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THE TREATMENT OF NON-RESPONSIVE BIDS IN SOUTH AFRICAN PUBLIC PROCUREMENT LAW

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Submitted toward the fulfilment of the degree of

Doctor of Philosophy

in the School of Law of the University of the Witwatersrand, Johannesburg.

December 2018

DECLARATION

I, the undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree.

Peter Stephen Volmink

16 December 2018

ABSTRACT

Non-compliance with bid requirements raises two interrelated questions. First, when is a deviation from a bid requirement legally significant? Secondly, under which circumstances, if any, are procuring authorities permitted to overlook (condone) non-compliance? Our courts have been inconsistent in their approach to both questions. One line of cases appears to hold bidders to unfaltering compliance with bid requirements. This approach draws a link between compliance and the attainment of important public-interest objectives such as integrity and the equal treatment of bidders. From this non-instrumental perspective, compliance is seen as having intrinsic value and should thus be upheld for its own sake. Another line of cases places the emphasis on other public-interest objectives, such as value for money and economic and operational efficiency. It calls into question the wisdom of disqualifying meritorious but non-compliant bids when this yields economically inefficient outcomes, particularly in instances involving relatively minor breaches. This approach is instrumental in nature, in that it draws a link between compliance and best economic outcomes.

Our courts are also divided on the question of condonation. The dominant view currently is that procuring entities have no authority to condone non-compliance in the absence of an express provision permitting them to do so. The only exception permitted is if the bid requirement in question is immaterial, unreasonable or unconstitutional. Other rulings have adopted a broader, more generous approach to condonation.

The problem of deviation cannot be resolved simply by categorizing the deviation in question as either ‘major’ or ‘minor’. The argument put forward in this thesis is that the principles of purposiveness and proportionality offer the best analytical tools to reach a balanced decision on the legal effect of a deviation. A proper understanding is required of when a deviation from a prescribed standard is material. This can best be achieved by examining materiality through the lens of purposiveness. The principle of proportionality, on the other hand, requires a balancing of important public-interest considerations. In this balancing exercise due weight must be placed on compliance, given its importance in achieving a fair tender process. But instances may arise when the disqualification of a bidder would be disproportionate, given the nature of the breach and the loss to the public purse if a compliant but inefficient bid were to be chosen above a non-compliant but technically superior bid. Proportionality requires that the issue of bid responsiveness be approached in a thoughtful and reflective manner, and not in a pedantic, legalistic fashion. In certain instances, a proportional

response may require that the non-compliance be condoned. Compliance and optimality are both key to an efficient procurement process, and both principles should as far as possible be vindicated during the process of judicial review.

The thesis states the law as at 16 December 2018.

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I would like to thank my supervisor, Professor Cora Hoexter, for her invaluable guidance. I have benefitted so much from her extraordinary breadth of knowledge and generosity of spirit, not to mention the boundless patience that she displayed during the writing process.

This thesis was born out of the practical difficulties that legal and procurement practitioners have shared with me regarding the treatment of non-responsive bids. I would like to thank the colleagues and friends who have helped me to grapple with many of the difficult themes that are addressed in this thesis. I hope that the thesis will contribute in some measure to a more balanced approach to the problem of non-responsiveness.

TABLE OF CONTENTS

DECLARATION	i
ABSTRACT	ii
ACKNOWLEDGEMENTS	iv
DETAILED TABLE OF CONTENTS	1
LIST OF ABBREVIATIONS	10
CHAPTER 1 Introduction and Regulatory Context	11
CHAPTER 2 A Critique of *AllPay*	39
CHAPTER 3 Jurisdictional facts	78
CHAPTER 4 Condonation, correction and waiver	118
CHAPTER 5 Estoppel	144
CHAPTER 6 Procedural fairness	173
CHAPTER 7 The doctrine of *functus officio* and the principle of self-correction	213

CHAPTER 8
Recommendations and Conclusion 238

BIBLIOGRAPHY 267

TABLE OF CASES 273

APPENDIX 1
A critique of the UNCITRAL Model Law on Public Procurement 291

APPENDIX 2
South African Law Reform Commission's Proposed Clause on Revocation 299

APPENDIX 3
Pretorius' Proposed Clause on Revocation 300

APPENDIX 4
My Proposed Clause on Revocation 301

APPENDIX 5
Recommendations for Legislative Reform 303

DETAILED TABLE OF CONTENTS

DECLARATION		i
ABSTRACT		ii
ACKNOWLEDGEMNTS		iii
TABLE OF CONTENTS		1
LIST OF ABBREVIATIONS		10
CHAPTER 1		
Introduction and regulatory context		11
1.1	Background to the thesis	11
1.2	Terminology	15
1.3	Integrity, equality and efficiency	18
1.4	Overview of the public procurement framework in South Africa	21
1.5	Key research questions	26
	(a) The purposive approach as expressed in *AllPay 1*	27
	(b) Procedural jurisdictional facts	29
	(c) Condonation and waiver	30
	(d) Estoppel	31
	(e) Procedural fairness	32
	(f) Self-help, self-correction and the doctrine of *functus officio*	33
	(g) Methodology	34
1.6	Chapter outline	36
	(a) Chapter 1	36
	(b) Chapter 2	36
	(c) Chapter 3	36
	(d) Chapter 4	36
	(e) Chapter 5	36
	(f) Chapter 6	36
	(g) Chapter 7	36
	(h) Chapter 8	36

1.7 Conclusion 37

CHAPTER 2

A Critique of *AllPay* 39

2.1 Introduction 39

Part 1

2.2 The strict and permissive approaches 40

2.3 The Factual Matrix 44

2.4 The High Court's Ruling 46

2.5 The SCA's Ruling 47

2.6 The Constitutional Court's Ruling 50

(a) Inconsequential Irregularities 50

(b) The importance of the regulatory framework As a whole 51

(c) Compliance has intrinsic value 51

(d) 'Mandatory and material' 52

(e) The 'proper' approach 53

Part 2

2.7 Beyond formalism 55

2.8 Red herrings, Red flags and the public interest 57

2.9 Purpose and materiality 62

Part 3

2.10 The implementation of *AllPay* jurisprudence 67

(a) The application of the purposive approach 67

(b) Deviation 71

(c) The default position 72

(d) Standing 74

2.11 Conclusion 76

CHAPTER 3

Jurisdictional facts and appropriate remedies 78

3.1 Introduction 78

Part 1

Procedural jurisdictional facts 81

3.2 The position at common law 81

3.3 The position in the constitutional era 84

3.4 The demise of the jurisdictional fact doctrine 86

3.5 Evaluating the seriousness of a deviation from prescribed requirements: The 'materiality' determination 87

(a) Process versus purpose 89

(b) Reading the provision in context 91

(c) A standard of correctness? 94

Part 2

Legal consequences of non-compliance with procedural jurisdictional facts: The 'remedy' determination. 96

3.6 Void and voidable 96

3.7 The key question: What does a 'just and equitable' remedy require? 103

(a) Appropriate relief 104

(b) The corrective principle 105

(c) The multilateral nature of tender disputes 107

(d) Revisiting earlier case law 112

(e) Balance, legality and administrative efficiency 114

3.8 Conclusion 116

CHAPTER 4

Condonation, correction and waiver 118

4.1 Introduction 118

4.2 Condonation and waiver 121

4.2.1 Condonation 121

(a) Proportionality 121

(b) Balance, necessity and suitability 124
(c) A presumption of disqualification 127
(d) Condonation and corruption 129
4.2.2 Correction 131
4.2.3 Waiver 134
4.3 The rule against fettering 139
4.4 Conclusion 142

CHAPTER 5
Estoppel 144
5.1 Introduction 144
5.2 Estoppel 146
(a) 'The functions and dysfunctions of form' 146
(b) Estoppel: The conventional approach 147
(c) Ameliorating the harsh effects of the conventional approach 150
(d) Rethinking estoppel 156
(e) Egregious misconduct 159
5.3 Alternative paths 161
(a) Remedial powers 162
(b) Substantive legitimate expectation 165
(c) The 'public law remedy' 169
5.4 Conclusion 170

CHAPTER 6
Procedural fairness 173
6.1 Introduction 173
6.2 Universality and flexibility 176
6.3 A question of rights 178
6.4 The procurement cycle 181
6.5 Application of procedural fairness to disqualification of bidders on grounds

of non-responsiveness 186
(a) The position of a non-responsive bidder 187
(b) The position of a preferred bidder 194
6.6 Preliminary decisions 199
(a) Broad principles 200
(b) The 'proximity' principle 204
(c) A 'decision' having 'direct, external, legal effect' 206
(d) Preliminary decisions and bid responsiveness 207
6.7 Conclusion 210

CHAPTER 7
Self-help, self-correction and the *functus officio* principle 213
7.1 Introduction 213
7.2 The *functus officio* principle 215
7.3 The *Kirland* judgment 223
7.4 The bid evaluation process 224
7.5 Preliminary decisions 226
7.6 Revocation authorized by empowering provisions 227
7.7 Erroneous final decisions 230
7.8 Valid final (favourable and unfavourable) decisions 232
7.9 Legislative reform 233
7.10 Conclusion 235

CHAPTER 8
Conclusion: The treatment of non-responsive bids in South African public procurement law 238
8.1 Introduction 238
Part 1
General Principles 239
8.2 Non-responsiveness 239

8.3 Compliance matters 241
8.4 The two-stage approach 242
(a) Void and voidable 243
(b) The public interest 245
(c) A range of remedies 248
Part 2
Specific Principles 250
8.5 Materiality 250
(a) The materiality of the bid condition 250
(b) The materiality of the deviation from the bid condition 250
8.6 Proportionality 252
8.7 Condonation 253
(a) Condonation and corruption 254
(b) Immaterial, unreasonable and unconstitutional 255
(c) A proportionality-based approach 256
(d) Correctable defects 257
(e) Legislative reform 259
8.8 Waiver 259
8.9 Fettering 260
8.10 Estoppel 261
(a) Estoppel 261
(b) Alternative paths 262
8.11 Procedural fairness 263
8.12 Self-correction 265
8.13 Prevention of non-responsive bids 266

BIBLIOGRAPHY 267
TABLE OF CASES 273
APPENDIX 1
Defective Bids: A Critique of the UNCITRAL Model Law 291

APPENDIX 2

South African Law Reform Commission's Proposed Clause on Revocation 299

APPENDIX 3

Pretorius' Proposed Clause on Revocation 300

APPENDIX 4

My Proposed Clause on Revocation 301

APPENDIX 5

Recommendations for Legislative Reform 303

LIST OF ABBREVIATIONS AND ACRONYMS

AD	Appellate Division
ADJASA	Administrative Justice Association of South Africa
AG	Auditor General
BBBEE Act	Broad Based Black Economic Empowerment Act 53 of 2000
BAC	Bid Adjudication Committee
BEC	Bid Evaluation Committee
BSC	Bid Specification Committee
CIDB	Construction Industry Development Board
ECJ	European Court of Justice
IDC	Industrial Development Corporation
JV	Joint Venture
MFMA	Municipal Finance Management Act 56 of 2003
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PFMA	Public Finance Management Act 1 of 1999
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
RFI	Request for Information
RFP	Request for Proposal
RFQ	Request for Quotation
SANRAL	South African National Roads Agency SOC Ltd
SAPS	South African Police Services
SCA	Supreme Court of Appeal
SCM	Supply Chain Management
SOC	State-Owned Companies
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER 1

INTRODUCTION AND REGULATORY CONTEXT

1.1 BACKGROUND TO THE THESIS

The public tender process contains a welter of preconditions and administrative requirements that could easily ensnare bidders and administrators, even those with considerable experience in the field of public tendering.[1] Non-compliance with stated bid requirements poses a significant risk to the legitimacy of the bidding process. The risk of error is exacerbated by the conditions under which public procurement is conducted. The bidding process is highly regulated; it is normally carried out under severe time constraints; it involves the submission of large amounts of information that must be analysed and evaluated by inadequately trained staff under pressurized circumstances; the applicable rules are often poorly drafted and in some instances conflict with each other; bidders are not well-informed about the consequences of non-compliance and do not always appreciate the importance of submitting complete bids; and the dividing line between compliance and non-compliance is often difficult to draw.[2]

Full compliance with bid requirements is regarded as a *sine qua non* for participation in a procurement event, and consequently non-compliance with any of the myriad formalities and conditions could render a bid defective and thus subject to disqualification. The following are just some examples from our case law of instances in which public bodies have disqualified bidders for failure to comply with bid conditions: failure to provide an original tax clearance certificate;[3] failure to provide both an original as well as a copy of an application form;[4] failure to pay an application fee timeously;[5] failure to provide a signed copy of a declaration of interest

[1] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 295.
[2] Omer Dekel 'Improving Public Procurement Efficiency — Applying a Compliance Criterion' (2015) 3 *Public Procurement Law Review* 63.
[3] *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA) (hereafter *Moroka*); *PRASA v Swifambo Rail Agency (Pty) Ltd* [2017] ZAGPJHC 177 (3 July 2017); *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* [2011] ZAECELLC (16 March 2011); *Azcon Projects CC v National Minister Department of Public Works, Mthatha* [2011] JOL 27630 (ECM) (hereafter *Azcon*); *VDZ Construction (Pty) Ltd v Makana Municipality* [2011] ZAECGHC 64 (3 November 2011) (hereafter *VDZ Construction*).
[4] *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA) (hereafter *Pepper Bay*).
[5] Ibid.

form;[6] failure to provide annual financial statements[7] or certified copies thereof;[8] failure to provide a signed copy of audited statements;[9] the use of abbreviated names instead of the full names of the applicant in an application form;[10] failure to provide certain zoning certificates;[11] failure to demonstrate the requisite levels of experience[12] or to provide qualifications of key personnel;[13] failure to provide certified copies of identity documents or company registration papers;[14] and deviation from technical requirements.[15] The list goes on.

To the casual observer, some of these grounds for disqualification may seem rather petty and overly formalistic. It might be argued that it is counter-productive to disqualify bidders for failure to comply with mere trifles that do not touch on the substance of a bid. The observer may protest that if the primary purpose of public procurement is to promote the public good by obtaining the best quality products and services at the best available price, it would be economically senseless to disqualify meritorious bidders based on non-compliance with minor administrative requirements. It might also be argued that the public interest in protecting the public purse requires a different approach.[16]

In some instances, our courts have agreed with this sentiment.[17] For example, in *VDZ Construction (Pty) Ltd v Makana Municipality*, the applicant was disqualified because it had provided only one original page of a municipal billing clearance certificate (the second page was a copy), whereas the RFP required the submission of a complete original.[18] However, it transpired that the error occurred during the process of collation by the municipality that issued

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[6] *Millennium Waste Management v Chairperson, Tender Board, Limpopo Province* 2008 (2) SA 481 (SCA) (hereafter *Millennium Waste*).
[7] *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2016] 1 All SA 313 (SCA) (hereafter *Aurecon*); *WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality* [2017] ZAECGHC 45 (17 March 2017); *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform; Asla Construction (Pty) Ltd v The Head of the Department of Rural Development and Reform* [2016] 3 All SA 686 (WCC).
[8] *Inyameko Trading 189 CC v Minister of Education* [2007] ZAWCHC 74 (10 December 2007) (hereafter *Inyameko*).
[9] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 502 (SCA) (hereafter *National Lotteries Board*).
[10] Ibid.
[11] *Elite Bingo (UTH) Proprietary Ltd v Zwane N.O* [2017] ZAECGHC 53 (11 May 2017).
[12] *Umso Construction (Pty) Ltd v MEC of the Government of the Province of the Eastern Cape Responsible for Roads and Transport* [2016] ZASCA 61 (14 April 2016).
[13] *Jocastro (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2018] ZAWCHC 44 (11 April 2018) (hereafter *Jocastro*).
[14] *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality* [2010] JOL 26195 (ECM) (hereafter *Sizabonke Civils*).
[15] *B Braun Medical (Pty) Ltd v The Director General: National Treasury* [2016] ZAGPPHC 1114 (3 November 2016); *Kwafel CC v Kwa Dukuza Municipality* [2017] ZAKZDHC 1 (15 January 2017).
[16] Dekel (note 2 above) 64.
[17] *Millennium Waste* (note 6 above) para 21; *National Lotteries Board* (note 9 above) para 20.
[18] *VDZ Construction* (note 3 above).

the certificate. The court held that a quick telephone call by the respondent to its sister municipality would have resolved the matter. The court further held that condonation of the applicant's non-compliance would have served the public interest by facilitating competition among tenderers.[19]

But in other instances, the courts have adopted a less lenient approach. For instance, in *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality*, the court held that organs of state ought not to be burdened with the responsibility of enquiring from bidders why they had not complied with 'an essential, simple and sufficiently highlighted provision of its conditions of tender'.[20]

The rejection of a meritorious bid for minor flaws seems 'intuitively disturbing'.[21] It seems common-sensical to draw a distinction between the legitimate enforcement of tender requirements and the adoption of a narrow, formalistic and inflexible approach.[22] But when is this line crossed? Furthermore, how should the law treat defective bids? These questions lie at the heart of this thesis and are explored in the chapters that follow.

