UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG
WITS SCHOOL OF LAW

THE ADOPTION OF COMPETITION LAW REMEDIES IN THE RESOLUTION OF UNLAWFUL ADMINISTRATIVE DECISIONS IN PUBLIC PROCUREMENT

by
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Submitted in partial fulfilment of the requirements for the degree of
Master of Laws by Coursework and Research Report
at the University of the Witwatersrand, Johannesburg

Date: 1 November 2023

DECLARATION

I, Melissa Levia Sonickson (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Word Count: 11020 words [Incl. the body of your report, footnotes **BUT** excl. title page, declaration, abstract, table of contents and bibliography]

ACKNOWLEDGEMENTS

All thanks and glory to the main man in my life, GOD. He has blessed me with this opportunity and his mercy has carried me through to its completion. I would like to thank my parents for all the sacrifices they have made to raise me into the woman I am today. My Ma and Da have raised me to be determined, to persevere and they have motivated me to become more than just ordinary.

I would like to thank my sister Nicolene who supported me, especially emotionally and financially, I couldn't have reached this point if it wasn't for her encouragement and love. I also want to express my sincere thankfulness to my niece Hailey who helped me manage my mental health during the course of my Masters of Law degree.

I would like to thank all my lecturers and supervisor, Professor Fola Adeleke, for their continued patience, support and guidance throughout the course of my Master's Degree. Lastly, I would like to thank the University of the Witwatersrand for funding my studies.

This research report is dedicated to each and every South African that is disheartened by the corruption in public procurement. Corruption can be irradicated with the help of the nation and innovative solutions. Through this we can achieve a better future.

#StrongerTogether - RWC Champions 2023

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Abstract

This research report analyses the highly regulated area of public procurement, the available remedies and the role of competition law remedies as a potential form of redress for unlawful administrative decisions in public procurement. The decision to award a tender qualifies as administrative action and is reviewable in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA). Setting aside an unlawful tender is a primary remedy, however, a court has the discretion to grant this order. The court's discretion is founded on an analysis of various interests and the conclusion is based on the most practicable outcome. Where a court withholds its discretion to set aside the tender, the successful tenderer benefits from an unlawful process. In unlawful procurement processes, competition is almost always distorted and the successful bidder has a competitive advantage due to unlawful conduct. It is a constitutional requirement and necessary that public institutions apply a competitive procurement process. Remedies found in the Competition Act, Act 89 of 1998, are more favourable than allowing the successful bidder to continue to benefit from an unlawful process. This research report develops a case for the amendment of PAJA to include 'anti-competitive conduct' as a ground to review administrative decisions in public procurement. The amendment will permit the applicability of the Competition Act and the remedies found within this area of law.

Introduction

In South Africa, public procurement is governed by s 217 of the Constitution.[1] When an organ of state procures goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.[2] However this does not prevent a public body from implementing a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination.[3] The Preferential Procurement Policy Framework Act ("PPPFA") was enacted to provide a framework for the implementation of a procurement policy that is fair and equitable in accordance with the Constitution.[4] The PPPFA is one of many laws which govern public procurement in South Africa. Public procurement has been characterised as administrative action, therefore it is subject to judicial review. In determining the remedy in judicial review proceedings, the court follows a two-stage approach.[5] First, a court is required to declare any administrative action that is inconsistent with the Constitution invalid and second, make any order that is just and equitable.[6] In determining a just and equitable order, the court has the discretion to set aside the conduct, maintain the status quo, order damages, and declare certain rights or grant an interdict. The setting aside remedy is a primary remedy granted at the court's discretion.

Where a court has withheld its discretion to set aside an unlawful procurement process, the consequence is that the tenderer benefits from an unlawful process. By withholding its discretion, the competition within the market the tender took place is not restored and often, the applicant who institutes the review application has been disadvantaged by the distortion of competition through the unlawful administrative conduct which took place. It is a constitutional principal that public procurement should follow a competitive process. The Competition Act 98 of 1998 is the law in South Africa

[1] The Constitution of the Republic of South Africa, 1996.
[2] Ibid s 217(1).
[3] Ibid s 217(2)
[4] Act 5 of 2000.
[5] *See Ex Parte Women's Legal Centre, In Re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) paras 12 –13. The principle applied is the doctrine of objective invalidity, the court does have a limit on the declaration of invalidity.
[6] Supra note 1 s 172(1).

that regulates competition in the country. Amongst others, an objective of the Competition Act is to promote an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, to benefit all South Africans. Due to a distortion of competition in the market the Competition Act becomes applicable.

In this research report, I intend to argue that the Promotion of Administrative Justice Act ought to be amended to include a ground which challenges anti-competitive conduct in unlawful procurement procedures. This is necessary because courts are weary to exercise their discretion to set aside unlawful procurement tenders when time has lapsed and there have been intervening events which would make the setting aside of the administrative action impracticable. This includes situations where setting aside would be overly disruptive or setting aside the administrative action would not be just and equitable. In the event that the procurement process is not set aside, there is not much retribution or consequences to bidders who have been enriched by unlawful processes. The purpose of this research report is to show that competition law remedies should be introduced as a remedy where it would be unjust and unequitable to set aside administrative action related to public procurement.

In formulating this argument, the general law of public procurement will be discussed. Next, I will assess the remedies available in terms of administrative law to unlawful public procurement. This will be accompanied by a critical analysis of the judgments in *CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd*[7] and M*illennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others*[8] *T*he analysis of these cases will show the current shortfalls in administrative law remedies provided for unlawful public procurement. Thereafter, I will discuss the framework of competition law and the interconnectedness of competition and procurement. Lastly, I propose an amendment in the judicial review of administrative action, in order to restore the status quo regarding competition in the circumstances where a court will withhold the primary remedy to set aside unlawful procurement processes.

[7] 2012 (1) SA 216.
[8] 2008 (2) SA 481.

Applicable law on Public Procurement in South Africa

In the public sector, public procurement involves the appointment of contractors who serve a public interest, the purchasing of goods or services by governmental departments and state-owned entities, including organs of state for the benefit of South African citizens.[9] Public procurement is financed by public money, which is money collected by government through various taxes.[10].

The initial regulation of procurement begins in the Constitution.[11] The Constitution sets out the requirements and processes of public sector procurement.[12] Section 217(1) provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217(2) sets out procurement as a policy tool,[13] organs of state or institutions, can implement a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination.[14] This is endorsed by s 217(3) which mandates national legislation to prescribe a framework within which the procurement policy, referred to in s 217(2), must be implemented.

