THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 40/13

In the matter between:

ESORFRANKI PIPELINES (PTY) LTD	**FIRST APPELLANT**
CYCAD PIPELINES (PTY) LTD	**SECOND APPELLANT**
and	
MOPANI DISTRICT MUNICIPALITY	**FIRST RESPONDENT**
TANGO CONSULTANTS CC	**SECOND RESPONDENT**
TLONG RE TRADING SMN JV	**THIRD RESPONDENT**
TLONG RE YENG TRADING CC	**FOURTH RESPONDENT**
BASE MAJOR CONSTRUCTION (PTY) LTD	**FIFTH RESPONDENT**
MAITE IRENE MOAKAMELA	**SIXTH RESPONDENT**
MOTLATSO CONSTANCE MALEBATE	**SEVENTH RESPONDENT**
LU JINPU	**EIGHTH RESPONDENT**
MAILULA CHRISPOLAND MAHOWA	**NINTH RESPONDENT**

Neutral citation: *Esorfranki Pipelines v Mopani District Municipality* (40/13) [2014] ZASCA 21 (28 March 2014)

Coram: Mthiyane DP, Lewis and Bosielo JJA, Van Zyl and Legodi AJJA

Heard: **4 March 2014**

Delivered: **28 March 2014**

Summary: Judicial review of administrative action – tender process – contract concluded pursuant to unlawful tender award declared void and set

aside – determination of a just and equitable remedy in terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000 – relevant considerations – municipality found to have been biased in its decision to award the tender – successful tenderers guilty of fraud and fronting – orders for costs to reflect the reprehensible and serious nature of the conduct of the municipality and the successful tenderers.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Matojane J sitting as court of first instance):

1 The first and second appellants' appeal against the orders in paras 2 and 3 of the order of the high court is upheld with costs including the costs of two counsel, such costs to be paid jointly and severally by the first and the third to fifth respondents on the scale as between attorney and client.

2 The aforesaid orders are set aside and are substituted with the following orders:

'(a) Any contract entered into between the first respondent and the third to fifth respondents pursuant to the award of the tender to the respondents for the construction of a pipeline between the Nandoni dam and the Nsami water treatment works (Nandoni to Giyani Pipe Project; project number LPR018), is declared void *ab initio* and is set aside.

(b) The first respondent is ordered to formally approach the Department of Water Affairs within seven days of the granting of this order to request that Department to do the following:

(i) To take such steps as may be necessary to determine the extent of the works necessary to perform remedial work and to complete the construction of the pipeline and the other works as contemplated in the aforesaid tender, for purposes of publishing a tender for the said remedial work and the completion of the works;

(ii) To prepare and publish an invitation to tender for the performance of the remedial work and completion of the works as aforesaid;

(iii) To evaluate and adjudicate all bids received, and to make an award in respect of such invitation to bid.

3 The first and the third to fifth respondents jointly and severally are ordered to pay the costs of the review application by Esorfranki Pipelines (Pty) Ltd under case no 13480/2011, and of the third Rule 49(11) application dated 27 August 2011 under case no 13480/2011, such costs to be on an attorney and client scale, and to be inclusive of all the reserved costs and the costs of two counsel where applicable.

4 The first and the third to fifth respondents jointly and severally are ordered to pay the costs of the review application by Cycad Pipelines (Pty) Ltd under case no 17852/2011, such costs to be on an attorney and client scale, and to be inclusive of all the reserved costs and the costs of two counsel where applicable.

5 The first appellant's appeal against the order in para 4 of the order of the high court is dismissed with costs.'

JUDGMENT

Van Zyl AJA (Mthiyane DP, Lewis and Bosielo JJA and Legodi AJA concurring)

[1] In August 2010 the first respondent, the Mopani District Municipality (the municipality) invited tenders for the construction of concrete reservoirs and a welded steel bulk pipeline between the Nandoni dam in Thohoyandou and the Nsami water treatment works in Giyani in the Limpopo Province. The purpose of the pipeline was to provide water to the greater Giyani area. A drought in 2009 caused the water levels in the Nsami dam to drop to the extent that there was insufficient water to ensure a supply of water to the inhabitants of Giyani. The water shortage was so severe that a local state of disaster was declared in terms of the provisions of the

Disaster Management Act 57 of 2002 and emergency measures had to be implemented.

[2] A decision was then made at a national government level to source water from the Nandoni dam and an amount of more than R284 million was made available for that purpose. The construction of the pipeline is a project of the Department of Water Affairs. The municipality was appointed by the Department as an 'implementation agent'. In terms of their agreement it was made responsible for the implementation and management of the project. To that extent it was tasked with the appointment of contractors and other service providers 'in accordance with procurement procedures approved by the department and in consultation with the Department when inviting bids, considering bids and administering the contracts of appointed Professional Service Providers (PSP's) and Contractors'.

