

**IN THE COURT OF APPEAL OF LESOTHO  
HELD AT MASERU**

**C OF A (CIV) NO. 26/2022  
CCA/0039/2022**

In the matter between:

**PROCUREMENT POLICY AND ADVICE  
DIVISION  
APPELLANT  
INDEPENDENT ELECTORAL  
COMMISSION  
APPELLANT**

**1<sup>ST</sup>**

**2<sup>ND</sup>**

AND

**LAXTON GROUP LIMITED**

**RESPONDENT**

**CORAM** : DAMASEB, AJA  
MUSONDA, AJA,  
CHINHENGO, AJA

**HEARD** : 17 OCTOBER 2022  
**DELIVERED** : 11 NOVEMBER 2022

***SUMMARY***

*A tender award made by a tender panel established in terms of the Public Procurement Regulations 2007 contrary to the recommendation of the Evaluation Team of the Procurement Unit; same may be collaterally challenged in review proceedings.*

**JUDGMENT**

**PT DAMASEB AJA:**

[1] The present appeal is concerned with the outcome of a tender process undertaken by the Independent Electoral Commission of Lesotho (IEC) in respect of the voters roll for the purpose of the recently concluded national elections in Lesotho. The IEC is a public body created by s 66 of the Constitution of Lesotho.

[2] In the Kingdom of Lesotho, the procurement of goods and services by a public body such as the IEC is statutorily prescribed by the Public Procurement Regulations 2007<sup>1</sup>(Procurement Regulations). Such a public body is referred to in the Procurement Regulations as a *Procurement Unit* (Unit). All public bodies - ministries, district councils, state-owned entities, any other bodies covered by public law or any project implementing authority authorized to carry out public procurement and funded by foreign loans, grants and assistance, constitute a Procurement Unit when carrying out public procurement.<sup>2</sup>

[3] The Procurement Regulations leave no doubt that the public sector procurement architecture of Lesotho is founded on (a) legality, (b) accountability, (c) efficiency, (d) transparency (e) overall value for money and (f) segregation of functions infusing checks and balances. To give effect to these values the legislator (through the Procurement Regulations) created separate bodies exercising discrete roles

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<sup>1</sup> Legal Notice 1 of 2007.

<sup>2</sup> Regulation 3(2).

and functions – thus adding an additional (sixth) dimension to the values listed above.

[4] The Ministry of Finance has the ultimate oversight function over public procurement in Lesotho. That is so because one of the bodies created under the Procurement Regulations is the *'Public Policy and Advice Division (PPAD), headed by a "Director"*. In terms of Regulation 5(2) *'PPAD shall be a department in the Ministry'* of Finance.

### **PPAD's Mandate**

[5] In terms of Regulation 6(1), PPAD is *'responsible for the development of the public procurement system by securing legality, accountability, efficiency, transparency and overall value for money in the implementation of public procurement and by stimulating a competitive environment with equality of treatment among bidders in the public procurement process'*.

[6] Sub-regulation (2) of Regulation 6, amongst others, empowers the PPAD to:

*' . . .*

*(c) monitor compliance with procurement policies and the Regulations;*

*. . .*

*(m) set up an Appeal Panel to deal with complaints and appeals from suppliers and companies, and PPAD shall provide the Secretariat service to the Appeals panel . . .'*

## Procurement procedure

[7] Whether it is to procure goods and services, inviting tenders for such goods and services, evaluating bids received in response to an advertisement, and awarding a tender to, and contracting with the successful bidder, is the responsibility of a Procurement Unit. Once a successful bidder has been awarded a tender, the Procurement Unit's last function is to hold a debriefing session at which it performs an important function, amongst others, of informing the unsuccessful bidder(s) of the reason(s) for their (or its) lack of success *'in broad and constructive terms'*.

[8] In terms of Regulation (30) (1):

*'The Unit shall invite the tenderer who has satisfied the requirements specified and submitted the most favourable tender to enter into a contract.'*

[9] Regulation 32 obligates a Unit, after it has awarded a tender, to hold a debriefing session whereat it *'shall advise unsuccessful tenderers of the reasons for their lack of success in broad and constructive terms . . .'*

[10] The award of a tender by a Unit is preceded by the following internal processes within the Unit.<sup>3</sup> The evaluation of competing tenders is done by the Procurement Unit's

<sup>3</sup> See Regulations 49 and 50.

