FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: **147**

PARTIES:
INTERTRADE TWO (PTY) LTD **APPELLANT**

And

THE MEC FOR ROADS & PUBLIC WORKS,

EASTERN CAPE **1ST RESPONDENT**

THE PREMIER OF THE EASTERN CAPE **2ND RESPONDENT**

REFERENCE NUMBERS -

- Registrar: **1790/04**
- Magistrate:
- High Court: **CISKEI DIVISION**

HEARD: **29/3/07**

DATE DELIVERED: **31/5/07**

JUDGE(S): **PLASKET, J**

LEGAL REPRESENTATIVES -
Appearances

- for the State/Applicant(s)/Appellant(s):
- for the accused/respondent(s):

Instructing attorneys:
- Applicant(s)/Appellant(s):
- Respondent(s):

CASE INFORMATION -
- *Nature of proceedings* :
- *Topic*:
- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA

(CISKEI DIVISION)

CASE NO: 1790/04
DATE HEARD:29/3/07
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REPORTABLE

In the matter between:

INTERTRADE TWO (PTY) LTD **APPELLANT**

and

THE MEC FOR ROADS & PUBLIC WORKS,
EASTERN CAPE **1ST RESPONDENT**

THE PREMIER OF THE EASTERN CAPE **2ND RESPONDENT**

The appellant had tendered for certain contracts. It was common cause that no final decision had been taken. Two issues arose for decision on appeal. First, it was contended that because no estimates were done prior to the opening of tenders, as they should have been in terms of regulation 11(1) of the regulations made in terms of the Preferential Procurement Policy Framework Act 5 of 2000, the entire tender process was a nullity and the appellant was therefore not entitled to any relief on this basis. It was held that compliance with regulation 11(1) was not mandatory and consequently that the tender process was not vitiated on this account. This issue having been decided in favour of the appellant, the second issue was whether the appropriate remedy for the failure to take a final decision on the tenders was an order awarding the tenders, or some of them, to the appellant, or an order directing the first respondent to take a decision. It was held that the tender process, particularly the evaluation of the tenders, had been flawed and that this

precluded the court from substituting its decision for that of the first respondent, even if exceptional circumstances were held to be present. It was ordered that the evaluations be done again by a consultant from a firm other than the one that evaluated the tenders initially and that a final decision had to be taken within a stated period of time. Accordingly, the appeal succeeded with costs.

JUDGMENT

PLASKET, J:

[A] INTRODUCTION

[1] The South African Constitution is based on a set of founding values that include the rule of law and constitutional supremacy[1] as well as accountability, responsiveness and openness.[2] These democratic values are given specific content by, *inter alia*, a fundamental right of access to 'any information held by the State'[3] and a fundamental right to just administrative action comprising of rights to lawful, reasonable and procedurally fair administrative action, as well as to reasons for adverse administrative action.[4]

[2] The importance of these fundamental rights in the present appeal is illustrated graphically by the judgment of Maya AJA in *MEC for Roads and Public Works, Eastern Cape and another v Intertrade Two (Pty) Ltd*[5], an appeal by the present respondents against an order directing them to furnish information to the present appellant concerning the tender process that is in

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[1]Section 1(c).
[2]Section 1(d).
[3]Section 32(1)(a). This right is given effect to by the Promotion of Access to Information Act 2 of 2000. (Note that s 32(1)(b) extends the right to information held by private persons or bodies if the information is 'required for the exercise or protection of any rights'.)
[4]Section 33(1) and (2). These rights are given effect to by the Promotion of Administrative Justice Act 3 of 2000.
[5]2005 (5) SA 1 (SCA).

issue in this matter. Having held that the technical defences raised by the present respondents had no merit, Maya AJA proceeded to state:[6]

> 'There is another issue that requires comment. The appellants' resistance to Intertrade's request for documentation on technical grounds was, in my opinion, most reprehensible. Important issues are at stake here. Intertrade seeks to establish the truth about an extraordinarily extended tender process to exercise and protect its rights. The appellants knew what documents it required from the outset. They did not raise any impediment which would prevent them from producing the documents. Neither did they deny that they had the documents in their possession. Their response is rendered more deplorable by the report contained in the department's own correspondence which shows that, whilst they were embarking on delaying tactics at the taxpayer's expense, sick and vulnerable citizens were suffering and children were dying in poorly maintained hospitals as a direct result of their failure to comply with their constitutional obligations.'