The Preferential Procurement Policy Framework Act ("PPPFA")[15] was enacted to give effect to s 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution and matters

[9] Organisation for EconomicCo-operation and Development, last accessed from https://www.oecd.org/gov/public-procurement/ on 6 January 2022.
[10] National Treasury Procurement FAQs, last accessed from https://procurement.vulekamali.gov.za/#:~:text=Procurement%20refers%20to%20the%20process,procurement%20process%20must%20be%20followed on 14 February 2023.
[11] Supra note 1.
[12] Ibid s 217.
[13] Anthony AM 'Re-Categorising Public Procurement in South Africa: Construction Works as a Special Case' *PER / PELJ* 2019(22).
[14] Supra note 1 s 217(2) Const.
[15] Supra note 4 PPPFA.

connected to s 217 of the Constitution.[16] The importance of this law is that it mandates organs of state to, in the determination of its preferential procurement policy and its implementation which involves the evaluation and awarding of a tender, follow a preference point system within the framework as set out in s 2 of the PPPFA.[17] The point system operates on a dual scale, where more preference points are awarded for lower-value contracts and less-preference points for higher-value contracts.[18] The point system operates according to the size of the tender put out to the public. The Preferential Procurement Regulations sets out the formula which must be applied to calculate the points for price in respect of tenders or procurement of different values.[19] The regulations set out the process for the evaluation, awarding, cancellation and re-invitation of tenders.[20] The PPPFA obligates an organ of state to implement its preferential procurement policy within a framework with specific goals including contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability,[21] or any other specific goal provided that the goal is clearly specified in the tender invitation.[22] The Constitution and the PPPFA then form the basis for other legislation and framework policies which ensure the financial management of organs of state and institutions. At national and provincial level the Public Finance Management Act (PFMA) and its Regulations have been enacted to regulate financial management and procurement.[23] The Local Government: Municipal Finance Management Act (MFMA)[24] and Regulations,[25] regulate procurement and financial management of municipalities. These laws are a few amongst many others – the area of procurement in South Africa is a highly regulated area of law.[26]

[16] Ibid preamble of Act PPPFA.
[17] Ibid s 2.
[18] GN 2721 of 4 November 2022: Preferential Procurement Regulations cl 4.
[19] Ibid clauses 4 –7.
[20] Ibid. Ibid clause 4–9.
[21] Supra note 4 s 2(d) PPPFA.
[22] Ibid s 2(e).
[23] Act 1 of 1999.
[24] Act 56 of 2003.
[25] Ibid.
[26] G Quinot 'In-house provisioning and South African public procurement law' (2014) Journal for Juridical Science 39(1) at 115.

The public procurement process generally operates similarly at all three levels of government, however, there are some differences. There are four types of procurement processes to source goods and services.[27] These are petty cash purchases, verbal or written quotations, written price quotations and competitive bidding. This research report focuses on procurement involving competitive bidding. At national and provincial level, competitive bidding is required for contracts over R500 000.[28] This differs slightly at the local government level where competitive bidding is for contracts over R200 000.[29] A competitive bidding process consists of various stages.[30] Generally, a competitive procurement process begins with the compilation of bid documentation, then the invitation for public bids, site meetings and necessary briefing sessions, the analysis and evaluation of bids by the bids adjudication committee and the bids evaluation committee of the various institutions, the award of the tender and finally the proper record keeping of all documentation.[31] Government has issued General Procurement Guidelines which establishes the five pillars of procurement: value for money, open and effective competition, ethics and fair dealing, accountability and reporting equity.[32] These elements are described as pillars because if one of them is contravened the procurement system will fail.[33] These guidelines are a minimum set of standards and are broad so that organs of state can incorporate them into their specific guidelines.[34] From the guidelines, a repetitive theme of an acceptable procurement framework or policy is that it must be competitive.[35] A competitive bidding process is beneficial to the public and ensures that goods and services required are obtained at the best value for money.[36]

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[27] Phoebe Bolton 'Public Procurement as a Tool to Drive Innovation in South Africa' (2016) PER/PELJ 19 at 13.
[28] National Treasury Practice Note 8 of 2007/2008 at 3.
[29] Ibid at 4.
[30] Phoebe Bolton 'The Committee System For Competitive Bids In Local Government' (2009) 12 PER/PELJ 2 at 62/168.
[31] Ibid.
[32] General Procurement Guidelines at 3, last accessed from https://www.treasury.gov.za/legislation/pfma/supplychain/default.aspx on 27 December 2022.
[33] K Raga and W Albrecht 'Determining an ethical basis for public sector procurement management : the South African local sphere of government' (2008) 43 Journal of Public Administration 4.1 at 792.
[34] Ibid at 793.
[35] Op cit note 34 at 1 and 5.
[36] Ibid at 4–5.

In contrast to a competitive procurement process, organs of state or institutions could elect to follow a deviation process. A deviation process replaces a competitive bidding process where it would be impractical to follow the ordinary procurement procedure.[37] Various circumstances could require institutions to deviate from the ordinary procurement process. These circumstances include; an emergency, impracticality or where the goods or services to be procured are only available from a sole supplier.[38] What is problematic about the deviation process is that organs of state and institutions often elect it as opposed to the ordinary procurement processes to avoid the competitive constitutional requirements.[39] On 28 August 2018, the office of the Chief Procurement Office in National Treasury presented a presentation focusing on deviation and expansions to the Standing Committee on Appropriations. The identified fault areas were that accounting officers were using the emergency provisions to enter into long term contracts, disregarding National Treasury instructions against deviations, and the failure to seek National Treasury's approval for single source procurements.[40]

The public procurement process as it is currently implemented operates substantially different to the way it had during Apartheid. During Apartheid, the procurement process was centralised.[41] This process places the sole power of procurement with a specific person, department or institution.[42] The Apartheid government achieved this through enacting racial laws which sought to exclude black people from participating in the economy. The enactment of laws such as the Group Areas Act of 1950, the Bantu Investment Corporation Act of 1959 and the Population Registration Act of 1950, amongst others, were laws which sought to formalise the appropriation of wealth and businesses to the white minority and dispossessing black people.[43] Furthermore,

[37] Claire Tucker and Lubumba Kamukwamba 'Public Procurement & Government Contracts ' 2020 available at https://bowmanslaw.com/wp-content/uploads/2020/05/Public-Procurement-and-Government-Contracts.pdf refer to page 7.
[38] *Refer to* General Notice 868 of 30 May 2005 s. 36(I)(a); Practice Note No. 8 of 2007/2008.
[39] Infra note 40.
[40] Meeting report of the Standing Committee on Appropriations of meeting dated 28 August 2018, last accessed from https://pmg.org.za/committee-meeting/26923/ on 10 February 2023.
[41] Sewpersadh P and Mubangizi JC 'Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2017) 20 PER/PELJ at 10.
[42] Refer to definition last accessed from https://www.gep.com/knowledge-bank/glossary/what-is-centralized-procurement on 24 February 2023.
[43] Samson Zondi *Tenders And Corruption In Post-Apartheid South Africa: Rethinking African Ethics As A Panacea For Corruption* (Unpublished Master of Arts thesis, University KwaZulu-Natal 2012).

these laws made it possible for the Apartheid government to contract with white-owned business and exclude black people in the economy. The process was crafted to oppress and deny the majority of South Africans access to services, employment and entrepreneurship.