[3] The tender was awarded to the third respondent, a joint venture (the joint venture) consisting of two entities, namely the fourth respondent, Tlong Re Yeng Trading CC (Tlong Re Yeng) and the fifth respondent, Base Major Construction (Pty) Ltd (Base Major Construction). Two unsuccessful bidders, namely the first appellant, Esorfranki Pipelines (Pty) Ltd (Esorfranki) and the second appellant, Cycad Pipelines (Pty) Ltd (Cycad), then proceeded to bring review proceedings in the North Gauteng High Court. This culminated in an agreement in terms of which the award was set aside and the municipality was ordered to re-adjudicate the tenders received by it. According to the municipality the reason for this agreement, which was made an order of court, was the realisation that in the tender process it had applied regulations made in terms of the Preferential Procurement Policy Framework Act,[1] which unbeknown to it had been declared *ultra vires* by the KwaZulu-Natal High Court.[2]

[4] The municipality thereafter in February 2011 re-adjudicated the tenders and once more decided to award the tender to the joint venture. Esorfranki and Cycad were once again dissatisfied with this decision and as before individually proceeded

[1] Act 5 of 2000.
[2] Regulations 8(2) to 8(7) of the Preferential Procurement Regulations, GN R725, *GG* 22549, 10 August 2001 were declared as invalid in the judgment of *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality & others* 2011 (4) SA 406 (KZP).

to institute review proceedings. The main relief sought by each appellant was the setting aside of the municipality's decision to award the tender to the joint venture and the substitution thereof of a decision to award the tender to them. Each application was further accompanied by a claim for interim relief in the form of an interdict pending the outcome and final adjudication of the review application, and in terms of which the municipality was to be restrained from taking any steps in implementing the decision to award the tender to the joint venture. The joint venture was in turn to be interdicted from taking any steps towards the execution of any contract which may have been concluded pursuant to the decision.

[5] Cycad chose not to pursue its application for interim relief, because an interim order (the interim order) was granted by the high court at the instance of Esorfranki in March 2011. This order became the subject matter of a plethora of further proceedings aimed at either setting it aside, or its continued operation and implementation. I intend to refer to some of these proceedings in such detail as may be relevant to the issues raised in this appeal. The first step was taken by the municipality which applied for leave to appeal the granting of the interim order. In terms of Rule 49(11) of the Uniform Rules of Court, the effect of an application for leave to appeal against an order of the court is that the order is suspended pending the decision of such application, 'unless the court which gave such order, on the application of a party, otherwise directs'. When the municipality and the joint venture failed to give an undertaking that the award of the tender would not be acted upon, Esorfranki then proceeded in terms of sub-rule (11) to apply for an order that, pending the determination of the application for leave to appeal, the interim order should continue to operate. This resulted in the granting of an interim order suspending any further work on the project.

[6] That order was extended from time to time until the dismissal of the municipality's application for leave to appeal. In dismissing the application the high court held that its order was interim in nature and effect, that it was not appealable and that on the merits there were no reasonable prospects that another court would come to a different conclusion. The municipality proceeded to file a petition to this court for leave to appeal against the grant of the interim order. This was followed by a second application brought by Esorfranki in terms of Rule 49(11). It once again

sought to prevent the implementation and execution of the tender. Following upon this application, the municipality and the joint venture gave certain undertakings with regard to the continued execution of work on the tender. Some of these undertakings were incorporated into a court order, only to be discharged at a later date. This prompted Esorfranki to launch a further application for an interim interdict which was to operate pending the hearing of the second Rule 49(11) application. This in turn culminated in an order interdicting the municipality and the joint venture from taking any steps to implement the award of the tender pending the adjudication of the second Rule 49(11) application. Subsequent to this order this court dismissed the municipality's application for leave to appeal. The result was that there no longer existed any necessity, as in the case of the first application, to determine the merits of the second application in terms of Rule 49(11).

[7] Dissatisfied with the decision of this court to dismiss its application for leave to appeal, the municipality then filed an application with the Constitutional Court for leave to appeal to that court. This caused Esorfranki to institute a third application in terms of Rule 49(11) (the third Rule 49(11) application). It once again sought an order that pending the outcome and adjudication of the municipality's application for leave to appeal to the Constitutional Court, the interim order remain in operation. In this application Esorfranki also sought additional relief against certain of the office bearers of the municipality and the joint venture (the sixth to eighth respondents), namely that they be ordered to give effect to the interim order sought and that they be held to be in contempt of the interim order for their earlier failure to do so. Esorfranki further cited the municipality's attorney of record Mr M C Mahowa (Mahowa) as the ninth respondent, asking the court not only to order him to give effect to the interim order, but also to pay the costs of the third Rule 49(11) application *de bonis propris*, on an attorney and client scale.