[3] This appeal does not concern, directly at any rate, the right of access to information although the appellant has complained that all the information that it sought has not been provided.[7] The main focus of this case is the right to just administrative action in the tendering process. (It is by now trite that tendering decisions by organs of State constitute administrative action as contemplated by s 33 of the Constitution and as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 – the PAJA.[8]) It was in the

[6] Para 20.

[7] The most obvious instance of the withholding of information concerns a document that emanated from the Director-General of the Provincial Government which is bizarrely (and inappropriately) marked 'Top Secrete' (sic). While most of the document was provided, one page – no doubt the most important to the appellant – has not been furnished and no explanation or apology has been tendered. The appellant's protestations have simply been met with a wall of silence, a response that ill-behoves an organ of State that is under constitutional duties to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. (Constitution, s 7(2).)

[8] See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA), para 39 of the judgment of Olivier JA and paras 7-9 of the judgment of Schutz JA; *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA), para 14; *Metro Projects CC and another v Klerksdorp Local Municipality and others* 2004 (1) SA 16 (SCA), para 12; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA), paras 11-12.

context of tendering that Olivier JA, in *Transnet Ltd v Goodman Brothers (Pty) Ltd*[9] emphasised the importance of administrative justice when he held that '[t]he right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner'.

[4] A further set of constitutional imperatives comes into play in this case: s 195(1) of the Constitution provides that the public administration 'must be governed by the democratic values and principles enshrined in the Constitution' including, *inter alia*, the promotion of the 'efficient, economic and effective use of resources', the impartial, fair, equitable and unbiased provision of services, accountability in public administration and the fostering of transparency. Finally, it is important to bear in mind that, in terms of s 237 of the Constitution, '[a]ll constitutional obligations must be performed diligently and without delay'.

[B] THE FACTS

[5] The facts are, by and large, not in dispute. What follows is a summary of the more important facts.[10] They make disturbing reading and tend to show that many of those involved in what can only be described as a fiasco were grossly incompetent and displayed a shocking, unacceptable degree of indifference to the plight of those whose health and well-being was, and continues to be, put at risk at 36 provincial hospitals and clinics in four districts of the Eastern Cape. All in all, the conduct of the administration in this matter displays an alarming degree of ineptitude, a lack of appreciation of what is required, a lack of judgment, rationality and common sense, and a disturbing contempt for the Constitution and for the people of the province that the Constitution seeks to protect from abuses of public power. In fairness to the first respondent, it must be said that much of the blame can be laid at the door of the Provincial Tender Board, which no longer exists.

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[9] 2001 (1) SA 853 (SCA), para 42.

[10] The facts are set out clearly and succinctly in Maya AJA's judgment in the access to information appeal. See paras 3-6. Subsequent to the appeal, however, further papers were filed in this aspect of the case, the review of the failure to decide on the tenders.

[6] The appellant – to whom I shall refer from now on as Intertrade -- is the corporate successor to an entity known as YBB CC, which traded as King Enterprises and Car Electricians. It had, in 1997, successfully tendered for two contracts in terms of which it was to undertake preventative maintenance and repairs of plant and equipment at a number of the Provincial Government's hospitals. The contracts were to run until the end of March 1999 but YBB was requested by the Provincial Government to extend the contract, at the prevailing rates, for another year. It agreed to do so.

[7] During this period fresh tenders were invited for the contracts. YBB was the only tenderer but the tenders were not awarded as a decision was apparently taken to combine the two contracts and invite new tenders for the single contract. The Provincial Government requested Intertrade, which had by now stepped into the shoes of YBB, to extend the contracts, again at the prevailing rates, for yet another year (ending at the end of March 2001). Intertrade agreed to do so. Tenders were again invited for one combined contract for the hospitals. Intertrade's tender was the lowest but a decision was taken not to award the tender. Instead, a decision was taken to split the contract into an electrical component and a mechanical component and to invite tenders once more.

[8] Intertrade agreed, on request, to continue with its preventative maintenance and repair work at its original rates until the end of January 2002. Once again, tenders were invited for the electrical and mechanical contracts. It was recommended that the contracts be awarded to Intertrade but the Provincial Tender Board decided that the tenders should not be awarded because the splitting of the contracts along the lines of electrical work and mechanical work was not cost-effective. It was decided instead to combine the contracts again and invite tenders yet again. Intertrade was asked to extend its 1997 contract for a further period until the end of March 2003. It agreed to do so, on the basis of escalated rates.

[9] This time, when the combined contracts were put out to tender, Intertrade was the only tenderer but this still did not avail it as the Provincial Tender Board decided not to award the tender, despite the favourable recommendation of the Head of the Department of Roads and Public Works. Instead, the Provincial Tender Board directed the Department to 'draw up a rephrased specification in order to accommodate other service providers to tender for the components which are contained in the tender, and re-advertise'.