The principle of fairness, one of the key ingredients of a legitimate tender process, requires that all bidders comply equally with the terms and conditions of a bid document.[23] Compliance with bid requirements is necessary for a bid process to be regarded as lawful and to ensure proper administrative functioning in the award of tenders.[24] However, it is 'notoriously difficult' to determine when less-than-perfect compliance results in invalidity.[25] Indeed, there is no bright line of distinction to be drawn between a fatal and a non-fatal irregularity in a bid process.[26] Both an overly strict approach as well as an excessively permissive approach could undermine the integrity of the bidding process, and our courts have often struggled to determine where to draw the line.[27] A rigid adherence to regulatory compliance would sanction any

[19] Ibid para 17.
[20] *Sizabonke Civils* (note 14 above) para 29.See also *Pepper Bay* (note 10 above); *Moroka* (note 3 above).
[21] Omer Dekel 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237.
[22] Peter Volmink 'Legal Consequences of Non-Compliance with Bid Requirements' (2014) 1 *African Public Procurement Journal* 41, 44.
[23] P Bolton 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PER* 2315.
[24] *Inyameko Trading* (note 8 above) para 27; *Westinghouse v Eskom Holdings* 2016 (3) SA 621 (CC) (hereafter *Westinghouse*) para 39. In *Areva NP Incorporated in France v Eskom Holdings SOC Ltd* 2017 (6) SA 621 (CC), the Constitutional Court overturned the *Westinghouse* judgment on the narrow issue of *locus standi*.
[25] *Metro Projects CC v Klerksdorp Municipality* 2004 (1) SA 16 (SCA) (hereafter *Metro Projects*) para 15.
[26] Throughout this thesis, I will use the terms 'tender' and 'bid' as well as 'tenderer' and 'bidder' interchangeably.
[27] Bolton (note 23 above) 2315.

procedural defect irrespective of its nature and effect, whereas an unduly permissive approach could undermine the principles of legality and the equal treatment of bidders. But a purposive approach, on the other hand, would take a variety of factors into account, such as the materiality of the defect, the purpose of the procedural requirement and the importance of administrative efficiency.[28]

The case law suggests that non-compliance with responsiveness criteria gives rise to legal challenges in a variety of circumstances:

(i) An organ of state may fail to apply a mandatory bid requirement at all or alternatively, fail to apply the requirement in a uniform and even-handed manner.[29] In the latter instance the organ of state typically disqualifies only certain non-compliant bidders but fails to disqualify other equally non-compliant bidders;[30]

(ii) Bid requirements may be applied in an unduly rigid and mechanical fashion. In such instances, organs of state usually fail to differentiate between material and immaterial bid requirements or fail to appreciate the distinction between perfect compliance and sufficient (substantial) compliance;[31]

(iii) An organ of state may seek to enforce bid requirements that are vague, irrelevant or 'immaterial, unreasonable and unconstitutional';[32]

(iv) The organ of state may use alleged breaches of bid requirements opportunistically to resile from otherwise unimpeachable contracts;[33]

(v) organs of state may misinterpret a bid requirement and by do doing commit an error of fact or law.[34]

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[28] Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475, 476.

[29] *Gidani (Pty) Ltd v Minister of Trade and Industry* [2015] ZAGPPHC 457 (4 July 2015); *Jocastro* (note 13 above).

[30] *Autozone Retail and Distribution (Pty) Ltd v The National Commissioner of Police NO* [2015] JOL 33089 (GJ) (hereafter *Autozone*) paras 42 – 57; *WDR Earthmoving Enterprises v Joe Gqabi District Municipality* [2018] ZASCA 72 (30 May 2018); *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* [2018] ZAGPJHC 476 (22 June 2018).

[31] *Millennium Waste* (note 6 above); *Minister of Social Development v Phoenix Cash and Carry* 2007 (9) BCLR 982 (SCA) (hereafter *Phoenix Cash and Carry*).

[32] *Millennium Waste* (note 6 above); *GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works* [2007] JOL 20439 (D).

[33] Hoexter (note 1 above) 295. *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA) is a good example of how an organ of state used alleged breaches of tender regulations and bid conditions as a pretext to cancel an otherwise legitimate contract. See also *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works* [2015] 4 All SA 255 (SCA).

[34] *Trencon (Pty) Ltd v The Industrial Development Corporation of South Africa Ltd* [2013] ZAGPPHC 147 (3 June 2013); *Jocastro* (note 13 above).

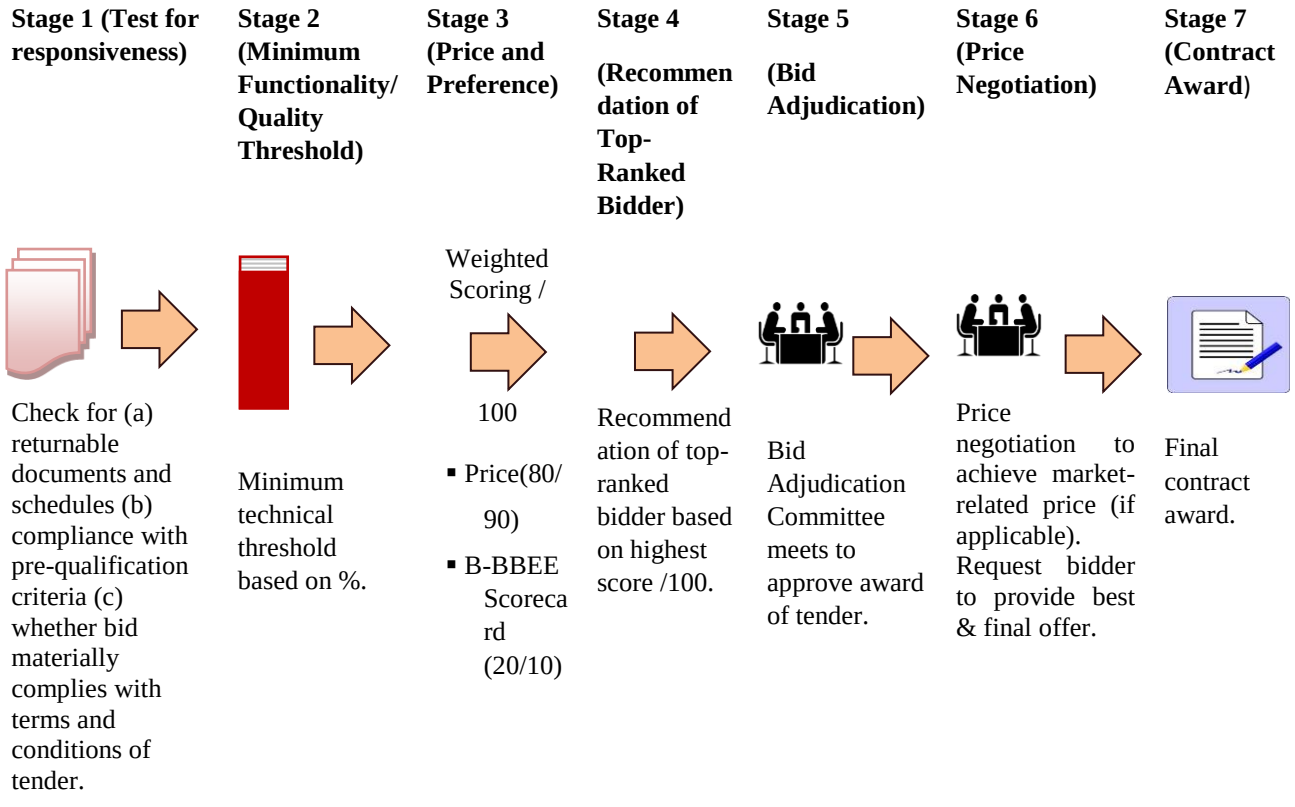
(vi) Legal challenges are usually brought by unsuccessful bidders after being disqualified on grounds of non-responsiveness. However in at least one instance, a successful bidder instituted legal action precisely because it was not disqualified from the process when it ought to have been. [35]

Before proceeding, some terminology associated with the bid process must be explained.

1.2 TERMINOLOGY

The public bidding process consists of a series of filtering (rejection) and selection procedures.[36] During the filtering process, bidders are disqualified based on their failure to meet minimum criteria. This is usually done without regard to the cost of disqualification. A risk thus exists that the most cost-effective bidder might be rejected during the filtering process for failure to meet an administrative requirement.[37] The filtering process takes place during stages 1 and 2, and the selection process during stages 3 to 7, as depicted in figure 1 below.

Figure 1[38]



[35] *Steenkamp NO v The Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC).

[36] DJ Wickens 'The Meaning and Application of Cost-Effectiveness as a Constitutional Requirement for the South African Procurement System' (unpublished LLD Thesis, North-West University 2017) 412.

[37] Ibid 413.

[38] Adapted from Transnet's Procurement Procedures Manual (unpublished) page 95. Figure 1 is also discussed in Chapter 7, in the context of the *functus officio* doctrine.

During stage 1, bidders are assessed for responsiveness, both in formal and substantive terms.[39] Formal responsiveness involves an assessment whether bids were submitted on time and whether all information required was provided in the prescribed format.[40] This usually includes various 'returnable documents', such as certificates, financial statements, company registration documents, technical information, pricing schedules and the like. At this point, the focus is on compliance with the administrative requirements of a bid document. The test for substantive responsiveness on the other hand is two-fold: first, it involves a determination whether the bid complies with minimum regulatory or pre-qualification criteria. Regulatory requirements include aspects such as registration on the Central Supplier Database[41] as well as tax compliance.[42] Pre-qualification criteria usually relate to (a) technical aspects, such as years of experience, registration with a professional or regulatory body, minimum levels of resources available etc. or (b) social criteria, such as minimum B-BBEE levels or an undertaking by the contractor to sub-contract a minimum percentage of contract value to various designated groups.[43]

Secondly, the test for substantive responsiveness involves an assessment whether the bid complies with the specifications of the goods or services stipulated in the bid document — in other words, 'whether the bidder offered what the contracting authority requested'.[44] It is self-evident that a bid that meets all administrative and pre-qualification criteria, but which offers goods or services that are materially different to what the RFP requires, cannot be regarded as a compliant bid. The Preferential Procurement Policy Framework Act (PPPFA) employs the term 'acceptable tender' to mean 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.[45] The objective of bid evaluation is to award bids to the most meritorious *and acceptable* bidders.[46]

Bids that fail the test for responsiveness are normally disqualified at stage 1. Bids that satisfy all the responsiveness criteria at stage 1 progress to stage 2, where they are assessed against functionality criteria. These involve technical or quality criteria, such as lead times,

[39] G Quinot 'The Role of Quality in the Adjudication of Public Tenders' (2014) 17 *PER/PELJ* 1110 at 1112.
[40] Ibid .
[41] National Treasury SCM Instruction 4A 2016/17 Central Supplier Database last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 11 June 2018.
[42] National Treasury SCM Instruction 9 of 2017/18 Tax Compliance Status Verification last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 11 June 2018.
[43] Regulations 4 and 9 of the PPPFA regulations, 2017 in GN 40553 *GG* 10684 of 20 January 2017.
[44] Quinot (note 39 above) 1113.
[45] Section 1*(i)* of the PPPFA.
[46] Wickens (note 36 above) 227.

energy efficiency, method statement, technical compliance, experience of human resources and so on. Bidders are usually allocated evaluation points for each criterion and are required to meet a minimum threshold, expressed as a percentage. Quinot refers to these as 'qualification criteria' that are used to ascertain whether bidders are able to provide the goods or perform the works or services at the required standard.[47] Qualification criteria, like responsiveness criteria, are used in a binary manner — 'bidders either qualify or they do not'.[48] Bids that meet the minimum threshold score at stage 2 progress to stage 3 where they are evaluated based on award criteria of price and preference.

Responsiveness and qualification criteria must be understood as distinct from award criteria. The former are regarded as a *sine qua non* for further evaluation, whereas the latter involve an evaluation of bids against each other on the basis of price and preference. Responsiveness and qualification criteria may potentially overlap with each other. Quinot explains that a bidder that fails to meet qualification criteria may also be regarded as non-responsive.[49] Although there is some elasticity to the manner in which the term 'responsiveness' may be used, for purpose of this thesis, the term will be used to refer to the requirements that must be met at stage 1 of the evaluation process. In other words, responsiveness is used in relation to the requirement to provide mandatory documentation and to comply with prequalification criteria, as stated in the RFP.

Whereas responsiveness and qualification criteria are used in an *absolute* sense, award criteria are used in a *relative* sense to compare bidders with each other. The Preferential Procurement Policy Framework Act 5 of 2000 prescribes that only price and preference may be considered as award criteria to compare and rank bidders *inter se* and to award a bid.[50] During stage 3 bidders are scored out of 100 points (90 or 80 points are assigned to price and 20 or 10 points to B-BBEE, depending on the value of the contract).[51] During stage 4 bidders are ranked based on their score out of 100 evaluation points and the bidder who scores the highest points is recommended for the award. During stage 5 the highest-ranked bidder must be awarded the contract, unless 'objective criteria' justify the award to a lower-ranked bidder.[52]

[47] Quinot (note 39 above) 1111.
[48] Ibid.
[49] Ibid 1113.
[50] Section 2(1)(*a*) and (*b*) of the PPPFA; Ibid 1111.
[51] In terms of regulations 6 and 7 of the PPPFA regulations (note 43 above), if the value of the tender is less than R50 million, 80 points are assigned to price and 20 to B-BBEE. If the tender is above R50 million, 90 points are assigned to price and 10 to B-BBEE.
[52] Section 3(1)(*f*) of the PPPFA.

However, if the highest-ranked bidder's price is not market-related, the parties may enter into a round of price negotiations in order to arrive at a market-related price. The contract with the successful bidder is concluded at step 6.

1.3 INTEGRITY, EQUALITY AND EFFICIENCY

According to Dekel, public procurement seeks to achieve three objectives.[53] The first, and primary objective, is to maintain integrity in the bidding process.[54] This requires that a strong anti-corruption ethos in procurement be maintained. Quite apart from the moral, social and legal problems created by corrupt bidding practices, it often leads to economically inefficient outcomes 'since favouritism in contracting usually leads to economically suboptimal decisions and adverse economic effects on the economy and the public'.[55] The second objective is economic efficiency. Government holds public funds in trust, and its trustee status requires of it to ensure that its procurement processes leads to the most economically efficient outcome.[56] The third is equality. This element requires equality *ex ante* — all eligible bidders must be afforded an equal opportunity to participate in government tendering, as well as equality *ex post* — bids must be evaluated against the same criteria that are stipulated upfront in the bid document. Ideally, every procurement event will achieve all three outcomes. However, a dilemma arises when the most economically advantageous bid is also a defective bid.[57] For example, the best bid may have been submitted late, or with missing signatures or documents. According to Dekel, virtually any dilemma that arises in public procurement reflects a conflict between at least two objectives.[58]

How the dilemma is resolved will depend on the relative weight that the procuring entity assigns to each objective. Since integrity is the primary objective, it will automatically outweigh the other two objectives.[59] Hence, a procurement event that lacks integrity cannot be upheld, even if it yields the most efficient outcome.[60] Difficulties arise when a choice must be made between the objectives of equality and efficiency. If the procuring entity places a greater value on equality it will reject a defective bid in favour of a more inefficient offer, resulting in

[53] Dekel (note 2 above) 64; Dekel (note 21 above) 238-239.
[54] Dekel (note 21 above) 242.
[55] Ibid 241.
[56] Ibid 242 – 243.
[57] Dekel (note 2 above) 64.
[58] Dekel (note 21 above) 240, 267.
[59] Ibid 258.
[60] Ibid 258.

sub-optimal outcomes and a loss to the public purse.[61] On the one hand, if the procuring entity places a premium on economic efficiency, it may be inclined to overlook the defects at the expense of fair and equal treatment of bidders.[62] Added to this, is the complexity involved in distinguishing between those instances of non-compliance that must lead to disqualification and those that do not.[63]

The weight assigned to equality will depend on whether equal treatment of bidders has 'intrinsic value' or 'instrumental value'.[64] Equality has intrinsic value when it is viewed as a worthwhile objective to pursue on its own, and not only in relation to how it serves to promote other objectives. On the other hand, equality has instrumental value if it is seen as an aid to the achievement of other objectives, such as economic efficiency or integrity.[65] Based on the latter approach, equal treatment will decline in importance if it conflicts with or fails to achieve economic efficiency.[66] Dekel argues that equal treatment has intrinsic, rather than instrumental value.[67] However, he also argues for the use of a 'disqualification presumption', in terms of which procuring entities are required to reject a non-compliant bid, but may decide not to when there are convincing arguments to the contrary. In simple terms, when faced with a defective bid, a procuring entity must choose the approach that contributes more (or is least damaging) to the public interest.[68] In deciding which alternative would be the most appropriate, a procuring entity should ask itself a number of questions:

> Will rectifying or overlooking the flaw give the offeror an unfair advantage over others? If so, how material an advantage will be gained by the offeror with the flawed offer ie, what is the extent of the violation of the equality principle? What are the circumstances that brought about the flaw? Did it come about in good faith or is there a suspicion of corruption or of a prohibited manipulation of the public tender (the preservation of integrity)? What are the economic implications, under the circumstances, of rejecting the offer or of rectifying it (striving toward economic efficiency)? What might be the long term economic implications of the decision (efficiency considerations)? How will the decision affect the public's faith in the Government and in the entire concept of the public tender process?[69]

[61] Ibid 239; Dekel (note 2 above) 65.
[62] Dekel (note 21 above) 239.
[63] Dekel (note 2 above) 64.
[64] Dekel (note 21 above) 246.
[65] Ibid 247.
[66] Ibid.
[67] Ibid 246.
[68] Ibid 259.
[69] Ibid.

The more serious the violation of the equality principle and/or the smaller the economic harm resulting from a bid disqualification, the greater the need for strict compliance with bid criteria. Conversely, the greater the economic advantage to be derived from the defective bid and the slighter the violation of the equality principle, the stronger the justification will be for overlooking the defect.[70] Dekel's 'disqualification presumption' will be further discussed in Chapter 4 when dealing with condonation and waiver.

