THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 511/04

In the matter between:

THE CHAIRPERSON: STANDING TENDER COMMITTEE	**FIRST APPELLANT**
DEPARTMENT OF PUBLIC WORKS	**SECOND APPELLANT**
THE DIRECTOR GENERAL: DEPARTMENT OF PUBLIC WORKS	**THIRD APPELLANT**
THE MINISTER OF PUBLIC WORKS	**FOURTH APPELLANT**

and

JFE SAPELA ELECTRONICS (PTY) LTD	**FIRST RESPONDENT**
JFE POWER DISTRIBUTION (PTY) LTD t/a JFE RETICULATION	**SECOND RESPONDENT**
NOLITHA ELECTRICAL & CONSTRUCTION (PTY) LTD	**THIRD RESPONDENT**
THE STATE TENDER BOARD	**FOURTH RESPONDENT**

Coram : **SCOTT, CAMERON, MTHIYANE, LEWIS JJA *et* MAYA AJA**

Date of hearing: **2 SEPTEMBER 2005**

Date of delivery: **26 SEPTEMBER 2005**

Summary: **Review of decisions to award tenders for repair and maintenance work at prisons - decisions invalid at time they were made - by reason of effluxion of time and considerations of practicality relief not granted - successful appellants ordered to pay costs.**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] Nolitha Electrical and Construction (Pty) Ltd ('Nolitha') was the successful tenderer for three separate contracts with the Department of Public Works ('DPW') for work to be executed at the Drakenstein, Worcester and Helderstroom prisons respectively in the Western Cape. The work related to facilities such as steam and hot water generation, electrical infrastructure, kitchen and laundry equipment and the like. It comprised both a repair and maintenance component. The first respondent, JFE Sapela Electronics (Pty) Ltd ('Sapela') unsuccessfully tendered for the Worcester and Helderstroom contracts, while the second respondent, JFE Power Distribution (Pty) Ltd, trading as JFE Reticulation, ('Reticulation'), unsuccessfully tendered for the Drakenstein contract. Sapela and Reticulation challenged the award of the three tenders to Nolitha. The challenge was upheld in the Cape High Court by H J Erasmus J who, in addition to other relief, set aside the award of the tenders to Nolitha and declared the contracts entered into between Nolitha and the DPW to be null and void. The present appeal is with the leave of the court *a quo*.

[2] The first appellant is the chairperson of the DPW's Standing Tender Committee ('STC') which functions at the DPW's head office. The tenders in the present case were both called for and awarded by the

STC. The DPW, which is the second appellant, also has standing tender committees at each of its regional offices. The significance of these will become apparent later. The standing tender committees all exercise powers delegated to them by the State Tender Board established in terms of the State Tender Board Act 86 of 1968. The State Tender Board, the Director General of the DPW, the Minister of Public Works and Nolitha were all cited as respondents in the court below but took no part in the proceedings.

[3] Before turning to the complaints levelled at the award of the tenders to Nolitha it is necessary to describe briefly the tender process that is adopted in the case of contracts of the type in question. A consulting engineer is appointed for each contract. The function of the consultant is first to design the works and prepare the necessary documents, including specifications, drawings, and a schedule of quantities for inclusion in the tender documents. Once the tenders are opened, which takes place in public, they are scrutinized by the consultant to ensure they are complete and comply with the formal requirements of the tender documents. He also checks the priced schedule of quantities and corrects any calculation errors that he finds. Thereafter he prepares a draft report (there may be more than one) in which he sets out his analysis and assessment of the tenders as well as

his recommendations as to which should be successful. The draft is discussed with what was referred to in the papers as the 'private' project manager and ultimately finalized in the form of a report by the 'departmental' project manager which is signed by him and which contains a recommendation to the STC as to which of the tenders ought to be accepted. The private project manager in the case of all three contracts was Africon Engineering International (Pty) Ltd ('Africon'). This company was not appointed on an *ad hoc* basis. It has an on-going relationship with the DPW and has fulfilled the function of a private project manager for more than 20 years.