[10] It was now decided to split the contracts differently and call for new tenders. They were to be split between a mechanical and electrical component, on the one hand, and a kitchen and laundry component, on the other. When Intertrade was asked once more to extend its contracts until 1 April 2003, it refused to do so.

[11] In September 2003, the Provincial Government, through its consulting engineers, Lukhozi Consulting Engineers (Pty) Ltd, issued four requests for tenders in respect of the hospitals. This time the tenders were split into the following: tender PTB5-02/03-1893ME, which was for mechanical and electrical work for the hospitals in the Alfred Nzo and OR Tambo districts; tender PTB5-02/03-1894ME, which was for mechanical and electrical work for the hospitals in the Chris Hani and Ukhahlamba districts; tender PTB5-02/03-1893LK, which was for laundry and kitchen repairs and maintenance for the hospitals in the Alfred Nzo and OR Tambo districts; and tender PTB5-02/03-1894LK, which was for laundry and kitchen repairs and maintenance for the hospitals in the Chris Hani and Ukhahlamba districts.

[12] Intertrade tendered for all four of the contracts. It was the only tenderer for the two mechanical and electrical contracts and one of two tenderers for the laundry and kitchen contracts. Despite various recommendations having been made, it is common cause that no final decision has been taken in respect of the four tenders. In two of the tenders – the mechanical and electrical tenders -- Intertade was the only tenderer, although its prices in both were significantly higher than the prices that were arrived at by the engineer

who evaluated the tenders. In the remaining two tenders – the kitchen and laundry tenders – Intertrade's prices were higher than those tendered by two apparently related close corporations that had tendered for one tender each. Intertade's prices were also higher than the evaluated prices.

[13] Intertrade brought the failure to decide on review. Its application was dismissed in the court below and it is against that judgment that it now appeals. The judge in the court below held that the 'process was fatally flawed' because of a failure to compile estimates prior to opening the tenders[11] but does not appear to have decided the application on this basis. Instead, although he accepted that no decision had been taken,[12] he dismissed the application on the basis that the respondents' explanation as to why no decision was taken was acceptable.[13] This explains the costs order that he made, namely that the 'respondent is ordered to pay the applicant's costs of the application up until the date of the filing of the respondents' answering affidavits'.[14]

[14] In my view, the judgment must be interfered with. The court below accepted that no decision had been taken. While that state of affairs exists, the administrative process is incomplete and hangs in limbo. It is a reviewable irregularity for an administrative decision-maker to fail to take a decision when he or she has been empowered to do so.[15] A duty rests on the first respondent to decide on the tenders, and he must do so.

[15] The issues that arise in this appeal are first, whether a failure on the part of the first respondent's department to compile estimates prior to the opening of the tenders is fatally defective to the tender process and, secondly, if it is not, whether the appropriate relief for the failure to decide on the tenders is a

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[11] Judgment, paras 30 and 36.
[12] Judgment, para 33.
[13] Judgment, paras 34-36.
[14] Judgment, para 2 of the order.
[15] *Julius v Lord Bishop of Oxford* (1880) 5 AC 214 (HC), 225; *Cape Furniture Workers' Union v McGregor NO* 1930 TPD 682, 686; *Mahambehlala v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 342 (SE), 352H-353D; *Mbanga v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 359 (SE), 368E-H; *Ntame v MEC for Social Development, Eastern Cape and two similar cases* 2005 (6) SA 248 (SE), para 36.

remittal to the first respondent or an order that, where Intertrade is the only tenderer, the tenders must be awarded to it and the remaining two be remitted to the first respondent for a final decision to be taken.

[16] When the process under challenge commenced, the power to enter into contracts on behalf of the Provincial Government was vested exclusively in the Provincial Tender Board.[16] That is no longer the case: the Provincial Tender Board Repeal Act (Eastern Cape) 6 of 2004 (EC) repealed the Provincial Tender Board Act (Eastern Cape) 2 of 1994 (EC), thus abolishing the Provincial Tender Board, and vests the power to contract for the procurement of goods and services in the various government departments and other provincial public entities. The first respondent is therefore now the organ of State vested with the power to decide on the tenders in issue in this appeal.