The conflicting approaches adopted by the SCA and the Constitutional Court in the *AllPay* case reflect the divergence between the 'intrinsic' and 'instrumental' views.[71] The SCA opted for an instrumental view of equality. In the SCA's view, the imperfections that might have existed in the bidding process were eclipsed by the superior offer that was made by the winning bidder.[72] On this approach, the most economically efficient outcome was achieved. The Constitutional Court, on the other hand, held the view that equal treatment of bidders has intrinsic value and as such, the demands of equality could not simply yield to the demands of economic efficiency. The court held that the award of tender was constitutionally invalid because it violated the equality principle.[73] However, efficiency considerations were not entirely disregarded by the court. The court held that efficiency considerations could be taken into account during the remedy stage of review proceedings.[74]

In *AllPay 1*, the Constitutional Court suggested that all three objectives (integrity, equality and efficiency) could be achieved by following a compliance-driven approach.[75] According to the Constitutional Court, compliance serves to: (a) ensure fairness to participants in the bid process (the equality objective); (b) enhance the likelihood of efficiency and optimality (the efficiency objective); and (c) guard against a process skewed by corruption (the integrity objective).[76] But Dekel argues differently. As he sees it, rather than promoting all three objectives equally, compliance often involves a trade-off between equality and efficiency,

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[70] Ibid 260.

[71] This study makes reference to various judgments involving the *AllPay* matter. To avoid confusion, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) will be referred to as '*AllPay 1* or the 'merits judgment' to distinguish it from the subsequent ruling of the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (6) BCLR 641 (CC), referred to as '*AllPay 2* or the 'remedy judgment'. The ruling of the SCA in the *AllPay* case 2013 (4) SA 557 (SCA) will be referred to as *AllPay (SCA*), and the ruling of the High Court in the same matter [2012] ZAGPPHC 185 (28 August 2012) will be referred to as *AllPay (High Court).*

[72] *AllPay (SCA)* (note 71 above) para 80. See also the approach adopted in *Millennium Waste* (note 6 above).

[73] *AllPay 1* (note 71 above) paras 83 – 93.

[74] Ibid para 25.

[75] Ibid para 27.

[76] Ibid para 27.

usually with efficiency being allocated a lesser weighting. I return to this aspect in Chapter 2, when I analyse the *AllPay* judgments in more detail.

1.4 OVERVIEW OF THE PUBLIC PROCUREMENT REGULATORY FRAMEWORK IN SOUTH AFRICA

A comprehensive review of South Africa's public procurement regime falls outside the scope of this thesis.[77] However, a brief overview of the procurement regime is necessary to understand the regulatory context within which the test for bid responsiveness is applied. The procurement regime consists of 'a complex web of primary and subordinate legislation as well as supply chain management policies'.[78] The various regulatory instruments both empower public bodies in their procurement processes and place limits on their powers.[79] 'Procurement processes, in order to be lawful and constitutionally compliant, must be undertaken in accordance with these provisions: compliance with them is legally required and they may not be disregarded.'[80]

There are three distinct features of South Africa's procurement regime that must be highlighted: The first is its fragmentation.[81] Quinot observes that there is no single comprehensive statute that deals with public procurement.[82] In fact, National Treasury (NT) observes that there are no fewer than eighty pieces of legislation that govern public procurement in South Africa.[83] Additionally, the various legislative instruments sometimes conflict with each other. This has 'create[d] uncertainty about which of these diverse instruments take legal precedence in regulatory interpretation when public procurement cases are disputed in court'.[84] It is little wonder that the procurement framework has been variously

[77] For a comprehensive review of South Africa's public procurement regulatory framework see Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 138 − 207. See also Prof Geo Quinot '*An Institutional Legal Structure for Regulating Public Procurement in South Africa. "Research Report on the Feasibility of Specific Legislation for National Treasury's Newly Established Office of the Chief Procurement Officer*"' (March 2014) (hereafter *Quinot report*) 9 – 47.
[78] *WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality* [2017] ZAECGHC 45 (13 March 2017) para 6.
[79] Ibid.
[80] Ibid.
[81] Geo Quinot 'Enforcement of Procurement Law from a South African Perspective' (2011) 6 *Public Procurement Law Review* 193; Quinot Report (note 77 above) 9.
[82] Quinot (note 81 above) 193.
[83] National Treasury *Public Sector Supply Chain Management Review* (2015)10. I will refer to this report as the 'SCM Review'. See also R Cachalia, 'Government Contracts in South Africa: Constructing the Framework' (2016) 27 *Stellenbosch Law Review* 88, 91.
[84] SCM Review (note 83 above) 12. See also Quinot Report (note 81 above) 194.

described as 'convoluted',[85] 'Byzantine'[86] and a 'hodge-podge of rules from all the major branches of law'.[87] Efforts are apparently underway to rationalize and streamline the procurement regime under the aegis of a new Public Procurement Bill.[88] However, as at date of submission of this thesis, the Bill has not been promulgated.

The second striking feature of the regulatory framework is its peremptory nature. The word 'must' is commonly used throughout the regulatory instruments that impact public procurement.[89] The regulatory regime is practically devoid of discretionary power. Given the mandatory nature of the regulatory regime, organs of state are required to ensure strict compliance with the legislative prescripts and must therefore stay within the confines of their statutory powers when they conclude contracts on behalf of the state.[90] No matter how well-intentioned, public bodies cannot confer power on themselves that they do not possess.[91] The use of peremptory language is ostensibly intended to limit the risk of error or corruption by minimizing the level of discretion afforded to administrators in the performance of their day-to-day tasks.[92] However, given the serious capacity constraints within the public sector, I am of the view that an overly-prescriptive approach might actually increase the risk of fatal errors occurring during a tender process.

The third significant feature of the regulatory framework is its punitive character. The manner in which the Public Finance Management Act 1 of 1999 (PFMA) deals with 'financial misconduct' has created a veritable 'Sword of Damocles' over the public service. Any expenditure that is not in accordance with the regulatory framework constitutes 'irregular expenditure',[93] which is regarded as a form of financial misconduct.[94] It should be pointed out that the concept of 'financial misconduct' is not confined to acts of gross negligence, fraud and corruption, but includes *any* expenditure that is not in accordance with legislative requirements. Not only do acts of financial misconduct taint the legality of tender awards, they also attract

[85] *Moroka* (note 3 above) para 8.
[86] Quinot report (note 77 above) 3.
[87] Ibid 1.
[88] Ibid 14. On 21 February 2018 the Minister of Finance announced in his budget speech that the Public Procurement Bill would be submitted to Cabinet during March 2018. However, the Bill has not been promulgated as yet.
[89] For example the word 'must' appears in the PPPFA regulations, 2017 (note 43 above) no fewer than 34 times.
[90] Bolton (note 77 above) 74.
[91] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) para 70.
[92] *Sanyathi Civil Engineering & Construction (Pty) Ltd v Ethekwini Municipality* 2012 (1) BCLR 45 (KZP) (hereafter *Sanyathi Civils*) para 32.
[93] 'Irregular expenditure' is defined in section 1 of the PFMA as 'expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation'.
[94] Sections 81 – 85 of the PFMA.

deleterious consequences for the officials concerned.[95] This may (at least partly) explain the seemingly inflexible approach often adopted by public officials to compliance with regulatory and bid requirements.

The rather noxious cocktail made up of a highly fragmented system couched in peremptory language, implemented by inadequately trained and often poorly supervised staff, operating under enormous pressure with limited resources and within a punitive environment, often leads to procurement failures, in many instances spectacularly so. A review of the case law suggests that the primary cause of failure in public procurement is not fraud or corruption (prevalent though such malpractices may be), but rather 'negligence, incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders'. [96]

Oft-quoted, but seldom observed,[97] s 217(1) of the Constitution states 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 and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.[98] Section 217 is regarded as the 'genesis' of public procurement law[99] and must therefore be the starting point in any discussion regarding public procurement in South Africa. [100] The section is striking in its brevity, it is couched in broad, principled terms[101]and represents the 'minimum requirements' for a valid tender process.[102] But it is by no means the only provision of the Constitution that impacts upon public procurement.[103]

The following key principles are enshrined in s 217: fair treatment of all bidders; openness and transparency in the award of tenders; the use of open, competitive selection methods as the norm in public procurement; the selection of bidders on the basis of overall cost effectiveness (as opposed to cheapest price); the use of public procurement as a policy

[95] In terms of s 38(1)(*h*)(*iii*), an accounting officer *must* take effective disciplinary steps against an official who makes irregular expenditure. In terms of s 81(1), an accounting officer who fails to take such disciplinary steps may face criminal sanction.
[96] *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) para 1.
[97] In *Phoenix Cash and Carry* (note 31 above) para 1, the SCA remarked rather ruefully, that in its experience the principles contained in s 217(1) are more honoured in the breach than in the observance.
[98] For an analysis of all five constitutional principles, see Bolton (note 33 above) 40 – 59.
[99] *Sanyathi Civils* (note 89 above) para 26.
[100] *Rodpaul Construction CC v Ethekwini Municipality* [2014] ZAKZDHC 18 (2 June 2014) para 17.
[101] Quinot report (note 77 above) 13.
[102] *Millennium Waste* (note 6 above) para 4.
[103] Quinot Report (note 77 above) 14; Bolton (note 77 above) 33. Other sections that impact public procurement include s33 (the right to administrative justice) and s195 (basic values and principles governing public administration).

instrument to promote the achievement of socio-economic goals;[104] and the implementation of a preferential procurement policy within a legislative framework. The five principles of public procurement (fairness, equity, transparency, competitiveness and cost-effectiveness) are interrelated, interconnected and mutually reinforcing.[105] They provide a 'normative framework' for the development of a coherent public procurement system.[106]

The issue of fairness is often raised in the context of bid-responsiveness. Disqualified bidders usually raise the argument that their disqualification from a tender process is 'unfair'. But the fairness or unfairness of a decision to disqualify a bidder on grounds of non-responsiveness is not always self-evident.[107] Bolton argues that the concept of fairness in s 217(1) should be limited to procedural fairness.[108] I hold a different view. In Chapter 4, I argue that proportionality should be a key consideration when a decision is taken to disqualify a bidder on grounds of non-responsiveness. The infusion of fairness with a standard of proportionality, necessarily involves a substantive assessment of what is considered appropriate under the circumstances.

The Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) does not employ the term 'responsive tender', but instead uses the term 'acceptable tender'.[109] As indicated above, an 'acceptable tender' is defined as 'any tender which, *in all respects*, complies with the specifications and conditions of tender as set out in the tender document' (own emphasis).[110] A bid that does not meet the standard of an 'acceptable tender' will generally be regarded as non-compliant. Organs of state must only evaluate bids that are regarded as acceptable; failure to adhere to this rule will render a tender decision reviewable.[111] The legislation does not make any provision for organs of state to accommodate minor deviations from bid requirements.[112] This is in marked contrast to the UNCITRAL Model Law

[104] Section 217(2) is permissive, rather than prescriptive in nature. It does not prohibit the use of procurement to promote empowerment objectives, but does not prescribe that this be done either. See *Viking Pony Africa Pumps (Pty) Ltd v Hidro-tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 23. For a detailed discussion of the use of public procurement as a policy instrument, see Bolton (note 77 above) 59 – 63.
[105] Bolton (note 77 above) 56.
[106] Quinot report (note 77 above) 2. For a detailed discussion on the five principles see Bolton (note 77 above) 40 – 59.
[107] *Metro Projects* (note 25 above) para 15.
[108] Bolton (note 77 above) 47
[109] However, as pointed out by Bolton (note 23 above) 2320, the term 'responsive tender' is still used in the case law. The term also appears in the 'Standards for Uniformity' issued by the Construction Industry Development Board in respect of construction-related procurement.
[110] Section 1(*i*) of the PPPFA (emphasis added).
[111] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] 4 All SA 487 (SCA) (hereafter *JFE Sapela*) para 11; *Overstrand Municipality v Water and Sanitation Services of South Africa (Pty) Ltd* [2018] ZASCA 50 (29 March 2018) (hereafter *Overstrand*) para 50.
[112] Bolton (note 23 above) 2321.

on Public Procurement, which expressly provides that a tender may be regarded as responsive even if it contains minor deviations that do not materially alter the essential characteristics of the tender.[113]

However, our courts have brought South African procurement law in line with international standards by avoiding a literal approach. The SCA stated that the term 'acceptable tender' should not be interpreted to include requirements that are immaterial, unreasonable or unconstitutional.[114] The principle of 'materiality' is therefore fundamental to the assessment of responsiveness. Bolton suggests a legislative change to make express allowance for minor deviations from bid requirements.[115] She also suggests that bid documents be written with a degree of flexibility to allow for condonation of non-conformance in specified instances.[116]

In *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*,[117] the SCA went one step further and held that the term 'acceptable tender' should not merely be understood to mean compliance with bid conditions but should also be understood in light of the broader requirements of fairness, equity, transparency, competitiveness and cost-effectiveness, as expressed in s 217(1). In this instance, a tenderer had prior knowledge that a certain percentage of the works that had been put out to tender had already been completed. The tenderer therefore priced only on the remaining works, which made its bid significantly cheaper than its competitors that did not have the benefit of this inside knowledge. Even though the bid complied with all bid requirements, the court held that it was not an acceptable bid because it fell short of the principles enshrined in s 217(1).

The Standards for Uniformity (SFU) issued by the Construction Industry Development Board (CIDB) employ the term 'responsive tender".[118] A responsive tender is defined as one that 'complies with all the terms, conditions and specifications of the tender document without material deviation or qualification'.[119] A material deviation is one which, in the employer's[120] opinion, would:

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[113] Article 43(1)(*b*) of the UNCITRAL Model Law. See Appendix I for a critique of the Model Law's approach to defective bids.
[114] *Millennium Waste* (note 6 above) para 19; *Moroka* (note 3 above) paras 12 – 13.
[115] Bolton (Note 23 above) 2344 – 2345.
[116] Ibid.
[117] *JFE Sapela* (note 111 above).
[118] Paragraph F.3.8 of the Standards for Uniformity. The Standards were issued in terms of sections 4(*f*) and 5(4)(*b*) of the CIDB Act 38 of 2000, read with regulation 24 of the CIDB regulations, 2004 (as amended).
[119] Ibid.
[120] The term 'employer' is used in the construction industry to refer to a procuring entity.

a) Detrimentally affect the scope, quality or performance of the works or services;

b) Significantly change the employer's or the tenderer's risks and responsibilities under the contract, or

c) Affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.[121]

An employer must 'reject a non-responsive tender offer, and not allow it to be made responsive by correction or withdrawal of the non-conforming deviation or reservation'. [122] Unlike the definition of 'acceptable tender' in the PPPFA, which requires bidders to comply 'in all respects' with the terms and conditions of tender, the SFU recognizes that a bid must be rejected only if the non-compliance was 'material'.[123] This approach is more aligned to international best practice than the approach adopted in the PPPFA.

1.5 KEY RESEARCH QUESTIONS

Five overarching research questions are examined in this thesis:

(i) How should the materiality of a deviation from a prescribed bidding requirement be determined?

(ii) Should procuring entities have the right to condone non-compliance with bid requirements?

(iii) How should the law treat 'administratively unjust' contracts ie contracts that were erroneously concluded with non-responsive bidders?[124]

(iv) To what extent should a non-responsive bidder be afforded procedural fairness before it is disqualified?

(v) To what extent should procuring entities be allowed to correct errors that have occurred during the course of a bidding process?

These questions will be analysed in light of the following legal principles:

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[121] Para F.3.8 of the Standards for Uniformity (note 118 above). To the best of the author's knowledge, this is the only legislative provision in the South African public procurement framework that contains a test for materiality.

[122] See *Aurecon* (note 7 above) paras 25 – 26 for discussion on the withdrawal of a non-conforming deviation.

[123] In *Aurecon* (note 7 above) para 26 the SCA held that it was for the Bid Evaluation Committee, in its sole discretion, to decide whether a particular deviation from a tender requirement was material.

[124] Quinot adopts the useful phrase 'administratively unjust contract' in reference to contracts awarded in breach of the applicable regulatory framework. See Geo Quinot 'Worse Than Losing A Government Tender: Winning It' (2008) 1 *Stell LR* 101. I will use this term in relation to contracts that were erroneously awarded to non-responsive bidders.

(i) The purposive approach as expressed in *AllPay 1*;[125]

(ii) The treatment of procedural jurisdictional facts;

(iii) The principles of condonation and waiver;

(iv) The doctrine of estoppel;

(v) The right to procedural fairness; and

(vi) The doctrine of *functus officio* and the principle of self-correction.

A brief overview of these principles is discussed below.

(a) The purposive approach as expressed in AllPay 1

Prior to *AllPay 1*, court rulings on non-compliance with mandatory bid requirements vacillated between a strict and a lenient approach.[126] This vacillation reflects an underlying tension in our law between two competing ideals: the need for consistency, impartiality and uniformity on one hand and the need for individualized justice and flexibility in administrative decision-making on the other.[127] *AllPay 1* sought to achieve a balance between these objectives through the application of a purposive approach within the context of public procurement.

AllPay 1 outlined what the court considered to be the 'proper approach' to determining the effect of bid irregularities.[128] This involves a three-step enquiry.[129] First, it must be determined whether an irregularity occurred, that is whether there was a deviation from prescribed requirements. Secondly, it must be determined whether the irregularity amounts to a ground of review under the PAJA. At this stage, a court has to assess the materiality of any deviation from legal requirements, viewed in the light of the purpose of the requirements.[130] Thirdly, if the answer to the second enquiry is in the affirmative, a 'just and equitable' remedy must be determined.

