process and that the scoring on functionality was irrational, unfair and inequitable. In his opinion, based on the raw

scores of both bidders, they both should have been considered for pricing and BBBEE compliance in the next round. He then recommended that the matter be returned to the BEC for consideration.

[42] CTP JV contended that the DG failed to consider Ellis SC's opinion. The DG in his answering stated that he perused Ellis SC's opinion. This averment is not challenged by CTP JV in their replying affidavit. The fact that the DG did not mention the opinion of Ellis SC in his reasons for awarding a tender to Lebone Consortium does not in itself mean that he had not considered the opinion. Furthermore the role of Ellis SC was merely to provide advice. The court order did not explicitly or impliedly require that Ellis be present at the meetings of the BEC and neither was he expressly made a member of the BEC. The appointment of advisors was in my view, a safeguard and not a requirement.

[43] It has to be noted that the opinion of Ellis SC was undoubtedly a relevant consideration that could not be ignored. However, that does not mean that the opinion had to be followed as this would amount to an administrator being dictated to by his/her legal representative. As stated in *Walele v City of Cape Town & others*<sup>7</sup> a decision maker should not merely accept the opinion of a technical expert, but must independently apply his mind in making a final decision and that may include not following expert advice, which he considers wrong. In the premises I find that the evidence does not disclose any reviewable irregularity.

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<sup>7</sup> [2008] ZACC 11; 2008 (6) SA 129 (CC) para 69.

### **The involvement of Mr Subban**

[44] CTP JV submitted that Mr Subban, as the project manager for the tender, should not have been allowed to give a presentation to the newly appointed BEC. This submission is based on the fact that the court order expressly excluded the involvement of any person who was previously involved in any aspect of the tender to serve on the newly appointed BEC. CTP JV submitted further that Mr Subban in his presentation, changed the specification of the tender and created new requirements which were not identified in the special conditions. The new requirements are stated as identifying specific risk management strategy, elevated delivery above other factors, and made reference to super link vehicles.

[45] It is rational for the members of the BEC to make use of the expertise of the most senior official responsible for the workbook project in order to understand the criteria of functionality specified in the bid. As long as this official does not participate in the BEC's deliberations or decision making. The project manager employed by DBE would not advise them on the issues because he had also being previously involved in the tender process. Mr Subban's comments about risk management related to the risk which ought to be dealt with in a risk management strategy which is not new to any tendered work. His observation that delivery is the most critical part of the tender, and his reference to 22-wheel super-link trucks, is self-evident as this tender is for printing and delivery of workbooks. Equally important is the use of large vehicles that will be able to transport volumes of books across the country. There is no evidence that Mr Subban participated in the BEC's deliberations and decision making. I find that the involvement of Mr Subban did not affect the integrity of the bid.

## Remedy

[46] I have found that the decision to award the tender to Lebone Consortium is in terms of s 6(2)(i) of the Promotion of Administrative Justice Act (PAJA)<sup>8</sup> constitutionally invalid as it violates the requirements of equity, transparency and objectivity under s 217 of the Constitution. It therefore follows that that decision to award the tender to Lebone Consortium should be declared unlawful in terms of s 172(1)(a) of the Constitution. In *AllPay 1*<sup>9</sup> the Constitutional Court pointed out that once a ground of review under PAJA has been established there is no room to shy away from it. What falls to be considered, are the consequences of the declaration of invalidity. This involves the determination of a remedy under s 172(1)(b) of the Constitution and s 8 of PAJA which allows a court upon declaration of invalidity to make an order which is just and equitable. This so because there is a clear distinction between the constitutional invalidity of administrative action and the just and equitable remedy that may flow from it.

[47] CTP JV, as an aggrieved party is entitled to an appropriate and effective remedy. But that remedy must be fair to those affected by it and yet vindicate effectively the right violated.<sup>10</sup> The remedy must be aimed at correcting or reversing the consequences of the decision taken by the DBE.

[48] In *AllPay 2* Froneman J stated<sup>11</sup>:

‘This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This

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<sup>8</sup> Promotion of Administrative Justice Act 3 of 2000

<sup>9</sup> Fn 2 para 25

<sup>10</sup> Fn 2 para 26

<sup>11</sup> *AllPay Consolidated Investment v CEO, SA Social Security Agency* 2014 (4) SA 179 (CC) para 32; [2014] ZACC 12

must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Secondly, in the context of public procurement matters generally priority must be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequence of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social – security matters’.

[49] The determination of the just and equitable remedy must be undertaken in light of the following facts which are either common cause or were not seriously disputed. The tender was awarded from 1 April 2017 until 2020 for printing and delivery of workbooks for the 2018, 2019 and 2020 academic years. After March 2020, it will be subject to discretionary extension for further two years. The primary beneficiaries of the tender are learners and teachers. Due weight must be given to them as they are most closely associated with the benefits of the tender contract. In my view, an order that will result in the disruption in the teaching and learning will not be just and equitable and will be counter – productive as it will result in hurting those who were meant to benefit from it. An order that will result in the violation of the learners’ right to basic education should be avoided. Provision of school workbooks should continue without disruption as education is a constitutional imperative.

[50] The parties, recognizing the need to keep the tender contract in place pending the correction of the invalid decision are agreed that it would be just and equitable to suspend the declaration of invalidity for a limited period while a new tender is undertaken to permit Lebone Consortium to perform under the current tender contract. They, however, disagree on the period of suspension. CTP JV contends that the declaration of invalidity should be suspended until 31 March 2019. Lebone Consortium contends

that the declaration of invalidity should be suspended to allow it to remain in place to provide workbooks for the 2020 school year. This contention was advanced on the basis of the allegation that all bidders including Lebone Consortium and CTP JV submitted their bids on the basis that they would receive a tender award for at least three years. This fact they took into account in the pricing of bids, the conclusion of leases and employment contracts with their employees and other third parties to enable them to discharge their obligation under the tender contract. The Lebone Consortium justifies its contention also on the basis of time required to prepare for the provision of workbooks. In this regard, it contends that the process of design and printing and collection of data relating to each school's requirements for the 2020 school year has to commence as early as November/December 2018 for the delivery of the workbooks to take place in January 2020.

[51] In the circumstances of this matter, given the affluxion of time, the need to protect the interests of the learners who are closely associated with the benefits of the tender contract and that Lebone Consortium is an innocent tenderer, an order suspending the declaration of invalidity of the tender award until 31 March 2020 will be just and equitable. This will ensure an uninterrupted provision of workbooks to the learners and also afford Lebone Consortium an opportunity to rearrange its contractual relationship it entered into with third parties pursuant to the tender contract.

#### Order

1. The appeal succeeds with costs, including costs of two counsel.
2. The order of the court a quo is set aside and replaced with the following order:

- ‘(a) The decision of the first respondent to award the tender to Lebone Consortium to provide the printing, packaging and distribution of workbooks to public schools from 1 April 2017 to 31 March 2020 with the option of a further two year extension, is constitutionally invalid.
  - (b) The operation of the invalidity order is suspended until 31 March 2020 pending the award of a lawful tender by the first respondent.
  - (c) The first to the fifth respondents are ordered jointly and severally to pay the applicants’ costs, including costs of two counsel.’
3. CTP JV’s and Lebone Consortium’s bids should be re-evaluated in terms of the functionality stage by the newly constituted BEC and BAC.

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**FE MOKGOHLOA  
ACTING JUDGE OF  
APPEAL**



**APPEARANCES**

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