[17] Before proceeding to deal with the legal issues, it is necessary to say something more about the lamentable state of affairs in the hospitals that are the subject matter of what seems to be a never-ending tender process. It is not disputed that preventative maintenance at these hospitals stopped being done at the end of March 2003 and is still not being done: the maintenance of mechanical, electrical, laundry and kitchen equipment has only been done – often by Intertrade – on an *ad hoc* basis when plant and machinery breaks down. This crisis management type of approach has, on the respondent's own documents, led to deaths. A Problem Report Form of the Department of Roads and Public Works dated 9 July 2003 in respect of an electrical circuit breaker in the maternity ward of Saint Patrick's Hospital states: 'Circuit breaker is tripping at nursery which led to deaths of three kids. This is a matter of urgency.' Despite this, the Provincial Government has failed to address the problem meaningfully and with the urgency that the deaths of children should engender in a caring administration. It was this lack of concern for the people of the province who had to endure treatment at

[16] *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA), paras 7-9.

hospitals with failing plant and equipment that drew the ire of Maya AJA in the access to information appeal.

[C] THE ISSUES

(a) Prior Estimates

[18] As stated above, the first issue to be decided is whether the failure on the part of the first respondent's department, through its consulting engineers, to compile estimates of the tenders prior to the opening of the tenders is fatal to the tender process. If it is, it robs Intertrade of any right to compel the first respondent to take decisions on the four tenders because no valid tender process exists.

[19] The facts in relation to this point are as follows. According to Mr Malcolm Boucher, a director of Intertrade, and who deposed to its founding affidavit, he provided estimates because the departmental official in charge of opening the tenders ascertained that the consulting engineers had not done so. It is not contended by Mr Kemp, who appeared for Intertrade, that this amounts to the making of proper estimates.

[20] Mr Steven Kleyn, a director of Lukhozi Consulting Engineers (Pty) Ltd, and who evaluated the tenders for the Provincial Government, admitted that he was telephoned about the estimates but stated that he did not provide them as it was 'the client's function to give estimates to tenderers, if they so wish'. Although he stated that prior estimates were drafted, he never attached any to his affidavit, none form part of the rule 53 record and none were provided to Intertrade by the respondents as a result of its successful access to information appeal. Only one estimate was provided by Kleyn and that appears to have been compiled after the event.

[21] On the basis of the above, it can be accepted that no prior estimates were made in respect of the four tenders. This is certainly accepted by

Intertrade and the point has been taken by Mr Buchanan, who appeared with Mr Notshe for the respondents, that this is fatal to Intertrade's case.

[22] Regulation 11(1) of the regulations made in terms of the Preferential Procurement Policy Framework Act 5 of 2000 provides that, prior to inviting tenders, an organ of State 'must' plan properly for and, 'as far as possible, accurately estimate the costs of, the provision of services or goods for which an invitation for tenders is to be made'.

[23] Whether regulation 11(1) postulates a 'mandatory and material procedure or condition' (in the language of s 6(2)(b) of the PAJA), the non-compliance with which is fatal to the validity of the administrative action concerned is a matter of statutory interpretation. In part, at least, it involves an enquiry into whether the use of the word 'must' was intended to place a mandatory duty on organs of State to comply with the regulation – on pain of their further steps being invalid -- or whether compliance is merely directory.

[24] In *Weenen Transitional Local Council v Van Dyk*[17] the provision under scrutiny used the word 'shall' to impose certain duties on a local authority before it assessed rates on immovable property. The court was required to determine whether a failure to have complied rendered the determination of the rates invalid. Combrink J held:[18]

> 'The language employed in s 166 is manifestly mandatory where the local authority is instructed that it "shall" assess the rates for a given financial year in accordance with the provisions of s 105(1) and that, after the public inspection period had elapsed, it "shall" publish the two prescribed notices in the prescribed manner. Equally categorical is the declaration in the succeeding s 167(1) that the rates "shall" become due and payable one month after the publication of the first of the said notices and "shall" be paid on or before the final date set forth in such notice. To be sure, the use of the verb "shall" by the lawmaker in prescribing the steps to be taken by a local authority in terms of s 166

[17] 2000 (3) SA 435 (N).
[18] At 445D-G.

is an indication, even a strong one (*Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683), that the injunction is peremptory, but by the same token our case law literally bristles with decisions in which that verb had, in the light of other exegetic considerations, been assigned a directory import. Accordingly it remains a matter of construction whether *in casu* the lawmaker intended the verb “shall” to be read as “a categorical imperative” (per Van den Heever JA in *Messenger of the Magistrate's Court, Durban v Pillay* (supra)) or “a mere directory verb” (per Van Winsen AJA in *Maharaj v Rampersad* (supra)). To that end I adopt the approach suggested by Van Winsen AJA in the *Maharaj* case at 644D-E, namely to consider the object and importance of the provision under consideration. That exercise must obviously be undertaken with due regard to the enactment as a whole.’