Evaluation Team (ET)<sup>4</sup> whose function is *'to examine and evaluate tenders, prepare an evaluation report and make recommendations to the Tender Panel on award of contract'*.

[11] In terms of Regulation 49(6):

*'An evaluation report from the Evaluation Team to the Tender Panel shall be made in the form of the minutes of the evaluation meeting and include full details of the evaluation against the criteria published with the invitation to tender, reasons for rejecting any or all tenders, recommendations approved by the majority of the members of the Evaluation Team, their rationale and all relevant and supporting information.'*

[12] In terms of sub-regulation (7):

*'All Evaluation Team members shall sign the evaluation report, majority views shall be similarly evidenced and attached to the majority evaluation report'*.

[13] The values of accountability and transparency are clearly evident from these provisions. As I have shown, the ET's report, with recommendations, serves before the Tender Panel (TP) and the latter makes the final decision to award a tender.

[14] As will soon become apparent, the TP's deliberations are also statutorily required to be accountable and transparent. The TP's crucial function, in terms of Reg. 50(3)(c), is to:

<sup>4</sup> Regulations 49(1) and (2).

*'consider the report and recommendations made by the Evaluation Team and to decide which tenderer shall be awarded the procurement contract.'*

[15] According to Reg.50 (12):

*'The [TP] shall convene to consider the report and recommendation as to the award of the procurement contract as made by the [ET]'*.

[16] In terms of Reg. 50 (13):

*'The [TP] shall ensure that-*

- (a) the competitive process has been followed in accordance with these Regulations;*
- (b) the award of the procurement contract is strictly in accordance with objective evaluation criteria as set out in the Invitation to Tender;*
- (c) no subjective judgement or conflict of interest are brought to bear on the decision;*
- (d) the decision is able to stand scrutiny by the audit authorities, the business community and the public in general;*
- (e) the decision can withstand any challenge of anticompetitive behaviour or misuse of public funds; and*
- (f) the Government is achieving value for money.'*

[17] In terms of Reg. 50 (19):

*'The Tender Panel shall make full account of its proceedings and the account be a matter of public record'.*

## **Settlement of disputes**

[18] Reg. 54 provides:

*(1) A tenderer, a trade association, an auditor of the Government or any group with a legitimate interest in the object of the contract may submit a written complaint to the Unit not beyond 3 calendar months following the date of contract award, any supporting evidence shall be enclosed with the complaint.*

*(2) The Unit shall notify all tenderers about the nature of the complaint and invite tenderers whose interest might be affected by a respective decision, to the complaint proceedings.*

*(3) Failure of the notified tenderers to participate in the complaint proceedings will prevent the tenderers from bringing further complaints concerning the same subject matter.*

*(4) The Unit shall review and make a decision on the complaint in 10 working days after the submission of the complaint, where the complaint is not accepted as valid, the decision shall state the justification for non-acceptance, but, where the complaint is accepted as valid, the decision shall state how the complaint will be rectified.*

*(5) The Unit shall not enter into a contract in respect of the tender in question after receiving a complaint and until such time as the*

*complaint is resolved, either through a decision by the Unit or where such a decision is unacceptable to the complainant through a decision by the Appeals Panel, except where suspension of the tender process would be against the public interest, the Minister shall be the arbiter of whether the tender process is in the public interest.'*

[19] Reg. 55 provides:

*'(1) The complainant may appeal to the PPAD within 5 working days where-*

- (a) the complainant does not agree with the decision of the Unit,*
- (b) the Unit did not issue a decision within the specified time, or*
- (c) the Unit entered into a contract before its decision on the complainant, unless not entering into the contract is against the public interest.*

*(2) PPAD shall consider a complaint and issue the following decisions where it considers that the Unit breached these Regulations:*

