Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: **1250/2021**
DATE HEARD: **15 NOVEMBER 2021**
DATE OF REASONS: **12 AUGUST 2022**

In the matter between:

DEFENSOR ELECTRONIC SECURITY (PTY) LTD Applicant

and

THE MEC FOR COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS, NORTHERN CAPE PROVINCE First Respondent

MASICEBISE BUSINESS SOLUTIONS (PTY) LTD Second Respondent

Coram: Nxumalo J *et* Erasmus AJ

REASONS FOR THE ORDER GRANTED

Per: **NXUMALO J:**

INTRODUCTION:

1. The applicant in these proceedings is Defensor Electronic Security (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of

South Africa. The first respondent is a member of the Executive Council responsible for the Northern Cape Department of Cooperative Governance, Human Settlements and Traditional Affairs. The second respondent is Masicebise Business Solutions (Pty) Ltd, also a company registered and incorporated in terms of the company laws of South Africa.

2. It is common cause that the second respondent was the successful bidder of tender number NC/06/2021, which was published by the first respondent on 16 April 2021. The tender pertained to the appointment of a service provider to render security services for the department at certain of its offices. It is also common cause that the applicant and other tenderers unsuccessfully participated in the said tender process. It is further common cause that the applicant was informed of the said result on 31 May 2021. This application was thereafter urgently lodged on 06 August 2021, in terms of rule 6(12) of the Uniform Rules of Court. Pursuant to a directive of this Court, the application was postponed to 15 November 2021, for adjudication by a full bench of this Court.

3. The applicant's motion *inter alia* sounded as follows. That the motion be heard as an urgent one in terms of the provisions of rule 6 (12) of the Uniform Rules of Court and that the necessary condonation be granted to the applicant in respect of non-compliance with the prescribed time limits, forms and service. That the decision of the first respondent to disqualify the applicant in respect of tender NC/06/2021: Appointment of a service provider to render security services to the first respondent be declared constitutionally invalid, reviewed and set aside. That the decision of the first respondent to award the impugned tender to the second respondent be declared constitutionally invalid, reviewed and set aside. That the tender be awarded to the applicant. That the first respondent be ordered to pay the applicant's costs, alternatively and only in the event that the motion is opposed by both respondents, that they jointly and severally be ordered to pay the applicant's costs. Lastly, that the applicant be granted further and/or alternative relief as the Court deems meet.

4. The respondents were *inter alia* enjoined to enter an appearance on or before Friday, 25 June 2021 and to thereafter deliver their answering affidavits on or before Wednesday, 21 July 2021. The motion was predicated against founding, supplementary and replying affidavits. The first respondent delivered answering and supplementary answering affidavits to resist the motion and prayed that the same be dismissed with costs. The second respondent, for its own part, did not oppose the motion.

5. On 15 November 2021, the motion was adjudicated urgently in terms of the provisions of rule 6 (12) of the Uniform Rules of Court and the necessary condonation was granted to the applicant in respect of non-compliance with the prescribed time limits, forms and service. Thereafter, having heard counsel for the applicant and the first respondent and having read and considered the documents delivered of record; this Court thereupon declared the first respondent's decision to disqualify the applicant in respect of the impugned tender constitutionally invalid, reviewed and set aside. The impugned decision to award the tender to the second respondent was contemporaneously declared constitutionally invalid, reviewed and set aside. The applicant's and second respondent's bids were remitted to the first respondent to be re-evaluated on price. Lastly, the first respondent was ordered to pay the applicant's costs, which costs included costs consequent upon the employment of two counsel.

INTERLUDE:

6. On 29 November 2021, the second respondent delivered a notice requesting this Court to provide reasons for the above-mentioned order. Meanwhile, notwithstanding the abovementioned order, the second respondent continued to render services to the first respondent. Consequently, the applicant was constrained to launch a second urgent motion which was subsequently abandoned because the first respondent on or about, 26 April 2022, in writing notified the second respondent of its intention to terminate its impugned services by 31 May 2022. The first respondent contemporaneously indicated

that it intended to appoint the applicant with effect from 01 June 2022, in substitution.

7. The second respondent, in reaction to the foreshadowed termination of the impugned contract, on or about 19 May 2022, launched an urgent motion which was heard by Mamosebo J, on 27 May 2022.[1] In that urgent motion, the second respondent sought an interim interdict restraining the first respondent from terminating the impugned contract, pending the adjudication and finalisation of a review application foreshadowed in Part B of its notice of motion. Mamosebo J reserved judgment and thereafter handed the same down on 31 May 2022, dismissing Part A of the motion with costs. Consequently, Part B of that motion is still pending before this Court.

BRIEF STATEMENT OF THE RELEVANT FACTS:

8. It is common cause that the first respondent published an invitation to tender on 16 April 2021, with a closing date of 07 May 2021. The applicant and others duly and timeously submitted their tenders. According to the tender notice and invitation to tender, there were certain peremptory requirements that had to be complied with and a functionality assessment was applicable. The tenderers had to score at least 75 points or more to be evaluated on price.

9. It is significant to point out that the specified rates generically make provision for the total direct costs of a security guard and a 40% share of overheads, which is an amount charged by a security company to a client. Paragraphs 3. 1 and 3. 2, of the invitation to tender, regulating pricing, expressly stipulate as follows:

> *"3 PRICING*
>
> *The following conditions shall be applicable and form an integral part of the bid:*
>
> *3.1 For purpose of this contract, use will be made of the relevant category security officers, as defined in the order made in terms of section*

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[1] **Masicebise Business Solutions v The MEC: Cooperative Governance Human Settlement & Traditional Affairs NC Province and Another** (992/2022) [2022] ZANCHC 31 (31 May 2022)

51A(2) of the Labour Relations Act... as published Government Gazette No. 25075 dated 13 June 2003.

3.2 It is expected that the contractor shall pay his/her employees at least a minimum monthly basic wage, as prescribed for the Area concerned in the Basic Conditions of Employment Act 75 of 1997: Sectorial Determination 6: Private Security Sector, South Africa (Government Gazette No. 29188 dated 1 September 2006."