Following the 1994 elections, the democratic government took to reform and remedy the injustices Apartheid had caused. These efforts sought to include black people in the functioning of the economy.[44] This is achieved through the enactment and enforcement of the Broad-Based Black Economic Empowerment Act (BBBEEA).[45] This law facilitates broad based black economic empowerment in eight ways. First, the promotion of economic transformation to enable meaningful participation of black people in the economy.[46] Second, achieving a substantial change in the racial composition of ownership and management and in skilled occupation of existing and new enterprises.[47] Third, increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training.[48] Fourth, increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training.[49] Fifth, promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity.[50] Sixth, empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills.[51] Seventh, promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector.[52] Finally, increasing effective economic participation and black-owned and managed enterprises, including small, medium and

[44] Phoebe Bolton, "The Public Procurement System in South Africa: Main Characteristics" (2008) 37:4 Pub Cont LJ 781 at 800. The term black people is a generic term for Africans, Coloureds and Indians.
[45] Act 53 of 2003.
[46] Ibid s 2(a).
[47] Ibid s 2(b).
[48] Ibid s 2(c).
[49] Ibid s 2(d).
[50] Ibid s 2(e).
[51] Ibid s 2(f).
[52] Ibid s 2(g).

micro enterprises and co-operatives and enhancing their access to financial and non-financial support.[53]

The Prevention and Combating of Corrupt Activities Act (PCCA) [54] applies to public procurement to the extent that it provides for the strengthening of measures to prevent and combat corruption.[55] The law establishes the offence of corruption and places a duty on persons in positions of authority to report corruption amongst other objectives.[56] Importantly, it provides for the establishment and endorsement of a register to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts.[57] Regulations have been issued which demands government to publish and keep a register of companies and persons who are tender defaulters.[58] This register is publicly posted and accessible. The register sets out tender defaulters, individuals and suppliers who have been restricted to partake in tender processes, their registration numbers, the duration of the restriction period and the reason for their restriction as well.[59] Section 3 of the PCCA states the instances in which a person who either directly or indirectly performs conduct mentioned in the section is guilty of the offence of corruption. In part 2 of the PCCA, the law goes further to detail specific acts of corruption.[60] The enactment of this statute along with its regulations assists the sphere of public procurement to remain impartial and endorses the constitutional requirement of a competitive procurement process. It ensures that bidders who are bad to contract with are detected and brought to the attention of the public and it sets out the type of conduct that would be classified as an offence.

Public procurement is highly regulated and is an area that requires strict processes and control due to its sensitivity and the sum of money involved in the processes. Therefore, there ought to be adequate scrutiny of the awarding and processes of

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[53] Ibid s 2(h) Const.
[54] Act 12 of 2004.
[55] Ibid preamble.
[56] Ibid preamble.
[57] This is endorsed by s 32 of the Act. and regulated by
[58] GNR.194 of 11 March 2005: Regulations regarding the Register for tender defaulters.
[59] List of defaulters available at http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf last accessed on 21 December 2021.
[60] This is found in ss 4 to 21.

public tendering because it can lead to the irregular expenditure of public funds. Public procurement law is specific to the regulation, processes, and prevention of unlawful activity in public procurement. It has been established and accepted that the process of awarding a tender is administrative action.[61] Therefore, an aggrieved party may challenge the awarding, management, and determination of public procurement in terms of administrative law.

3 Administrative Law – Judicial Review

Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This right is enjoyed by both natural and juristic persons.[62] The right seeks to protect the area of law which is concerned with the exercise of public power and the performance of public functions.[63] Based on the development of law, the spending of public money in the public interest by a public body would call for the application of administrative law principles.[64] Furthermore, the court has accepted that the decision of a public body to accept or reject the award of a tender qualifies as administrative action.[65] Generally this includes the solicitation, evaluation, supplementary processes and award of public tenders.[66]

The Promotion of Administrative Justice Act (PAJA) has been enacted to give effect to the right of administrative action and matters related thereto.[67] The law seeks to promote a culture of accountability and good governance in public administration.[68] Because public procurement processes have been classified as administrative action, it will be an area of public administration which is subjected to PAJA. An aggrieved bidder can challenge a procurement process by bringing a review application which seeks an order that will enforce lawful procurement rules and analyse the fairness of the process.[69]

[61] Infra note 64.
[62] Cora Hoexter *Administrative Law in South Africa* 2 ed (2017) Ch9 at 487.
[63] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).
[64] *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (A) paras 11-12.
[65] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) para 21.
[66] Op cit note 48 at 783. *Refer to* footnote 16.
[67] Act 3 of 2000, preamble.
[68] Ibid.
[69] Op cit note 70 at 798.

Section 6 of PAJA sets out the grounds for judicial review of an administrative action. Where a court finds that the administrative action is unlawful, in granting an order that is just and equitable, it would apply one of the remedies found in s 8 of PAJA. From the outset, the court is obligated by s 172(1)(a) of the Constitution when deciding a constitutional matter to declare the conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency thereafter, the remedies of s 8 of PAJA may become applicable. An applicant may approach the court to set aside an unlawful administrative action in terms of s 8(1)(c). This is a common order sought by applicants because it is a primary remedy.[70] However, a court that is asked to set aside an invalid administrative action has a discretion whether to grant it or not.[71] A court will withhold this remedy if it would be impracticable to grant an order setting the action aside,[72] it would be overly disruptive,[73] there has been an effluxion of time or where it would be unjust and unequitable to do so.[74] This is extremely common when an aggrieved bidder institutes legal proceedings seeking an order to set the action aside and the successful tenderer has already begun performing and providing the good or service in terms of the procurement contract.[75] By the time the matter is brought before the court, contractors have usually begun performing their duties in terms of agreements and have concluded further contracts with third parties to perform the duties.[76] If the court were to set aside the unlawful tender there would be contractual implications on parties who weren't party to the tender at its inception. However, if the court withholds its discretion to set aside an unlawful procurement process, it will result in a bidder benefiting, economically, from an unlawful administrative process. This is purely unfair.

This circumstance seems to place the court between a rock and a hard place. Furthermore, the effect of endorsing an unlawful procurement process is a travesty to justice, however, the practicality of canceling and setting aside the contract would create an even greater absurdity. These circumstances can be observed through the

[70] Op cit note 66 at 546.
[71] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 (SCA) para 36.
[72] *Chairperson Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA).
[73] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer (No2@)* 2014 (4)SA 179 (CC).
[74] *Eskom Holdings Ltd v New Reclamation Group (Pty)* 2009 (4) 628 (SCA).
[75] Ibid.
[76] Ibid.

cases of *Cash Paymaster* and *Millennium Waste Management*, where the court was faced with the balancing exercise to either withhold its discretion or exercise it to set aside an unlawful contract.

CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd[77]

The South African Social Security Agency (SASSA) is responsible for the administration of social assistance in terms of chapter 3 of the Social Assistance Act 13 of 2004.[78] The duties and functions of SASSA are legislated in terms of the SASSA Act 9 of 2004.[79] The South African Post Office Ltd (SAPO) is a state owned enterprise and Postbank is a division in SAPO.[80] Postbank offered simple affordable banking services, to low income groups through the SAPO network.[81]

Before SASSA, social grants were effected by cash payment contractors, including Cash Paymaster Services (Paymaster), the respondent in the matter.[82] Paymaster was servicing beneficiaries in five provinces and its contracts were due to expire in March 2009.[83] In 2009, SASSA and Paymaster extended the contract for a further year and agreed to engage in future negotiations in good faith in an attempt to enter into a new consolidated service agreement in relation to cash payments.[84] From 1 April 2006, SASSA through the transfer of rights and duties 'inherited' the contracts performed by contractors providing the cash payment services of social grants in different provinces.[85] In July 2009, SASSA and SAPO entered into the 'Letter Agreement' which effectively offered a beneficiary of a social grant to open a Postbank account, if they did not have one they will be asked if SASSA, on behalf of the beneficiary, can open a Postbank account.[86]

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[77] 2012 (1) SA 216 (SCA).
[78] Ibid para 4.
[79] Ibid para 4.
[80] Ibid para 6.
[81] Ibid.
[82] Ibid para 8.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid para 9.

Paymaster launched an application in the High Court, seeking to review the decision SASSA took to enter into the Letter Agreement with SAPO, and to interdict SASSA from entering into a final agreement with SAPO to render certain services.[87] The High Court upheld the application by setting aside the decision to enter into the Letter Agreement and granted the interdict which prevented SASSA from contracting with SAPO for services relating to the service of the payment of social security.[88] Further, the High Court ordered that the accounts of beneficiaries should not be closed pending the envisaged procurement process.[89]

SASSA and SAPO appealed the order to the Supreme Court of Appeal (SCA).[90] The issue before the court was whether SASSA was obliged to follow a competitive process.[91] Paymaster was dissatisfied that SASSA did not follow a competitive process before entering into the Letter Agreement.[92] The court reiterated the requirement in s 217 of the Constitution that organs of state are tasked to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The court stated that once a system, as implied by s 217 is in place, the determination of whether any procurement is valid must be answered with reference to the legislation or regulation.[93] The court stated that the objective of the PFMA is to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions the PFMA applies to.[94] The PFMA applied to SAPO and SASSA. The PFMA and Treasury Regulation provides for the required constitutional 'system'.[95] These legal references also require that procurement processes follow a competitive process. The supply chain management policy stated that in procurement and tendering, SASSA should do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.[96] However, the court held that because the policy permits an accounting

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[87] Ibid para 2 *Paymaster*.
[88] Ibid para 3.
[89] Ibid.
[90] Ibid para 1.
[91] Ibid para 2.
[92] Ibid para 14.
[93] Ibid para 15.
[94] Ibid para 17.
[95] Ibid para 19.
[96] Ibid para 20.

officer or the CEO to deviate, SASSA is not obliged to follow a system which is fair, equitable, transparent, competitive and cost-effective.[97] Regarding reasons, the court held that there must be rational reasons for the decision and that the reasons must be recorded.[98] The court held that the arguments contended by Paymaster that the decision was irrational were insufficient, such as that the viability of SAPO was not tested against other bidders through a competitive bidding system to show whether SAPO was the best option.[99] Regarding the recording of the decision, the court held that the regulations do not indicate that recording of the decision is mandatory.[100] The SCA upheld the appeal and set aside the High Court's order, dismissing the application by Paymaster.[101]

Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province[102]

The Department of Health and Social Development issued an invitation to tender for the removal, treatment and disposal of medical waste in Limpopo.[103] Millennium Waste Management Pty Ltd (MWM) along with 14 other companies had responded to the invitation and entered bids.[104] The Chairman of the departmental tender committee stated that the tenders received followed a two phase process: the administrative compliance phase and technical compliance phase.[105] MWM was disqualified at the first phase for failing to sign a form titled 'declaration of interest'.[106] Following the disqualifications of the other bidders and the second phase of technical compliance, Thermopower Technology Processors/Buhle Waste/Afrimedicals JV (the consortium) was the only remaining bidder.[107] The tender was awarded to the consortium on specified conditions.[108] MWM contacted the Head of Department (HOD) enquiring

[97] Ibid para 21 *Paymaster*.
[98] Ibid.
[99] Ibid para 27.
[100] Ibid para 28.
[101] Ibid para 30.
[102] 2008 (2) SA 481.
[103] Ibid para 5.
[104] Ibid para 6.
[105] Ibid.
[106] Ibid.
[107] Ibid para 7.
[108] Ibid para 9.

which tenderer was successful. The HOD replied to MWM and informed them of their disqualification due to the failure of not correctly completing the declaration of interest form and that the consortium won the tender.[109]

MWM instituted an urgent application to the High Court seeking an interdict to restrain the DOH from concluding and implementing a contract with the consortium and that the interdict was to be enforceable pending the determination of the review.[110] Service level agreements between the consortium and the department had then been entered into and the court did not grant the interdict.[111]

The issues raised on the appeal was whether the disqualification of MWM's tender violated its right to procedural fairness and if this is the case, what would the appropriate remedy be.[112] The SCA rejected the DOH's argument and the tender boards argument that MWM's tender was lawfully and properly disqualified because it failed to sign the declaration of interest.[113] The court held that the law permits condonation of non-compliance with peremptory requirements in the case where condonation is not incompatible with public interest.[114] Further, condonation of MWM's failure to sign the declaration of interest would have served the public interest to facilitate a competitive process.[115]

In this case, the court used the PPPFA to determine whether MWM's tender constituted an acceptable tender.[116] The court held that the conditions relied on by the tender committee should not be mechanically applied with no regard to a tender's constitutional rights.[117] The court held that the tender committee acted unreasonably by disqualifying MWM's tender for an innocent omission regarding the declaration of interest.[118]

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[109] Ibid para 11 *Millennium Waste Management*.
[110] Ibid para 12.
[111] Ibid para 12.
[112] Ibid para 13.
[113] Ibid para 16.
[114] Ibid para 17.
[115] Ibid.
[116] Ibid para 18.
[117] Ibid para 21.
[118] Ibid.

Analysis

The beginning of this analysis ought to start with the principles of the Constitution as they are applicable to procurement. Section 195 of the Constitution sets out the basic values governing public administration. There are nine principles which include: a high standard of professional ethics must be promoted,[119] the efficient, economic and effective use of resources must be promoted,[120] the administration must be accountable,[121] transparency must be fostered by providing the public with timely,[122] accessible and accurate information and the public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.[123] The Public Administration Management Act,[124] promotes the values found in s 195 of the Constitution. This law is applicable to all public administration unless it is specifically excluded.[125] The Act operates with the object to promote a high standard of professional ethics in the public administration.[126]

The power of a court to review administrative action flows directly from the Constitution.[127] In *Bato Star*,[128] the court held that there is a single system of law regulating administrative action and it is grounded in the Constitution.[129] The court goes further to say that the grundnorm of administrative law is found in the principles of the Constitution.[130] Section 172 of the Constitution is applicable to judicial review proceedings brought in terms of PAJA and the principle of legality. Section 172(1) of the Constitution introduces the two-step approach to remedy unlawful administrative action. A court when deciding a constitutional matter within its power, in terms of s

[119] Section 195(1)(a) Const.
[120] Section 195(1)(b) Const.
[121] Section 195(1)(f) Const.
[122] Section 195(1)(g) Const.
[123] Section 195(1)(i) Const.
[124] Act 11 of 2014.
[125] Ibid s 2 of PMA.
[126] Ibid s 3(c).
[127] Ibid s 172.
[128] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 22.
[129] Ibid.
[130] Ibid para 22 *Bato*.