[8] In response to the third Rule 49(11) application the municipality filed a counter application seeking to set aside the interim order, and an order declaring Esorfranki's review application to have lapsed. On the date of the hearing both these applications were by agreement postponed to enable the parties to file further affidavits. In addition, it was ordered by agreement that the interim order would remain in force pending the determination of these applications. Cycad subsequently entered the

fray when it became aware of the existence of the municipality's counter application, and it, with a view to protect its own interests, sought leave to intervene and be afforded an opportunity to file an answering affidavit therein. At the adjourned hearing of the third Rule 49(11) application and the counter application, it was agreed that both the counter application and Cycad's application to intervene would be postponed *sine die*. Agreement was further reached with regard to the hearing and further conduct relating to Esorfranki and Cycad's applications for review. It was inter alia agreed that the two matters would be heard simultaneously.

[9] It would appear from the judgment of the high court (per Matojane J) that at the joint hearing of the two review applications the issues for decision were limited to the lawfulness of the municipality's decision to award the tender to the joint venture and the costs of Esorfranki's third Rule 49(11) application. Esorfranki abandoned the remainder of the relief claimed in the latter application, whilst the municipality abandoned its counter application with a tender of costs, such costs to include the costs of two counsel. Cycad in turn informed the court that it was no longer persisting in its claim in its review application that the tender be awarded to it.

[10] The high court upheld the challenge of Esorfranki and Cycad to the decision of the municipality to award the tender to the joint venture. There is no appeal against the order that the award was unlawful and that it was set aside. Nonetheless it is necessary briefly to describe the reasons for that order. The high court found that the tender submitted by the joint venture did not comply with the bid specifications, that it was guilty of fronting and that the municipality's decision was motivated by bias and bad faith. These findings were based inter alia on the following factors. The joint venture failed to comply with the required contractor grading. This is a standard determined and issued in terms of the Construction Industry Development Board Act 30 of 2000 and its regulations.[3] To qualify for evaluation a bidder must have the required contractor grading designation which is based on the estimated tender value. The required grading in this matter was 8CE PE or higher. In the case of a tender by a joint venture the bid documentation

[3] Regulation 25(3) of the Construction Industry Development Regulations, GN R692, *GG* 26427, 9 June 2004, discussed in *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* 2010 (4) SA 359 (SCA) para 14.

required every member of the joint venture to be registered with the Construction Industry Development Board; the lead partner to have a contractor grading designation of 8CE PE or higher; and the combined grading to be higher or equal to 8CE PE. Tlong Re Yeng was found to have possessed a grading of 1CE PE, and Base Major Construction a grading of 8CE. In the circumstances the court concluded that the joint venture failed to comply with the tender specifications and ought to have been disqualified from the tender process. Cycad and other similarly placed bidders were eliminated during the re-adjudication of the tenders on the basis that they possessed only a grading of 8CE.

[11] The high court further found that the joint venture failed to submit some of the information required by the tender specifications necessary to assess the tender requirements relating to competence and functionality. Members of the joint venture were also found to have made false representations in their tender submission. Tlong Re Yeng falsely stated that it was conducting its business at a given address when it was not, resulting in it being awarded a point in the adjudication of the tender in respect of locality. It falsely claimed to have been in business for three years prior to the submission of the tender. Base Major Construction in turn falsely represented that its sole shareholder, a foreign-born national, obtained South African citizenship at his/her date of birth, thereby improving its score for equity promotion goals. In the joint venture agreement entered into between Tlong Re Yeng and Base Major Construction it was recorded that both entities individually had experience in the construction industry when it was obvious that Tlong Re Yeng had no such experience and was as a consequence unable to manage and execute its half of the work. Lastly, by declaring that Tlong Re Yeng and Base Major Construction were, contrary to the terms of the joint venture agreement, to manage and execute the contract for the construction of the pipeline in equal shares, they managed to acquire additional points in relation to equity promotion goals.

[12] The high court found support for its finding that Tlong Re Yeng was used as a front in the following facts: it was established as an entity only after publication of the invitation to tender and a week before the tender was submitted; it had no assets, employees or income; it did not conduct business at the time the tender was submitted; it had no business address and did not exist at the address given in the

tender documentation, which was a residential house with only a few pieces of furniture; and lastly, Tlong Re Yeng's sole member was an employee at an unrelated business.

[13] Having found that the award of a tender was reviewable on grounds contained in s 6 of the Promotion of Administrative Justice Act (PAJA),[4] the high court then proceeded to determine what would constitute a just and equitable remedy as envisaged in s 8 of PAJA. The orders made by the court relevant to this appeal read as follows:

'1. The tender process is declared illegal and invalid and is set aside.

2. The Municipality is ordered to independently and at the joint venture's costs, verify that all the work has been done according to specifications and that the joint venture does all the necessary remedial work and work is completed as soon as possible in terms of the agreement.