10. A copy of the minutes of the Bid Evaluation Committee ("**BEC**") meeting held on 25 May 2021, was annexed as "SA12" to the founding papers. In respect of the applicant, the following is stated in the said minutes:

"*Defensor Security submitted a bid price of R33 601 781.25 for consideration by the Department, scored 90 points for functionality, SARS compliant, CSD compliant status report, BBBEE Level 1, form of offer completed and signed; PSIRA certificate declared valid and in order, submitted three (3) years financial statements, submitted Department of Labour certificate and completed their NCB forms. Meet functionality requirement hence considered responsive.*"[2]

11. On the same page, the following is also stated in the minutes:

"*Presentation of PSIRA rates schedule as at March 2021:*

The presenter informed the BEC that the following service provider charged rates not in line with PSIRA and they are:

- *Sothembela Security Services;*
- *Quivor Security Services;*
- *Alma Mater Security Services; and*
- *Defensor Security.*"

ISSUES FOR DETERMINATION:

12. It is common cause that on 31 May 2021, the first respondent informed the applicant that its bid proposal was unsuccessful as same was considered unresponsive. The reason why the said proposal was deemed unresponsive, according to the first respondent was because the applicant's unit price *per*

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2 At para 10

security guard charged was inconsistent with the "*unofficial*" PSIRA[3] rates as at March 2020 and 2021, which posed a serious risk for the first respondent.

13. It can therefore be deduced from the foregoing that after all had been said and done, the following issues congealed for determination before this Court, to *wit*: (a) whether the application was urgent; and (b) whether the mere fact that the applicant's tendered price was below PSIRA rates *ipse jure* rendered same non-responsive. These issues were then adjudicated in turn thus.

Whether the application was indeed urgent

14. In urgent applications, the Court or a Judge may dispense with form and service provided for in the rules and may dispose of such matter at such time and place and in such a manner and in accordance with such a procedure (which shall be as far as practicable be in terms of the rules) as it deems fit.[4] Rule 6(12)(b) expressly stipulates that in every affidavit or petition filed in support of any urgent application, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course.[5]

15. As far as the issue of urgency is concerned, the applicant contended as follows. It only became aware of the impugned award on 31 May 2021. After consultation with its legal representatives on 8 and 15 June, this application was drafted on 15 to 16 June 2021 and settled on 18 June 2021. Since the tender is for a limited period of 36 months, any relief sought by it will become completely academic after the expiry of the said period. If this application was launched in the ordinary course, it would have had the effect that at least a third of the tender period would have lapsed before the hearing of this application.

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3 Private Security Industry Regulatory Authority
4 Rule 6 12) (a)
5 See also **Luna Meubel Vervaardigers v Makin** 1977 (4) SA 135 (W)

16. That to the extent that the application implicates and vindicates a constitutional right, it is inherently urgent since the applicant will not be able to vindicate such right in the ordinary course. The applicant also contended that it was most impossible for it to launch an application for an interim interdict to prevent the first respondent from implementing the tender, pending the final determination of a review application. The applicant submits that this is so since, in such an application, it would have been required to demonstrate exceptional circumstances. In addition, the first respondent would have undoubtedly alleged that the balance of convenience favoured it as a result of the fact that it required security services on a continuous basis. The urgency of the matter notwithstanding, it has laid down reasonable time frames for the delivery of the record and answering affidavits. The parties were also able to timely deliver comprehensive heads of argument for the benefit of this Court, to which it is grateful.

17. The first respondent did not seriously argue against the notion that the motion was urgent, nor did it allude to any prejudice suffered or that might be suffered if the matter was to be adjudicated urgently. All it stated in this regard is that the applicant had not made out a case for urgency because it had ample time to apply for interim relief which could have prevented the second respondent from assuming the performance of the impugned contract on 01 July 2021. It behoves repetition that that the application was initially launched on 06 August 2021.

18. This Court disagreed with the respondent. Conversely, it agreed with the applicant that to the extent that the purpose of the relief sought was to vindicate a constitutional right, it will not be able to do so in the ordinary course. It is now settled law that where allegations are made relating to abuse of power by any public official or organ of state, which may impact upon the rule of law and may have a detrimental impact on the public purse, the relevant relief ought normally to be urgent.[6]

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[6] **Apleni v President of the Republic of South Africa** [2018[1 All SA 728 (GP) para [10] [also reported at [2018] JOL 39179 (GP) – Ed]

19. This Court also found that the motion is commercially urgent. If this application was launched in the ordinary course, it would have had the effect that at least a third of the tender period would have lapsed before the hearing of this application. Urgency in our law does not only relate to some threat to life or liberty, but also to commercial interests which may justify the invocation of rule 6(12), no less than any other interests.[7]

20. Even if the applicant for a moment was dilatory in lodging this application, lateness of and by itself does not *ipso facto* derogate urgency. It is so especially regard being had to the fact that the degree of relaxation of the rules and the ordinary practice of the Court was reasonable and commensurate to the degree of urgency, regard being had to Sections 34, 36 and 39 of the Constitution.[8] In the result, this Court found that, regard being had to the facts and circumstances of this case and regardless of the previous postponement, the motion remained urgent.

Whether the mere fact that the applicant's tendered price was below PSIRA rates *ipse facto* rendered same non-responsive

21. According to the applicant, the basis for the first respondent's finding that the applicant tender was non-responsive is fundamentally flawed. This fundamental flaw, according to the applicant, is evinced from the first respondent's conclusion that the applicant's tendered price was below PSIRA rates. The applicant contended that the first respondent made this finding notwithstanding the fact that there was no mandatory requirement in the invitation to tender that prescribed a minimum tender price. According to the applicant, neither the PSIRA Act[9] nor the Private Security Industry Regulations, prescribe a minimum amount that must be charged by a security

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7 **Stock v Minister of Housing** 2007 (2) SA 9 (C) 12I-13A.