- (a) nullify or modify illicit actions or decisions of the Unit wholly or partially;*
- (b) declare which provision of these Regulations should apply in a given case; or*
- (c) instruct the Unit to carry out the tender process after the breaches are rectified.*

*...*

*(4) PPAD shall seek an opinion from the independent Appeals Panel for reviewing the complaint related to the tender process authorized for*



*contracting, the decision of PPAD shall be based on the Appeals Panel opinion.*

*(5) The Appeals Panel shall comprise 3 independent experts who shall be selected according to the following procedures within 5 working days following the submission of the complaint:*

*(a) the complainant and the Unit shall each select an expert;  
and*

*(b) both experts shall select a third expert, where the two experts do not agree on the choice of the third expert, the Minister shall nominate the third expert; or*

*(c) the three experts shall nominate one of them to the chairperson.’ (Underlined for emphasis)*

## **Factual backdrop**

[20] In November 2021, the IEC advertised an invitation to tender for the procurement of an elector and voter management information system (EVMIS). The respondent (who was the applicant in the court *a quo*) submitted a bid as did several other bidders inclusive of 6th respondent- Face Technologies (Pty Ltd).

[21] Following submission of tenders and evaluation thereof within the Procurement Unit, the TP decided to award the tender to Laxton. The offer was accepted by Laxton on the same day - being 21 December 2021.

[22] The TP had advised Laxton of a 10 working days cooling off period within which other tenderers were free to object to the award of the tender. Because of silence by the IEC following Laxton's purported acceptance of the TP's offer, Laxton wrote a letter to the IEC on 27 January 2022 demanding to proceed with the execution of the tender.

[23] On 1 February 2022, the secretary of the TP wrote a letter informing Laxton that three competing tenderers for the EVMIS had lodged complaints with the PPAD regarding the award of the tender and that the IEC had been instructed by PPAD to halt all processes regarding the tender.

[24] On 28 March 2022, the secretary of the TP informed Laxton of the verdict of the PPAD - that the tender be re-evaluated by a different evaluation team and tender panel. The director of IEC issued another letter dated 1 April 2022 to all the companies that had tendered for EVMIS to re-submit valid bid certificates following the verdict of the PPAD to have the tender re-evaluated.

### **The litigation**

[25] Laxton was dissatisfied with this turn of events and approached the High Court on urgent basis seeking interim relief pending a substantive review application. The interim relief was aimed at interdicting the re-evaluation of the EVMIS

tender because, Laxton maintained, it had already been invited to enter into contract with the IEC.

[26] The substantive relief sought was to review and set aside the PPAD's decision to re-evaluate the EVMIS tender; and an order directing the IEC '*to proceed to the next stage of the tender process . . . and invite [Laxton] to enter into a contract*' with IEC in respect of the EVMIS.

[27] The gravamen of Laxton's case was that after an evaluation process conducted in terms of the Procurement Regulations, the TP '*duly accepted*' Laxton's tendered offer and invited Laxton to enter into a contract with the IEC because Laxton's bid was the most favourable proposal; that the cooling off period after the award of the tender had lapsed; that Laxton was not informed of any objection by any dissatisfied bidder; and that Laxton accepted the offer and had begun with preparations to implement the tender.

[28] Laxton's grounds for review are that it had never been informed about any complaint lodged by disappointed bidders; that as an interested tenderer it was entitled to be so informed and to be invited to the complaint proceedings but was not-contrary to Regulation 54(2) - denying it the right to a fair hearing. It is further stated that the '*Evaluation Team correctly performed its mandate as required by the law and thereafter recommended [Laxton] as the most favourable tender*'. That the PPAD decision and that of the Unit not to

abide by the ET's recommendation is '*grossly unreasonable, irrational and irregular*'. That the decision was arbitrarily made and contrary to the Procurement Regulations and therefore liable to be reviewed, corrected and set aside. That the offer to Laxton by the TP to enter into a contract created a legitimate expectation that the contract will be signed in terms of the Procurement Regulations. That the rejection of the tender award to Laxton '*was not made by the Evaluation Team nor by the [TP] but was a usurpation of the Evaluation Team's power by the [PPAD]*'.