3. Each party is ordered to pay its own costs.

4. Esorfranki Pipelines (Pty) Ltd is ordered to pay ninth respondents' costs on the attorney and own client scale, including the costs reserved on 3 and 4 October 2011.'

[14] The appellants' appeal is with the leave of the high court. Esorfranki's appeal is directed at the orders made in paras 2, 3 and 4 of the order. It seeks the setting aside of those orders and the substitution of an order to the effect that it be declared to have been the sole successful bidder in respect of the tender; that the municipality enter into a contract with it for the completion of the outstanding work on the pipeline; that the municipality and the members of the joint venture pay the costs of the application for review and of the third Rule 49(11) application on a punitive scale; and that Mahowa pay the costs of the third Rule 49(11) application. Cycad's appeal is in turn directed only at paras 2 and 3 of the order of the high court. It seeks an order setting aside those orders and substituting them with an order that the contract concluded between the municipality and the joint venture be set aside and that they pay the costs of its application in the review proceedings on an attorney and client scale. None of the respondents affected by the order of the high court chose to challenge either the correctness of the finding of the court that the award of the

[4] Act 3 of 2000.

tender to the joint venture was reviewable and liable to be set aside in terms of PAJA, or the relief granted.

[15] Before dealing with the main issue raised by the appeal (that is, the appropriate relief to be afforded to Esorfranki and Cycad), there are two preliminary matters that must first be disposed of. The first relates to the issue raised by the municipality and the joint venture in their heads of argument and in documentation filed subsequently that any order dealing with the validity of the contract concluded between the municipality and the joint venture for the construction of the pipeline would not have any practical effect. The submission was that the work would in all probability have been concluded by the time of the hearing of this appeal. This contention, however, stood in stark contrast to a recent progress report of the Department of Water Affairs and other evidence placed before this court by Esorfranki showing that the work on the project is anything but complete. Counsel for the relevant respondents consequently elected to abandon any argument that the issues raised in the appeal may have become moot.

[16] The second aspect is the objection raised by the municipality and the joint venture to the standing of Cycad. The contention is based on the fact that the bid specifications required a tenderer to have a contractor grading designation of 8CE PE. Because Cycad had a lower grading it was argued that it could not submit a tender capable of acceptance and could not proceed to contest the award in the litigation. I am, however, satisfied that Cycad does have standing in the circumstances of this case. It sought to vindicate the constitutional right of just administrative action given expression in PAJA.[5] Its standing is therefore to be determined in terms of s 38 of the Constitution[6] read into PAJA:[7] In *Giant Concerts*

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[5] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) para 82. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 25; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 99.

[6] Relevant to these proceedings is subpara *(a)*. It reads as follows:
'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–
(a) anyone acting in their own interest; . . . .'

[7] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC) para 29.

CC v Rinaldo Investments (Pty) Ltd & others[8] the principles applicable to standing in this context were summarised as follows:

'(a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.'

[17] Cycad was a co-tenderer. A tenderer has the right to a fair and competitive tender process irrespective of whether the tender is awarded to him.[9] This includes the right to compete on an equal footing with his competitors who are similarly placed such as the joint venture which was also not registered in the category of contractors required by the bid specifications. Any decision of the municipality in the award of the tender would not only have affected or potentially affected Cycad's financial interests in the award of the tender, but also its interest in a fair process arising from the submission of its bid. A further consideration in this regard is that the issues raised on the facts of this matter give rise to serious concerns about good governance and accountability:

'To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns

[8] Above para 41.

[9] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC) para 60.

of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.'[10]

[18] I turn to deal with the appeal against the relief granted by the high court in para 2 of its order. On the findings made by the court the tender process was clearly flawed in material respects rendering it reviewable and liable to be set aside. Consistent with s 172(1) of the Constitution,[11] s 8 of PAJA empowers a court in judicial review to grant 'any order that is just and equitable'. Section 8 confers on a court undertaking judicial review a 'generous' discretion.[12] The discretion in s 8 must be exercised judiciously.[13] The remedies in s 8 are not intended to be exhaustive: they are examples of public remedies suited to vindicate breaches of administrative justice.[14] The ultimate purpose of a public law remedy is said to '. . . afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law'.[15] Ultimately the remedy must be fair and just in the circumstances of the particular case.[16]

[19] In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*[17] Froneman J explained it as follows:

'This "generous jurisdiction" in terms of s 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative

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[10] *Giant Concerts* para 34.
[11] Section 172(1) of the Constitution reads:
'(1) When deciding a constitutional matter within its power, a court–
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may 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 declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'
[12] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 30.
[13] *Mvumvu & others v Minister for Transport* 2011 (2) SA 473 (CC) para 46.
[14] *Steenkamp* above para 30.
[15] *Steenkamp* above para 29.
[16] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 42.
[17] *Bengwenyama* paras 83 and 84.

action, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.'

And

'It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it.'