172(1)(a) of the Constitution, is obliged to declare administrative action, that is inconsistent with the Constitution, invalid to the extent of its inconsistency. Secondly, s 172(1)(b) is at the discretion of the court to make an order that is just and equitable. Although this is the constitutional precondition, a court would be required to consider on a case-by-case basis whether, in terms of legal certainty, to exercise its discretion in setting aside an unlawful administrative action by determining whether the remedy fits the circumstance. In *Eskom*, the court held that the desirability of certainty in these circumstances could require a court to withhold the remedy of setting aside unlawful administrative action because people who had acted on the fact that the administrative action was lawful, would be prejudiced if the administrative action were set aside.[131]

In *Bengwenyama Minerals*,[132] Froneman J analysed the effect of administrative remedies when an administrative action is declared unlawful. The court held that if an administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order is final and not a temporary suspension of invalidity.[133] This is an established consequence of judicial review remedies explained in *Oudekraal*.[134] First, the declaration of invalidity of a contract can have catastrophic consequences for both parties to the tender and third parties.[135] In this regard, the court in *Oudekraal* held that when a court is tasked to set aside an invalid administrative action in judicial review proceedings, it has the discretion to withhold the remedy.[136] Further, this discretion is pivotal in administrative law due to its effect on minimizing injustice when legality and certainty collide.[137] In practice, a court will elect not to set aside an unlawful contract due to the prejudice the order will cause to all interested parties. This is the clear approach adopted in *Millennium Waste Management*. The court held that in terms of s 8 of PAJA, a court is required to strike a balance between the applicant's interests and the interests of the respondents.[138]

[131] Supra note 79 para 9 *Eskom*.
[132] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).
[133] Ibid para 82.
[134] Supra note 76 para 46 *Oudekraal*.
[135] R Cachalia and L Kohn 'The quest for 'reasonable certainty': Refining the justice and equity remedial framework in public procurement cases' (2020) SALJ 659 at 668.
[136] Supra note 76 para 36 *Oudekraal*.
[137] Ibid.
[138] Ibid para 22.

The court identified and considered four interests in the determination of whether to set aside the unlawfully awarded contract.[139] The interests were: the appellant, the consortium, the public and the public purse. Regarding the appellant, this was the loss of the opportunity to have its tender considered.[140] The interests of the consortium is that it had already entered into contracts to begin providing services.[141] Regarding the public, the court held that the removal of medical waste must be performed without any disruption and Limpopo does not have the capacity to step in itself if the contract with the consortium was terminated.[142] Regarding the consideration of the interests of the public purse, the court steered away from speculating what the outcome would be if the contract was set aside and the appellant was to provide the service. When the interest of the public purse is weighed against the potential interruption to the collection and disposal of medical waste, the latter outweighs the concerns to the public purse.

In paragraph 26 of the judgement, the court notes that there is no suggestion that the consortium was complicit in the exclusion of the appellant's tender. Based on the facts, this inference cannot be made since the exclusion of the tender was due to the declaration of interest not being signed. However, what is concerning is the differential of the fee which the tenderers were willing to provide the service. The consortium was prepared to provide the service at 87.8% more than the appellant.[143] In addition to this, the consortium was the only tenderer who had successfully complied with the administrative and technical requirements, out of a group of 17 tenderers.[144] The court stated that it was unable to assess why the differential was that large and that the consortium answered along the lines that its prices were in line with the estimates for a comparable service in Gauteng.[145] The court failed to provide reasons why it was unable to asses why the differential was that large though the court was provided with documents where it could analyse the difference, this exercise could have assisted the interests and concerns to the public purse but the court was reluctant to do so.

[139] Supra note 9 para 24 *Millennium Waste Management*.
[140] Ibid para 24.
[141] Ibid para 27.
[142] Ibid para 28.
[143] Supra note 9 para 29 – 30.
[144] Ibid para 6.
[145] Ibid para 29.

In judicial review, the court and the applicant are limited to the facts and issues that were before the administrator.[146] Furthermore, the court has an oversight responsibility and function when it comes to administrative action.[147] The Constitutional Court has emphasised that a court is required to exercise an appropriate level of deference in order to respect the fundamental constitutional principle of the separation of powers.[148] However, where a court exercises a high level of deference that results in an important interest of the public being ignored, deference should not be the court's primary consideration. Courts should be robust when scrutinising decisions by public bodies because it is these circumstances that they are defending the interests of the public. This was a perfect opportunity for the court to analyse the possibility of fraud or malpractice and bring it to the attention of the administrator although it was not asked to make a judgment thereon. This analysis will be useful when the bids are re-considered. By exercising a higher level of deference, the court unintentionally impacted on the competitive process which is to take place when the bids are reconsidered by the tender board.

In contrast to the judgment of *Paymaster*, Paymaster was unable to show that the reasons for deviating from the ordinary procurement procedure was irrational.[149] However, in the same context, if this type of contract had to be set aside, the implications on the public would be enormous. There are many people in South Africa who rely monthly on a grant and if these services were to come to a complete halt, it would severely impact the livelihoods of South Africans. A deviation is not an unlawful process, there are prerequisites which the accounting officer is required to comply with. However, Treasury Regulation 16A6.4 suggests that an accounting officer or accounting authority may elect to deviate from the competitive bids process in a specific case or where it is impractical.[150] The requirements to justify a deviation, in this case, is that there must be rational reasons for a deviation and the reasons should be recorded.[151] This enforcement of this regulation is circular. When read together with

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[146] G Quinot *Administrative Justice in South Africa: An Introduction* 1ed (2015) at 30.
[147] Ibid at 118.
[148] Supra note 133 para 46 *Bato*. Deference is a doctrine requires the court to exercise a level or degree of respect in regard to the decisions made by public bodies, this concept is explored in A Klaasen 'Public Litigation and The Concept of "Deference" in Judicial Review' (2015) 5 PER 18 at 1.
[149] Supra note 8 para 27 *Paymaster.*
[150] Ibid para 19.
[151] Supra note 8 para 21.

regulation 16A3.1(a), which requires an accounting officer or accounting authority to develop and implement an effective and efficient supply chain management system for the acquisition of goods and services,[152] Regulation 16A6.4 supersedes Regulation 16A3.1(a). Even more so, Regulation 16A6.4 suggests that an accounting officer or accounting authority may elect to follow a deviation at their own whim since a 'specific case' is not readily defined. This is problematic because it has the potential to make an ordinary procurement process be altered to a deviation, which process is not competitive in nature. The regulations suggests that a deviation process can be opted for at any time provided that the accounting officer or accounting authority is able to provide reasons.

The anti-competitive conduct in *Paymaster* is identifiable through the admission made by Paymaster. Paymaster made the argument that it could possibly submit a tender to provide the same services together with another entity.[153] This is the ultimate effect of a deviation process on competition in a market. It locks out all other tenderers from bidding because of an administrator's belief that it is the best process to follow. This suggests that deviations could impede the constitutional requirement of a competitive bidding process. What makes this reality worse is that there is no limit on the number of deviations an entity is limited to elect within a given financial period.[154] This makes the constitutional requirement of a procurement system which is 'fair, equitable, transparent, competitive and cost-effective' futile.