### **Answering affidavit**

[29] A completely different picture emerged from the answering affidavit deposed to by the Director of PPAD who, on behalf of the 3<sup>rd</sup> and 8<sup>th</sup> respondents, opposed the review application by Laxton. The deponent deposed that after the Unit completed its process, the PPAD had become seized with the matter (as will soon become apparent) and obtained all the official documents from the Unit related to the tender. Based on that he had become privy to the documents relating to how the tender was dealt with within the Unit. The Director accordingly denied that Laxton was the preferred bidder when regard is had to the reports of the ET and the TP. The official documents revealed that the ET had excluded the joint venture Laxton/SAF with reasons, amongst others because its tendered price was not competitive.

[30] The ET's recommended (most preferred bidder) was Face Technologies as it was the lowest evaluated response to the tender. The Director denies that Laxton could accept the offer made by the TP on 21 December 2021 because that offer was subject to a suspensive condition (the cooling off period) and that during that period complaints were lodged by disaffected bidders and that such complaints triggered the dispute resolution machinery under the Procurement Regulations.

[31] The deponent also alleged that the TP's award of the tender to Laxton was contrary to the ET's recommendation and *'without justifying the recommendation by the Evaluation Team'*. He maintains that the TP's decision goes against the procurement principles and that the TP had conflicted itself by re-evaluating and awarding the tender on its own. That, according to the deponent, *'means that there is no segregation of duties on its part'* and that the TP was *'player and referee at the same time'*.

[32] The Director goes on to allege that while the ET performed its mandate according to law, the TP considered an irrelevant factor by not awarding the tender to the most economically advantageous tender, *'simply on the basis that the tenderer had rendered the same services for the last 20 years till to date'*. In that regard, the deponent goes on to state that the TP had included a tender specification or term

which was not included in the tender document rendering their decision procedurally unfair.

[33] The Director therefore denies that the PPAD acted unlawfully and that its decision to order a re-evaluation of the EVMIS was justified in the circumstances. According to the PPAD, the invitation to Laxton by the TP could not create a legitimate expectation or contractual obligations between the Unit and Laxton because the expectation could not be reasonable as it stemmed from an unlawful award.

[34] It is clear from PPAD's answering affidavit that complaints by disaffected bidders were lodged directly to PPAD and not to the Unit; that PPAD did not empanel the Appeal Panel as envisaged under the Procurement Regulations and that whatever deliberation on the complaints that ensued within the PPAD was without the participation of Laxton.

[35] In any event, the deponent states, Laxton had gone on to participate in the re-evaluation process ordered by the PPAD and that the re-submission process had already been completed when the current proceedings were launched.

## **Reply**

[36] In the replying affidavit, now faced with the reality that the ET had not actually recommended it but Face

Technologies, Laxton asserts that the TP is not a rubber-stump for the ET and that the legally valid decision is that of the TP. It is also alleged that the ET's report is a '*non-starter*' as it was only signed by three out of five members and that two members decided not to sign it '*for reasons best known to them*'.

### **The High Court's approach**

[37] The High Court (Mathaba J) identified the central issue it had to decide to be whether Laxton was granted *audi* either by the Procurement Unit (IEC) or by the PPAD - before the decision (by PPAD) to order a re-evaluation of the EVMIS tender. The learned judge below made the following findings.

That on 21 December 2021 Laxton was informed by the Procurement Unit that it was the successful bidder. That Laxton should within 10 days of being informed of its success accept the award. That the offer to Laxton was subject to a suspensive condition (cooling off period) of 10 days within which dissatisfied (unsuccessful) bidders could lodge complaints against the award.

[38] That the record of proceedings does not show that a complaint was lodged with the IEC in terms of the Procurement Regulations. The record also does not show that Laxton was made aware of any such complaint during the cooling off period.

[39] That Laxton accepted the award on the same date that it received the offer - being 21 December 2021. That Complaints were laid directly with PPAD by dissatisfied bidders and not in terms of the relevant Procurement Regulation which requires a complaint first to the Unit and thereafter by way of an appeal to the PPAD. Laxton was not made aware of such complaints neither was it included in any hearing before the PPAD when such complaints were entertained and allowed.