This latter passage shows clearly that only once administrative action is found to be unlawful, may a court then determine what equitable relief should be granted.[18]

[20] The need for such relief usually arises where adverse consequences flow from an order declaring administrative action unlawful. Third parties may have altered their position on the basis that the administrative action was valid and may suffer prejudice if it is declared invalid. In the context of the procurement of goods and services an order declaring the tender process unlawful means that the decision to award the tender and the contract which was entered into pursuant thereto are both void *ab initio*.[19] It has consequently been held that the factual consideration that it may not be practicable to set the award aside must be given due weight in the exercise of the court's discretion in deciding to declare the administrative action unlawful and set it aside.[20] That discretion takes into account considerations of 'pragmatism and practicality'.[21] Its underlying reason is the desirability of certainty.[22]

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[18] See also *Allpay* above para 28 and 29.

[19] *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) para 13 and *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA) para 26.

[20] *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) para 27; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 23; *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9 and *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* 2010 (4) SA 359 (SCA) para 20.

[21] *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* above para 28.

[22] *Eskom Holdings* above para 9.

[21] In this case, however, the high court, although correctly finding that the flaws in the tender process and award tainted it and the contract, nonetheless in effect ordered that the joint venture continue to execute the invalid contract under the municipality's supervision. No doubt it was the consideration of pragmatism and practicality that weighed heavily with the high court in ordering the continued execution of an invalid contract. It apparently made that decision in response to the claim by Esorfranki that an appropriate order would be one in terms of which it was to be declared the only successful bidder, and the municipality be ordered to award it a contract to complete the work. The court found that the order proposed by Esorfranki raised a number of 'issues and practical difficulties', and that the granting of the order sought by Esorfranki would not serve to protect the interests of those who were to benefit from the construction of the pipeline. These issues, which it found not to have been properly addressed, included inter alia 'the logistical, legal and financial viability of such a relief' and 'the extent to which the contract has been completed, the ownership of materials, whether if the balance of the contract is legally and factually separable, it should be put out to tender etc'.

[22] The decision of the high court to give effect to a contract concluded pursuant to an unlawful tender award is flawed for several reasons. First, the parties to that contract had acted dishonestly and unscrupulously and the joint venture was not qualified to execute the contract. The first order that the high court made – that the award was unlawful – was undermined by the order that the joint venture continue the work. The second reason is that it was premised on the possible existence of a number of unknown consequences which might follow upon an order declaring the award of the tender unlawful. A decision made in the exercise of the discretion in s 8 of PAJA must be based on fact and not on mere speculation. The delay in the finalisation of the review proceedings brought about a change in the factual position and it was the function of the court to ensure that it be placed in a position to arrive at an informed decision with regard to what an appropriate remedy would be. This could and should have been addressed by an appropriately worded order.[23]

[23] See by way of example the order made in *Allpay* above para 98.

[23] Thirdly, the decision whether to declare conduct in conflict with the Constitution unlawful but to order equitable relief, in the circumstances of any particular case, involves the weighing up of a number of competing interests. Certainty is but one. Other factors include the interests of affected parties and that of the public.[24] In *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others*[25] the court also emphasised the importance of the principle of legality:

'The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent.'

And

'[T]hen the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality.'[26]

[24] In the context of an unlawful tender process for the acquisition of goods and services for the benefit of the public, the finding as to an appropriate remedy must strike a balance between the need for certainty, the public interest, the interests of the successful and unsuccessful tenderers, other prospective tenderers, the interests of innocent parties and the interests of the organ of state at whose behest the tender was invited. On the facts of the present matter, having declared the tender process to be unlawful, in deciding to grant equitable relief the following considerations were relevant to the exercise of the court's discretion. The fact that the joint venture acted upon the award immediately was not due to inaction on the part of the appellants. On two occasions they immediately instituted legal proceedings to set aside the municipality's irregular decision to award the tender to the joint venture. During the course of the proceedings Esorfranki consistently sought to prevent the contract from being implemented.[27] It was rather the persistence of the municipality and the joint venture, in the face of a valid challenge to the award, pursuing a hopeless appeal against the interim order, and by their opposition to the first appellant's Rule 49(11) applications, that any delay resulted. That delay and the execution of the contract were therefore of the municipality and the joint venture's own making. The result was

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[24] *Millennium Waste Management* above para 23.
[25] *Bengwenyama* above paras 84 and 85.
[26] *Bengwenyama* above paras 84 and 85.
[27] See paras 4 to 6 of this judgment.

that the joint venture had the benefit of a contract it should never have had in the first place.