This thesis considers how the purposive approach has advanced procurement law in South Africa. I argue that the emphasis placed on the materiality of the deviation is both the strength and the weakness of *AllPay 1*. The focus on materiality is a welcome change from the artificial, mechanical and rule-bound approach followed in cases such as *Pepper Bay*[131]and

[125] Note 71 above.
[126] Compare *Pepper Bay* (note 4) and *Moroka* (note 3) with *Millennium Waste* (note 6) and *Phoenix Cash and Carry* (note 31).
[127] *National Lotteries Board* (note 9 above) paras 11 –12; Volmink (note 22 above) 44 – 46.
[128] *AllPay 1* (note 71 above) paras 28 – 29.
[129] Ibid.
[130] Ibid para 28.
[131] Note 4 above.

Moroka,[132] which seemed to demand unfaltering compliance from bidders. In my view, the better approach is to acknowledge that 'a fair process does not demand perfection'[133] and that not every flaw should be regarded as material or fatal.[134]

However, *AllPay 1* should not be interpreted to mean that the question of materiality should be viewed solely (or even primarily) through the lens of purposiveness.[135] A more holistic approach is required, one that balances a range of factors, such as whether the non-compliance afforded the non-conforming bidder an unfair advantage, the degree of prejudice suffered by the affected party, the reasonableness and importance of the bid requirement itself, the degree of the deviation, and whether the purpose of the requirement was met.

Furthermore, the *AllPay* case demonstrates that bid requirements do not always have a readily discernible purpose. In this instance, the High Court, the SCA and Constitutional Court all discerned *different* purposes behind the requirement that bidders had to submit separate bids per province. The danger exists that a court may be inclined to find (or not to find) a purpose, based on its appetite for intervention in the procurement decision in question. Furthermore, the purpose identified by the courts may not be the same as the purpose contemplated by the administrators who drafted the bid document in the first instance. This in turn may fuel perceptions of unwarranted judicial interference in administrative processes that Quinot warns about.[136] Depending on how the purpose of a bid document is perceived, courts are likely to come to vastly different conclusions as to whether a deviation from the bid requirement occurred, and if so, whether the underlying purpose was achieved. [137]

A further aspect that will be considered in this thesis is whether it is the sole prerogative of the judiciary to apply the purposive approach or whether it is also incumbent upon administrators to apply the purposive approach during the evaluation of bids. My view is that the purposive approach as outlined in *AllPay 1* is not merely intended to be an interpretive technique designed for exclusive use within the inner sanctums of judicial power. Rather, the purposive approach is a rule of law that is essential to ensuring just administrative action, a

[132] Note 3 above.
[133] *AllPay (SCA)* (note 71 above) para 21.
[134] Ibid. Although the SCA's judgment was subsequently overruled by the Constitutional Court, this principle was not disturbed. See also *Westinghouse v Eskom Holdings* [2016] 1 All SA 483 (SCA) paras 17, 35 and 36; *Logbro Properties CC v Bedderson N.O.* [2003] 1 All SA 424 (SCA) paras 16 – 17; Hoexter (note 1 above) 352.
[135] *AllPay 1* (note 71 above) paras 28 – 30.
[136] Quinot report (note 77 above) 118 – 119.
[137] In Chapter 2, I discuss the courts' application of the principle of purposiveness post the *AllPay* judgment.

right that all organs of state are obliged to respect, protect, promote and fulfil.[138] It is also essential for sound, proportionate decision-making at administrative level.[139]

(b) Procedural Jurisdictional Facts

The common-law notion of 'jurisdictional facts' refers to formalities or preconditions that must be satisfied before a discretionary power is exercised.[140] Baxter observes that whenever a public body acts, '[i]t must ascertain whether the prescribed conditions for acting exist and it must determine the permissible limits of its authority in the circumstances'.[141] 'Procedural jurisdictional facts' refers to procedures or formalities that must be met whilst 'substantive jurisdictional facts' refers to preconditions that must exist[142] before an administrator may validly exercise his or her power.[143] The existence of the fact is said to be 'jurisdictional' because the administrator is clothed with power to act — that is to say that the administrator has jurisdiction — only if the procedural requirement or condition prescribed was fulfilled.[144] Bid requirements may be regarded as procedural jurisdictional facts, because the requirements set out in the RFP (or other empowering provision) have to be met in order for the administrator to exercise his or her power to award the tender.[145] Absent the prescribed formalities, or if the administrator makes a mistake regarding their presence, the administrator lacks authority to award the tender.[146]

In Chapter 3, the discussion pertaining to procedural jurisdictional facts addresses two issues: First, the complexities involved in the determination whether a procuring entity lacked jurisdiction to award a bid. I point out that not every instance of non-compliance with a jurisdictional fact is legally significant. A contextual reading of the relevant provision is required to understand its purpose and materiality in relation to the bid document as a whole.

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[138] Sections 7(3) and 8(1) of the Constitution.
[139] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 observes (at 485) that ' "administrative law" is as much concerned with ways of generating good primary decisions as it is with detecting abuse of power'. See also Cheryl Saunders 'Apples, Oranges and Comparative Administrative Law' 2006 *Acta Juridica* 423, 446.
[140] Yvonne Burns *Administrative Law* 4 ed (2013) 391.
[141] Baxter *Administrative Law* (1984) 452.
[142] Typically, these preconditions refer to a required state of mind on the part of the administrator. For example, a regulation may require that an administrator 'must be satisfied' that a certain state of affairs exist before making a decision. *Walele v The City of Cape Town* 2008 (6) SA 129 (CC) (hereafter *Walele*) paras 46 – 72 is a good example of a case involving substantive jurisdictional facts.
[143] Hoexter (note 1 above) 290; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) (hereafter *Kirland*) para 98.
[144] Hoexter (note 1 above) 290.
[145] Ibid 295.
[146] Ibid 290; *Paola v Jeeva* 2004 (1) SA 396 (SCA) para 16; See also *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] All SA 387 (SCA).

However, if non-compliance with a jurisdictional requirement is found to be material, the courts must declare the resultant tender award constitutionally invalid.[147]

The second issue relates to the legal consequences that flow from a finding of constitutional invalidity. The corrective principle of administrative law requires vindication of the rule of law and correction of the administratively unfair decision. But it does not necessarily require that the invalid act be declared a nullity in all instances. I discuss various factors that courts consider when deciding on a remedy that is 'just and equitable'. A defective award of a public contract does not render the contract void or non-existent, for 'it exists as a fact and may provide the basis for lawful acts pursuant to it'.[148] I argue that case law that suggests that the consequences of invalidity cannot vary from case to case,[149] is incorrect and should be revisited in the light of the *AllPay* judgments.[150]

(c) Condonation and waiver

A decision to condone non-compliance with bid formalities is somewhat contentious — particularly from the perspective of compliant bidders, who may feel aggrieved at what might be perceived as favouritism toward the non-compliant bidders. Yet, Baxter observes that 'in special circumstances greater good might be achieved by overlooking technical defects'.[151] The grounds upon which an administrator may exercise powers of condonation (and its close relative, waiver), will be discussed in Chapter 4. The conflicting stances taken by the SCA on the issue of condonation will also be discussed.[152]

The power to condone is relatively uncontentious when the applicable legislation expressly provides for it. Even then, condonation is not there for the asking[153] and difficulties of interpretation may arise.[154] It is more contentious when the relevant empowering provision does not provide for it. In *Moroka*, the SCA categorically rejected the notion of implied powers of condonation.[155] According to the SCA, an organ of state may only condone non-compliance

[147] Section 172 (1) (*a*) of the Constitution.
[148] *Merafong City Local Municipality v Ashanti Ltd* 2017 (2) SA 211 (CC) para 36.
[149] See for example *Quakeni Local Authority v FV General Trading CC* 2010 (1) SA 356 (SCA) (hereafter *Quakeni*).
[150] Note 71 above.
[151] Baxter (note 141 above) 486 and the cases cited there.
[152] *Millennium Waste* (note 6 above); *Lotteries Board* note (note 9 above); *Moroka* (note 3 above); *Pepper Bay* note (note 4 above); *Overstrand* (note 111 above).
[153]*MEC for Public Works, Roads and Transport: Free State Provincial Government v Phutanang Transport Service* [2006] SCA 73 (RSA) (31 May 2006).
[154] I illustrate this point with reference to reg 36(1)(*b*) of the MFMA regulations published under GN 868 in *GG* 27636 of 30 May 2005.
[155] *Moroka* (note 3 above) paras 14 – 15. See also *Pepper Bay* (note 4 above) paras 31 – 33; *Mobile Telephone Networks (Pty) Ltd v Transnet SOC Ltd* [2018] ZAGPJHC (18 June 2018) para 14.

with bid requirements if such powers were expressly provided for in the empowering legislation. I argue that the principle of proportionality does not countenance such a restrictive approach.

(d) *Estoppel*

It sometimes happens that organs of state resile from contracts that were erroneously awarded to bidders who ought to have been disqualified for being non-responsive. Invariably, a decision to cancel a contract has devastating consequences for the contractor concerned. The contractor might have incurred financial and other obligations in order to fulfil his or her contractual commitments, and may face financial ruin as a consequence of the decision to cancel. In Chapter 5, I consider the circumstances under which a public entity may be estopped from relying on the invalidity of a tender award in order to cancel a contract.

The conventional answer to the estoppel question is that our law will not permit the use of estoppel when it would amount to sanctioning an illegality.[156] To sanction an illegality would 'subvert the legitimate purpose of [the legislation] by lending the court's imprimatur to the very mischief which the statute seeks to prevent'.[157] It is said that such an approach would fly in the face of the rule of law and the principle of legality which lie at the heart of the Constitution.[158] The law does however allow for a more flexible approach in respect of non-compliance with mere internal rules and policies. [159]

The conventional approach is regarded as 'settled law'.[160] However, the question that must be answered is the following: how should the law respond to the manifest injustice suffered by third parties doing business with the state when their contracts are to be terminated despite initial assurances provided by the procuring entity that the award of contract was

[156] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) (hereafter *RPM Bricks*) paras 11–16; *Prodiba* (note 146 above) paras 39 – 40.
[157] *Cool Ideas CC v Hubbard* 2014 (4) SA 474 (CC) (hereafter *Cool Ideas*) para 53. This case did not deal with estoppel *per se*, but rather with whether an arbitral award could be made an order of court, when doing so would amount to sanctioning an illegality. The Court found that the arbitral award could not be made an order of court and invoked the well-known estoppel cases of *Schierhout v Minister of Justice* 1926 AD 99 and *Hoisain v Town Clerk, Wynberg* 1916 AD 236, as authority for this position.
[158] *RPM Bricks* (note 156 above) para 24; *Cool Ideas* (note 157 above) paras 52 – 58.
[159] *RPM Bricks* (note156 above) para 12. See also *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A).
[160] *RPM Bricks* (note 156 above) para 16; *The Provincial Government of the Eastern Cape v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) (hereafter *Contractprops*) para 11.

regular?[161] Our law has all but shut the door on claims for delictual and administrative damages. And claims based on unjustified enrichment do not offer much solace either.

I take issue with the apparent blanket prohibition on the use of estoppel in cases involving legislative breaches. I argue that in *RPM Bricks*,[162] the SCA failed to engage with the main thrust of the court's reasoning in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*[163] that the doctrine of estoppel ought to be reassessed in the light of our constitutional values.[164] It also ignored a number of academic voices that have been calling for a reappraisal of the doctrine.[165] I argue that the law should not bestow on government 'the dubious privilege of not being bound by the representations of its employees in routine commercial transactions',[166] particularly in cases involving egregious misconduct on the part of its officials. I also explore whether the judgment of the Constitutional Court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* has opened an alternative pathway to estoppel.[167]

(e) Procedural fairness

Our law has never required 'a knee-jerk response of affording a right to a hearing in every case regardless of the context or circumstances of those affected'.[168] Context is everything, especially in relation to the right to procedural fairness.[169] The right to procedural fairness is highly variable,[170] the fundamental question always being 'what does fairness demand in the circumstances of a particular case'?[171]

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[161] In *Contractprops* (note 160 above) para 9, the SCA indicated that such contracts are invalid and cannot be enforced, irrespective of the harsh consequences which may follow if the contracts are cancelled. See also *Quakeni* (note 149 above) paras 14 – 16.
[162] Note 156 above.
[163] *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W).
[164] Ibid paras 3 – 37.
[165] G M Ferreira 'Estoppel by Representation' in die Publiekreg' (1991) 54 *THRHR* 398; A Cockrell 'Can you Paradigm? – Another Perspective on the Public Law/Private Law Divide' 1993 *Acta Juridica* 239 –240; Geo Quinot *State Commercial Activity: A Legal Framework* (2009) 179.
[166] *Portmann v United States* 674 F.2d 1155, as quoted in Walter Gellhorn, Clark Byse, Peter Strauss, Todd Rakoff & Roy Schotland *Administrative Law: Cases and Comments University Casebook Series* (1987) 527.
[167] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40.
[168] O' Regan J in *Walele* (note 142 above) para 123.
[169] Section 3(2)*(a)* of the PAJA. Geo Quinot *Administrative Law: Cases and Materials* (2000) 523; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para 114; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 101; *Premier, Mpmulanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91(CC) para 39; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 219.
[170] Hoexter (note 1 above) 502; Paul Craig *Administrative law* 7 ed (2012) 12-001.
[171] *Zondi* (note 169 above) para 114.

The extent to which the right to procedural fairness should be observed when a bidder is disqualified on grounds of non-responsiveness involves two separate inquiries. The first is whether the duty to ensure procedural fairness applies to a tender process in the first instance. If the answer to this question is 'yes', the next question relates to the content of the right. Our courts have been inconsistent in their answers to both questions. In *Thabo Mogudi Security Services CC v Randfontein Local Municipality*, the court rejected the notion that the right to procedural fairness has a role to play in a tender process,[172] whilst cases such *Azcon Projects CC v National Minister, Department of Public Works, Mthatha*,[173] seem to regard the application of procedural fairness rights to tender processes as axiomatic. In chapter 6, I argue that the right to procedural fairness finds application in public procurement processes. However, the right does not apply uniformly, and with the same degree of intensity throughout all stages of the tender process. I analyse the nature of the procurement cycle and argue that the right to procedural fairness mutates throughout the various stages of a tender process. Factors such as the stage of the tendering process under consideration, the degree of discretion afforded to the administrator during a particular stage and the impact of the decision on the administrative subject are all likely to affect the 'margin of appreciation given by the judge to the agency'.[174]

(f) Self-help, Self-correction and the Doctrine of Functus Officio

In Chapter 7, I explore the extent to which an administrative body should be allowed to rectify a procedural irregularity that occurred during a bidding process. This is considered to be a matter 'of great practical importance in administrative law'.[175] Errors often occur in the course of decision-making processes involving public procurement. For example, a tender committee may not be quorate at the time it took a decision or a bidder may be erroneously disqualified as 'non-responsive'. Should a procuring entity be allowed to 'self-correct', and if so, under which circumstances? The notion of 'self-correction' raises the contested subject of rectification of administrative failures without the need to seek judicial intervention. I argue that self-correction in defined instances is not at odds with the doctrine of *functus officio*. I

[172] *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) paras 42 – 43; See also *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George* [2005] JOL 1368 (C) paras 28 – 31.
[173] *Azcon* (note 3 above).
[174] Hoexter (note 1 above) 503.
[175] Ibid 276.

also draw a distinction between 'self-correction' and 'self-help' that the Constitutional Court warned against in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*.[176]

The doctrine of *functus officio* serves to protect the public interest in ensuring the reliability of administrative decisions.[177] But the doctrine does not require the observance of judicial rituals to reverse administrative errors in all instances. A degree of flexibility is necessary simply to make modern administration work. The doctrine recognizes the right to revoke administrative decisions when there is legislative authority to this effect, when the decision is of a preliminary nature, and when rights have not been adversely affected. Modern administration probably takes (and retakes) thousands of decisions on a daily basis. In my view, Baxter is correct when he observes that '[e]ffective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and reversal of decisions previously made'.[178]

I argue that *Kirland*[179] does not negate the need for flexibility in administrative decision-making. *Kirland* dealt with the reversal of a final, advantageous decision that had bestowed rights on the recipient. Such decisions, said the court, could not be reversed without judicial sanction. But there is a wide range of administrative decisions that fall outside the ambit of the judgment. This is particularly so in the context of public procurement, where preliminary decisions are often taken and reversed without impacting on the rights or legitimate expectations of bidders. I argue that until a final tender award is made, decisions may be revisited, revised or revoked without breaching the *functus* principle, provided of course that the principles of rationality, proportionality, legality and procedural fairness are observed.

However, legislative reform is required to clarify the contours of the *functus* doctrine. I argue that the proposals put forward by the SALC, with a few amendments added, provides a sound basis for such reform.[180]

(g) Methodology

This study does not involve empirical analysis, nor is it based on qualitative or quantitative research methodologies. The research methodology involves a critical textual analysis of case

[176] *Kirland* (note 143 above).
[177] South African Law Reform Commission Discussion Paper 112 (Project 25), *Statutory Revision: Review of the Interpretation Act 33 of 1957* (September 2006) (hereafter *Discussion Paper 112*) 4.74.
[178] Ibid.
[179] *Kirland* (note 143 above).
[180] Discussion Paper 112 (note 177 above).

law, key texts, journal articles, legislation and online resources. The objective of this thesis is two-fold: first to highlight weaknesses in the current state of the law pertaining to defective bids and secondly, to make recommendations for law reform.