[25] The starting point in the search for the meaning that the legislator intended when promulgating the regulations ought to be a common sense one which Baxter captures with his usual clarity. He states:[19]

> ‘Administrative action based on formal or procedural defects is not always invalid. Technicality in the law is not an end in itself. Legal validity is concerned not merely with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects.’

[26] The methodology for the search for the true meaning of words such as ‘shall’ and ‘must’, on the one hand, and words such as ‘may’, on the other, was guided by Wessels JA in *Sutter v Scheepers*[20] who adopted a four-point rule-of-thumb approach in the following terms:[21]

> ‘(1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate. …

[19] Baxter *Administrative Law* Cape Town, Juta and Co: 1984, 446.
[20] 1932 AD 165.
[21] At 173-174. See too Hoexter *The New Constitutional and Administrative Law* (Vol 2: Administrative Law) Cape Town, Juta and Co: 2002, 139-141.

> (2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory. …
>
> (3) If, when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
>
> (4) The history of the legislation will also afford a clue in some cases.'

[27] The process of determining whether non-compliance with a procedure or condition brings in its train nullity is not a mechanical process. That it is a nuanced and often difficult interpretive exercise is made clear by Combrink J in the *Weenen Transitional Local Council* case. He noted a recognition on the part of judges 'that the validity of actions in purported compliance of a statutory injunction cannot be determined by a mere label such as "peremptory" or "directory" without proper regard being had to the intention of the legislator derived from the enactment as a whole'.[22]

[28] It will be noted that regulation 11(1) is couched in the positive – an 'organ of State must' – rather than in the negative -- 'no organ of State may proceed with a tender unless …'. This, on the strength of *Sutter v Scheepers* may be taken as an indication that the injunction is not mandatory. Secondly, apart from being couched in the positive, no sanction has been prescribed for non-compliance. This too, according to Wessels JA in *Sutter v Scheepers* is indicative of the provision being directory rather than mandatory. Thirdly, it appears to me that an interpretation of the regulation that makes compliance with it mandatory, with non-compliance axiomatically resulting in invalidity of the process, would render the public procurement process unworkable, would often result in unfairness, would encourage unscrupulous conduct and would without justification elevate form over substance. These factors support an interpretation of the regulation that it is directory rather than mandatory.

[22]Supra (note 17) at 444C-D.

[29] An interpretation that regulation 11(1) is mandatory would render public procurement unworkable because it would focus attention, and blow out of all proportion, an internal management tool that is intended to be a fairly rough and ready guide to the reasonable cost of the provision of the goods or services involved. The process by which estimates were arrived at would become the focus of challenges to tendering decisions because, in the event of the estimates not having been done at all, or having been done badly or inadequately or inaccurately, the entire process may then fail, not because the result was unfair, irrational or otherwise reviewable but because a step that was required to be taken at an early stage, and that may be entirely irrelevant at the end of the process, had not been properly completed. Apart from making the tender process unworkable, such an interpretation of regulation 11(1) would elevate formalistic i-dotting and t-crossing to a disproportional importance in relation to issues of substance.

[30] Such an interpretation would often result in unfairness because it could have the effect of an objectively fair, rational and otherwise unimpeachable tender being set aside at the instance of an unsuccessful tenderer because a bureaucrat failed to do his or her job properly at an early stage in the process even though this failure may not have had an impact on the eventual decision. Worse still, it could result in organs of State opportunistically using defects in their internal management to resile from contracts that are in reality unimpeachable simply because they no longer want to abide by their terms. The defects in the process may, after all, only be known to the organ of State which may use it as the ultimate trump card when the need arises. It can, I believe, be assumed that an interpretation that could encourage or even allow such unscrupulous conduct was probably not intended by the legislator, and ought to be avoided.

[31] The regulations of which regulation 11(1) is a part are intended to provide the *procedure* for the implementation of the Preferential Procurement Policy Framework Act. The Act and the regulations are part of a public procurement

system that has been 'elevated to the status of constitutional principle'[23] and is required by s 217(1) of the Constitution to be 'fair, equitable, transparent, competitive and cost-effective'. Regulation 11(1) is a small part of the machinery that is designed to achieve results that meet the constitutional standard. In the end result, however, the entire public procurement process that is the subject of challenge must pass the test of s 217(1) of the Constitution.