[40] Although it is alleged that the tender TP acted unlawfully in approving Laxton's bid, the court a quo remarked that the Procurement Unit did not seek self-review of that alleged unlawful decision.

[41] The High Court accordingly concluded that having been informed that it was the successful bidder, Laxton was entitled to *audi* before the PPAD's decision to cancel the tender and calling for a re-evaluation. The decision was therefore liable to be reviewed and set aside.

[42] Mathaba J, made the following order:

*'67.1 The decision of the 3rd respondent to re-evaluate the tender of Elector and Voter Management Information System Tender No: LES/IEC/TEN/PAN/2021-22/03 and thereby unlawfully aborting the process which had evaluated and found the applicant to be the preferred candidate who qualified to proceed to enter into a contract is reviewed and set aside.*



*67.2 the decision of the 4th respondent to re-evaluate the tender of Elector and Voter Management Information System Tender No: LES/IEC/TEN/PAN/2021-22/03 and thereby unlawfully aborting the process which had evaluated and found the applicant to be the preferred candidate who qualified to proceed to enter into a contract is reviewed and set aside.*

*67.3 Processes that may have ensued as a consequence of the decision of the 4th respondent to re-evaluate the tender of Elector and Voter Management Information System Tender No: LES/IEC/TEN/PAN/2021-22/03 and thereby unlawfully aborting the process which had evaluated and found the applicant to be the preferred candidate who qualified to proceed to enter into a contract are hereby reviewed, set aside and nullified.*

*67.4 The third and the eighth respondents to pay costs of this application.'*

[43] Significantly, the High Court declined to grant consequential relief in the form prayed for in paragraph 6 of the notice of motion which sought an order that Laxton be invited to enter into a contract with the IEC and to proceed to implement the EVMIS tender on the basis that it was the successful tenderer.

[44] The court a quo's reluctance to grant consequential relief is problematic because it creates great uncertainty about what would happen next and the practical value and effectiveness to Laxton of the order setting aside PPAD's

decision. It seems more like a pyrrhic victory because it appears not to have a practical benefit for Laxton.

[45] The learned judge appeared to recognise as much when she said:

*'[49] I am not sure how the parties will proceed with the matter once the impugned decisions are reviewed and set aside. But should the matter somehow find its way back to the PPAD, it will not be proper for the director of the PPAD to be involved in its adjudication to guard against perception of bias. If permissible, he has to recuse himself. It is clear from this verdict, as well as his answering affidavit, that he is convinced that the evaluation team did a proper job in recommending Face Technologies. I must caution that I'd not have full facts as a result of which whatever I am saying about recusal of the director should not be construed as definitive'.*

*[45] This observation is capable of an interpretation that although the PPAD's decision was set aside, a fresh appeals process had to take place in terms of the dispute resolution process set out in paragraph 18-19 of this judgment. If that was indicated, the court should have made an order to that effect.*

## **The appeal**

[46] It is alleged by 3<sup>rd</sup> and 8<sup>th</sup> respondents that the court a quo misdirected itself in reviewing and setting aside the PPAD's decision directing a re-evaluation and that it should instead have found that:

- a) There were glaring irregularities in the award vitiating the said award on “legality collateral challenge”.
- b) The TP violated the segregation of duties, a principle critical in the public procurement system regulated by the Procurement Regulations.
- c) Even if Laxton was denied *audi*, that failure did not affect Laxton adversely, rendering the requisite hearing an issue of no moment in the ultimate decision.
- d) There was a complaint lodged with the Procurement Unit and through the appeal process to PPAD.
- e) That the High Court should not have made a special costs order against 3rd and 8th respondents.

[47] There is no cross-appeal by Laxton against the High Court’s order refusing the grant of specific performance for it to be contracted to implement the EVMIS tender.