The court held that Paymaster was required to show that the reasons for the decision to enter into the Letter Agreement was irrational.[155] The court held that generalised allegations by Paymaster, such as that the agreement was wrong because the viability of SAPO was not tested through a competitive bidding system, do not address whether the reasons were rational. [156] In the case, the court upheld the appeal by SAPO and SASSA, which meant that the Letter Agreement is lawful and operational[157]. It should

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[152] Ibid para 19 *Paymaster*.
[153] Ibid para 26.
[154] National Treasury report on all deviations from 2020 last accessed from http://ocpo.treasury.gov.za/Suppliers_Area/Pages/Deviations-and-Exspansions.aspx on 26 February 2023.
[155] Supra note 8 para 27 *Paymaster*.
[156] Ibid.
[157] Ibid para 30.

not be ignored that a competitive tender procurement process is a constitutional requirement. Therefore, the finding and orders by the judiciary ought to align with the prescripts of a competitive procurement process.

The case of *Oudekraal* places the responsibility on the court to determine an appropriate remedy when procurement is being challenged in terms of PAJA. A court is responsible to determine an appropriate remedy from the available remedies as well as its practical effect. This has to be determined on a case-by-case basis.[158] In *Millenium Waste Management*, the award of the tender was challenged on the ground that the award was materially influenced by an error of law and other grounds in section 6 of PAJA.[159] The court held that it appeared that they would have succeeded on another ground in terms of PAJA.[160] PAJA does not provide that a court or tribunal has the power to judicially review an administrative action on a ground of competition. Competition is almost always distorted by unlawful administrative actions. This is regardless of whether the unlawful action is due to the conduct of an official or where a bidder acted unlawfully. What is side-lined in the consideration of this is that competitive procurement processes are a constitutional requirement.[161] A breach of this requirement would be an infringement of the right to fair competition to another bidder, who is usually the applicant in a PAJA review.

Section 8 of PAJA provides a list of primary just and equitable remedies a court may apply in the case of judicial review proceedings.[162] As a means to determine whether the current remedies are aligned with the constitutional requirement of competitive procurement processes, a consideration of the current administrative remedies and their effectiveness is necessary.[163] The UNCITRAL Model Law is a standard to determine the effectiveness of a procurement remedy system.[164] This benchmark is

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[158] Supra note 76 para 36 *Oudekraal*.
[159] Supra note 9 para 21 *Millennium*.
[160] Ibid.
[161] Emphasis is placed on the importance that competition is a constitutional principal. It is premised on s 217 read with s 2 of the Constitution. Section 2 of the Constitution states that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
[162] Op cit note 66 at 545.
[163] In *Fose v Minister of Safety and security* 1997 (3) SA 786, the court held that an appropriate remedy has to be effective.
[164] Kingsley Tochukwu Udeh 'A Comparative Study Of The Effectiveness Of Bidder Remedies In South Africa And Nigeria' Dissertation for Doctor of Laws, Stellenbosch University 2018 at 44.

useful because it supports the harmonisation of procurement regulation at an international level and it could assist to provide the composition of an effective bidder remedy system.[165] There are elements of an effective remedy which can be extracted from the Model Law benchmark.[166] A pertinent element of the benchmark is that no unlawful acts or decisions in a procurement procedure are exempt from being challenged.[167] A key characteristic of an effective remedy is one which balances the interests of suppliers and contractors, accordingly, against the integrity of the procurement process.[168] Another characteristic of an effective remedy is that it is able to produce the desired result, however, simultaneously achieving a proper balance between interests and rights of all those involved.[169] One of the desired outcomes, is the restoration of competition. If the primary remedy to set aside unlawful tenders is considered – it does restore competition if the tender is set aside. However, if a court withholds its discretion to set aside the tender, competition remains distorted.

The remedies for unfair administrative action attract public law remedies.[170] The purpose of public law remedies is, in this case, for the aggrieved bidder to advance efficient and effective public administration compelled by constitutional precepts.[171] In *Steenkamp*,[172] the court held that the purpose of administrative remedies, is to pre-empt, correct or reverse an improper administrative decision. It is a constitutional requirement that procurement processes and systems ought to be competitive.[173] Therefore, the remedies provided in terms of judicial review are required to restore competition, where it has been distorted due to unlawful administrative action. This would be the opportune time to discuss competition law as it operates in South Africa. This discussion is limited to the Competition Act and the statutory remedies for anti-competitive conduct.

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[165] Ibid.
[166] Ibid at 45.
[167] Ibid at 46.
[168] Ibid at 45.
[169] Ibid.
[170] Supra note 69 para 29–30 *Steenkamp.*
[171] Ibid page 45.
[172] Supra note 178 para 29.
[173] Supra note 1 s 217(1) Const.

Competition Law in South Africa

The Competition Act was enacted to primarily establish a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominance and mergers, the establishment of the Competition Tribunal and the Competition Appeal Court and related matters.[174] Further, the purpose of the Act is to promote and maintain competition in South Africa.[175] In the preamble of the Act, the drafters state that the people of South Africa recognize that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans, that credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy. The law has been adopted in order to achieve a more effective and efficient economy in South Africa, regulate the transfer of economic ownership in keeping with the public interest and establish independent institutions to monitor economic competition and give effect to the international law obligations of the Republic.[176]

Anti-competitive conduct is regulated and prohibited by the Competition Act. The Act identifies conduct which could be regarded as anti-competitive conduct. Chapter 2 of the Competition Act regulates prohibited practices. Contained therein, s 4 prohibits restrictive horizontal practices and is concerned with the relationship between competitor firms or firms which operate at the same level of the supply chain. Section 5 regulates restrictive vertical practices and concerns anti-competitive conduct between firms in a vertical relationship -the relationship between a firm and its suppliers, its customers or both. Section 8 and 9 prohibit conduct relating to the abuse of dominance and price discrimination.

The Act does not define anti-competitive conduct. In *Competition Commission and SAA*,[177] the court analysed section 8(1)(c) and (d) of the Competition Act.[178] The court

[174] Preamble of Competition Act.
[175] Ibid s 2.
[176] Ibid preamble.
[177] *Competition Commission and South African Airways (Pty) Ltd* (final) (18/CR/Mar01) [2005] ZACT 50 (28 July 2005).
[178] Ibid para 132.

determined the meaning of anti-competitive effect as stated in s8(1)(d). The court imputed the meaning that anti-competitive conduct will be present where there is evidence of actual harm to consumer welfare or if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.[179] This should not be an overly restrictive interpretation of the meaning of conduct that has an anti-competitive effect because there could be circumstances where harm to consumer welfare could then be justifiable.