[4] It is convenient to begin with the Drakenstein tender. The relevant facts on which Reticulation based its attack on the award of the tender to Nolitha can be shortly stated. The repair work related to 11 installations. Installation A was headed 'Steam Generation'. Nolitha quoted a total of R146 664,00 for this part of the work. The amount was made up of a mere R4 164 for the actual repair work and R142 500 for the remainder of the items such as operating and maintenance manuals, statutory inspections and tests, logging, training and recording. The amount of R4 164 was clearly not market related. An examination of Nolitha's priced schedule of quantities revealed that it had quoted a nominal amount of R2 for each and every item of actual repair work for this installation,

hence a total of only R4 164,00. By contrast, Reticulation's quotation for the repair work was R455 719,78. The difference between the two ie R451 555,78, exceeded the amount by which Nolitha's overall tender exceeded that of Reticulation. Reticulation's tender was the second lowest. It also gained, after Nolitha, the second highest number of points calculated in terms of a points system to which I shall refer later.

[5] The reason for Nolitha tendering as it did was readily apparent. The Drakenstein tender was advertised in the Government Tender Bulletin on 12 September 2003. The closing date for tenders was 8 October 2003. Unbeknown to the STC and the DPW's head office, the DPW's regional tender committee in Cape Town had advertised for tenders on 23 May 2003 for work involving the replacement of the steam operated boilers at the Drakenstein prison with electric colorifiers. The local tender was awarded to Bambama Construction (Pty) Ltd which ultimately executed the work. The consequence of the Bambama contract was to render the repair work itemized in the schedule of quantities unnecessary. Nolitha was obviously aware of this and for this reason tendered in the manner it did.

[6] The consulting engineer for the Drakenstein contract (and the Worcester contract) was Mashura Consulting (Pty) Ltd. Mr Aslam Ogier, a director, was the engineer actually involved in the project. He prepared

several drafts for the report which the departmental project manager would ultimately be required to sign and submit to the STC. This report, as previously mentioned, contained the recommendation as to which tender ought to be accepted. Ogier's drafts were all submitted to Africon (the 'private' project manager) for discussion. Significantly, in all but one of these he recommended that Reticulation, and not Nolitha, be awarded the contract. He clearly had some knowledge of the earlier tender. In his initial drafts he referred to Nolitha's 'abnormally low' price for the repair section of Installation A and commented:

'In our opinion the low rates are misleading or the tenderer used low rates to justify a low installation cost based on the speculation that electrical heaters will replace the entire steam installation.'

Nonetheless the final draft which became the report dated 4 December 2003 and submitted to the STC by the departmental project manager recommended that Nolitha's tender be accepted on the basis that it was the lowest and gained the highest number of points. The report contained no reference to the abnormally low tender price for Installation A or to the overlapping of tenders. No explanation was given for this omission save that the acceptance of Nolitha's tender was regarded as not involving an 'unacceptable financial risk' for the DPW and there were 'insufficient grounds to out motivate Nolitha'.

[7] Reticulation's complaint was that Nolitha's tender was unacceptable and should have been rejected. It contended that by failing properly to price a section of the work Nolitha had gained an unfair advantage over other tenderers and had thereby also prejudiced the State. But before dealing with the legal principles involved it is convenient to set out briefly the circumstances of the Worcester tender which was the subject of a similar complaint by Sapela.

[8] In its Worcester tender Nolitha quoted a mere R1 606 for section 3 of Installation A. The section was headed 'Hot Water Generation'. Sapela quoted R203 964,68 for this section. As in the case of the Drakenstein tender, the amount of R1 606 was clearly not market related. The priced schedule of quantities for the section shows that Nolitha quoted a nominal price of R11 for each and every item save for two. The lowest tender was that of M & D Engineering but its tender was excluded for want of completion. Nolitha's was the second lowest and Sapela's the third lowest.

[9] Once again the reason for Nolitha quoting nominal prices for the section in question was apparent. The closing date for the Worcester tenders was 10 September 2003. Here too, unbeknown to the STC and the DPW head office, the DPW's regional office on 5 September 2003 advertised for tenders for work involving the installation of a new hot

water service at the Worcester prison. This tender was subsequently also granted to Nolitha. The effect of the latter tender was to render the repair work under section 3 unnecessary. Nolitha was obviously aware of the regional office's tender.

[10] Again the consulting engineer had knowledge of the earlier tender and appreciated the reason for the nominal amounts quoted in Nolitha's tender. The two draft reports prepared by Ogier contained the following statement.