8 Section 34 of the Constitution expressly grants everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or where appropriate, another independent and impartial tribunal of forum. Section 36, for its own part stipulates how and to what extent certain rights in the Bill of Rights may be limited. Section 39(1), on the other hand enjoins our Courts, Tribunal and forum, when interpreting the Bill of Rights to *inter alia* promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

9 Private Security Industry Regulation Act 56 of 2001.

company to a client. According to the applicant, all that PSIRA does from time to time is to issue circulars indicating costing guidelines.

22. The applicant also contended that to the extent that it was nowhere prescribed in the tender that an applicant may not tender below a specific rate, it was consequently not a mandatory provision of the tender that a tenderer will be found to be non-responsive, on that basis alone. That it is so since the said costing guidelines are published merely to provide guidance to both security companies and their clients as to what is considered reasonable fees (guidelines) for security services. According to the applicant, the only reason why the starting point of the costing guideline is the prescribed minimum wage is simply because security companies are required to pay a minimum wage to their employees. What remained to be added to the minimum wage was the "*share of overheads*" of each security company.

23. The applicant further contended that the first respondent's finding that its tender was non-responsive because it allegedly charged prices which are inconsistent with the prescribed PSIRA rates, is patently informed by a fundamental irregularity in the evaluation and adjudication of its bid. That it is so since, whilst the prescribed rates make provision for the total direct costs of a security guard and a 40% share of overheads, the first respondent failed to take into consideration the variation of the amount charged by a security company to a client. That it is not prescribed in any legislation what the minimum amount is that a company may charge a client. That the fact that the applicant is an established security company with an established infrastructure and footprint within the area where the first respondent required the security services enabled the applicant to reduce its overheads.

24. According to the applicant further, the first respondent clearly applied different and preferential principles when the second respondent's tender was evaluated. In doing so, the first respondent discriminated against the applicant in an unlawful and unconstitutional manner which renders the said administrative process irregular and susceptible to being declared invalid and set aside. The applicant furthermore contended that the manner in which the

first respondent evaluated the second respondent's tender as compared to the applicant's demonstrates bias or at least reasonably suspected bias. That if the first respondent was not biased, it would also have found the second respondent non-responsive because its tender price was below the tendered price of the applicant. This outcome, according to the applicant, is paradoxical, regard being had to the fact that the second respondent tendered an amount which is less than its own. The applicant, for its own part, had quoted an amount of R33, 601 781.25.[10]

25. In this regard, the applicant relied on the provisions of Section 6(2)(a)(ii) of **THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT** 3 of 2000 ("**PAJA**"). As far as the finding of the first respondent that the applicant's tender was non-responsive is concerned, the applicant relied on Section 6(2)(d) of PAJA. In respect of the first respondent's failure to disqualify the second respondent, the applicant relied on Section 6(2)(c) of PAJA. These said Sections expressly and respectively empower this Court to review an administrative action if the administrator who took it acted under a delegation of power which was not authorised by the empowering provision;[11] or the action was materially influenced by an error of law;[12] or the action was procedurally unfair.[13]

26. The applicant also contended that the first respondent's procedural irregularities consisted primarily of distinct errors in the process of adjudicating the impugned tender. First, the tender of the applicant was excluded from further consideration upon the first respondent erroneously finding that the applicant's tender was non-responsive. This on the basis that the unit price charged per security guard was inconsistent with PSIRA rates. According to the applicant, the said finding was outside of the power of the first respondent because no such mandatory prescribed requirement appears in the tender specifications or otherwise.

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10 GP3, p30, Vol 1
11 Section 6 (2)(a)(ii)
12 Section 6 (2)(d)
13 Section 6 (2)(c)

27. It also contended that the impugned finding was also patently incorrect, for the following reasons. The PSIRA rates are merely guidelines and nothing more. There is no mandatory provision in the tender that precluded tenderers from tendering below PSIRA rates. The first respondent completely failed to appreciate that the PSIRA's guideline prices consist of a minimum wage of a security guard as determined in terms of sectoral determination in terms of **THE BASIC CONDITIONS OF EMPLOYMENT ACT** 75 of 1997 and a 40% share with regard to the overhead costs of a security company.

28. According to the applicant, if the required additional contributions are added to the total payment that has to be made to a grade C security guard in an urban area which amounts to R12 507.03, the total cost to the company for the said security would amount to R13 423.17. When the 40% overheads are added, the total amount comes to R18 792.44. In the premise, the applicant contended that it did not charge a rate below the total minimum direct costs per security guard.

29. Regard being had to the foregoing, the applicant contended that its tendered price was significantly above the prescribed minimum and only marginally below PSIRA's guideline prices, which include the 40% share, pertaining to overheads. In the premise, it contended that there was no rational basis for the statement that the applicant posed a risk to the first respondent to appoint the applicant simply because its rate was below the PSIRA rates. According to the applicant, the reason given by the first respondent to disqualify it from the tender process was therefore patently informed by a fundamental irregularity in the evaluation and adjudication of the applicant's offer to tender. That it is so since the applicant did not, charge a unit price which was inconsistent with PSIRA rates.

30. The applicant also contended that the first respondent ought to have disqualified the second respondent instead on the basis that the second respondent failed to comply with certain mandatory requirements. That even if the first respondent honestly believed that the applicant's tender was non-responsive because its tendered amount was too low, it did not make any

sense for the first respondent to then proceed to award the impugned tender to the second respondent. The applicant said it is so since the first respondent's tendered price was below its own. That the second respondent's tender ought to have been disqualified based on the fact that it could not have passed the mandatory requirements of the tender and its tender could not have passed the mandatory threshold score of 75, in respect of functionality. This aspect, according to the applicant, rendered the procurement unconstitutional, in that the first respondent discriminated unjustifiably against the applicant. This infringed on its fundamental right entrenched in Section 9 of the Constitution.[14]

31. The applicant also contended that the two answering affidavits delivered by the first respondent advanced various new reasons why the applicant was found to be non-responsive. That to the extent that these new reasons appear nowhere from the record, same were simply an afterthought that sought to justify what was patently an irregular and constitutionally invalid decision. That the appropriate remedy in the circumstances was to refer the evaluation of its tender and that of the second respondent back to the first respondent for reconsideration.