## **Submissions**

### *Appellants*

[48] Adv. Thakalekoala for the appellants submitted that the record amply demonstrates that the TP acted unlawfully in

awarding the tender to Laxton. According to counsel, the answering affidavit on behalf of 3<sup>rd</sup> and 8<sup>th</sup> respondents show how the TP deviated from a recommendation of the ET - contrary to the values that underlie the procurement process. Those allegations of illegality on the part of the TP constitute sufficient collateral challenge that justified the High Court in not granting the review relief supplied by Laxton.

### *Respondent*

[49] Adv. Setlojoane on behalf of Laxton supported the judgment and order of the High Court. Counsel stated that it is clear on the record that Laxton was denied *audi* before a decision adverse to its interests was taken and that the resultant setting aside of the PPAD by the High Court is unassailable.

### **Issues to be decided**

[50] The outcome of the appeal hinges on the nature and extent of the unlawful conduct within the Procurement Unit; the nature and extent of the unlawful conduct by PPAD; whether Laxton was denied *audi* - and if so whether that justified the reviewing and setting aside of PPAD's decision-making.

[51] The appellants had on affidavit laid bare the illegal conduct perpetrated by the TP which conduct they insist

vitiates the award made to Laxton. As pointed out in the grounds of appeal, those allegations constitute a “*collateral challenge*” to Laxton’s application for review. Thus, even if the court *a quo* was satisfied that PPAD or the IEC denied Laxton *audi* before the decision to order re-evaluation of the tender, that infringement would be of no relevance because the award it relies upon was vitiated by the TP’s illegal conduct. According to the appellants, the principle of legality which is a cornerstone of the procurement system created by the regulations required that the Procurement Unit complied with the strictures of the governing regulations. Its failure to do so rendered the award to Laxton void and unenforceable.

### **Discussion**

[52] Mathaba J’s approach is wanting in a material respect: The learned judge does not holistically engage with the legislative scheme governing public procurement, the respective roles of the bodies that took part in the decision-making and whether in the manner it acted, the TP gave effect to the values of the procurement architecture that I set out earlier in this judgment.

[53] The learned judge’s singular focus was on the conduct of the PPAD (whilst no doubt it was necessary also to be considered) and not whether the TP’s conduct after receiving the ET’s recommendation was statutorily compliant. There was sufficient material disclosed on the record by 3<sup>rd</sup> and 8<sup>th</sup>

respondents to necessitate a legality inquiry as regards the TP's award of the tender to Laxton.

[54] The High Court glossed over important issues raised by either party on the papers – issues which go to the very root of legality. According to Laxton, the ET did not make a valid recommendation because the minutes of its deliberations were not signed by some members of that body. The record supports that contention yet the issue is not addressed by the High Court. Laxton therefore asserts that the ET's recommendation of Face Technologies was null and void and that the TP was at large to take the decision itself.

*Audi was denied*

[55] It is beyond dispute that neither the Procurement Unit nor PPAD made Laxton aware of the complaints lodged by three unsuccessful bidders against the award of the tender to Laxton. Not only that, the complaints by the unsuccessful bidders were not to the Procurement Unit as is required by the Regulations.

[56] It is clear from the dispute resolution framework that I set out above (in paragraphs 18-19) that it is only once the complaints procedure to the Procurement Unit is exhausted that an appeal lies to the PPAD. The Regulations make no provision for leapfrogging an appeal to PPAD without recourse, in the first instance, to the Procurement Unit. PPAD therefore acted beyond its powers in assuming jurisdiction

over the complaints by the unsuccessful bidders. But that is not the end of the irregularity on PPAD's part apparent on the record.

[57] However it became seized of the complaints, PPAD had the duty to follow the procedure set out in the Regulations for the adjudication of appeals to it. I have set out that procedure fully and need not repeat it here. Suffice it to say that PPAD was required to apprise Laxton of the complaints and to afford it *audi* which it failed to do.

[58] Barring any illegality that tainted the award to Laxton, a clear case was made out for the review and setting aside of the decision by PPAD to halt the tender process for the EVMIS and ordering a re-evaluation of the tender.