In relation to the remedies set out in the Act, s 59 of the Competition Act permits the Competition Tribunal to impose an administrative penalty in the matter where: firms have engaged in prohibited conduct in terms of Chapter 2 of the Competition Act, parties have contravened or have failed to comply with an interim or final order of the Competition Tribunal, the Competition Appeal Court or where a party breaches its merger conditions or commits an irregularity related to the merger. The Competition Tribunal will impose an administrative penalty in terms of s 59(2) of the Competition Act after considering the factors set out in ss 3. The administrative penalty is calculated at a percentage of the firm’s annual turnover in the Republic of South Africa and its exports from the Republic of South Africa during the firm's preceding financial year. However, in terms of section 59(3A), the Competition Tribunal has the discretion to increase the administrative penalty. The remedy of an administrative penalty differs to the penalty in s 74, which is a penalty imposed on a person who is convicted of an offence in terms of the Act.

Chapter 7 of the law is dedicated to offences. Section 73(1) states that a person commits an offence who contravenes or fails to comply with an interim or final order of the Competition Tribunal or the Competition Appeal Court. In subsection 2, the Act sets out other offences which is based on conduct in contravention of the Competition Act. Section 73 offences refer to the offence a person has committed, as opposed to a firm. Following the amendment to the Competition Act by Act 1 of 2009, section 73A was enacted. Section 73A criminalises the act of cartel conduct by directors of a firm or by a person engaged or purporting to be engaged by a firm having management authority within the firm. As an aside, this section is similar to the offences and aims

[179] Ibid.

set out in the PCCA. One of the despotic remedies is a divestiture order.[180] In terms of section 60(2), the Competition Tribunal may make an order directing any firm, or any other person, to sell any shares, interests or assets of the firm, if it has contravened s 8 of the Act;[181] and the prohibited practice cannot adequately be remedied in terms of another provision of the Act or is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice or following a market inquiry as per s 2(c).

Apart from the analysis of *Millennium Waste Management* and *Cash Paymaster*, the current law regulating judicial review proceedings of public procurement falls short in several ways. PAJA remedies are ineffective with regard to the enforcement of the remedies in the sphere of procurement. I respectfully make this submission based on three reasons. First, it is an established principle that PAJA is applicable to the review of public procurement processes,[182] however, the Act does not expressly refer to procurement or define the ambits which in judicial review will apply to it. The remedies found in s 8 of PAJA are solely remedies for an administrator and are not specifically created for the review of public procurement. However, in a review there is a possibility that a bidder can be the one who is at fault or there is the existence of dishonesty or corruption which resulted in the bid being awarded to the tenderer. The legislation which has been enacted to provide effective remedies to aggrieved bidders does not assist to restore the competition or the equilibrium in procurement and is not punitive towards an unlawfully successful tenderer. Second, procurement is an area which is highly regulated and there are many statutes and regulations which aid to assist all users to enforce the rule of law.[183] These laws are essential to an extremely sensitive and potentially corrupt environment. They ensure that the public purse is spent in a manner that the public receives the necessary goods and services which is value for money. Public procurement processes are complicated by over regulation because the legislation and regulation differ per province, departments, municipalities and organs of state. Officials may find it more desirable in circumstances where there are too many regulatory burdens to rather follow deviation processes. Third, the remedies

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[180] Section 60 of Competition Act.
[181] This relates to the prohibited practice of the abuse of dominance.
[182] Supra note 68 *Umfolozi*.
[183] Matt Johnston 'Tenderpreneurship Where did the (tax) money go?' (2020) Taxtalk 8 at 8.

in PAJA, which are mainly focused against the administrator, do not seek to restore competition. Procurement is required by the Constitution and subsequent legislation to follow a competitive process, it would only be fair that the remedies in PAJA seek to restore competition, however, it falls short. This is probably due to the explicit exclusion of procurement processes in PAJA which is highly problematic.

On the other hand, the Competition Act provides substantially effective remedies to restore competition.[184] The remedies in the Act balances the interests of the parties involved against the integrity of the process itself. The court does not have much discretion to exercise when an applicant prays for a competition law remedy. The main source of competition law in South Africa is the Competition Act.[185] When unlawful administrative action occurs, it would ordinarily impact competition within the specific market of the procurement process. Anti-competitive conduct is not solely restricted to the conduct identified in the Competition Act. Further, the remedies in the Competition Act will assist and achieve the purpose of effective remedies identified in paragraph 29 of *Steenkamp*,[186] which is fair and just to those affected by it and vindicate the rights of those who have been disadvantaged.

Legal Reform

The approaches presented in the current legislative framework, regarding relief for unlawful awarding of tenders, as well as the remedies which the court has presented does not satisfy the constitutional requirement that procurement must follow a competitive process neither does it promote it.[187] In certain circumstances, the current judicial review remedies goes as far as to defeat the purpose of challenging decisions due to its ineffectiveness.[188] Therefore, there is a necessity for law reform to introduce a system which holds the people who have engaged in anti-competitive conduct or tenderers who have engaged in anticompetitive conduct resulting in the unfairness of an award of a tender as well as tenderers who benefit from unlawful processes,

[184] Competition Act ss 59 & 60, 64–68, 69–77.
[185] Ibid preamble.
[186] Supra note 69.
[187] *Refered to* as procurement legislation.
[188] Supra note 159 and 160.

accountable. This improvement can be achieved through the amendment to PAJA to include ‘anti-competitive conduct’ in the Act. This amendment will be added to s 6 which will permit any court or tribunal to review an administrative action if the action is anti-competitive.[189]

The amendment to PAJA will open the door for aggrieved bidders to seek an order which includes a remedy provided for in the Competition Act when bringing a review application. Section 3 of the Competition Act sets out the applicability of the Act, and the application of the Act has not been excluded from judicial review. The principle of legality requires that an invalid administrative action be set aside.[190] This creates a tension between the requirements of law and reality; where setting aside the award of a tender would cause a disruption or is impractical. In *Eskom Holdings Limited,* the court held that in the desirability for certainty, an administrative action may not be set aside where people have acted on the basis that the administrative action was valid due to the retrospective effect of the order[191]. The remedies found in the Competition Act would be beneficial in judicial review when it is impractical in the circumstances for the court to grant the discretionary remedy to set aside unlawful administrative acts. Specifically, the remedies found in s 59 and s 60 would be applicable in the circumstance where a tenderer will continue to benefit from an unlawful action where the court withholds its discretion to set aside the conduct. The offences relating to identifiable persons such as s 73 of the Competition Act would be relevant where the applicant is able to identify any particular anti-competitive conduct stated in the Act.

The premise for the attribution of the remedies in the Competition Act is based on s 172(b) of the Constitution. The section empowers a court to make *any* order that is just and, where it would be just and equitable to apply the statutory remedies found in the Competition Act, the court should do so. In *Bengwenyama Minerals,* the court held that when determining a just and equitable remedy in terms of PAJA and the Constitution, it is important to consider the importance of the principle of legality. The approach to unlawful administrative action in the sphere of procurement by the court to determine whether relief is just and equitable should give full effect to the finding of

[189] The amendment will be s 6(2)(j) of PAJA.
[190] Supra note 138.
[191] Supra note 137.

invalidity. It needs to be noted that having 'anti-competitive conduct' as a ground for review does not change or allude to a different process of challenging anti-competitive conduct.