'Abnormally low rates; lower than market related rates appear in Installation A – Hot Water Generation Systems. Average price for this installation is R194 000.00 (tenders 4 & 5) whilst Nolitha's price is R1 606.00. We are of the opinion that the reason for these low rates is due to the tenderer's speculation that some of these installations shall fall away or be part of a different PWD contract in the near future.'

As in the case of the Drakenstein tender, the final report submitted to the STC contained no reference to the abnormally low tender price for section 3 of Installation A or to the overlapping of tenders. Sapela's complaint was similar to that of Reticulation, although in this instance the amount by which Sapela's tender for section 3 exceeded that of Nolitha did not exceed the difference between the two overall tenders.

[11] The starting point is the Constitution. Section 217 reads:

'(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.'

The national legislation contemplated in ss(3) is the Preferential Procurement Policy Framework Act 5 of 2000 Act ('the Preferential Act'). In terms of s 2 an organ of state is required to determine its 'preferential procurement policy' and implement it in a framework embodying a 'preference point system'. That system, in turn, is to distinguish between contracts having a Rand value above or below a prescribed amount. In the upper category a maximum of 10 points may be allocated for specific goals relating in effect to categories of historically disadvantaged persons, 'provided that the lowest acceptable tender scores 90 points for price'. In the case of the lower category 20 points may be allocated for the specific goals referred to above, 'provided that the lowest acceptable tender scores 80 points for price'. In terms of s 2(1)(f) the contract is to be awarded to the tenderer who scores the highest points, unless

certain specified criteria justify the award to another tenderer. These criteria are not relevant to the present inquiry. The reason is that for a tender to be eligible for consideration, ie for the allocation of points, it must in terms of s 2(1) be an 'acceptable tender'. An 'acceptable tender' in turn is defined in s 1 as meaning:

'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'

It is well established that the legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. See *Pharmaceutical Manufacturers Association of SA : in re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 17 and 50; *Gerber v Member of the Executive Council for Development Planning & Local Government, Gauteng* 2003 (2) SA 344 (SCA) para 35. The acceptance by an organ of state of a tender which is not 'acceptable' within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement. This was common cause between the parties.

[12] The STC clearly awarded all three contracts on the basis of a points system as envisaged in s 2 of the Preferential Act. All three fell

into the upper category. There was, however, a dispute on the papers as to whether a document entitled ‘Conditions Pertaining to Targeted Procurement’ produced by the respondents constituted the DPW’s ‘preferential procurement policy’ and, if so, what weight was to be attributed to it. In terms of clause 4.1 of the document employers are required, prior to a detailed evaluation of tenders, to determine whether each tender is *inter alia* a ‘responsive tender’. A fairly comprehensive definition of that expression then follows. Its object, no doubt, is to give content to the concept of ‘acceptability’. But it is the latter that is the statutory, and therefore the decisive, threshold requirement. In the circumstances, it is unnecessary to resolve the dispute between the parties as to the relevance of, or the weight to be attributed to, the document. What must be decided is whether Nolitha’s Drakenstein and Worcester tenders were ‘acceptable tenders’ within the meaning of the Preferential Act.

[13] Counsel for the appellant submitted in this court that the failure on the part of a tenderer to price each and every item of the schedule of quantities did not amount to non-compliance ‘with the specifications and conditions of tender as set out in the tender documents’ within the meaning of the definition of ‘acceptable tender’. In support of this contention he referred to various provisions in the tender documents and

in particular to clause 6 to the preamble to the schedule of quantities. It reads:

‘An amount or rate shall be entered against each item in the Schedule of Quantities, whether or not quantities are stated. An item against which no amount or rate is entered will be considered to be covered by the other amounts or rates in the Schedule.

Should the Tenderer group a number of items together and tender one lump sum for such group of items, the single tendered lump sum shall apply to that group of items and not to each individual item, or should he indicate against any item that full compensation for such item has been included in another item, the rate for the item included in another item shall be deemed to be nil.’

In my view this provision and the others to which counsel referred do not assist in justifying the award to Nolitha. It is no doubt true that the failure to price each and every item in the schedule of quantities would not necessarily be fatal to the tender. But this is not the issue. Clause 7.1 of the Conditions of Tender reads:

‘We undertake to submit our Bills of Quantities with all items duly priced, extended and cast in ink together with our tender and the full set of tender documents and drawings.’