### *Collateral challenge*

[59] The 3<sup>rd</sup> and 8<sup>th</sup> respondents in their answering affidavit raised the issue of the unlawfulness of the manner in which the TP went about awarding the tender to Laxton. It is common cause that in awarding the tender to Laxton, the TP disregarded the recommendation of the ET: Face Technologies and not Laxton was the ET's preferred bidder.

[60] The minutes of the TP's proceedings give no clarity as to the reason why the TP disregarded the recommendation of the ET, more so because, as is common cause, the tender of

Laxton was far in excess of what had been budgeted for the project and was the highest of the bids submitted. As was made clear by PPAD's Director in his answering affidavit, it is only at the stage where complaints were lodged with the PPAD and upon his inquiry that the TP's secretary informed him of the true reason which actuated the TP deviating from the ET's recommendation of Face Technologies: that face Technologies had rendered the service to the IEC for over 20 years and it was time to 'distribute wealth'.

[61] When the TP's disregard of the ET's recommendations became apparent after the answering affidavit was filed, Laxton changed tack in a material respect. First, it maintained in reply that the actual power to grant tenders is that of the TP and not the ET and that the latter only makes recommendations which the TP may or may not accept. Secondly, it was alleged by reference to the record, that the minutes of the ET's deliberations show that not all members that allegedly attended the meeting signed the minute as is required by the Procurement Regulations and that, for that reason, the ET's recommendation was invalid.

[62] Both these points offer no assistance to Laxton's quest to make the TP's decision stand. The TP's jurisdiction only arises upon a report being laid before it by the ET. It enjoys no power under the Regulations to be both evaluator and awarder of tenders. That clearly does violence to the principles of segregation of functions, transparency and



avoidance of conflict embedded in the Procurement Regulations. As a creature of statute, the TP has only such power as is specifically granted to it. It cannot pull itself up by its bootstraps and cloth itself with power not given to it by the law-giver.

[63] The assertion that the ET's recommendation lacks the force of law because it was not authorised by all the members of that body is a further nail in the coffin of the TP's assumption of power to award the tender in the manner it did. Absent a valid recommendation of the ET, the TP has no jurisdiction over a tender.

[64] A collateral challenge is relevant in so far as it determines whether the primary remedy should be granted and depending on the proceedings, a collateral challenge can be the applicant's sword or the respondent's shield. A collateral attack is therefore an attempt by a party to assert the unlawfulness of an administrative act whilst it does not itself seek a direct review of that administrative act. *Cocks v Thanet BC*<sup>5</sup> is authority for the proposition that a public law challenge is permissible if it arose collaterally in the course of an ordinary civil action.

[65] In this case, the primary remedy sought by Laxton is the review and setting aside of PPAD's decision adverse to Laxton. The collateral challenge is therefore the 3rd and 8th

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<sup>5</sup> [1983] 2 A.C. 286.

respondents' shield against Laxton in its endeavour, by means of judicial review, to void PPAD's decision-making and to be considered the successful bidder in respect of the EVMIS on the strength of an equally invalid decision by the TP - an illegality that is apparent on the record. Australian courts have held that collateral challenge is presumptively available for errors appearing on the face of the record.<sup>6</sup>

[66] Collateral challenge of the TP's award was even more appropriate because in the absence of a direct challenge, it is presumed to have the force of law. There is nothing in the scheme of the Procurement Regulations that would prevent the PPAD from collaterally challenging the TP's decision making.<sup>7</sup> On the contrary, the fact that the Procurement Regulations give the mandate to PPAD to enforce legality and integrity of the procurement process is all the more reason why in review proceedings initiated by others it should be competent to mount a collateral challenge.

[67] All the information and evidence needed to sustain such a challenge is on the record and no additional evidence was needed to substantiate the challenge<sup>8</sup>. Most importantly, all the parties with a direct interest in the matter were before court in the same proceedings<sup>9</sup>. Allowing the collateral challenge would serve to avoid '*cumbrous duplicity of*

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<sup>6</sup> Director of Housing v Sudi (2011) 33 VR 559 at 565.

<sup>7</sup> Compare: R v Wicks [1988] A.C. 92.

<sup>8</sup> Hunter v Chief Constable of the West Midlands Police [1982] A.C. 529.