32. In sum, according to the first respondent, the foregoing tenderers were disqualified on the basis that same were allegedly non-responsive because the respective unit prices charged by the said tenderers *per* security guard were inconsistent with the unofficial PSIRA[15] rates, as at 2020 and 2021, which posed a serious risk for the first respondent. It is apparently for this singular reason, according to the first respondent, its BEC[16] concluded that the second respondent was the only bidder that complied with all the conditions of the tender with an amount of R32 277 866.24, as its tendered price.

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14 In terms of Section 9 (1) of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law

15 Private Security Industry Regulatory Authority

16 Bid Evaluation Committee

33. The applicant's tendered price for dayshift grade C security guards amounted to R16 500.00 and R 16 700.00, for nightshift. In terms of PSIRA's unofficial pricing structure for 2021, with effect from March 2021, different grades of security guards and categorises areas between 1 to 3, are specified. Areas 1 and 2, being urban areas and 3 being rural. The minimum rate for security guards in respect of urban areas is slightly higher than the prescribed rates for rural areas.

34. Annexure SA13, is a document compiled by the first respondent that contains a summary of the tendered prices of all the tenderers including the "*PSIRA rates as at March 2020 and as at March 2021*". Annexed to the founding papers is also annexure SA14, the contract pricing structure effective March 2021, as published by PSIRA. Of significance, is that a specific distinction is made between urban areas and rural areas. In urban areas, guards are generally paid more as compared to rural areas. There is also a distinction between the different grades of security guards.

35. The first respondent reflected the minimum rates in respect of urban areas as R18 328.86 and in respect of rural areas as R17 889.91. According to the applicant, whilst it was not entirely clear where the first respondent obtained the exact figures referred to by it, the mistake made by the first respondent is fairly obvious. It said it is so since the prescribed PSIRA rates has a subtotal containing the specific minimum payment that has to be made to a security guard; the total direct costs; and the share of overheads. The prescribed PSIRA rates has a subtotal containing the specific minimum payment that has to be made to a security guard, the total direct costs and the share of overheads.

36. The minimum salary that has to be paid to a grace C security guard in respect of an urban area was consequently R13 423.17. The minimum salary that should be paid to a grade C security guard in respect of a rural area is R12 883.49. The "*share of overheads*" is calculated as a 40% of the direct costs that will have to be expended by a security company to enable it to render the services. This 40% is merely to calculate what is considered to be

a reasonable rate charged by a security company. This amount is not paid to a security guard.

37. It is obvious, according to the applicant, that the "*share of overheads*" will be different for each and every security company. There is an obvious advantage to a company with an established infrastructure. Where a security company has been in business for a long period (like the applicant) the overhead costs can be reduced significantly. It would be so, according to the applicant, since there would be an obvious saving where the applicant already owns vehicles, buildings, firearms and equipment.

38. That the rates charged by the applicant in the tender includes the minimum payment that will have to be made to the security guards, the share of overheads calculated by the applicant and the profit of the applicant. The applicant can easily calculate its overhead costs. Over the years the applicant has developed a specific model that makes it easy to calculate the applicant's overhead costs. This makes it easy for the applicant to calculate the total rate that will then include the applicant's profit.

39. According to the applicant, based on the aforesaid, there was simply no basis for the first respondent to disqualify the applicant based on the allegation that the applicant's rates were too low. What is prescribed in the PSIRA rates is the minimum payment that has to be made to a security guard. It is most certainly not prescribed by PSIRA that a security company is obliged to allocate 40% of its share of overheads to each security guard. Equally important, the bid specifications also did not require the 40% overheads in the rates per security guard in the tenders.

40. It is against this backdrop that the applicant contended that the statement made by the BEC that the applicant charged rates not in line with PSIRA, was patently incorrect. In the premise, the applicant contended that the finding of the first respondent that its tender was non-responsive simply had no factual basis and certainly no empowering provision to have made the finding exists. Consequently, according to the applicant, the foregoing constitutes a

reviewable irregularity in the tender process.

41. It is trite in our law that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on motion, if the facts as stated by the respondent together with the facts alleged by the applicant, that are admitted by the respondent, justify such an order.[17]

42. The first respondent, for its own part, averred and contended *inter alia* as follows. That **THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT** 5 of 2000 (the "**PPPFA**") gives effect to Section 217 (3) of the Constitution and provides the framework for implementation of procurement policy contemplated in Section 217 (2).[18] The implementation of the PPPFA is in turn enabled by the Preferential Procurement Regulations (the PPR). The PPR regulates bids based on functionality as a criterion.[19]

43. The first respondent contended that the applicant was evaluated on two aspects; to *wit*: pricing in terms of PSIRA rates and maintenance of its security system. With regard to the latter, the applicant charged R1.4 million, whilst the second respondent did not charge anything. With regard to the former, according to the first respondent, the implication of charging rates below the relevant PSIRA rates was that the applicant would have paid its security personnel salaries that are less than those prescribed by the said authority,

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17 **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634

18 Section 217 (1) of the Constitution, provides as follows:
"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."
Section 217 (2), for its own part expressly stipulates that section 217 (1) does not prevent the said organs of state or institutions from implementing a procurement policy 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.

19 *Cf* the relevant parts of the said Regulation 8, stipulates as follows:
"(1) An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.
(2) ....
(3) the total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000, not exceed 90 points.
(4) ....
(5) ...
(6) ....
(7) Preference for being an HDI and/or subcontracting with an HDI and/or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price."
(Emphasis supplied)

thereby posing a risk to the first respondent, in that it would disrupt the supply of services by disgruntled employees.

44. The first respondent also averred and contended as follows. That the mandate of PSIRA is derived from **THE PRIVATE SECURITY INDUSTRY REGULATION ACT** 56 of 2001. The primary objective of the said authority is to regulate the private security industry and to exercise effective control over the practice of the occupation of security service providers in the public and national interests and in the interest of the private security industry itself. At present, more than ten thousand two hundred security businesses are registered with PSIRA.