The thesis commences with a critique of the *AllPay* judgments.[181] The judgments of the Constitutional Court in *AllPay 1*[182] and *AllPay 2*[183] have a direct bearing on many of the themes that are explored in later chapters, and as such the *AllPay* judgments are foundational to this study. Read collectively, the judgments establish a number of key principles that impact procurement law. These include the proper legal approach to assessing the legal consequences of bid irregularities;[184] the question of materiality;[185] the importance of compliance in tender processes;[186] the importance of procedural fairness in procurement transactions;[187] the proper approach to determining a 'just and equitable' remedy;[188] the centrality of the public interest to public procurement;[189] and the extent to which private entities assume the mantle of public bodies when they transact with the State in order to deliver key services.[190] Various other judgments emanating from the Constitutional Court, the SCA and the divisions of the High Court are also discussed.

The legislative instruments that are analysed include the Preferential Procurement Policy Framework Act 5 of 2000, Public Finance Management Act 1 of 1999, Local Government: Municipal Finance Management Act 56 of 2003 and the CIDB Standards for Uniformity.[191] I point out inadequacies in the current legislative framework and make recommendations for legislative reform.

This is not a study in comparative law. However, reference will be made to foreign case law and legislation, where appropriate. These include references to the World Trade Organisation's Agreement on Government Procurement, the UNCITRAL Model Law on Procurement and European Union Directives on Public Procurement.

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[181] Note 71 above.
[182] Ibid.
[183] Ibid.
[184] *AllPay 1* (note 71 above) paras 22 – 30.
[185] Ibid.
[186] *AllPay 1* (note 71 above) para 40.
[187] Ibid.
[188] *AllPay 2* (note 71 above) paras 29 – 34.
[189] *AllPay 1* (note 71 above) para 33.
[190] *AllPay 2* (note 71 above) paras 47 – 67.
[191] Note 118 above.

Finally, the study synthesizes the research into a number of key principles and recommendations on how non-responsive bids should be treated in South African public procurement law.

1.6 CHAPTER OUTLINE

This thesis consists of eight chapters.

(a) Chapter 1 provides a background to the thesis, discusses the key research questions to be explored and the research methodology that will be employed.

(b) Chapter 2 provides a critique of the purposive approach as expressed by the Constitutional Court in *AllPay 1*.

(c) Chapters 3 analyses the issue of non-responsiveness through the lens of the theory of jurisdictional facts.

(d) Chapter 4 considers the issue of condonation and waiver.

(e) Chapter 5 analyses the thorny issue of estoppel.

(f) Chapter 6 discusses the application of the principle of procedural fairness to public procurement in general, and bid responsiveness in particular.

(g) Chapter 7 considers the questions of 'self-correction', 'self-help' and the doctrine of *functus officio*.

(h) Chapter 8 provides my conclusions and recommendations. My recommendations focus on the following aspects: (i) factors that ought to be considered before a bidder is disqualified as non-responsive (ii) the circumstances under which organs of state ought to be given the power to condone non-compliance with bid conditions (iii) the application of the right to procedural fairness throughout the various stages of the procurement cycle (iv) whether organs of state have a right to correct erroneous administrative decisions in the procurement process (v) how the principle of estoppel ought to be applied when an organ of state relies on its own non-compliance with procurement regulations in order to cancel a contract. Appendix 5 contains recommendations for legislative reform.

1.7 CONCLUSION

Case law on bid responsiveness pulls in different directions. Our courts have not offered a clear position on the treatment of defective bids, precisely because it is often difficult to determine whether a bidder has crossed the unmarked boundary line between compliance and non-compliance. Judges, lawyers and administrators grapple with the perennial question as to what constitutes sufficient compliance. There is significant potential for a coherent body of jurisprudence to coalesce around the *AllPay* cases. However, *AllPay* has not resolved all the difficulties inherent in the treatment of defective bids, and some troubling areas, such as the issues of condonation and estoppel, still await a definitive ruling by the Constitutional Court.

This thesis contributes to the legal discourse in the following ways: the key principles applicable to bid responsiveness are identified, analysed and various proposals are made for their further development where this is considered necessary. The issue of 'materiality', a key consideration in the disqualification of a bidder on grounds of non-compliance, is viewed through the lens of the jurisdictional fact doctrine. This helps to develop an understanding of what may regarded as a material deviation from jurisdictional requirements as well as an appreciation of the consequences of such deviation. The question regarding the circumstances under which an organ of state may condone non-compliance is considered in light of the principle of proportionality. It is recommended that condonation should be allowed when disqualification of a bidder would amount to a disproportionate response. The troubling question of estoppel is considered. It is recommended that the law ought to come to the assistance of innocent contractors who are victims of egregious misconduct on the part of state organs.

The circumstances under which a disqualified bidder is entitled to procedural fairness is also considered. The manner in which the right to procedural fairness mutates throughout the various stages of the procurement cycle is explained. It is argued that the content of the right to procedural fairness will depend on the stage of the procurement process at which a bidder is disqualified. The right of procuring entities to rectify mistakes that have occurred during a bidding process is also discussed. It is argued that rectification is essential to an efficient procurement process. Finally, recommendations are made for legislative changes that will provide greater guidance to decision-makers on the issue of bid responsiveness. As such, the thesis will be of benefit to both the legal community as well as administrative bodies.

Although this thesis focusses mainly on defective bids, the issue regarding the (often invisible) line between compliance and non-compliance finds application in other areas of administrative decision-making as well, such as the award of grants, bursaries, concessions, licenses and public-private partnerships. In fact, it finds application in just about any area of public law in which compliance with minimum requirements is regarded as a *sine qua non* for bestowing a right, benefit, advantage or privilege. The principles discussed in this thesis therefore find application beyond the area of public procurement.

CHAPTER 2

A CRITIQUE OF *ALLPAY*

2.1 INTRODUCTION

This chapter is divided into three parts. Part 1 explains the legal position that pertained before *AllPay*.[1] Part 1 also discusses the key principles that have emerged from the various *AllPay* judgments. Part 2, provides a critique of the *AllPay* judgments. Part 3 provides an analysis of post-*AllPay* jurisprudence in relation to the treatment of non-responsive bids.

It might seem curious that a thesis that focusses on the topic of non-responsiveness should place considerable emphasis on the *AllPay* judgments, when those judgments had little to say about the treatment of non-responsive bids *per se*. In fact, the issue of non-responsiveness was addressed in passing, and only in relation to the winning bidder's failure to quote separately for all nine provinces, as was required by the RFP. The merits judgment focused mainly on SASSA's failure to assess the B-BBEE credentials of the winning bidder and the last-minute changes that were introduced to the tender. However, the relevance of *AllPay 1* lies in the methodology established for dealing with bid irregularities. This methodology could be used to evaluate the effect of any procedural infirmity in a bid process, including the issue of non-responsiveness.

Furthermore, there are aspects of the *AllPay* judgments that have a bearing on the topics addressed in this thesis, such as the jurisdictional fact theory, the issue of condonation, the doctrine of estoppel and the right to procedural fairness, which are discussed in Chapters 3, 4, 5 and 6 respectively. It is therefore necessary to understand the reasoning of the various courts that considered the matter, as well as the factual context in which the case was decided. But to appreciate the significance of the judgments, it is necessary to outline the legal position that pertained before the Constitutional Court handed down its rulings in *AllPay.*

[1] This thesis discusses the *AllPay* judgments handed down by the Constitutional Court, the SCA and the High Court. To avoid confusion, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) will be referred to as '*AllPay 1*' or the 'merits judgment' to distinguish it from the subsequent ruling of the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (6) BCLR 641 (CC), referred to as '*AllPay 2*' or the 'remedy judgment'. The ruling of the SCA in the *AllPay* case 2013 (4) SA 557 (SCA) will be referred to as *AllPay (SCA*), and the ruling of the High Court in the same matter [2012] ZAGPPHC 185 (28 August 2012) will be referred to as *AllPay (High Court).*

PART 1

2.2 THE POSITION BEFORE *ALLPAY* — THE STRICT AND 'PERMISSIVE' APPROACHES

Prior to *AllPay 1*, the jurisprudence regarding the treatment of non-responsive bids revolved around two opposing axes — a strict approach and a permissive approach.[2] The cases of *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*[3] and *Dr J S Moroka Municipality v Betram (Pty) Ltd*[4] typify the strict approach. In *Pepper Bay*, the SCA upheld a decision taken by the department to disqualify a certain Mr Smith and a company known as Pepper Bay (Pty) Ltd from a selection process for the awarding of fishing licenses.

Smith arrived well ahead of the closing time of the bid, but his application was not accepted because the original was not accompanied by two copies, as stipulated in the license application form. He was instructed by departmental officials to return the following day with the original and the two copies, which he duly did. However, the Chief Director subsequently rejected his application for being late. Pepper Bay's application on the other hand was rejected because timeous payment of the application fee had not been made. Its accountant had erroneously post-dated the cheque to a date after the closing date, and thus the cheque was not honoured by the bank at the closing date and time. The SCA held that a credit that is provisional in the sense that it can still be reversed does not constitute payment.[5] The SCA interpreted the relevant empowering provision to mean that the Chief Director had no authority to condone non-compliance with its provisions.[6]

Moroka, on the other hand, dealt with the opposite scenario to *Pepper Bay*, namely where a bidder had provided a copy but not the original of a tax clearance certificate (TCC), as was required by the RFP. Relying on its decision in *Pepper Bay*, the SCA held that the organ of state had no authority to condone non-compliance with mandatory requirements.[7]

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[2] Peter Volmink 'Legal Consequences of Non-Compliance with Bid Requirements' (2014) 1 *African Public Procurement Journal* 41.
[3] *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) (hereafter *Pepper Bay*).
[4] *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA) (hereafter *Moroka*).
[5] *Pepper Bay* (note 3 above) para 23.
[6] Ibid paras 33−34.
[7] *Moroka* (note 4 above) paras 13−16.

The following principles inform the strict approach: (a) tender rules must be applied strictly, consistently and predictably in order to achieve a corruption and collusion-free tender process;[8] (b) strict and equal compliance by bidders on the closing date of the bid is essential to the integrity of the bidding process, upholds the principle of equal treatment and strengthens public confidence in public tendering;[9] (c) a strict approach serves an important educational purpose by teaching bidders to take bid requirements seriously;[10] (d) 'it will prevent a "slippery slope" leading to the evasion of all inconvenient public tender rules';[11] (e) the strict approach is unambiguous, provides clear guidance to potential bidders and leaves little room for error;[12] (f) Full compliance usually comes at a cost. Consequently, it would be unfair to compliant bidders who have gone to the trouble and expense of ensuring full compliance if they were to be placed on the same footing as bidders who have not similarly invested in full compliance;[13] (g) if public authorities are afforded a discretion to overlook compliance with bid requirements, they are likely to exercise such discretion in favour of government's immediate interests in achieving the most economically efficient outcome, not necessarily the fairest outcome;[14] (h) it is not for courts to second-guess a decision made by an organ of state to include certain prequalification criteria in an RFP;[15] (i) failure to comply with the stated prequalification criteria must result in a tender's being rejected for not meeting the requirement of an 'acceptable tender' as defined in the PPPFA;[16] (j) an administrative authority has no inherent authority to condone non-compliance with peremptory requirements in the public interest.[17] An organ of state has the power to condone non-compliance only if such power was bestowed on it by the applicable regulatory framework;[18] (k) An organ of state is not obliged to afford

[8] *LDM Consulting v South African National Roads Agency (Ltd)* [2017] ZAKZPHC 8 (7 March 2017) para 12; Omer Dekel 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237, 263-264; Max du Plessis & Andreas Coutsoudis 'Considering Corruption Through the *AllPay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law' (2016) 133 SALJ 755, 756.
[9] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (hereafter *Steenkamp*) para 60; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 57; Dekel (note 8 above) 261.
[10] Dekel (note 8 above) 262. However, Dekel (at 263) expresses doubts about the educational value of the strict approach.
[11] Ibid
[12] Ibid 265.
[13] Omer Dekel 'Improving Public Procurement Efficiency — Applying a Compliance Criterion' (2015) 3 *Public Procurement Law Review* 69.
[14] Dekel (note 8 above) 264.
[15] *Moroka* (note 4 above) para 10.
[16] Ibid; *MEC Police Roads and Transport, Free State Provincial Department v Ritcom (Pty) Ltd* [2015] ZAFSHC 241 (3 December 2015) para 31.
[17] *Pepper Bay* (note 3 above) para 31.
[18] Ibid para 31; *Moroka* (note 4 above) paras 12−16.

procedural fairness protection to non-compliant bidders before disqualifying them;[19] (l) however, a tenderer should not be disqualified for failing to meet a mandatory requirement, if the bid requirement in question is immaterial, irrelevant, unreasonable or unconstitutional.[20]

The rulings in *Minister of Social Development v Phoenix Cash and Carry: Pmb CC*[21] and *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province*[22] could be regarded as the lodestar of the permissive approach. This statement is perhaps more accurate in relation to *Phoenix Cash and Carry* than *Millennium Waste*. In *Millennium Waste*, Jafta JA (as he then was) actually agreed with the approach adopted in *Pepper Bay,* but found that the regulations applicable in that case afforded officials the power to condone non-compliance.[23] Rather than representing a negation of the strict approach, it could be argued that *Millennium Waste* simply ameliorated the strict approach by adding a public interest dimension. In that instance, the court held that non-compliance could be condoned when it is in the public interest to do so.[24]

The following principles inform the permissive approach: (a) the definition of 'acceptable tender' in the PPPFA should not be given its wide literal meaning. It does not require a tenderer to comply with conditions that are immaterial, unreasonable or unconstitutional; [25] (b) an organ of state has the power to condone non-compliance in order to promote the values of fairness, competitiveness and cost effectiveness;[26] (c) the public interest is best served by the selection of the bidder offering the best price (after giving weight to preference), not by eliminating meritorious bidders for non-compliance of a purely administrative nature;[27] (d) courts must adopt a purposive approach when determining whether non-compliance renders a tenderer's bid unacceptable;[28] (e) bid conditions must not be mechanically applied without regard to a bidder's constitutional rights;[29] (f) fairness may

[19] *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality* [2010] JOL 26195 (ECM) para 28; *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) paras 42–43; *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George* [2005] JOL 1368 (C) paras 28 – 31; *AllPay (SCA*) (note 1 above) para 95.
[20] *Moroka* (note 4 above) paras 10 and 11; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo* 2008 (2) SA 481 (SCA) (hereafter *Millennium Waste*) para 11.
[21] *Minister of Social Development v Phoenix Cash and Carry: Pmb CC* [2007] 3 All SA 115 (SCA) (hereafter *Phoenix Cash and Carry*).
[22] Note 20 above.
[23] Ibid para 16.
[24] Ibid para 17.
[25] Ibid para 19.
[26] Ibid para 17.
[27] Ibid para 2; *Millennium Waste* (note 20 above) para 17.
[28] *Phoenix Cash and Carry* (note 21 above) para 19.
[29] Ibid para 21.

require that a bidder be allowed to remedy an obvious and innocent mistake or to provide clarification to ensure that a proper evaluation can take place;[30] (g) a process that places undue emphasis on form at the expense of substance opens the door to corrupt practices by creating the ideal subterfuge for corrupt officials to eliminate unfavoured bidders on grounds of technical non-compliance;[31] (h) it is important to distinguish between instances of procedural non-compliance that go to the heart of a tender process and defects of lesser importance;[32] (i) organs of state should afford non-compliant bidders some form of procedural fairness protection before disqualifying them.[33]

Grote explains the tension between the strict and the permissive approach in the following terms:[34]

> To invalidate an act for an insignificant procedural defect would hamper administrative activity and encourage excessive formalism, which in turn would stifle initiative and paralyse the administrative process; on the other hand, not to annul for any formal defect at all would be detrimental to a law-abiding administration and would prejudice the rights of the individual.[35]

Writing in the context of European legal systems, Grote explains that the degree of tolerance for procedural defects is largely influenced by whether the legal system in question adopts a 'substantive' approach or a 'procedural' approach.[36] A substantive approach places the emphasis on the link between the formal requirement and the substantive quality of the decision. If the defect has no impact (actual or potential) on the merits of the decision, it will not affect the validity of the decision.[37] The procedural approach, on the other hand, emphasizes the link between observance of the formality and the protection of the rights of the affected person.[38] The default position with the procedural approach is that an administrative decision that came about as a result of a procedural impropriety must be restarted and a fresh decision

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[30] Ibid; *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) (hereafter *Metro Projects*) para 13.
[31] *Phoenix Cash and Carry* (note 21 above) para 2.
[32] Ibid para 2.
[33] *VDZ Construction (Pty) Ltd v Makana Municipality* [2011] JOL 28061 (ECG); *Imvusa Trading 134 CC v Dr Ruth S Mompati District Municipality* [2008] ZANWHC 46 (20 November 2008)*; Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* [2011] JOL 26927 (E); *Azcon Projects CC v National Minister Department of Public Works, Mthatha* [2011] JOL 27630 (ECM); *Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality* [2015] ZAFSHC 32 (10 March 2015) (hereafter *Sethakatshipa*) para 31.
[34] Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475, 487.
[35] Ibid 487.
[36] Ibid 499.
[37] Ibid. Germany is an example of a legal system that follows a substantive approach.
[38] Ibid. France is an example of a legal system that follows the procedural approach.

be taken.[39] South African law has long been ambivalent about whether it follows a substantive or a procedural approach. The tension between substance and process was mediated in the merits judgment, in which the Constitutional Court vindicated a purposive approach without diminishing the importance of observing process in public procurement.[40]

2.3 THE FACTUAL MATRIX

During April 2011, the South African Social Security Agency (SASSA) issued an RFP inviting bids for the distribution of social grants to approximately ten million recipients, over a period of five years. Bidders could choose whether they wished to bid for all nine provinces or only certain provinces. One of the mischiefs that SASSA sought to address was that the identity of beneficiaries could not be verified prior to receiving payment. This opened the door to abusive and fraudulent practices.[41] The RFP thus introduced biometric verification (fingerprint or voice identification) as the preferred method of establishing the identity of the beneficiary.[42]

The RFP followed a standard two-stage evaluation methodology. During the first stage, bids were evaluated for technical ability/functionality, where the minimum threshold was set at 70%. Bidders who passed this threshold were invited to make presentations during which their final scores were adjusted. Only those bidders whose final technical score remained at 70% or above after presentations would be evaluated for price and preference during the second stage. The initial technical (pre-presentation) score allocated to AllPay Consolidated holdings (Pty) Ltd (AllPay) was 70.42%, whereas that of its rival CashPaymaster Services (Pty) Ltd (CPS) was 79.79%. After presentations, however, AllPay's score was reduced to 58% whereas CPS's score increased to 82.44%. AllPay was thus eliminated from further evaluation and the tender was awarded to CPS. Aggrieved by this decision, AllPay challenged the award of the tender on several grounds:[43]

(a) Material changes were made to the RFP shortly before the closing date. The main bone of contention related to certain last-minute changes that were introduced in respect of biometric verification. Whereas the RFP initially indicated that biometric verification was the preferred option, 'Bidders' Notice 2' which was issued 17 days before the closing date, indicated that biometric verification had become a mandatory requirement. AllPay complained that this last-minute change did not

[39] Ibid 480.
[40] *AllPay 1* (note 1 above).
[41] *AllPay (High Court)* (note 1 above) paras 9 – 10.
[42] *AllPay 1* (note 1 above) paras 9 and 73.
[43] These grounds mutated somewhat over the course of the litigation process.

afford it sufficient time to adapt its proposal in order to meet the mandatory requirement. AllPay also alleged that the notice confused bidders and evaluators alike regarding the applicable criteria.