[25] Further, the invalidity of the tender process was not the result of negligence or incompetence on the part of anyone. That the setting aside of the contract might have been disruptive to the finalisation of the construction of the pipeline must be assessed against the fact that the tender process, and consequently the contract itself, was tainted by dishonesty and fraud. Accordingly, problems which might potentially arise, as foreseen by the high court, in the contractual relationship between the municipality and the joint venture by reason of an order setting the contract aside 'may not be of any consequence in the case of corruption or fraud, or where the successful tenderer was complicit in the irregularity'.[28] The joint venture dishonestly obtained the award and the contract. It is therefore hardly open to it to complain that it may suffer prejudice by an order setting the award aside and declaring the contract void. Fraud is conduct which vitiates every transaction known to the law.

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever; . . . .' [29]

[26] The award of public tenders is governed by s 217 of the Constitution. It requires awards to be made in accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective'. The interests of the members of the community who are to benefit from the supply of water via the pipeline must be assessed against their interest, and that of the public at large, that this constitutional imperative be given effect to; that the tender process is free from corruption and fraud; and that public moneys do not land up in the pockets of corrupt officials and business people. It is also in this context that the high court's finding of fronting must be considered. The difficulty with fronting is that the person or entity who stands to

[28] Per Harms DP in *Moseme Road Construction* above para 21.
[29] Per Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 QB (CA) at 712. See further *Firstrand Bank Ltd t/a Rand Merchant Bank & another v Master of the High Court, Cape Town & others* [2013] ZAWCHC 173 (11 November 2013) paras 20-27.

benefit financially from the award of the tender is not the one to whom it was in fact awarded. The person or entity used as a front, as in the present matter, more often than not does not have the capacity or competence to execute the tender. It amounts to the exploitation of such persons for financial benefit and constitutes a fraud on those who are meant to be the beneficiaries of legislative measures put in place to enhance the objective of economic empowerment of historically disadvantaged people.

[27] I therefore conclude that the high court erred in the exercise of its discretion and that its decision in effect to allow the continuation of the contract should be set aside. I am satisfied that in the circumstances of this case, and weighing up the relevant interests, the only appropriate order would be one expressly declaring the contract void and granting equitable relief. As the work on the project is partially complete it would require the Department of Water Affairs to assess the extent of the work already performed, and to determine not only the value of the completed and uncompleted work but also what steps, if any, would be necessary to complete the work on the project. In the interests of the communities who are to benefit from the pipeline it is imperative that this be done as expeditiously as possible. I accept the submission of Esorfranki and Cycad that because of the bias displayed by the municipality in the adjudication of the tender and its conduct in the review and interlocutory proceedings, it should play no part in any further tender process in relation to this project.

[28] That leaves the appeal against the costs orders made by the high court. As stated earlier, it ordered the parties to pay their own costs in the review application and in the third Rule 49(11) application. Esorfranki was, however, ordered to pay the costs of the municipality's attorney Mahowa, whom it cited as the ninth respondent in the third Rule 49(11) application, on the attorney and own client scale. The determination of the issue of liability for costs is in the discretion of the court that is called upon to adjudicate the merits of the issues raised in the litigation between the parties. It is a discretion which is to be exercised judicially upon a consideration of the facts and circumstances of each individual case and is in essence a matter of fairness to both sides. Being a judicial discretion a court of appeal will interfere with the exercise of such a discretion only where it is shown that:

'[T]he lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[30]

[29] The finding of the high court that the parties were to pay their own costs in respect of the relevant applications was essentially made on the basis of what the court described in its judgment as the 'unreasonable and unconscionable manner in which Esorfranki and its attorney including Cycad conducted this litigation'. It found that the appellants made themselves guilty of collusion. That finding is not supported by the facts. Esorfranki and Cycad are separate legal entities, they separately submitted tenders, instituted legal proceedings and instructed separate firms of attorneys to act on their behalf. The mere fact that they were the joint beneficiaries of a tender awarded to them in another province, and that there may have been similarities in the papers filed by them in the present proceedings, does not support a finding of collusion, the import of which after all is the presence of dishonesty. There is nothing untoward in one litigant aligning itself with another and co-operating in the quest to achieve a particular result in legal proceedings.

[30] Another factor taken into account in penalising Esorfranki and Cycad with an unfavourable costs order was that Esorfranki's attorney had suggested in a letter to the municipality that if the matter were settled, they would not support any future criminal investigations against the municipality. The letter was written without prejudice, and in an attempt to settle the matter. It could not have been construed as blackmail, as the municipality attempted to argue. Whatever its faults, the attorney's letter was in itself insufficient to deprive the appellants of their costs, particularly in the case of Cycad which the attorney purported to represent in sending the letter. Cycad immediately took steps to distance itself from the letter. To the extent that the attorney may have wrongly held himself out to also act on behalf of Cycad, and may have made himself guilty of unprofessional conduct, that was effectively addressed by the high court in directing that his conduct be referred to the relevant Law Society

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[30] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11; *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 24.

for investigation. The court's reliance on the fact that Cycad may have abandoned certain of the relief claimed in its notice of motion was also misplaced. That did not mean that the second appellant was not entitled to seek an order declaring the contract invalid.