45. That the costing guideline issued by PSIRA from time to time is therefore published to provide security companies and their clients (or prospective clients) with guidelines as to what constitutes reasonable fees for security services. The basis of the costing guidelines is the prescribed minimum wage as determined by relevant legislation. Statutory non-negotiable amounts are then added followed by an estimated share of overhead costs, which historically amounts to 40%.

46. That the implications of this costing guideline are that a security company not charging the same amount as the PSIRA costing guidelines would not be able to pay the minimum prescribed wage; or the non-negotiable statutory amounts and would not be able to cover the overheads of the security company. The security company would also not be able to make a profit. That a security company charging an amount less than the PSIRA guideline is walking a thin line. That it so since any unforeseen circumstance or expense could result in a loss unless the security company pays its employees less than the prescribed minimum wage, ceases to make the non-negotiable statutory contributions or reduces its overheads.

47. That the foregoing is relevant in the adjudication of the bids for rendering security services because PSIRA, is uniquely positioned to be able to advise an entity such as the first respondent through costing guidelines. That a

company willing to accept the minimum PSIRA rates or less will in all probability be able to pay the minimum prescribed wage, statutory contributions and cover overheads. Nothing more. That the risks associated with such an arrangement and the acceptability of such risks for all the parties involved are left for the parties to decide.

48. That the unsatisfactory ramifications in these circumstances for the first respondent are obvious. Having a security company that can at best break even does not bode well for consistent satisfactory service delivery. That a security company that operates at a loss creates even greater service delivery concerns. All too frequently, employees of loss-making companies have been forced to bear the brunt of the loss by having their wages reduced. A contract workforce consisting of hard done by security guards charged with protecting the employees and premises of the first applicant would pose obvious risks to the first respondent.

49. Whilst it was common cause that the applicant's tendered price for dayshift grade C security guards amounted to R16 500.00 and R16 700.00, for nightshift, the said 2020 rates were used only because at the time the invitation to tender was published, the 2021 rates had not yet been published. The "*unofficial*" rates which took effect in March 2021 were R17 406.13, for urban areas and R16 593.46, for rural arears. The undercharging of the applicant was considered a risk by the applicant because it implied an underpayment in salaries of security personnel. The mere fact that a tenderer is functionally responsive does not automatically qualify such a tenderer to be awarded the tender.

50. It would not be in the public's best interest and contrary to Section 217 of the Constitution, for an organ of state to pay an amount exceeding what is considered reasonable within a certain industry. On the other hand, paying an amount which in all probability would result in a bidder being unprofitable would also not be in the best interest of the public as consistent service delivery would be at peril. That the decision to consider a bid price below a pre-determined amount as unresponsive is rational as it would prevent the

awarding of contract to bidders at prices that is clearly not sustainable. It is so regard being had to the provisions of the Preferential Procurement Regulations, in terms of which an accounting officer or authority is enjoined to ensure that the prices paid for services are market-related. This decision is also in line with the empowering provision as stated in paragraph 1.2.27 of the tender document.

51. That paragraph 3. 7 of the invitation to tender, also requested bidders to take cognisance of and make provisions for the new security sector rates as published by PSIRA, at the commencement of the contract in their pricing structure. Paragraph 1.2.27, on the other hand, stipulated that a responsive tender is one that conforms to all the terms and conditions of the tender, without material deviation or qualification.

52. A material deviation or qualification is deemed to be one which, in the employers' opinion, would detrimentally affect the quality, service or supply identified; significantly change the employer's or the tenderer's risks and responsibilities under the contract; or affect the competitive position of the other tenderers presenting responsive tenders if it were to be rectified. In terms of this provision, a tender that is deemed unresponsive must be rejected and not allowed to be made responsive by correction or withdrawal of the non-conforming deviation or reservation.[20]

53. In the premise, the first respondent submitted that PSIRA with more than 10 200 members has a membership that is representative of the security service industry such that it is well positioned to be able to provide a costing guidelines that can be followed to ascertain what is reasonable in the industry. To this extent, the respondent contended that the decision to use the PSIRA costing guidelines is reasonable and rational. It was also submitted for the respondent that the decision to consider a bid price below a pre-determined amount as unresponsive, is rational as it would prevent the awarding of a contract to bidders at prices that are clearly not sustainable. That it is so regard being had to the provisions of the Preferential Procurement

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[20] Tender Invitation; particularly 1.2.27

Regulations, in terms of which an accounting officer or authority is enjoined to ensure that the prices paid for services are market-related. That the impugned decision was also in line with the empowering provisions as stated in the tender document. So the first respondent's argument went. The Republic is one sovereign, democratic state founded on *inter alia* supremacy of the Constitution and the rule of law, regard being had to Section 1(c) of the Constitution. The import of the foregoing is the fact that this Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[21] It is so that the Bill of Rights applies to all law and binds all arms of government and all organs of state.[22] It is also so that everyone is equal before the law and has the right to equal protection and benefit of the law.[23] It is against this backdrop that Section 33(1) of the Constitution expressly arrogates everyone the right to administrative action that is lawful, reasonable and procedurally fair.

54. Section 39(1) of the Constitution, for its own part, expressly enjoins every Court, Tribunal or forum, when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) of the Constitution contemporaneously enjoins every Court, Tribunal or forum to promote the spirit, purport and objects of the Bill of Rights. It is so that, when organs of state at all spheres of government, like the first respondent, or any other institution identified in national legislation, contracts for goods or services, they must do so in accordance with systems which is fair, equitable, transparent, competitive and cost-effective.[24]

55. Section 172(1)(b) of the Constitution, for its own part, expressly empowers this Court, when deciding a constitutional matter within its power to make any order that is just and equitable, including (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the

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21 Section 2 of the Constitution of the Republic of South Africa, 1996
22 Section 8 (1), ***ibid***
23 Section 9 (1), ***ibid***
24 Section 217 (1), ***ibid***

declaration of invalidity for any period and on any conditions, to allow competent authority to correct the defect.