[32] Regulation 11 as a whole is intended to place an obligation on those who manage tender processes to plan them properly so the public purse is used cost-effectively and so that the result will be fair, rational and otherwise constitutional. Despite the importance of estimates as a management tool for the rational evaluation of tenders, it is possible for a tender process that has not been done in compliance with regulation 11(1) nonetheless to be fair and rational. In this sense, it cannot be said that, from a practical point of view, compliance with regulation 11(1) is an absolute imperative for a tender process that meets the constitutional standard and, in my view this could not have been intended by the maker of the regulations.

[33] For the above reasons, I conclude that non-compliance with regulation 11(1) does not have the effect that the entire tender process has been vitiated: Intertrade is still, in other words, entitled to a decision. It is to that issue that I now turn.

(b) The Failure to Decide

[34] It is common cause that no final decision has been taken in respect of the tenders, despite the effluxion of a more than reasonable time for a decision to be taken. This means that there can be no dispute that Intertrade is entitled to relief: s 6(2)(g), together with s 6(3)(a) of the PAJA, provide that the failure to take a decision within a reasonable time is a ground of review and hence an infringement of the fundamental right to just administrative action. Once that is

[23]Penfold and Reyburn 'Public Procurement' in Woolman, Roux, Klaaren, Stein and Chaskalson *Constitutional Law of South Africa* (2 ed) (Vol 1) Cape Town, Juta and Co: 2006, 25-1.

accepted, the only remaining issue is what is the appropriate remedy that should be awarded.

[35] It was argued by Mr Kemp that the court should simply substitute its decision for that of the decision-maker and award the mechanical and electrical tenders to Intertrade, while the laundry and kitchen tenders should be referred back to the first respondent for a final decision to be taken. Given the track record of the Provincial Government in this tender process, that robust option has its attractions. Mr Buchanan, on the other hand, argued that the court is not able, as a matter of law, to substitute its decision because the remedial section of the PAJA that applies to failures to decide, namely s 8(2), does not contemplate substitution as a remedy: it is only in the case of a decision having been taken and then being set aside that, in terms of s 8(1)(c)(ii)(aa), a court may 'in exceptional circumstances' take the decision rather than remit it to the administrative decision-maker. In the second place, Mr Buchanan has argued that even if the court was entitled to take the decision as a matter of law, it does not have the necessary information available to it to do so, the circumstances are not exceptional and it would not be able to take a fair and rational decision.

[36] Mr Kemp has submitted, in my view correctly, that the tender process in this case was shot through with irregularities. The first such irregularity is the absence of prior estimates. While I have stated that the absence of prior estimates does not in itself vitiate the process, it does have an impact on the remedy in this case: there is no rough bench mark, determined prior to the opening of tenders, by which a decision-maker can be guided as to what may or may not be a reasonable tender. That problem may be overcome by proper evaluations of the tenders. In this case, however, the tenders were not properly evaluated.

[37] A number of inconsistencies and mistakes in the evaluation of the tenders have been highlighted by Mr Boucher in his replying affidavit. For instance, in the ME1893 tender, Mr Kleyn determined a provisional amount of R300 000.00 for building repairs and maintenance. Despite this being a set and

immutable figure for all tenderers, when Mr Kleyn evaluated the tenders he used a figure of R200 000.00.

[38] Secondly, in his supplementary affidavit, Mr Boucher pointed out that in the LK1893 tender (in which Mr Kleyn recommended that Zululand Steam CC be awarded the tender) that 'whilst the applicant did so, Zululand Steam failed to allow for time-related costs over the 36 month period of the contract resulting in a discrepancy of some R3m on this item between the respective bidders'. Mr Kleyn's accepted this to be correct but said that this 'does not mean however that the cost related thereto were not included in other rates' and that 'although Zululand Steam, in many instances, allowed far less in respect of time-related costs an allowance has indeed been made in most cases'. To this Mr Boucher has replied as follows:

> 'The contention that the costs of time-related items were included in rates other than the ones which have a time component is simply startling. It is unsurprising that respondents do not give any actual example hereof. It simply demonstrates that these tenders were not properly compiled or evaluated. If a tenderer deflates a rate for his time-related items and artificially inflates certain of his other rates, there is an obvious danger to the client if the quantity of the latter items is greater than expected. Engineers are ordinarily watchful of this and do not allow the practice.'