The desired outcome of the proposed legal reform is that an aggrieved bidder will be able to bring an application which challenges the administrative processes of a tender on the listed grounds in s 6 of PAJA as well as the new ground of anti-competitive conduct. This means that the award of the tender must be challenged in terms of one of the grounds in s 6 of PAJA and the new ground of anti-competitive conduct will be an additional or alternative ground for which the tender is being challenged.[192] An aggrieved bidder who challenges an alleged unlawful tender process on the proposed ground of anti-competitive conduct will be required to set out and identify the alleged anti-competitive conduct, in addition to their principal allegation, in the founding affidavit and in rebuttal, the respondent can rely on defenses recognized in competition law. The anti-competitive conduct is not limited to that stated in the Competition Act but includes any conduct that's effect on foreclosing the market to other competitors is substantial or significant.[193] Private law is the body of law that regulates private individuals. Public law concerns the connection between the government and the people it manages as well as the law which governs society as a whole.[194] Private remedies are to prevent the commission or repetition of an injury,[195] while public remedies are preventative or punitive.[196] The nature of the remedies presented in the Competition Act have characteristics of public law remedies. This will make it less complicated for courts to apply the remedies under judicial review.

The introduction of this new ground of review should not be interpreted as an ignorance of an aggrieved bidders right to approach the Competition Tribunal on any of the grounds in the Competition Act. The new ground does not prevent the aggrieved

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[192] The legal reform seeks to achieve a complimentary ground where the challenge of a tender has to be primarily on a ground already found in s 6 of PAJA, then the auxiliary ground of 'anti-competitive conduct'.
[193] Supra note 189.
[194] Public law definition last accessed from https://www.tutorialspoint.com/differences-between-private-law-and-public-law on 4 February 2023.
[195] Private law remedies definition last accessed from https://www.upcounsel.com/legal-def-remedies-remedy#:~:text=Private%20remedies%20are%2C,injury%20which%20has%20been%20committed 4 February 2023.
[196] Ibid.

bidder to approach the court to seek the legal recourse based on procurement legislation. Additionally, the new ground overcomes the hurdle that the Competition Commission does not investigate the fraudulent or biased awarding of tenders, the fraudulent submission of false or misleading information in tender documents.[197] The amendment to PAJA to include anti-competitive conduct as a ground in s 6 does promote the right to access to courts and justice because it allows an aggrieved bidder to lodge a single claim as opposed to a multiplicity of litigation if the aggrieved bidder would be required to approach another authority.[198] This new ground will be most useful when the court withholds its discretion to set aside an unlawful tender, the court then will be able to apply competition law remedies which would restore competition and evade any catastrophic circumstances if the contract were to be set aside.

There are benefits to the applicability of competition law remedies in the case where the court is unable to set aside the unlawful procurement as opposed to the current position where the unlawfully successful tenderer continues to benefit from an unlawful process. The benefits can be considered in terms of four considerations, which are similar to the interests identified in *Millennium Waste Managemen*t when the court determined whether to exercise its discretion to set aside the unlawful procurement process. These are the benefits to the tenderer, the aggrieved bidder, the public and the public purse.

In relation to the tenderer, this refers to the tenderer who will unlawfully succeed from an unlawful process, it would prevent them from having to go through the tender process and re-bidding for the same bid or incurring wasteful expenditure due to contracts already entered into with innocent third parties based on their obligation to perform in terms of the tender contract. An aggrieved bidder will have the benefit of the promotion of equitable justice as well as the restoration of competition in a market they were disadvantaged in. The public and its interests will also benefit to the extent that goods or services would not have to come to a sudden halt due to the declaration

[197] The Commission will investigate collusive tendering amongst firms who submit tenders and this includes and is not limited to agreements amongst competing tenderers to rotate bids, fix prices and engage in cover pricing – if it does not fall in this category the allegation must be reported to the South African Police Services. Information available at https://www.compcom.co.za/faq/ last accessed on 13 February 2023.
[198] Supra note 1 s 34 Const.

of invalidity and the public can continue to receive goods and services without interruption. Regarding the public purse, the new ground protects it from a double jeopardy- what is problematic with the current remedies are that an unlawful contract that is not set aside continues to benefit the unlawful winner. Anti-competitive conduct by either officials of the state, or the tenderer itself has implications on the public purse. It is inexplicable that government funds can be used for self-gain, self-enrichment, and or any other purpose other than what it has been mandated to be used for. The remedy such as a penalty in terms of s 59 of the Competition Act, will assist to recover some of the public monies. Therefore, it will limit the amount of money spent on awarding the contract and the subsequent reconsideration thereof. These four categories should be the interests the court ordinarily considers when determining whether to set aside an unlawful administrative action and if it is just and equitable in the circumstances to apply competition law remedies.

Conclusion

Public procurement is reviewable in terms of PAJA. The primary remedy to set aside an unlawful procurement process does not seek to restore competition and it allows a tenderer to benefit from an unlawful process. The courts election to withhold its discretion to set aside unlawful tenders is an injustice. The regulation of procurement begins with the Constitution. Section 217 of the Constitution states that when an organ of state or institution contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Subsequent legislation has been enacted to enforce the constitutional principles of public procurement. Procurement legislation and regulations operate at different levels of government and are different for different types of procurement. This area of law is highly regulated due to its sensitivity and the involvement of public money. This research report focused on procurement that follows a competitive process.

Through case law, public procurement has been established as administrative action. Administrative action is reviewable in terms of PAJA. PAJA sets out the grounds to challenge procurement and provides remedies an applicant can seek. The primary remedy is that of setting aside the tender, this is a discretionary remedy. A court will be reluctant to set aside the unlawful tender if it would be prejudicial to the parties involved. This reluctancy can be observed through the case of *Millennium Waste Management*, where the court took into consideration the interests of the aggrieved bidder, the tender, the public and the public purse to determine whether to set aside the unlawful tender. In that case the court withheld the remedy to set aside the contract and rather remitted it back to the administrator. That remedy did not restore competition and the bidder in the case had benefited from the unlawful tender because it was not set aside. In *Paymaster,* the court endorsed the legislation and regulation permitting a deviation process. Deviation processes are lawful, however, due to its nature it locks out competition. Competition law remedies provide a better outcome than the decision not to set aside an unlawful action. Competition of a market is almost always distorted due to unlawful administration action, irrespective of whether the tenderer or the administrator is to blame for the unlawful administration.

In order for competition law to become applicable, PAJA must be amended to include ‘anti-competitive conduct’ as a ground to challenge administrative action. This new ground does not prevent an aggrieved bidder to approach the court and challenge the tender in terms of procurement legislation. However, it does promote an aggrieved bidder’s right to access justice and courts. The penalty remedy available in the Competition Act will limit the impact to the public purse because some of the funds will be able to be recovered due to unlawful action. The Competition Act also establishes an offence for directors who partake in conduct identified in the Act. This is similar to the offences set out in the PCCA. This allows an aggrieved bidder to bring one application to the court which will ensure that directors and those in charge are held accountable. It is necessary that amendments are made to the current law, so as to assist public procurement, as opposed to introducing new legislation.

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