What is required is that the tender relate to the entire work itemized in the schedule of quantities. This much is clear from clause 6 to the preamble; an item not priced will be considered to be covered by the other items. But this is not the basis upon which Nolitha tendered. It

tendered nominal amounts for items covering entire sections of the work and it did so on the understanding that the work would not be required.

[14] The definition of ‘acceptable tender’ in the Preferential Act must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is ‘fair, equitable, transparent, competitive and effective’. In other words, whether ‘the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents’ must be judged against these values. Merely because each item is priced does not mean that there was proper compliance. What the Preferential Act does not permit a tenderer to do is in effect omit from his tender a whole section of the work itemized in the bill of schedules and required to be performed. A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on the premise, inherent in the tender documents, that all the work itemized in the schedule of quantities is to be performed. Whether work may later be omitted is of no consequence. What is imperative is that all tenderers tender for the same thing. By tendering on the basis that certain work will not be required a tenderer is able to reduce his price to the detriment of other tenderers, and almost certainly also to the detriment of the public purse since he is likely to load other items to the detriment of the employer.

Such a tender offends each of the core values which s 217 (1) of the Constitution seeks to uphold. It would not be a tender which is ‘acceptable’ within the meaning of the Preferential Act.

[14] It follows that in my view both Nolitha’s Drakenstein tender and Worcester tender were unacceptable and should have been rejected. It follows too that the award of those contracts to Nolitha was invalid. In view of this conclusion it is unnecessary to deal with a further ground upon which Reticulation challenged the validity of the Drakenstein tender.

[16] I turn now to the Helderstroom tender. When the tenders were opened in public it appeared that Sapela’s tender was the lowest. But after the tenders had been examined by the consulting engineer, Nolitha’s tender was reduced by no less than some R900 000 as a result of what was said to be ‘arithmetical errors’. The effect was to make Nolitha’s tender the lowest. Not surprisingly this caused some disquiet amongst the other tenderers. However, the main thrust of the attack on the award of the contract to Nolitha related to something different.

[17] It appears that Nolitha misunderstood two items in the schedule of quantities (items 100.2 and 100.3) requiring the maintenance of a call centre. It quoted for the maintenance of the call centre itself instead of the cost of being in a position to receive and respond to call-outs for the

repair of electrical and mechanical installations at the prison. The error was reflected in the amounts quoted for these two items. While Sapela and another tenderer, M & D Engineering, quoted under R20 000 for both items, Nolitha quoted R1 693 000 for the one item and R63 000 for the other.

[18] In four draft reports dated respectively 17 October, 30 October and 31 October 2003 (two are dated 31 October) the consulting engineer, B N Buziba & Associates Cape CC, recommended that Sapela's tender, being the second lowest, be accepted. In the drafts the engineer referred to the unbalanced nature of the Nolitha tender and expressed the view that the acceptance of the tender would involve 'a substantial financial risk to the Department'. On 6 November 2003 the engineer wrote to Africon expressing the view that Nolitha had 'misunderstood the meaning of items 100.2 and 100.3' and that it had 'under-quoted on most of the remaining maintenance items for Installations A to P'. The following day, 7 November 2003, the engineer wrote to Nolitha regarding these items and suggested that:

'. . . these two maintenance items be measured monthly as a weighted average (according to value) of the achieved scores on all the installations.'

Nolitha's acceptance of the suggestion was subsequently (but on the same day) recorded in writing and signed on behalf of Nolitha on the

same letter. The final report dated 17 November 2003 addressed by the departmental project manager to the chairman of the STC recommended that Nolitha's tender be accepted. It contained no reference to the comments adverse to Nolitha in the engineer's earlier drafts.

[19] It is well established that a tender process implemented by an organ of state is an 'administrative action' within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). See eg *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para 5 and the cases there cited. As observed by Cameron JA 'This entitled the appellant . . . to a lawful and procedurally fair process . . . .' What is fair administrative process 'depends on the circumstances of each case' (s 3(2)(a) of PAJA). In *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) para 13 Conradie JA said:

'It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

In the present case, what in effect occurred is that Nolitha's tender, with the latter's written consent, was adjusted by the reallocation of an

amount over-quoted for one, or rather two items, to ‘most of the remaining maintenance items for Installations A - P’ for which Nolitha had under-quoted. The effect was apparently to convert a tender from one regarded by the engineer as unbalanced and a financial risk to one which was acceptable. But the offer made by Nolitha, as embodied in its tender, was not the one ultimately accepted. What was accepted was in truth an offer that was made on 7 November 2003, some two months after the closing date for tenders. In my view this was enough to strip the tender process of the element of fairness which requires the equal evaluation of tenders. It follows that the acceptance of the Nolitha tender and the award of the contract were correctly held by the court *a quo* to be reviewable.