[31] From a reading of the court's judgment on costs it is evident that it failed to consider that Esorfranki and Cycad were substantially successful in their application to review and set aside the tender process. To that extent they have achieved vindication of an important constitutional right. This failure in my view constitutes a material misdirection. A further aspect of utmost importance which was overlooked is the reprehensible nature of the conduct of the municipality and the joint venture in the tender process.[31] As stated earlier, the court issued an order of invalidity on the basis of having found the municipality to have been biased in its adjudication of the tenders and to have failed to insist on compliance with its own tender requirements. The joint venture was in turn found to have made itself guilty of dishonest conduct by misrepresenting the facts in their tender bid in an effort no doubt to achieve an advantage and to secure the award of the tender. The costs order made by the court does not reflect the seriousness of this conduct and the disapproval which it deserves.[32]

[32] The manner in which the municipality conducted itself in the litigation also calls for censure. Instead of complying with its duty to act in the public interest and to allow the serious allegations of fraud and dishonesty in the tender process to be ventilated and decided in legal proceedings, it chose to identify itself with the interests of the tenderers who stood accused of improper conduct. To this extent it failed to provide undertakings not to implement its decision to award the tender to the joint venture when reasonably requested to do so. It instead delayed the finalisation of the review proceedings by launching hopeless appeals against the

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[31] *Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging* 1946 AD 597 at 609.

[32] In *Tshopo v State* (29/12) [2012] ZASCA 193 para 37 this court (per Heher JA) said the following about dishonesty in the procurement of state tenders:

'Fraud in the procurement of state tenders is a particularly pervasive form of dishonest practice. It undermines public confidence in the government that awards tenders, apparently without regard for nepotism, and it creates perceptions unfavourable to the services provided pursuant to such tenders. It is proving notably difficult for the authorities to identify and root out such malpractices. The courts are obliged to render effective assistance lest the game be thought to be worth the candle.'

order interdicting it from implementing its own unlawful decision. This court in *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* said the following on the function of public bodies: '. . . depending on the legislation involved and the nature and the functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act'.[33] In *Premier, Free State & others v Firechem Free State (Pty) Ltd* it was concluded that '[t]he province was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist . . . attempts at enforcement'.[34] In all the circumstances I am satisfied that an appropriate court order would have been one which reflected the disapproval of the court with the conduct of the municipality and the joint venture.

[33] Insofar as the costs of Esorfranki's third Rule 49(11) application are concerned, as was the position with the other two Rule 49(11) applications, the launching of this application was clearly motivated by the unreasonable refusal of the municipality and the joint venture to undertake to desist from continuing with any work on the project pending the determination of the municipality's application for leave to appeal to the Constitutional Court. The reasonableness of providing the undertaking requested must be assessed in the context of it having been found more than once that Esorfranki had met the requirements for an interim interdict aimed at protecting its rights in the review application. In fact, on occasion the municipality agreed to the granting of such an order.

[34] In addition, the attempt to obtain leave to appeal against the granting of the interim order was ill advised and destined to fail. The interim order was clearly not appealable. It was not final in its effect. That the practical effect of the order may have been to delay the execution of the contract for the construction of the pipeline did not make it a final order. This in any event does not appear to have been the complaint of the municipality with regard to the granting of the order. Its complaint was rather that it was not given a proper hearing before the order was granted. The municipality's remedy was to apply to the court which first granted the interim order

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[33] *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23.
[34] *Premier, Free State & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 36.

for the rescission or amendment thereof. 'And in the case of a common-law interim interdict or attachment *pendente lite* there is no reason why, for sufficient cause, they would not, generally, be open to variation, if not rescission'.[35] I am accordingly of the view that in the circumstances Esorfranki acted reasonably and was justified in launching the third Rule 49(11) application, and that there exists no reason for it to be deprived of the costs thereof. For the reasons mentioned earlier an appropriate order would similarly have been one on an attorney and client scale.

[35] The next question relates to the order for costs in relation to the relief claimed against the attorney, Mahowa, in the third Rule 49(11) application. Although I do not agree with every finding of the high court in this regard, I am not convinced that it misdirected itself in ordering Esorfranki to pay Mahowa's costs on a punitive scale. Mahowa was, as stated earlier, the attorney acting for the municipality. He was not a party to any of the proceedings. There existed no basis in fact or in law to compel him in either his personal or professional capacity to comply with any of the orders sought in the Rule 49(11) application. The relief claimed in this regard, on a reading of Esorfranki's founding affidavit, was premised on the unsubstantiated allegation that 'the representatives of the respondents must be held responsible for their actions and inaction' in regard to the failure of the respondents to comply with court orders. Its speculative basis is that Mahowa had 'significant' influence over the municipality and that its actions must have been on his advice.