[39] Thirdly, Mr Boucher has pointed out that, in the tender of Eastern Cape Steam CC (LK1894), the tenderer omitted prices for 438 items, which comprised 26.45 percent of the total number of items and about seven percent of the total contract price. The fact that these prices were omitted is not in dispute and the point that Mr Boucher makes is that the tender rules have been ignored in that a significant number of items were not priced by the tenderer and this was ignored by Mr Kleyn. He deals too with Mr Kleyn's statement that the applicant did not price certain items in their tenders by stating:

> 'This riposte indicates just how little trouble the other Steam tenderers and Kleyn put into preparing their tenders, estimates and the

> evaluation of tenders. The reason is a simple one – the equipment in question does not have or utilise such spares or items for which no price has been provided. If a certain piece of equipment does not have a radiator, you do not price for a radiator or radiator hose for that item – if an item is not air-cooled, you do not price for a fan or a fan belt. By way of an example, I refer the court to page 263 of the applicant's ME1893 tender … . There are no prices for the removal of the radiator, re-coring it, the removal of the water pump and the like because a Lister Diesel Engine TS3 does not have a radiator (some of the others have). I would have thought that Kleyn would know why no figures were put in by the applicant. What is quite perplexing is what Steam priced for.'

[40] Finally, Mr Boucher has highlighted a number of blatantly inappropriate costs in Mr Kleyn's estimate of the ME1893 tender, which was made after the tenders were opened and which corresponded exactly to his tender evaluation, and thus formed the basis of his conclusion that the applicant's tender was high. These include, in the first place, an unrealistically low figure for monthly contractual commitments, which include 'telephone and cell phone charges, water, electricity, computers, photocopies, cameras (to photograph service items) and rental of premises to house at least four service vehicles, offices etc'. Mr Kleyn provided for a monthly amount of R1 666.00 for these costs, an amount which is self-evidently inadequate. In the second place, the depreciation of vehicles and equipment that he provided for was so low that Mr Boucher summed up the effect by saying that 'Kleyn considered that the four vehicles worth about R1 000 000.00 will be worth R940 000.00 after three years and after each travelling 100 000 kms over some of the worst roads in South Africa'. Thirdly, the amount he allowed for supervisory administration and stores staff meant that the gross salaries of supervisory staff, administrative staff and stores staff would, on average, be about R2 500.00 per month. Fourthly, Mr Boucher made the point that, while the applicant had set its travel rate per kilometre at R5.00, a figure that had been considered by Mr Kleyn to be fair and reasonable when he evaluated the applicant's 2002 tender, he set the rate in his evaluation at R3.50.

[41] These inaccuracies, mistakes and inconsistencies are evident from the papers. It is not correct to categorise them as disputes of fact that either cannot be resolved on the papers or ought to be resolved in favour of the respondents, on the normal principles: Mr Boucher's averments concerning Mr Kleyn's methodology are conclusions that he has drawn from the answering affidavits, the evaluations and other documentation. This court is able to draw conclusions as to the propriety, consistency and rationality of Mr Kleyn's evaluations. It is evident from what has been set out above that the evaluations of the tenders were flawed.

[42] In the light of the view I take of the appropriate remedy to be awarded, it is not strictly speaking necessary to deal with Mr Buchanan's argument that the court has no power to take the decision that the administrative decision-maker ought to have taken, in circumstances where, as in this case, no decision has been taken. Suffice it to say that I am not convinced that the argument is sound that the remedies listed in s 8(2) constitute a closed list. That argument appears to overlook the open-ended scheme of the remedies contemplated for breaches of the right to just administrative action: a court may, in terms of both s 8(1) and s 8(2) 'grant any order that is just and equitable' and the orders contemplated may *include* those that are listed. I see no reason why a failure to decide an application for a licence or permit, for instance, may not, in an appropriate case, be remedied by an order granting the licence or permit where its grant is a foregone conclusion and no purpose would be served in referring the matter back to the administrative decision-maker: a failure to decide may sometimes amount to a constructive refusal.[24]

[43] It is not necessary to decide the issue because it is simply not possible for this court to take the decision to award the mechanical and electrical tenders to Intertrade, much as I sympathise with it for the shameful treatment it has had to endure at the hands of some functionaries in the Provincial

[24] See, for instance, *Pharmaceutical Society of South Africa and others v Tshabalala-Msimang and another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and another* 2005 (3) SA 238 (SCA), para 38 in which the delay in deciding an application for leave to appeal was held to be 'so unreasonable in fact that it could only be interpreted as a refusal of leave'.