56. In its supplementary answering affidavit, the first respondent queerly attempted to raise new reasons why the applicant should have been found to be non-responsive. The applicant sought to reply to these allegations in its replying affidavit. This Court however do not think those issues, true or false are germane in these proceeding and therefore do not determine them.

57. It would be unfair on the applicant to determine these issues in these proceedings simply because it has come to Court in order to deal with the reason which was conveyed to it as the basis on which the decision to declare its bid proposal unsuccessful; to *wit*: because its unit price charged *per* security guard is inconsistent with the "*unofficial*" PSIRA rates as at March 2020 and 2021. It is trite in our law that it is not open to a respondents in review applications to raise other defences for the first time in its answering papers. [25]

58. It is also trite that an organ of state may only act within the powers lawfully conferred upon it. In the celebrated case of ***Fedsure v Greater Johannesburg Transitional Council,***[26] the first decision in which the Constitutional Court directly relied on the rule of law to assess the constitutional validity of legislation, the apex Court said the following, which in my view, is apposite in these proceedings:

> *"[I]t is a fundamental principle of the rule of law,*[52] *recognised widely, that* ***the exercise of public power is only legitimate where lawful. The rule of law - to the***

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25 **Jicama v West Coast District Municipality** 2016 (1) SA 116 (C).

26 1998 (12) BCLR 1458 (CC).

52 See Dicey *Introduction to the Study of the Law of the Constitution* 10th Ed (Macmillan Press, London 1959) at 193, in which Dicey refers to this aspect of the rule of law in the following terms:

"We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

. . . .

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."
[Footnotes omitted.]

extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. *This has been recognised in other jurisdictions. The principle is also expressly recognised in the 1996 Constitution...* ***It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law..."*** *At least in this sense, then, the principle of legality is implied within the terms of the Interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the Interim Constitution is a principle of legality..."*[27]

59. **THE PUBLIC FINANCE MANAGEMENT ACT** 1 of 1999 (the "**PFMA**"), for its own part expressly stipulates that in the event of any inconsistency between it and any other legislation, it prevails.[28] In other words, the PFMA trumps all other legislation inconsistent with it. Section 38(1)(a) of the PFMA, expressly requires accounting officers for departments, trading entities or constitutional institutions to *inter alia* ensure that they have and maintain: (i) effective, efficient and transparent systems of financial and risk management and internal control; (ii) systems of internal audit under the control and direction of audit committees complying with and operating in accordance with regulations and instructions prescribed in terms of Sections 76 and 77 of the PFMA; (iii) appropriate procurement and provisioning systems which are fair, equitable, transparent, competitive and cost-effective; and (iv) systems for properly evaluating all major capital projects prior to final decision on the project.

60. Section 38(1)(b) of the PFMA, on the other hand, renders accounting officers responsible for the effective, efficient, economical and transparent use of the resources of departments, trading entities or constitutional institutions. It requires accounting officers to take effective and appropriate steps to: (i) collect all monies due to departments; (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and (iii) manage available working capital efficiently and economically.[29]

61. Accounting officers are also responsible for the management, including the safe-guarding and maintenance of assets, and the management of liabilities

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27 Emphasis supplied
28 Section 3(3), PFMA
29 Section 38 (1) (c), PFMA

of departments, trading entities and constitutional institutions.[30] It is also the responsibility of accounting officers to comply with any taxes, levies, duties, pensions and audit commitments as may be required by legislation and to settle all contractual obligations and pay all monies owing; including inter-governmental claims, within the prescribed or agreed periods.[31] Accounting officers are further obliged to comply and ensure compliance by departments, trading entities or constitutional institutions, with all the provisions of the PFMA.[32]

62. Section 45 of the PFMA, for its own part, expressly enjoins other officials in any department, such as the respondent, to *inter alia* ensure that systems of financial management and internal control established for those departments are carried out within the areas of responsibility of those officials; to take responsibility for the effective, efficient, economical and transparent use of financial and other resources within those officials' areas of responsibility; to take effective and appropriate steps to prevent within those officials' areas of responsibility; to take effective and appropriate steps to prevent within those officials' areas of responsibility, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any other under-recollection of revenue due; to comply with the provisions of the PFMA, to the extent applicable to those officials, including any delegations and instructions in terms of Section 44 of the PFMA; and to take responsibility for the management, including the safeguarding of assets and the management of the liabilities, within those officials' areas of responsibility.

63. On the other hand, Section 6(2) of PAJA, expressly empowers a Court or Tribunal to judicially review an administrative action if-

> *"(a) the administrator who took it- (i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias;*

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30 Section 38 (1) (d), **ibid**
31 Section 38 (1) (e) and (f), **ibid**
32 Section 38 (1) (n), **ibid**

(b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c)* ***the action was procedurally unfair;***

(d) ***the action was materially influenced by an error of law;*** *(e)* ***the action was taken- (i) for a reason not authorised by the empowering provision;*** *(ii) for an ulterior purpose or motive; (iii)* ***because irrelevant considerations were taken into account or relevant considerations were not considered;*** *(iv) because of the unauthorised or unwarranted dictates of another person or body; (v) in bad faith; or (vi) arbitrarily or capriciously;*

(f) *the action itself— (i)* ***contravenes a law or is not authorised by the - empowering provision; or (ii) is not rationally connected to (aa) the purpose for which it was taken;*** *(bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator;*

(g) *the action concerned consists of a failure to take a decision;*

(h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*

(i) ***the action is otherwise unconstitutional or unlawful.***"[33]

64. It is so that the test for rationality was formulated in ***Pharmaceutical Manufacturers Association***.[34] The Court held that at minimum, when any public power is being exercised, it is required that there be a rational relationship between the exercise of power and the purpose for which the power was given.[35] The Court held that if such relationship cannot be found, the exercise of the power (public) is irrational, arbitrary, inconsistent with the requirements of the Constitution and therefore unlawful.[36]

65. It is also so that in ***Democratic Alliance v The President of the Republic of South Africa and Others***[37], the test was aptly summarised as follows.[38] The primary focus of a rationality review is premised on the valuation of a