[36] Further, the punitive costs order sought against Mahowa was based on an allegation in Esorfranki's founding affidavit that Mahowa 'appears not to have advised his client not to act contemptuously, has repeatedly failed to properly answer letters, and has caused substantial sums of taxpayers' monies to be wasted'. These allegations, which impugned the professional integrity of Mahowa, were similarly made without any factual support and were dealt with and denied by him in his answering affidavit. The attempt by Esorfranki to rectify this by seeking to provide

[35] *Phillips & others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 21. See also *Atkin v Botes* 2011 (6) SA 231 (SCA) para 12.

factual support for its case for costs in its replying affidavit, cannot on the rules applicable to motion proceedings, assist it in any way.[36]

[37] I may add that complaints were also raised in argument about the conduct of Mahowa on various occasions during the course of the different proceedings in the high court. This was not pertinently raised in the third Rule 49(11) application and the high court was better placed to investigate and determine the merit thereof. In the circumstances I cannot find that there were no reasonable grounds for the costs order made by the high court in para 4 of its order.

[38] That leaves the costs of the appeal. Esorfranki and Cycad were substantially successful in their appeal against the orders in paras 2 and 3 of the high court's order and they are entitled to their costs. I agree with counsel for Esorfranki and Cycad that, given the serious and reprehensible nature of the conduct of the municipality and the joint venture in the award of the tender and in the subsequent proceedings in the high court, and that the remedy granted by the said court was clearly inappropriate and indefensible, there are on the facts of this matter, circumstances present[37] which justify an order that the costs of the appeal should also be paid on an attorney and client scale.

[39] In the result:

1 The first and second appellants' appeal against the orders in paras 2 and 3 of the order of the high court is upheld with costs including the costs of two counsel, such costs to be paid jointly and severally by the first and the third to fifth respondents on the scale as between attorney and client.

2 The aforesaid orders are set aside and are substituted with the following orders:

'(a) Any contract entered into between the first respondent and the third to fifth respondents pursuant to the award of the tender to the respondents for the construction of a pipeline between the Nandoni dam and the Nsami water

[36] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635G-636B; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327D-H; *Port Nolloth Municipality v Xhalisa & others; Luwalala & others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111E-F and *Aeroquip SA v Gross & others* [2009] 3 All SA 264 (GNP) para 6.

[37] See *Herold v Sinclair & others* 1954 (2) SA 531 (A) at 537D-E and *Ward v Sulzer* 1973 (3) SA 701 (A) at 707B-D with regard to awards of costs of appeal on an attorney and client scale.

treatment works (Nandoni to Giyani Pipe Project; project number LPR018), is declared void *ab initio* and is set aside.

(b) The first respondent is ordered to formally approach the Department of Water Affairs within seven days of the granting of this order to request that Department to do the following:

(i) To take such steps as may be necessary to determine the extent of the works necessary to perform remedial work and to complete the construction of the pipeline and the other works as contemplated in the aforesaid tender, for purposes of publishing a tender for the said remedial work and the completion of the works;

(ii) To prepare and publish an invitation to tender for the performance of the remedial work and completion of the works as aforesaid;

(iii) To evaluate and adjudicate all bids received, and to make an award in respect of such invitation to bid.

3 The first and the third to fifth respondents jointly and severally are ordered to pay the costs of the review application by Esorfranki Pipelines (Pty) Ltd under case no 13480/2011, and of the third Rule 49(11) application dated 27 August 2011 under case no 13480/2011, such costs to be on an attorney and client scale, and to be inclusive of all the reserved costs and the costs of two counsel where applicable.

4 The first and the third to fifth respondents jointly and severally are ordered to pay the costs of the review application by Cycad Pipelines (Pty) Ltd under case no 17852/2011, such costs to be on an attorney and client scale, and to be inclusive of all the reserved costs and the costs of two counsel where applicable.

5 The first appellant's appeal against the order in para 4 of the order of the high court is dismissed with costs.'

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D van Zyl

Acting Judge of Appeal

APPEARANCES

For First Appellant:	K W Lüderitz SC (with him C Woodrow) Instructed by: Thomson Wilks, Johannesburg Webbers, Bloemfontein
For Second Appellant:	J P Daniels SC (with him T D Prinsloo) Instructed by: Du Toit McDonald Inc, Johannesburg Webbers, Bloemfontein
For First, Second and Sixth Respondents:	K Tsatsawane Instructed by: Mahowa Inc, Tzaneen Honey Attorneys Inc, Bloemfontein
For Third, Fourth, Fifth, Seventh and Eighth Respondents:	P F Louw SC Instructed by: Routledge Modise Inc, Johannesburg Symington & De Kok, Bloemfontein
For Ninth Respondent:	H van Eeden SC Instructed by: Cliffe Dekker Hofmeyr Inc, Cape Town Honey Attorneys, Bloemfontein