Government over a protracted period of time. The availability of proper and adequate information and the institutional competence of the court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from ‘exceptional circumstances’, before a court can legitimately assume an administrative decision-making function. This, it seems to me, is a minimum requirement of rational decision-making, a fundamental requirement of the rule of law.[25] In this case, because of the absence of proper estimates, because of the flaws in the evaluations of the tenders and because of the unknown consequences on the tenders of the inexcusable passage of time, both prerequisites are absent. If this court was to award the tenders to Intertrade, it would act arbitrarily and in conflict with the rule of law because it would not have a rational basis for concluding that the award of the tenders would be ‘fair, equitable, transparent, competitive and cost-effective’, as required by s 217(1) of the Constitution.

[44] I am acutely aware that the appellant will, no doubt, feel that it has been robbed of the prize to which it considers itself entitled. After all, it is not to blame for the way in which the tender process has been handled. I understand that, but wider interests and principles are involved. Courts, like any other institutions that exercise public power in terms of the Constitution, are duty-bound to act in terms of the rule of law and its principle of legality.[26]

[45] Courts are, furthermore, duty-bound to respect the separation of powers, an important pillar of the Constitution.[27] Indeed, administrative law is, itself, an

[25] *Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), paras 85-86.
[26] See in this regard, *S v Mabena and another* 2007 (1) SACR 482 (SCA), para 2 in which Nugent JA held: ‘The Constitution proclaims the existence of a State that is founded on the rule of law. Under such a regime legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the State. Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with law. As in the case of other State authority, the exercise of judicial authority otherwise than according to law is simply invalid.’
[27] *South African Association of Personal Injury Lawyers v Heath and others* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC), paras 21-26.

incident of the separation of powers, a point made in the following terms by Chaskalson P in the *Pharmaceutical Manufacturers* case:[28]

> 'Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them.'

[46] These constitutional principles mean that courts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government.[29] These restraints on the powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process. This case is an ironic example of that: if the Provincial Government had done a better job of administering the tender process there might have been more information available to this court, it might well have been concluded that exceptional circumstances were present and it might then have been possible to have taken a decision to award the tenders to the appellant.

[47] That, however, is in the realms of speculation. All that this court can do is to order that the process be completed. It appears to me, however, that a convincing case has been made out by the appellant that the evaluations of the tenders were flawed. If the end result of the process is to be 'fair,

[28] Supra (note 25), para 45.

[29] See generally *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), paras 46-48. In *Bato Star* the doctrine of deference was discussed in the context of review for reasonableness. O'Regan J located the doctrine of deference, which she preferred to regard as institutional respect, squarely within the doctrine of the separation of powers. For instance, at para 48, she held: 'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government.' See too *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others* 2006 (2) SA 199 (C), 211G.

equitable, transparent, competitive and cost-effective', the evaluations must be done again by a person other than Mr Kleyn or a member of his firm. The respondents will be ordered to appoint such a consultant, and to do so within a specified period. Once that has happened and the consultant has, also within a specified period, evaluated the tenders, the first respondent will be in a position to take a decision, in accordance with the statutory provisions that empower him, that will complete the tender process.

[D] THE RESULT

[48] For the reasons set out above, the following order is made.

1. The appeal is allowed with costs.

2. The order of the court below is set aside and altered to read as follows:

2.1 The first respondent is directed to appoint, within two weeks of the date of this order, an independent consultant who is not an employee of, or has an interest in, Lukhozi Consulting Engineers (Pty) Ltd who shall evaluate the tenders for the following contracts: tender PTB5-02/03-1893ME for mechanical and electrical work for provincial hospitals and clinics in the Alfred Nzo and OR Tambo districts; tender PTB5-02/03-1894ME for mechanical and electrical work for provincial hospitals and clinics in the Chris Hani and Ukhahlamba districts; tender PTB5-02/03-1893LK for laundry and kitchen repairs and maintenance for provincial hospitals and clinics in the Alfred Nzo and OR Tambo districts; and tender PTB5-02/03-1894LK for laundry and kitchen repairs and maintenance for the hospitals in the Chris Hani and Ukhahlamba districts.

2.2 The consultant thus appointed shall evaluate the tenders and make a recommendation to the first respondent within two months of the date of his or her appointment by the first respondent in terms of paragraph 2.1 above.

2.3 The first respondent is directed to decide on the above mentioned tenders within one month of receiving the recommendation mentioned in paragraph 2.2 above.

2.4 The respondents are directed to pay the applicant's costs.

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C. PLASKET

JUDGE OF THE HIGH COURT

I agree.

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E. REVELAS

JUDGE OF THE HIGH COURT

I agree.

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L. KEMP

ACTING JUDGE OF THE HIGH COURT