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33 Emphasis are supplied

34 **Pharmaceutical Manufacturers Association of South Africa and Another: *In Re Ex Parte* President of the Republic of South Africa and Others** 2000 (2) SA 674

35 ***Ibid***, para 85 and 90

36 ***Ibid***

37 **Democratic Alliance v The President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC)

38 ***Ibid***, para 32

relationship between means and ends. This relationship is in the form of a connection or link between the means commissioned to attain a purpose and the purpose itself. The objective of the evaluation is neither to decide whether specific means will attain the purpose nor is it to determine whether some means will achieve the purpose better than other means. The evaluation is only concerned with whether the means commissioned are rationally related to the purpose for which the power was conferred. If it is found that there is a rational relationship, then the decision is constitutional.[39]

66. In ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*** 2014 (1) SA 604 (CC) at paras 28 to 30, the following was said regarding the materiality of irregularities:

> "*[28]* *Under the Constitution there is no reason to conflate procedure and merit.* ***The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA.*** *This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.*
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> *[29]* ***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.***
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> *[30]* ***Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so.*** *Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O' Regan J, succinctly put the question in ACDP v Electoral Commission as being* ***"whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their***

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39 ***Ibid***

purpose." This is not the same as asking whether compliance with the provisions will lead to a different result."[40]

67. According to PSIRA's Industry Circular dated 24 July 2020, the Illustrative Contract Costing Guideline, PSIRA, itself expressly and unambiguously state that the said circular "... *is not an official PSIRA document and is distributed without prejudice."* That its purpose is limited only; to *wit*: (a) for security business to recognise and understand what employee costs they will have to take into consideration in order to comply with labour legislation; (b) for security business to be mindful of specific and other costs of operations that must be considered whilst quoting for security services and their impact on overall cost of business; (c) for consumers and prospective consumers of security services to consider the contents thereof when budgeting and procuring security services, in particular guidance for considerations of requests for quotations, request for proposals and competitive bids. Most importantly statutory obligations of contractual parties in respect of prescribed amounts payable by security businesses for such services. The variable costs as indicated in the Illustrative Contract Costing Guideline that are non-negotiable statutory amounts provided for in terms of the labour law; and (d) the last Section of the Guideline provides for an estimated share of costs of the security business. In this regard, the Authority historically uses 40% of the variable costs and continue to do so purely to ensure consistency in the costing structure for deployment of security officers going forward.

68. It is significant to point out that the 40% share of overheads is solely intended to cover all other costs associated with providing the security service i.e. liability and other insurance; payroll and administrative costs; control centre; transport costs (vehicle, maintenance and fuel); fixed infrastructure, rates and taxes; registers; security aids; occupational health and safety compliance; management and supervision and other statutory fees payable.

69. Of significance also is the fact that PSIRA accepts that the list is not exhaustive of the costs (and percentage share) because the foregoing may differ from

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40 Emphasis supplied

business to business. PSIRA also accepts that in addition to a percentage provided for the share in overhead costs, the Guideline excludes VAT as well as net profit, as the targeted profit margin will differ from business to business. With reference to the foregoing, PSIRA expressly advises that the guidelines are not intended to negate or undermine fair competitive business practices and/or to undermine, promote or encourage uncompetitive market practices in whichever form or shape within the private security industry or sector.[41]

70. In the government procurement context, it has been well said that a "*competitive*" system would refer to a system that involves a process of "*shopping around*" for the best possible deal.[42] The word "competitive" in Section 217 (1) of the Constitution therefore means that government contracts should be awarded only after a number of entities have been afforded an opportunity to compete for a particular contract. At the same time, where competitive procedures are used for the procurement of goods and services, this must give rise to efficiency and cost-effectiveness.

71. Thus, while the principle of cost-effectiveness may, at times, limit or qualify the use of competitive procedures, when use is made of competitive procedures, such procedures must enhance or reinforce the principle of cost-effectiveness. The latter, it has been well said, to a large extent depends on genuine and sustained competition.[43] At all times therefore, the principles of competitiveness and cost-effectiveness in Section 217(1) of the Constitution are interrelated and interconnected.

72. The foregoing is also in concert with **THE COMPETITION ACT** 89 of 1998, which was promulgated in recognition that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development to the benefit of all South Africans. It should be borne in mind that one of the advantages of competition is that an organ of state making use of competitive procedures is in apposition to compare prices, quality *etcetera,* and can choose to contract with the party offering the best

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41 See RA2, pp390-392, Vol 5
42 Phoebe Bolton, *The Law of Government Procurement in South Africa*, p42
43 ***Ibid***, p45

possible value. As correctly pointed out by Goyder, competition reduces the risk of goods or services produced not being wanted or not wanted at the price which they are offered.[44]

73. It has thus been well said that the fact that the principle of cost-effectiveness has been included in Section 217(1) of the Constitution, serves to illustrate the importance attached to efficiency in government procurement procedures. It also serves to illustrate that even though the principles of competitiveness and cost-effectiveness both concern the attainment of value for money, they are not synonymous.[45]

74. Whilst it is so in our law that when an organ of state variously limits the scope of its own powers, thereby preventing it from exercising the powers granted it by the legislature, such a limitation of its powers is in principle unlawful.[46] Whilst it is also so that organs of state are permitted to formulate and rely on policies, guidelines or standards in exercising their discretionary powers in order to structure their discretion and to ensure equality of treatment.[47] It is also so that, if the organ of state does not properly consider the merits of the case before it, but treats the policy, guideline, standard or precedent as a rigid rule or decisive factor, such a decision will not be lawful. In ***Moreletta Shopping Centre v Liquor Board and Another*** 1987 (3) SA 505 (T), that Court had to decide on the legality of a decision by the liquor board to refuse to grant a bottle store license. The board before it made the decision, had formulated a policy not to allow a bottle-store in small shopping centres serving residential areas. That Court held that the board, in refusing the license had blindly adhered to a fixed policy and set the decision aside.[48]