(b) Committees were not properly constituted when they took their decisions. AllPay argued that the Bid Adjudication Committee (BAC) was not properly constituted when it took the decision to award the tender. An internal circular issued by SASSA required that the BAC should comprise at least five people including a supply chain practitioner. However, the BAC was composed of four members, none of whom was a supply chain practitioner.

(c) SASSA had failed to evaluate CPS's empowerment partner properly. Although approximately 74% of the bid was to be performed by CPS's B-BBEE partners, SASSA had not assessed the capacity of those partners to provide the service. AllPay argued that CPS's bid as a whole had not been properly considered.

(d) CPS did not submit separate bids per province as required in the RFP document. The RFP contained a mandatory requirement that bidders who decided to bid for multiple provinces had to submit a separate bid for each province. However, CPS had presented only one bid for all nine provinces. According to AllPay, this rendered CPS's bid non-responsive and constituted grounds for disqualification.

(e) Lack of procedural fairness. AllPay argued that the bid presentation session constituted a 'hearing' of sorts to which bidders were invited to make representations. It alleged that the process was defective in that the purpose of the hearing had not been explained in advance, the invitation to the hearing gave less than forty eight hours' notice, SASSA had not responded properly to clarification questions, and scores were reduced in relation to items on which AllPay had not been invited to make representations. This, according to AllPay, rendered the process unfair and irrational. AllPay also argued that it should have been informed that its provisional score was to be reduced and given an opportunity to respond before that happened.

2.4 THE HIGH COURT'S RULING

The High Court held that the award of tender was invalid, but refused to set the award of the tender aside on grounds of 'practicality and certainty'.[44] The court found that a failure of administrative fairness had occurred as a result of the following: the decision to overlook CPS's failure to provide a separate bid for each province was reviewable in terms of s 6(2)(*f*)(*ii*)(*aa*) of the PAJA (the action was not rationally connected to the purpose of the empowering provision);[45] the incorrect composition of the BEC and the BAC as well as the failure to assess CPS's B-BBEE partner constituted fatal irregularities;[46] and AllPay's right to procedural fairness had been breached in that the process followed by SASSA to reduce its score was irrational and unfair.[47]

The court rejected SASSA's argument that the bid presentation was not unfair because both AllPay and CPS were given the same notice period (48 hours) to attend the presentation session. The court held that the fact that both parties had been treated equally unfairly was no answer to the allegation that the process had not been objectively fair.[48] However, the court rejected AllPay's complaint regarding SASSA's failure to answer certain clarification questions adequately. The court held that the complaint had been raised opportunistically, since AllPay was content to participate in the tender process notwithstanding SASSA's alleged failure to answer questions.[49]

Despite the finding of invalidity, the court did not set the award of tender aside. This was due to the practical upheaval that such an order would have.[50] Having considered the various interests that were at stake,[51] the court held that the interests of the beneficiaries of social grants were paramount.[52] The corrective principle of constitutional law was considered, but the court held that a balance had to be achieved between the requirements of certainty and the demands of legality.[53]

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[44] *AllPay (High Court)* (note 1 above) para 78.
[45] Ibid para 67.
[46] Ibid paras 64 − 67.
[47] Ibid para 58.
[48] Ibid para 56.
[49] Ibid para 38.
[50] *AllPay 1* (note 1 above) para 2.
[51] The court had regard to the ruling in *Millennium Waste* (note 20 above) paras 24 – 30.
[52] *AllPay* (*High Court*) (note 1 above) para 73.
[53] Ibid paras 71 – 72. The court had regard to the rulings of the Constitutional Court in *Steenkamp* (note 9 above) para 29 and *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 (hereafter *Bengwenyama Minerals*) para 85.

2.5 THE SCA's RULING

On appeal, the SCA criticized the High Court for being 'excessively receptive' to AllPay's complaints regarding unfair treatment.[54] The SCA overturned the High Court's ruling and held that no irregularities of any kind had occurred in the process.[55] According to the SCA, three inescapable facts confronted AllPay: SASSA was entitled to have the solution that it wanted, if the solution was available; CPS offered the solution that SASSA required; and AllPay was not able to provide the solution. Other matters were regarded as 'red herrings'.[56]

The SCA's approach was based on three inter-related principles. First, the SCA held that an inconsequential irregularity does not invalidate a tender process. An inconsequential irregularity is one which would not affect the outcome of the award, even if corrected.[57] Secondly, the SCA was critical of the notion that compliance with bid requirements has an intrinsic value and that non-compliance must lead to invalidity if the process is flawed, even if the flaw has no real consequences.[58] Such an approach, said the court, would be 'gravely prejudicial to the public interest'.[59] The SCA emphasized that fairness does not demand perfection and that not every error in a tender process must be regarded as fatal.[60]

Thirdly, it drew a distinction between an 'unlawful irregularity' and an 'internal irregularity'.[61] The SCA opined that an unlawful irregularity is one that is in conflict with the law, whereas an internal irregularity is one that is in conflict with an internal document, such as a policy or circular.[62] According to the SCA, only the former type of irregularity leads to invalidity.[63] Thus, in relation to the allegation that the BEC was not properly constituted, the SCA held that as no law required the BEC to be constituted in a particular manner, non-compliance with SASSA's internal standard did not amount to an unlawful irregularity.[64]

Turning to the specific allegations of irregularity, the SCA rejected the argument that CPS ought to have been declared non-responsive for failing to submit separate bids per province as required by the RFP. The court held that CPS's bid submission made it clear that SASSA could accept its bid for one or more provinces. Although CPS had submitted only one

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[54] *AllPay (SCA*) (note 1 above) para 96.
[55] Ibid.
[56] Ibid para 80.
[57] *AllPay (SCA)* (note 1 above) para 21; *AllPay 1* (note 1 above) para 19.
[58] *AllPay (SCA)* (note 1 above) para 21.
[59] Ibid. See also paras 58−59 and 96.
[60] Ibid para 21.
[61] Ibid para 59.
[62] Ibid paras 58 and 59.
[63] Ibid para 58.
[64] Ibid.

copy of its technical submission, it was the same for all provinces. The SCA stated that a business-like construction of the RFP would not require a bidder who offered the same solution for all nine provinces to duplicate its documents nine times.[65]

The SCA did not attach any significance to the allegedly defective composition of the BEC and the BAC.[66] According to the SCA, a defect in the composition of these committees did not render its decisions unfair.[67] The court distinguished cases such as *Schierhout v Union Government (Minister of Justice)*[68] and *Acting Chairperson: Judicial Services Commission v Premier of the Western Cape Province* [69]on the grounds that those cases concerned the exercise of a statutory power conferred upon a public body.[70] In contrast, neither the BEC nor the BAC were bodies having statutory powers, but were simply a group of officials brought together by SASSA to perform a specific task.[71] No law required the committees to be constituted in a particular way.[72]

As stated above, the real bone of contention in this matter was the effect that Bidder's Notice 2 had on the tender process. In a nutshell, the SCA held that the Notice had not introduced significant changes to the RFP but simply narrowed the range of options from which SASSA could choose.[73] According to the SCA, the RFP made it clear from the outset that a biometric solution would be chosen above one that did not have such a solution. The effect of 'Bidder's Notice 2' was simply to inform bidders that did not have biometric verification that they need not bid as their solution would not be chosen.[74] The court further held that the Notice would have made a difference only in respect of bidders who did not have the mandatory solution and who were bidding against competitors who also did not have the mandatory solution. Before the Notice was issued their bids might have been considered, whereas after the Notice was issued it was clear that their bids would be rejected.[75] However, the Notice made no difference to a bidder such as AllPay who was bidding against a competitor who had the mandatory solution, since the original RFP had already indicated to all bidders that the

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[65] Ibid para 53.
[66] Ibid paras 54− 64.
[67] Ibid para 57.
[68] *Schierhout v Union Government (Minister of Justice)* 1919 AD 30. At paras 56 and 64 of *AllPay (SCA)*, the SCA distinguished the cases of *Watchenuka v Minister of Home Affairs* 2003 (1) SA 619 (C), *Ryobeza v Minister of Home Affairs* 2003 (5) SA 51 (C) and *Yates v University of Bophuthatswana* 1994 (3) SA 815 (BG).
[69] *Acting Chairperson: Judicial Services Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA).
[70] *AllPay (SCA)* (note 1 above) para 56.
[71] Ibid.
[72] Ibid para 64.
[73] Ibid para 73.
[74] Ibid.
[75] Ibid para 74.

biometric solution was a preference and would be chosen. [76] As such, SASSA was bound to accept CPS's solution even without Bidders Notice 2.[77] This was not a case where SASSA had illegitimately altered the criteria after the tender closed or evaluated bidders against criteria that were different to those stated in the RFP.[78]

The SCA was unreceptive to AllPay's arguments regarding the alleged absence of procedural fairness. The court criticised AllPay for not raising complaints with SASSA at the appropriate time regarding the shortness of the notice to attend the presentation session. It held that 'the BEC can hardly be said to have acted unfairly if it proceeded without having been asked not to do so'.[79] It found that the real reason why AllPay could not deal with questions regarding its biometric solution was that it had none.[80]

The SCA also dismissed the complaint that AllPay's scores were reduced on aspects on which it had not been required to present. According to the SCA, SASSA had followed a reasoned approach and it was not for the court to question the quality of that reasoning.[81] A further complaint raised by AllPay was that it had not been told in advance about the issues it was required to address during the presentations and furthermore that it had not been afforded an opportunity to respond to SASSA's concerns before its provisional scores were reduced. In relation to this complaint, the SCA held that the right to procedural fairness was not implicated because none of AllPay's rights or legitimate expectations were affected, as bidders do not have a right to a contract.[82] The SCA further held that bidders do not have a legitimate expectation of being heard in the course of a tender evaluation process, as this would result in the evaluation of bids becoming interminable.[83]

[76] Ibid para 74.
[77] Ibid para 75.
[78] Ibid para 75. The SCA distinguished its earlier ruling in *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA).
[79] *AllPay (SCA*) (note 1 above) para 87.
[80] Ibid para 88.
[81] Ibid para 93.
[82] Ibid para 95.
[83] Ibid para 95.

2.6 THE CONSTITUTIONAL COURT'S RULING

The Constitutional Court re-emphasized the centrality of certain key principles that had been brought into question by the SCA.

(a) Inconsequential irregularities

The Constitutional Court made it plain that the inevitability of the outcome of a procurement event should not determine the validity of the administrative act in question.[84] The court criticized the SCA for conflating the test for irregularities and their import,[85] and the question of unlawfulness with the question of remedy.[86] Far from regarding inconsequential irregularities as 'red herrings', the court emphasized that 'the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process'.[87] The fact that the 'best' bidder is awarded a tender is no answer to an allegation that the procurement event was conducted unfairly and unlawfully. Consequently, even unmeritorious bidders are allowed to raise complaints regarding unfair treatment. As explained by the court in *Dimension Data (Pty) Ltd v State Information Technology Agency (SOC) Ltd*, 'fundamental to this [inquiry] is therefore the fairness of the process and not the substantive correctness of the outcome'.[88] Dismissal of inconsequential irregularities 'might well end up encouraging habitual disregard of procedural constraints by the administration'.[89]

The point regarding inconsequential irregularities is best illustrated with reference to SASSA's treatment of the element of empowerment in the tender process. SASSA did not investigate the empowerment credentials of CPS since it was the only entity that passed the technical threshold, and thus the only entity remaining in the contest. In SASSA's view no purpose would have been served by the allocation of preference points based on its B-BBEE credentials, as this would not have made any difference to the outcome of the tender process.[90] However, the court held that despite the inevitability of the outcome, there was an obligation on SASSA properly to assess CPS's empowerment credentials. In fact, '[t]hat obligation

[84] *AllPay 1* (note 1 above) paras 23 – 26; Meghan Finn '*AllPay Remedy*: Dissecting the Constitutional Court's Approach to Organs of State' (2014) 6 *CCR* 258, 260. The stance taken by the Constitutional Court regarding the so-called 'no-difference' principle seems at odds with its stance in relation to error of law. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 91, the court held that an error of law would not be regarded as material if it did not affect the outcome of the decision.
[85] Ibid para 22.
[86] Ibid para 24.
[87] Ibid para 22.
[88] *Dimension Data (Pty) Ltd v State Information Technology Agency (SOC) Ltd* [2016] ZAGPPHC 351 (13 May 2016) para 43. See also *Searle v Road Accident Fund* 2014 (4) SA 148 (ECP) para 59.
[89] Grote (note 34 above) 475.
[90] *AllPay 1* (note 1 above) para 70.

became even more crucial when there were no other competitors left in the second stage'.[91] Its failure to assess empowerment credentials properly resulted in the tender award's amounting to a nullity, despite the fact that the outcome was a foregone conclusion.[92]

However, the High Court has not always appreciated the significance of the distinction that was drawn in *AllPay 1* between process and merits. In certain instances, the courts have found that an applicant lacked *locus standi* to challenge a tender award as a result of shortcomings in its own tender submissions.[93] But this approach conflates the merits of a bid with the question of standing — the very issue that that the Constitutional Court cautioned against in *AllPay 1*. This aspect is further discussed below.

(b) The importance of the regulatory framework as a whole

Whereas the SCA drew a sharp distinction between internal policies and legislative prescripts, the Constitutional Court took a more holistic view of the regulatory framework. It held that the regulatory framework did not consist only of constitutional and legislative provisions, but included the terms and conditions of the RFP and internal circulars.[94] Public bodies are thus required to comply strictly with the regulatory framework *as a whole* and no aspect of the framework could be disregarded at a whim.[95] In *Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality*, the court added the following rider to this rule: The rule finds application only if bidders were made aware that the SCM policy and tender invitation would form part of the regulatory framework. [96] The qualification imposed by the court is not difficult to meet — the inclusion of a simple clause to this effect in the standard RFP document should suffice. The condition also helps to promote transparency regarding the applicable rules and standards that inform the award of tenders by public bodies.