[20] However, that is not the end of the matter. Had the application in the court below been adjudicated when proceedings were launched Sapela and Reticulation (‘the respondents’) would no doubt have been entitled to the relief they sought. But given the inevitable effluxion of time and the extent of the work performed by Nolitha between the launching of proceedings and the granting of judgment, the question that arises is whether the relief sought, and granted, was capable of practical implementation. It is necessary first to trace briefly the events between the award of the tenders and the judgment of the court *a quo*.

[21] The Helderstroom tender was awarded to Nolitha in early December 2003. The Drakenstein and Worcester tenders were awarded on 19 January 2004 and early February 2004 respectively. On 8 December 2003 Sapela wrote to the Ministry of Public Works expressing its concern about the adjudication of tenders and seeking an urgent meeting. There was no response. On 15 January 2004 Reticulation wrote to the Department of National Treasury in which it raised similar concerns regarding the tender process. The National Treasury responded in a letter dated 20 January 2004 and enquired whether Reticulation had asked the DPW for reasons for the award to Nolitha. Reticulation replied the same day, saying that without sight of the tenders themselves the reasons would be of little assistance. Also on 20 January 2004 the respondents lodged a complaint with the Public Protector. The latter responded on 22 January and suggested that the respondents request the DPW to suspend the award of further contracts pending receipt of information to enable them to consider their options. On 26 January Sapela requested reasons from the DPW for the decisions not to award the respondents the Helderstroom, Worcester and Drakenstein tenders. In addition it sought information and documents, such as engineers' reports, to enable it to evaluate those reasons. Also on 26 January it addressed another letter to DPW

requesting that the award of the Drakenstein prison be suspended until the requested information had been received. On 2 February 2004 the respondents received three letters from the DPW. The reasons given for the acceptance of Nolitha's tenders consisted of little more than a bald statement that Nolitha had scored the highest number of points. The information and copies of the documents requested were refused on the grounds of privilege. In the third letter, dated 2 February 2004, the DPW stated that the request to suspend the handing over of the Drakenstein site to Nolitha could not be considered. At that stage the respondents consulted attorneys. On 4 February the latter wrote to the DPW requesting information in terms of the Promotion of Access to Information Act 2 of 2000 regarding the award of the tenders to Nolitha. A response was received on 26 February 2004 but the information furnished was insufficient to enable the respondents to evaluate their position. The next day, 27 February 2004, the respondents launched the review proceedings which are the subject of this appeal.

[22] The application was brought as a matter of urgency and was set down for hearing on 4 March 2004. As the matter was opposed, it could not be heard on that day and by agreement it was referred to the semi-urgent roll for hearing on 24 May 2004. The first and second respondents (now first and second appellants) were ordered to dispatch

‘the records of the proceedings’ to the Registrar on or before 23 March 2004. On 6 April 2004 the respondents gave notice of their intention to apply on 24 May 2004 for an order restraining the DPW from giving access to any new installations to perform work pending the final determination of the review proceedings. In the event the interdict was not sought.

[23] Judgment was delivered on 12 July 2004. Erasmus J observed that by the time the application was heard in May 2004 much of the repair work pursuant to the respective contracts would already have been done. But, he said, the maintenance component of the contracts remained and the disruptive effect of declaring the contracts null and void could ‘be mitigated by suspending the coming into operation of the orders made so as to enable the parties to make appropriate arrangements for phasing out of work on the tenders, and completing particular facets of work which are incomplete’. Whether this was at all practical was not considered.

[24] When the appellants applied to the court *a quo* for leave to appeal the respondents countered with an application for an order in terms of Rule 49 (11) to the effect that pending the appeal the orders made in the court’s judgment of 12 July 2004 were not to be suspended but were to be put into effect as from 1 February 2005. The reason for the latter date

was that by then all the repair work would have been completed. What the respondents had in mind was that the maintenance component be separated from the repair component. The application was, however, refused. Erasmus J pointed out that both components had been the subject of a single tender and were to an extent inextricably interrelated; for example, the 12 month guarantee furnished by Nolitha covered all equipment and parts supplied and installed and formed an essential part of the maintenance programme. The extent of the maintenance would, no doubt, also depend upon the quality of the repair work. By now, of course, a substantial part of even the maintenance period has expired.