75. In ***Richardson and Others v Administrator of the Transvaal*** 1957 (1) SA 521 (T) 530B-C, it was held as follows:

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44 DG Goyder, 2003 EC, *Competition Law 4th Ed,* Oxford University Press, at 9
45 ***Ibid,*** p45
46 See Baxter, *Administrative Law* 414-426; *Hoexter, New Administrative Law* 164-168
47 **Wicker and Other v Minister of Correctional Services** 2001(2) SA 747 (C) 753i-755C
48 See also **Johannesburg Town Council v Norman Antey** *& Co* 1928 AD 335 AT 339-342

"[T]hose guides must not develop into hard and fast rules which preclude the person exercising the discretion from bringing his mind to bear in a real sense on the particular circumstances of each and every individual case coming up for decision."[49]

76. According to De Smith, the jurisprudential basis of this ground of review:

"...is to ensure that the perfectly legitimate administrative values, those of legal certainty and consistency, may be counteracted by another equally legitimate administrative value, namely, that of responsiveness. While allowing rules and policies to promote the former value, it insists that the full rigour of certainty and consistency be tempered with the wiliness to make exceptions, to respond flexibly to unusual situations and to apply justice in the individual case."[50]

77. In ***JSE v Witwatersrand Nigel Ltd***, capricious decision making was equated with the failure of an administrator to apply its mind to a matter.[51] It has been well said that applying one's mind to the matter may be equated with the umbrella requirement of lawful administrative action or administrative legality. It was therefore held that the failure to apply the mind might be demonstrated by the proof that:

"The decision was arrived at arbitrarily or capriciously or mala fide ***as a result of unwarranted adherence to a fixed principle*** *or in order to further an ulterior or improper purpose; or* ***that the [administrator] misconceived the nature of the discretion conferred upon him and took into account irrelevant consideration or ignored relevant ones."***[52]

78. This Court found that the impugned decision fell outside of the power of the first respondent because no such mandatory prescribed requirement appears in the tender specifications or otherwise. It is so since as evinced above, the mere fact that the applicant's tendered price was below PSIRA rates did not *ipse facto* render same non-responsive. In the premise, this Court found that the first respondent's decision to consider the applicant's bid proposal unsuccessful on the basis that its unit price charged per security guard was

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49 See also **South African Post Office v Chairperson of Western Cape Tender Board** 2001 (2) SA 675 (C) para 19

50 De Smith, *Principles of Judicial Review*, 2nd Edition, Sweet & Maxwell, 396

51 1988 (3) SA 132 (A) at 151

52 Emphasis supplied

inconsistent with PSIRA[53] rates as at 2020 and 2021, which allegedly posed a serious risk for the first respondent, was constitutionally invalid and therefore fell to be reviewed and set aside.

79. It can be deduced from the foregoing that the PSIRA guide, is not a hard and fast rule which precludes the first respondent from bringing its mind to bear in a real sense on the particular facts and figures behind each and every individual price tendered by the tenderer. That much is said by PSIRA itself. It was also evident that the first respondent's decision to disqualify the applicant in respect of the impugned tender was not only procedurally unfair but also materially influenced by an error of law. Conterminously, this Court also found that the decision was not only taken for a reason not authorised by the empowering provisions but also because irrelevant considerations were taken into account or relevant factors were not considered.

80. This Court concluded regard being had to the facts and the applicable law that the first respondent's decision was materially influenced by an error of law and/or procedurally unfair. Having established factually that an irregularity occurred, determined that the deviance was so material that same fell to be reviewed and set-aside under the relevant provisions of PAJA; to *wit*: Sections 6(2)(a)(ii); 6(2)(d) and 6(2)(c). On the face of it, the impugned tender did not stipulate anywhere that tender prices should not be below PSIRA rates. Regard being had to the foregoing, the applicant's prices could not on that fact alone rationally be deemed to be materially deviant.

81. In the premise, this Court decided that the impugned decision was arrived at arbitrarily or capriciously or *mala fide* as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose. The Court also decided that the first respondent has misconceived the nature of the discretion conferred upon it and took into account irrelevant considerations or ignored relevant ones. Further, this Court found that the impugned decision did not only contravene Section 38(1)(a)(ii) of the PFMA, but it is also not

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53 Private Security Industry Regulatory Authority

authorised by the provisions thereof. The impugned decision was also not rationally connected to or the purpose for which it was taken.

CONCLUSION:

82. As far as the appropriate remedy is concerned. The applicant drew inspiration from Section 172(1)(b) of the Constitution and Section 8(1)(c)(ii) (aa) of PAJA, respectively. The former empowers this Court, when deciding a constitutional matter within its power, to make an order that is just and equitable. With regard to the former, the applicant contended that in as far as the second respondent ought to have been disqualified, the applicant sought substitution relief on the basis that it would be a foregone conclusion that the tender ought to have been awarded to the applicant. That in such an instance, it will make little sense to require the first respondent to again evaluate the tenders. It also contended that in so far as this Court finds that there were irregularities in the process and that the applicant is not entitled to substitution relief, the appropriate remedy would be to refer the tender back, to be evaluated by the first respondent.

83. In terms of Section 8(1) of PAJA, this Court or Tribunal, in proceedings for judicial review in terms of Section 6(1), may grant any order that is just and equitable, including (a) directing the administrator (i) to give reasons; or (ii) to act in the manner the Court or Tribunal requires; (b) prohibiting the administrator from acting in a particular manner; (c) setting aside the administrative action and (i) remitting the matter for reconsideration by the administrator, with or without directions; or (ii) in exceptional cases (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or (bb) directing the administrator or any other party to the proceedings to pay compensation; (d) declaring the rights of the parties in respect of any matter to which the administrative action relates; (e) granting a temporary interdict or other temporary relief or (f) as to costs.

84. It is against this backdrop that this Court granted the said Order.

APS NXUMALO J
NORTHERN CAPE DIVISION
KIMBERLEY

I concur.
ERASMUS, AJ
NORTHERN CAPE DIVISION
KIMBERLEY