(c) Compliance has intrinsic value

It will be recalled that the SCA dismissed the argument that compliance with bidding prescripts has a value in itself. The Constitutional Court, on the other hand, regarded the SCA's approach as detrimental to the procurement process because it undermined the role that procedural

[91] Ibid para 68.
[92] Ibid.
[93] *Kwafel CC v Kwa Dukuza Municipality* [2017] ZAKZDHC 1 (5 January 2017) (hereafter *Kwafel*) para 17; *RodPaul Construction CC v Ethekwini Municipality* [2014] ZAKZDHC 18 (2 June 2014) (hereafter *Rodpaul*) para 52; *Transcreations KZN CC v City of Cape Town* [2015] ZAWCHC 32 (23 March 2015) (hereafter *Transcreations*) paras 11 – 19.
[94] *AllPay 1* (note 1 above) para 38. See also *Westinghouse v Eskom (SOC) Ltd* [2016] 1 All SA 483 (SCA) (hereafter *Westinghouse*) para 43; *Searle v Road Accident Fund* 2014 (4) SA 148 (ECP) para 73.
[95] *AllPay 1* (note 1 above) para 40.
[96] *Sethakatshipa* (note 33 above) paras 26 and 35.

requirements play in ensuring even treatment of all bidders.[97] Furthermore, the SCA's approach ignored the inseparability of a fair process and the best outcome, based on value for money. The Court explained that '[i]f the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed'.[98] Since only one bidder was allowed to progress to the second stage of the evaluation, the process was rendered uncompetitive with the result that a proper price comparison was not possible.[99] In essence, the Constitutional Court vindicated the principle that 'process does matter'.[100]

The court also pointed out that deviation from established processes may betoken a deliberately skewed process.[101] According to Froneman J, compliance with bid formalities serves three interrelated purposes: it ensures fairness in the bid process; it enhances optimality and efficiency in the outcome of the process and it protects the process against corruption.[102] Perhaps a fourth consideration should be added as a sub-objective of fairness: compliance promotes objectivity in the award of public tenders. [103] Objectivity is mentioned as a key principle in practically every international instrument dealing with public procurement.[104] Bidders ought to know in advance what they are bidding for, who qualifies to bid and who does not, how bids will be evaluated and on what basis the successful bidder will be selected. Seen in their proper context, bid requirements are not mere administrative formalities, but are indispensable to ensuring impartiality and minimizing the risk of whimsical and arbitrary decision-making in the award of public contracts. It is through the applicable procedural formalities that the state's interest in administrative efficiency and the individual's interest in having his or her rights adequately protected, can be reconciled.[105]

(d) 'mandatory and material'

The issue of 'materiality' was discussed in *AllPay 1* in two interrelated ways. In the first instance, the concept of materiality was used in reference to the *bid requirement itself.* The court emphasized that the ground for review in section 6(2)(*b*) of the PAJA is triggered by non-

[97] *AllPay 1*(note 1 above) para 23.
[98] Ibid paras 24 and 60.
[99] *AllPay 2* (note 1 above) paras 1 and 37.
[100] *Rodpaul* (note 93 above) para 32.
[101] *AllPay 1* (note 1 above) para 27.
[102] Ibid.
[103] P Bolton 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PER/PELJ* 2340, 2341.
[104] For example, art 9(1) of the United Nations Convention against Corruption (UNCAC) calls for the establishment in advance of tender rules and the use of objective criteria for public procurement decisions.
[105] Grote (note 34 above) 475.

compliance with an empowering provision that is both *mandatory and material*.[106] Non-compliance with a mandatory provision *per se* is insufficient to establish a ground for review. In addition to being mandatory, the provision must also be material — in the sense that it serves to promote an essential purpose.[107] This point was also made in *Minister of Social Development v Phoenix Cash & Carry–PMB CC*, in which the SCA distinguished between formal shortcomings that go to the heart of the bid process and matters of subsidiary importance.[108] By way of example, non-compliance with a mandatory provision in an RFP that the bid document must be completed in black ink (assume that a bidder used blue ink instead), will not necessarily trigger grounds for review if it cannot be established that the requirement serves a material purpose. A triviality couched in peremptory language remains a triviality. Thus, a bid may still be regarded as 'acceptable' despite its non-compliance with an immaterial requirement.[109]

In the second instance, it must be determined whether the *irregularity itself* (that is, the deviation from the prescribed norm) is material, in the sense of its being sufficiently serious. The judgment outlined the 'proper approach' to be followed for determining materiality in this, second sense.[110] Unfortunately, the Constitutional Court conflated these two aspects of materiality somewhat, by stating that s 6(2)(*b*) of the PAJA 'requires that the *non-compliance* must be of a material nature'[111] (own emphasis). Section 6(2)(*b*) has no such requirement. The sub-section is concerned with the materiality of the mandatory provision itself and not the materiality of the non-compliance. Leaving aside this judicial slip, the point made by *AllPay 1* is that the provision in question has to have a significant purpose in the context of the bid process as a whole and that non-compliance with the provision has to be sufficiently serious.

(e) The 'proper' approach

The court proceeded to outline what it referred to as the 'proper approach' to determining the effect of bid irregularities.[112] This involves a three-step enquiry.[113] First, it must be determined whether an irregularity occurred, that is to say whether there was a deviation from prescribed

[106] *AllPay 1* (note 1 above) para 62.
[107] See also *Maharaj v Rampersad* 1964 (4) SA 638 (A) (hereafter *Maharaj*) 644E-G.
[108] *Phoenix Cash & Carry* (note 21 above) para 2. See also *Rainbow Civils CC v Minster of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) para 92; *ABET Inspection Engineering (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa* [2018] ZAWCHC 7 (1 February 2018) (hereafter *ABET*) para 24.
[109] *Moroka* (note 4 above) paras 10 and 11; *Millennium Waste* (note 20 above) para 11.
[110] Discussed below.
[111] *AllPay 1* (note 1 above) para 62.
[112] Ibid paras 28−29.
[113] Ibid.

requirements. Secondly, it must be determined whether the irregularity amounts to a ground of review under PAJA. At this stage, a court has to assess the materiality of any deviation from legal requirements, viewed in the light of the purpose of the requirements.[114] Thirdly, if a finding of invalidity under one or other of the grounds listed in PAJA is made, the administrative action must be declared unlawful and a 'just and equitable' remedy must be found.[115] The purposive approach (sometimes referred to as a 'common sense approach') did not originate with *AllPay 1*.[116] In fact, it has been part of our law for a considerable period of time.[117] However, *AllPay 1* vindicated the principle that an inquiry into purpose is key to determining the materiality of a procurement irregularity.

The purposive approach yielded different outcomes in relation to the specific complaints raised by AllPay. In relation to the requirement that bidders had to submit separate bids per province, the court held that although a mandatory requirement had not been met, it did not amount to a reviewable irregularity. This is because the purpose of the requirement (namely, to assess whether bidders were able to provide a service in each of the provinces for which they submitted bids) was still achieved.[118] However, in relation to the complaint about the failure to evaluate CPS's B-BBEE partner, the purposive approach resulted in a finding of invalidity. The court stated that economic empowerment of historically-disadvantaged individuals (HDIs) was one of the primary purposes of the constitutional and legislative procurement framework as well as that of the RFP.[119] As a result of SASSA's failure to assess substantial empowerment, this purpose had not been achieved. SASSA's decision therefore amounted to a nullity.[120]

The remedy judgment is discussed in Part 3 of Chapter 3 when the question of judicial remedies is addressed.

[114] Ibid paras 29 – 30, and 58. *Sethakatshipa* (note 33 above) para 22.
[115] *AllPay 1* (note 1 above) para 56.
[116] *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) 659 (hereafter *Weenen*).
[117] *Maharaj* (note 107 above) 646C-E; *Kungwini Local Municipality v Silver Lakes Home Owners Association* 2008 (6) SA 187 (SCA); *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) para 108ff; *Millennium Waste* (note 20 above); *African Christian Democratic Party v The Electoral Commission* 2006 (3) SA 305 (CC) (hereafter *ACDP*) para 25; *Inyameko Trading 189 CC v Minister of Education* [2007] ZAWCHC 74 (10 December 2007) para 29.4.
[118] *AllPay 1* (note 1 above) para 62.
[119] Ibid para 46. See also s 217(2) and (3) of the Constitution.
[120] *AllPay 1* (note 1 above) paras 68, 71 and 72.

PART 2

A CRITIQUE OF *ALLPAY 1*

As indicated in Part 1, *AllPay 1* developed South African procurement law in three significant respects: it renounced a formalistic approach in favour of a purposive one, it vindicated the importance of compliance in public tender processes and outlined a framework for evaluating the materiality of a bid irregularity. I provide a critique of these and other related aspects of the judgment in the sections that follow.

2.7 BEYOND FORMALISM

AllPay 1 heralds a welcome departure from the formalistic approach adopted in *Pepper Bay*[121] and *Moroka.*[122] Hoexter describes formalism as a judicial preference for formal, technical or mechanistic reasons, as opposed to substantive reasons.[123] In Chapter 4, I argue that one of the key principles espoused in *Pepper Bay* and *Moroka* — that organs of state have no right to condone non-compliance unless the right to condone is specifically provided for in the empowering legislation — does not take into account the role that proportionality plays in administrative decision-making.

In my view these cases were wrongly decided, not because they recognized the importance of strict adherence to bid conditions, but because they failed to recognize anything else. *AllPay 1* heralds a shift to a more purpose-oriented approach. In Chapter 3, I argue that if *Pepper Bay*[124] and *Moroka*[125] had followed a purposive approach, the court might well have concluded that the underlying purpose of the bid requirements in both cases were satisfied, despite the imperfect compliance.[126]

However, *Pepper Bay* and *Moroka*-type thinking still appears to influence judicial reasoning, even since *AllPay.* This can be seen both in relation to persistent formalism

[121] *Pepper Bay* (note 3 above).
[122] *Moroka* (note 4 above).
[123] Cora Hoexter *The Transformation of South African Administrative Law Since 1994, with Particular Reference to the Promotion of Administrative Act 3 of 2000* (unpublished PhD thesis, University of Witwatersrand 2009) 35.
[124] *Pepper Bay* (note 3 above).
[125] *Moroka* (note 4 above).
[126] Ironically, the judgment in *Moroka* was handed down on the same day as *AllPay 1*. The SCA did thus not have the benefit of the *AllPay* jurisprudence when it handed down its judgment in *Moroka*.

regarding compliance with bid conditions[127] as well as the limited scope afforded to condonation.[128] Formalistic reasoning was displayed in *PRASA v Swifambo Rail Agency (Pty) Ltd*, in which the court invoked *Moroka* to justify its conclusion that a tax clearance certificate submitted by the respondent company was invalid because it did not contain a VAT number.[129] Yet, as explained by the Respondent, SARS's practice required that a company be trading in order to be given a VAT number and since it had not commenced trading at the time it obtained the certificate, it could not secure a VAT number. By all accounts, this was a valid explanation for the respondent's non-compliance. Nevertheless, the court held that since the provision in the RFP was written in peremptory terms, a bidder who failed to provide a valid certificate had to be disqualified. There was no discretion to condone a bid that did not meet this requirement.[130]

This formalistic approach creates an obstacle for so-called 'start-up' companies that have not commenced trading. On the strength of this judgment, such companies would be prevented from participating in bid processes as they would not be able to secure 'valid' tax clearance certificates. The finding also seems at odds with s 256 of the Tax Administration Act 28 of 2011 which deals with the circumstances under which SARS may issue a tax clearance certificate.[131] The case demonstrates the tenacity of formalism, even in the wake of *AllPay 1*.

Ultimately, the restrictive approach adopted by *Pepper Bay* must be understood in light of the legal position that prevailed at the time. The conventional view was that predetermined consequences attached to non-compliance with 'peremptory', as opposed to 'directory' provisions.[132] Because the bid requirement in that instance was regarded as peremptory, non-compliance automatically resulted in disqualification. However, the once-hallowed distinction between peremptory and directory provisions no longer carries the significance that it once

[127] See for example *VE Reticulation (Pty) Ltd v Mossel Bay Municipality* [2013] 2 All SA 489 (WCC) (hereafter *VE Reticulation*); *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] ZAGPJHC 177 (3 July 2017) (hereafter *PRASA*).
[128] *WDR Earthmoving Enterprises v Joe Gcabi Municipality* [2018] ZASCA 72 (30 May 2018) (hereafter *WDR Earthmoving Enterprises (SCA)*) paras 30 – 31, 34 and 40. See also *Mobile Telephone Networks (Pty) Ltd v Transnet SOC Ltd* [2018] ZAGPJHC (18 June 2018) (hereafter *MTN*) paras 14 – 15; *Amandla GCF Construction CC v Municipal Manager of Saldanha Bay Municipality* [2018] ZAWCHC 77 (22 June 2018) paras 40 – 44.
[129] *PRASA* (note 127 above).
[130] Ibid para 60.
[131] See in particular s 256 (3) (*a*) – (*b*) of the Tax Administration Act 28 of 2011. The section provides *inter alia* that SARS may provide a taxpayer with a certificate if the taxpayer is registered for tax and does not have any tax debt outstanding or outstanding return. No mention is made of a VAT number.
[132] *Pepper Bay* (note 3 above) paras 32 and 34.

did.[133] It is my contention that *Pepper Bay* and *Moroka* are jurisprudentially unsound.[134] As stated in *AllPay (SCA)*, a fair tender process 'does not demand perfection'[135] and not every flaw should be regarded as material or fatal.[136] Although *AllPay (SCA)* was overruled by the Constitutional Court, this principle remained undisturbed.[137]

2.8 RED HERRINGS, RED FLAGS AND THE PUBLIC INTEREST

One might say that what the SCA saw as mere 'red herrings', the Constitutional Court regarded as 'red flags' in the tender process. The SCA placed considerable emphasis on CPS's superior technical offer, as opposed to the procedural infirmities that plagued the process, thus producing a result that yielded greater economic and operational efficiency.[138] The SCA's approach has a certain practical, pragmatic and common-sense appeal to it. It filters out 'no-hopers' during the merits stage of a review application, thereby saving the parties the trouble and expense of a re-run of the process, the outcome of which is highly predictable. The SCA's approach calls into question the wisdom of following a judicial ritual of setting aside an administrative act and referring it back for reconsideration when the applicant has no prospect of success even if the defect were to be corrected.

But the SCA's approach has been criticized for creating a 'reverse analysis of the inevitability of an outcome conferring validity upon the administrative action preceding it'.[139] It created an imbalance in administrative law by viewing the irregularity through the lens of the eventual outcome and by placing pro-efficiency gains ahead of compliance.[140] The implication of the SCA's ruling is that if the eventual outcome remains the same, the irregularity can be overlooked or condoned. According to the Constitutional Court, this does not make for good jurisprudence.

Both the SCA and the Constitutional Court invoked 'public interest' considerations in support of their respective positions. According to the SCA, it was necessary to ensure that the

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[133] *AllPay 1* (note 1 above) para 30.
[134] Volmink (note 2 above) 55.
[135] *AllPay (SCA)* (note 1 above) para 21.
[136] Ibid.
[137] *Westinghouse* (note 94 above) para 36. *Westinghouse* itself was overturned in *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Others* 2017 (6) BCLR 675 (CC), but this principle remained undisturbed. See also *Logbro Properties CC v Bedderson N.O.* [2003] 1 All SA 424 (SCA); *Moseme Road Construction CC v King Civil Engineering Contractors* (Pty) Ltd 2010 (4) SA 359 (SCA) para 21; *The CEO, SASSA v Cash Paymaster Services* 2012 (1) SA 216 (SCA) para 29; Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 352.
[138] Dekel (note 8 above) 241; *AllPay 1* (note 1 above) para 18.
[139] *Rodpaul* (note 93 above) para 32. See also Finn (note 84 above) 260.
[140] *AllPay 1* (note 1 above) para 24.

public interest was not prejudiced by the invalidation of public tenders for inconsequential irregularities.[141] The public interest in ensuring that economically sensible outcomes are achieved, required it to act with caution when exercising its powers of judicial review.[142] The Constitutional Court, on the other hand, emphasized the importance of the public interest in holding public officials accountable for compliance with bid requirements.[143] According to Froneman J 'it is because procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner'.[144] Significantly, the Constitutional Court did not view fairness and efficiency as polar opposites. Rather, the court held that the purpose of a fair process is to arrive at the most efficient outcome.[145] 'The two cannot be severed. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.'[146]

In my view, the respective approaches of the SCA and Constitutional Court are not contradictory, but rather reflect different dimensions of the public interest. It is just as much in the public interest to avoid sub-optimal economic outcomes as it is to insist on proper compliance. How then should the tension between these important ideals be mediated? Dekel calls for the application of a 'disqualification presumption'.[147] The presumption places a heavy weighting on compliance, thus ensuring that, as a general rule, defective (non-compliant) bids are eliminated. However, procuring entities have to choose an outcome that contributes more (or is least damaging) to the public interest.[148] According to Dekel, a bid that contains relatively minor defects but which offers superior economic outcomes might be chosen above a compliant but economically inferior bid.[149]

The solution offered by the Constitutional Court in *AllPay 1*, one founded upon s 172(1) of the Constitution,[150] is somewhat different. Section 172(1) mandates a two-fold approach.

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[141] Ibid paras 19 – 21.
[142] Ibid para 23.
[143] Ibid para 4.
[144] Ibid para 4.
[145] Ibid paras 24 and 92.
[146] Ibid.
[147] Dekel (note 8 above) 259.
[148] Ibid 259.
[149] Dekel (note 13 above) 64.
[150] Section 172 (1) reads as follows:

> 'When deciding a constitutional matter within its power, a court
> (a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) May make any order that is just and equitable, including –

First, it requires a court to declare invalid any law or conduct that is inconsistent with the Constitution and thereafter to consider a remedy that is 'just and equitable'. Our constitutional structure does not permit courts to ignore constitutionally invalid decisions on the basis of pro-efficiency considerations, but it does allow for the public interest to be taken into account when choosing the most appropriate remedy. The court explained that the rights of unsuccessful bidders are not pre-eminent at the remedy stage[151] and 'it may often be inequitable to require the re-running of a flawed tender process if it can be confidently predicted that the result will be the same'.[152] Public contracts are not concluded on the state's behalf, but on behalf of the public[153] and the interests of those members of the public most directly affected by the contract must be recognised.[154] *AllPay 1* thus gives due weight to the different facets of the public interest, but at the *appropriate stage* of proceedings. During the merits stage the public interest in constitutional compliance is paramount, whereas during the remedy stage the inevitability of the outcome and the public interest in efficiency and cost-effectiveness are given due weight.

Unsurprisingly, the Constitutional Court rejected the view expressed by the SCA that AllPay's rights or legitimate expectations were not materially and adversely affected. The SCA's stance on this aspect is puzzling, as the issue was settled early on in our post-constitutional jurisprudence when the courts held that the right in question is not the right to be awarded the contract but the right to be treated fairly and equally in a tender process.[155] The Constitutional Court corrected the approach followed by the SCA and reaffirmed the principle that irregularities in the process that affect the fairness of the outcome certainly have the capacity to affect legal rights.[156] The court concluded that the decision to exclude AllPay from the second stage of the tender undoubtedly affected its rights and legitimate expectations.[157]

The court also held that in the context of public procurement, the invitation to bid as set out in the tender documents constitutes the 'notice' of the proposed administrative action, while

(i) An order limiting the retrospective effect of the declaration of invalidity; and
(ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[151] *AllPay 1* (note 1 above) para 56.
[152] Ibid para 29.
[153] Ibid para 56.
[154] Ibid. Du Plessis & Coutsoudis (note 8 above) 767 – 768.
[155] *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 171 (SCA) paras 41− 42; See also *Goodman Brothers v Transnet Ltd* 1998 (8) BCLR 1024 (W) 1031; *Steenkamp* (note 9 above) para 21; *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 (C) 916.
[156] *AllPay 1*(note 1 above) para 60. The Constitutional Court invoked the well-known judgment of the SCA in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 23.
[157] *AllPay 1*(note 1 above) para 60.

the bid submissions constitute the 'representations' made by the bidder.[158] Adequate notice requires that bidders be given sufficiently clear information to enable them to respond to all the requirements set out in the RFP.[159] Thus, with reference to 'Bidder's Notice 2', the court held that AllPay's right to procedural fairness was negatively affected by the vague and uncertain manner in which the Notice was drafted.[160] The court explained that '[t]he purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive'.[161] As will be discussed in chapter 6, this has significant implications for the manner in which the right to procedural fairness is dealt with in the context of public procurement.