[25] Counsel for the appellant submitted that the court *a quo* ought to have declined to set aside the contracts, if for no other reason because it was not possible to reverse what had already been done, and because by the time judgment was delivered it was no longer practicable to start the tender process over again for the outstanding work. It was submitted further that this state of affairs was attributable to the respondents' failure to institute review proceedings timeously and to seek an interim interdict preventing the work from proceeding.

[26] There is no merit in counsel's further submission. Within a day or two of becoming aware of the award of the Helderstroom tender the respondents wrote to the Ministry expressing their concern over the

tender process. As early as 26 January 2004 they wrote to the DPW requesting the documents necessary to enable them to ascertain their rights with regard to a possible review. The request was refused. A subsequent attempt to invoke the provisions of the Promotion of Access to Information Act was similarly unsuccessful. Ultimately they were obliged to institute proceedings even before they were fully apprised of the facts necessary to substantiate the review. The documents they sought were eventually furnished to them on 23 March 2004, almost two months after their initial request. It was only then that they were able to file a supplementary affidavit properly substantiating the relief they sought. In my view they were not in any way to blame for a delay in initiating proceedings or bringing them to finality. Nor were they at fault for failing to stop the work from proceeding. The DPW made it quite clear in correspondence that it was not prepared to suspend the work or to withhold from Nolitha access to any of the installations. It is true that the respondents did not proceed with their threatened interdict but, as explained in the replying affidavit, access to all the installations had by then (10 April 2004) been granted to Nolitha. Any application for an interdict would in any event have been opposed by the appellants.

[27] However, the appellants' stance on the impracticability of attempting to start the tender process over again for the completion of

the remaining work strikes me as correct. As observed by Erasmus J, the repair and maintenance components of the contracts are interrelated. The order of the court *a quo*, if implemented, is likely not only to be disruptive but also to give rise to a host of problems not only in relation to a new tender process but also in relation to the work to be performed.

[28] In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 SCA para 36 at 246D:

'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. See eg *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); see also s 7(1) of PAJA which gives statutory recognition to the rule. In a sense, therefore, the effect of the delay is to 'validate' what would otherwise be a nullity. See *Oudekraal Estates (Pty) Ltd*, *supra*, para 27 at 242E-F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule

is not to punish the party seeking the review. Its *raison d'être* was said by Brand JA in *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at para 46 to be twofold:

'First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.'

Under the rubric of the second I would add considerations of pragmatism and practicality.

[29] In my view, the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court *a quo* correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards. It follows that in my view the court *a quo* erred in making the order it did and this court is free to set aside that order.

[30] I turn to the question of costs. It is clear that the respondents' attempts to finalise the review as quickly as possible were frustrated by the appellants' refusal to let them have the necessary information and documentation. This was made available only on 23 March 2004. It is

also clear that the appellants were not prepared to delay the handing over of the sites or the execution of the work pending the receipt by the respondents of the necessary information. In the event, the respondents took the risk of launching proceedings even before they were able to properly substantiate their grounds of review. This they did in a supplementary affidavit filed after receipt of the information. Had the matter been adjudicated when the review proceedings were launched it would in all probability still have been practicable to grant the respondents relief. Through no fault of their own this is now denied them. It is true that in the answering affidavit filed on behalf of the appellants the point was taken that the matter had become academic, but the main thrust of their resistance to the relief sought both in this court and in the court below was always that the respondents' complaints had no substance. In the special circumstances of the case it seems to me to be appropriate for the appellants to be ordered to pay the respondents' costs both in this court and in the court below.

[31] The following order is made:

(1) The appeal is upheld. The first and second appellants are however ordered to pay the costs of appeal of the first and second respondents.

(2) The order of the court *a quo* is set aside and the following is substituted in its place:

‘(i) The application is dismissed.

(ii) The first and second respondents are ordered to pay the costs of the first and second applicants.’

_____
D G SCOTT
JUDGE OF APPEAL

CONCUR:

CAMERON JA
MTHIYANE JA
LEWIS JA
MAYA AJA