<sup>9</sup> Dwr Cymru Cyfyngedig (Welsh Water) v Corus U K Ltd [2006] EWHC 1183.

*proceedings'* in separate proceedings to set aside the TP's decision.<sup>10</sup>

[68] The 3<sup>rd</sup> and 8<sup>th</sup> respondents satisfied the test for a collateral challenge to Laxton's application for review of the PPAD's decision. Had the court *a quo* considered the matter holistically guided by the values embedded in the Procurement Regulations - instead of the narrow question whether Laxton was afforded *audi* - it would have come to the conclusion that the TP's award of the tender to Laxton was not justified and that the issue of *audi* became moot. If a decision is void or a nullity *ab initio* its invalidity must be able to be asserted by anyone in any proceedings where it becomes relevant.<sup>11</sup>

[69] The collateral challenge to the TP's award of the tender to Laxton therefore has merit and has the effect that Laxton could not succeed in setting aside the decision of PPAD. The entire process relating to the EVMIS tender was riddled with illegality such that the award to Laxton was *ultra vires* and clearly in breach of legality.

[70] Therefore, the appropriate order the High Court should have made was to dismiss Laxton's application for the review

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<sup>10</sup> Chief Adjudication Officer Foster [1993] A.C. 754.

<sup>11</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6<sup>th</sup> ed. 2017) 751.

and setting aside of PPAD's decision cancelling the EVMIS tender and ordering a re-evaluation of the bids submitted.

### **Condonation and reinstatement**

[71] Although the appeal was prosecuted timeously the appellants had not filed their heads of argument on time. The appeal had thus lapsed and required condonation and reinstatement. At the hearing of the appeal, Adv. Setlojoane for the respondent, *in limine*, objected that the appeal was not properly before court in the absence of an application for condonation and reinstatement of the appeal and that it should be struck off the roll, with costs.

[72] In an unusual, if unprocedural move, the appellants' counsel sought such condonation and reinstatement from the Bar stating that he had lately been overwhelmed with work as counsel appearing in various courts on behalf of the Government in urgent matters related to the then forthcoming elections. He had therefore overlooked the need to apply for condonation and reinstatement of the appeal. He argued that if such condonation is not granted, an indefensible decision of the High Court will be allowed to stand; that the High Court's erroneous conclusion needs to be reversed in the public interest and that the prospects of success are very good.

[73] I am prepared to grant the condonation sought from the Bar and to reinstate the appeal for the following reasons. Firstly, because, as the above discourse demonstrates, the prospects of success are very good. Secondly, the issues raised in this appeal are of grave public importance as they concern the proper interpretation of a legislative instrument at the heart of Government's operations: the acquisition of goods and services affecting the broader public as opposed to private litigants.

[74] Besides, the order of the High Court creates great uncertainty because of the choice made by the learned judge a quo not to grant consequential relief after reviewing and setting aside the PPAD decision. The court did not direct that because of the failure to afford *audi* to Laxton, the complaints process be undertaken afresh and the matter to be dealt with according to law. It will be recalled that the court also declined to order the Procurement Unit to proceed to conclude a contract with Laxton.

[75] What is to happen in the wake of the reviewing and setting aside of PPAD's decision therefore remains uncertain. It is therefore necessary that the appeal be determined so that there is certainty about the future. I wish to place on record that this condonation is being granted exceptionally and is confined to its facts.

## **Costs**

[76] Costs must follow the result and the 3<sup>rd</sup> and 8<sup>th</sup> appellants be awarded their costs both a quo and on appeal.

## **Order**

[77] I accordingly make the following order:

1. Condonation is granted for the appellants' failure to file their heads of argument for the appeal on time; and the appeal is reinstated.
2. The appeal succeeds, with costs, and the judgment and order of the High Court are set aside and replaced by the following order:

*'The application is dismissed, with costs'.*



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**P.T. DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**P MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree:



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**M.H. CHINHENGO  
ACTING JUSTICE OF APPEAL**

**FOR APPELLANT:**           ADV P T THAKALEKOALA

**FOR RESPONDENTS:**    ADV R SETLOJOANE