However, there are two aspects of the SCA's judgment that the Constitutional Court either failed to address or did not address adequately. This is disappointing, as South African procurement law would doubtless have benefitted from an authoritative view from the court on both issues. The first relates to the evaluation of the technical ability of a bidder's JV partner or subcontractor. The second relates to the manner in which presentation or site-inspection sessions are to be conducted. In relation to the first issue, AllPay raised the concern that SASSA had failed to evaluate the technical ability of CPS's B-BBEE partner, despite the fact that it would ostensibly carry out 75% of the contract. The Constitutional Court paid scant attention to this argument and chose instead to focus on SASSA's failure to evaluate CPS's own empowerment credentials properly — a point that was never argued by AllPay![162]

As SASSA had determined that the risk of non-performance by CPS's partner could be managed by imposing appropriate contractual obligations on CPS, the SCA held that SASSA's failure to assess the technical ability of CPS's empowerment partner did not give rise to a procedural irregularity. The court stated that whilst the wisdom of the decision could be questioned, the evaluation of bids was SASSA's prerogative and a court could not interfere simply because it thought the decision was unwise.[163] The court also stated that SASSA was

[158] Ibid para 90.
[159] Ibid. See also *Rodpaul* (note 93 above) para 51.
[160] *AllPay 1* (note 1 above) paras 88 and 91− 92.
[161] Ibid para 92.
[162] There is no indication in the judgment that this point was argued by AllPay.
[163] *AllPay (SCA)* (note 1 above) para 66.

not obliged by any law to evaluate the associated companies and its failure to do so did not impact unfairly on AllPay.[164]

The Constitutional Court ought squarely to have addressed the troubling views expressed by the SCA. After all, CPS and its B-BBEE partner had submitted their bid as a joint venture. They had therefore represented to SASSA that they were able to provide the services *jointly*, and that one of the partners in the joint venture would carry out 75% of the contract. The irrationality in SASSA's approach lay in the fact that it permitted CPS's bid to pass the functionality threshold of 70% based on an evaluation of CPS's technical ability *alone*. SASSA's approach was also unfair to AllPay, whose competitor was allowed to pass the technical threshold based on an inadequate evaluation of its technical ability. Arguably, it could not have been known with any certainty that CPS's bid would have passed the technical threshold had its B-BBEE partner been evaluated as well.

In relation to the second issue, the SCA adopted the position that AllPay had no complaint based on the right to procedural fairness — this, despite the fact that AllPay was given very short notice to attend the presentation session and was not told in advance what it was required to present on or that its scores had been reduced in relation to criteria on which it was not asked to present. Consistent with its 'red herring' paradigm, the SCA found that the real reason why AllPay could not deal with questions at the presentation session was that it did not have a suitable biometric solution.[165]

Bid presentations are common practice within public procurement[166] and usually form part of a two stage technical evaluation process in which bidders are initially scored based on their bid submissions and then invited to make presentations during which their scores could be adjusted. But it must be borne in mind that the presentation stage forms an integral part of the functionality evaluation,[167] and should therefore be subjected to the same rigour and requirements of procedural fairness as the first stage. This aspect was not lost on the High Court, which found that the manner in which the presentation session was handled was 'irrational, unfair and inconsistent with the requirements of section 217 of the Constitution, the PFMA and PAJA.'[168] The principles enunciated by the Constitutional Court regarding the

[164] Ibid.
[165] Ibid para 88.
[166] For example, clause 13.5.3(d) of Transnet's Procurement Procedures Manual (2015) (unpublished) allows bidders to be invited to make presentations after an initial 'desk-top' evaluation has been conducted.
[167] *AllPay 1* (note 1 above) para 13.
[168] *AllPay (High Court)* (note 1 above) para 58.

importance of procedural fairness ought to have been applied to rectify the SCA's stance regarding the presentation session.

2.9 PURPOSE AND MATERIALITY

Two aspects are discussed in this section. The first pertains to the difficulties involved in finding a clear purpose behind a particular bid provision. The second, is that the question of materiality cannot be limited to an inquiry into purpose alone.

It is clear from *AllPay 1* that the materiality of a deviation from stated requirements must be evaluated in light of the underlying purpose of the requirement. But finding a clear purpose behind a particular bid requirement often proves to be elusive. Bid requirements (and regulatory prescripts as a whole) do not always have a readily discernible purpose. As stated by Kentridge AJ in *S v Zuma* 'I am well aware of the fallacy of supposing that general language must have a single "objective" meaning'.[169] A good example of the vexed nature of purpose is to be found in the Constitutional Court's judgement in *Steenkamp v Edcon Ltd*, in which sharp differences existed between the majority and minority regarding the purpose behind certain provisions in the LRA. [170]

The difficulty with finding a single purpose is illustrated by the *AllPay* case itself in which the High Court, the SCA and Constitutional Court all discerned *different* purposes behind the requirement that bidders had to submit separate bids per province. The High Court found that the purpose of the tender was to 'ensure a comparative scrutiny of the bids across provinces' and found that this purpose had not been met.[171] The SCA on the other hand, perceived 'clearly' that what SASSA had in mind was that it was not prepared to consider bids 'that were open for acceptance only for multiple provinces or not at all',[172] that is to say it did not want bidders to adopt an all-or-nothing approach. The SCA found that CPS's bid met the objective of the requirement.[173] The Constitutional Court discerned yet a third purpose. It found that the purpose of separate bids per province was 'surely' to 'enable SASSA to assess whether

[169] *S v Zuma* 1995 (2) SA 642 (CC) para 17.
[170] *Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC). See also *ACDP* (note 117 above) for divergent views between the majority and minority on the purpose behind certain provisions in the Local Government: Municipal Electoral Act 27 of 2000.
[171] *AllPay (High Court)* (note 1 above) para 67.
[172] *AllPay SCA* (note 1 above) para 50.
[173] Ibid para 52.

the bidder would be able to provide the necessary services in each of the provinces for which it bid'.[174] It, too, found that the purpose had been met.

Even where consensus is reached regarding the purpose behind an empowering provision, disagreements may still arise as to the implications of a failure to comply with the provision. In *Cool Ideas CC v Hubbard,*[175] the majority and minority agreed that the primary purpose behind certain provisions in the Housing Consumers Protection Measures Act 95 of 1998 was to protect housing consumers. However, this common understanding led to vastly different conclusions regarding the implications of the failure on the part of the builder to comply with certain registration requirements. The majority held that notwithstanding the failure of the contractor to register as a home builder, the contract had to be upheld in order to protect the housing consumer.[176] The minority, on the other hand, held that the protection of housing consumers would be seriously undermined if the contract were not set aside.[177]

The divergent views expressed by the courts in the *AllPay* matter regarding the purpose behind the bid requirement in question create the impression that purpose often lies in eye of the beholder. They also create the impression that the purpose behind a bid requirement is whatever the reviewing court says it is. The danger exists that by a judicial sleight of hand, a purpose could be found in a bid document that was never contemplated by its drafters. To adapt Baxter's words, with a little ingenuity a particular purpose could either be 'found' or 'not found', depending on the particular judge's predilection for judicial intervention in administrative decisions.[178] This not only creates the danger of courts 'finding' a particular purpose that was never contemplated by the administrators who drafted the bid document, but may also fuel perceptions of unwarranted judicial interference in administrative processes that Quinot warns about.[179]

Turning to the question of materiality, *AllPay 1* should not be read to mean that purpose is the only, or even the most important, issue to be considered when the materiality of a deviation from bid requirements must be determined. On the contrary, purposiveness is but one of a number of considerations that must be taken into account, and only 'where appropriate'.[180]

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[174] *AllPay 1* (note 1 above) para 62.
[175] *Cool Ideas CC v Hubbard* 2014 (4) SA 474 (CC) (hereafter *Cool Ideas*).
[176] Ibid paras 48 – 49.
[177] Ibid para 104.
[178] Lawrence Baxter *Administrative Law* (1984) 457.
[179] Geo Quinot 'Enforcement of Procurement Law from a South African Perspective' (2011) *Public Procurement Law Review* 193, 205 – 207.
[180] *AllPay 1* (note 1 above) para 28.

Other factors, such as causality and prejudice, are also relevant. A procedural defect cannot be material in the absence of a causal relationship between the defective administrative act and an injured right.[181] Administrative efficiency, an important value governing public administration,[182] will undoubtedly be undermined if administrative action could be overturned for *de minimis* breaches that have no real impact on individual rights.[183] Grote observes that '[an]…approach…which also takes into account the requirements of administrative efficiency, would be far more likely to distinguish between cases in which the defect has had a real impact on the substance of the administrative decision and those situations where it had no influence at all'.[184]

The concept of causality is reflected in various principles of administrative law. For example, the built-in trigger in s 3 is that an administrative act must materially and adversely affect the rights or legitimate expectations of any person.[185] Our courts have held that the phrase 'materially and adversely' in s 3 means that the administrative act in question must have a 'significant and not a trivial effect'[186] and impact 'directly and immediately' on individuals.[187] In other words, the affected individuals must be able to demonstrate that the administrative act in question had a prejudicial effect. Materiality also plays a significant role when assessing the effect that an error of law has on a decision-making process.[188]

The causal relationship between materiality and prejudice is reflected in the test for bid responsiveness outlined in the CIDB's Standard Conditions of Tender (SCT). [189] The SCT define a material deviation from stated criteria as one which, in the Employer's opinion, would: (i) detrimentally affect the scope, quality or performance of the works, services or supply identified in the scope of works (ii) significantly change the Employer's or the tenderer's risks

[181] Grote (note 34 above) 476.
[182] Section 195(1)(*b*) of the Constitution.
[183] Hoexter (note 137 above) 473; *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2016] 1 All SA 313 (SCA) (hereafter *Aurecon*) para 23.
[184] Grote (note 34 above) 476.
[185] Hoexter (note 137) 220.
[186] *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) (hereafter *Joseph*) para 31; Hoexter (note 137 above) 397 – 398.
[187] *Greys Marine* (note 156 above) para 23.
[188] Section 6(2)(*d*) of the PAJA. See also Genesis *Medical Scheme v Registrar of Medical Schemes* 2017 (6) SA 1 (CC) para 101; *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd* 2012 (2) SA 16 (SCA) para 36; *Westinghouse* (note 94 above) paras 44 and 45; *Viva Engineering Project CC v Minister of Water Affairs* [2015] ZAGPPHC 254 (17 March 2015) para 74. Geo Quinot (ed) *Administrative Justice in South Africa An Introduction* (2015)142.
[189] Clause F.3.8.2 of the CIDB Standard Conditions of Tender. Last accessed from http://www.cidb.org.za/publications/Documents/StandardforUniformityinContructionProcurement20-20July2015.pdf on 3 June 2018.

and responsibilities under the contract, or (iii) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.[190]

The link between materiality and prejudice featured prominently in *Aurecon South Africa (Pty) Ltd v City of Cape Town*.[191] In this instance, the concern raised by the City was that bidders were not treated equally in that the winning bidder was afforded certain advantages that were not afforded to other bidders. For example, the winning bidder was requested to extend the validity period of its bid and was allowed to amend its tender documents, whereas other bidders were not afforded the same opportunity. These perceived defects in the process led the City to approach the court for an order to permit it to cancel the contract with Aurecon. However, the SCA found that no prejudice was suffered by other bidders because they had already been eliminated from the bidding process at an early stage and no purpose would have been served by inviting disqualified bidders to extend the validity period of their bids,[192] to request them to withdraw certain qualifications to their bids or to negotiate anything further with them.[193] *Aurecon* reinforces the principle that a reviewable irregularity must have a 'significant and not a trivial effect'.[194]

As indicated in Part 1, *AllPay 1* discussed the question of materiality in two interrelated ways. First, the bid requirement itself must be material.[195] Secondly, the deviation from the bid requirement must be material.[196] It is to this first aspect that I now turn. It seems axiomatic to state that non-compliance with an immaterial, unreasonable or unconstitutional bid condition should not be regarded as a material irregularity. After all, there is ample judicial authority for this view.[197] In terms of s 6(2)(*b*) of the PAJA, an administrative act is reviewable if a mandatory *and material* provision is not complied with. Yet our case law provides troubling examples of where the courts have upheld decisions to disqualify bidders for non-compliance with unreasonable or irrelevant bid conditions.[198] This is sometimes justified on the basis that to disregard a bid requirement, even an irrelevant one, would be unfair to other potential bidders who may have decided not to submit a tender because they were unable to meet the stated

[190] Ibid.
[191] *Aurecon* (note 183 above).
[192] Ibid para 23.
[193] Ibid para 28.
[194] *Joseph* (note 186 above) para 31.
[195] *AllPay 1* (note 1 above) paras 62.
[196] *AllPay 1* (note 1 above) paras 28 – 29.
[197] *Millennium Waste* (note 20 above) para 19; *Moroka* (note 4 above) paras 10 – 11.
[198] See for example *VE Reticulation* (note 127 above); *Basadi JV v MEC of Education, Province of the Free State* [2008] JOL 21070 (O).

requirement.[199] Furthermore, bidders who believe that a particular requirement is irrelevant should clear the position with the procuring authority prior to submitting their bid, but cannot cry foul when they participated in a tender process with full knowledge of what was required but failed to adhere to the requirements on the basis that they were considered to be irrelevant.[200]

I argue differently. If, objectively speaking, a bid requirement is found to be irrelevant, a bidder ought not to be excluded for non-compliance with such requirement on the basis that the bidder should first have 'cleared the position' with the public body. After all, what is there to clear? Bidders are only required to seek clarification when certain provisions in an RFP are unclear or ambiguous. But bidders ought not to be saddled with the responsibility of having to enquire into the reasons behind the inclusion of bid requirements that are clear but nevertheless unreasonable or irrelevant. An unreasonable provision in an RFP is not made less so merely because the affected party has not sought an explanation from the procuring entity for its inclusion. Administrative bodies owe the public a duty to act reasonably, not the other way round.[201]

Furthermore, one can question the argument that a bidder's exclusion from a bidding process could be justified on the basis that other potential bidders (who decided not to submit bids because they could not meet the unreasonable requirement) would be prejudiced if the requirement was not enforced. Of course, a bid may be declared non-responsive and rejected if it fails to comply with a bid requirement that is rational and reasonable. But a bidder who decides not to comply with a requirement that is irrational and unreasonable, ought not to be penalized simply because other (possibly less astute) bidders decided to exclude themselves from the process based on their inability to meet the irrelevant requirement.

The point that must be emphasized is this: non-compliance with an irrelevant or unreasonable bid condition cannot be regarded as material. Enforcement of such bid conditions defies judicial authority, defeats the right to procedural fairness, undermines rationality and represents the triumph of formalism over common sense.[202]

[199] *VE Reticulation* (note 127 above) paras 38 and 54.
[200] Ibid para 35.
[201] Section 33(1) of the Constitution.
[202] Volmink (note 2 above) 56.

PART 3

POST-*ALLPAY 1* JURISPRUDENCE

This section deals with the following issues: how the purposive approach has been applied in post-*AllPay* jurisprudence; how the principle of procedural fairness has been applied by the courts in the context of deviation from prescribed procedures and how the 'default position' espoused in *AllPay 2* has been applied by the courts.

2.10 THE IMPLEMENTATION OF *ALLPAY* JURISPRUDENCE

(a) The application of the purposive approach

Post-*AllPay* case law on the application of the purposive approach is somewhat ambivalent. On the one hand, it would seem that substantive reasoning has gained greater prominence subsequent to the *AllPay* ruling,[203] but on the other, the case law points to the troubling tenacity of formalistic reasoning. *ABET Inspection Engineering (Pty) Ltd v Petrosa* is a good example of the substantive, purposive approach. The issue that confronted the court was whether accreditation of the successful bidder could properly be taken into account in order to determine its responsiveness. In this instance, the successful bidder purchased a business as a going concern from company P. The accreditation certificates in question were issued in the name of company P, not in the name of the successful bidder. The unsuccessful bidder complained that the successful bidder ought to have been disqualified as non-responsive for failing to provide its own accreditation certificate.[204] Having analysed the relevant legislation, the court held that the certificates could properly be regarded as those of the successful bidder, that no irregularity or deviation from legal requirements had occurred and that the purpose of the legislative requirement had been met. The court stated further that even if there was a deviation or irregularity, 'its nature was so entirely formalistic that to hold that it gave rise to a review ground would be to unjustifiably elevate form above substance'.[205]

[203] See for example *Overstrand Municipality v Water and Sanitation Services of South Africa (Pty) Ltd* [2018] ZASCA 50 (29 March 2018) para 50.
[204] *ABET* (note 108 above). See also the judgment of the court *a quo* in *ABET v Petrosa* [2017] ZAWCHC 39 (8 March 2017).
[205] *ABET* (note 108 above) para 24.

In *Transcreations KZN CC v City of Cape Town*,[206] the court found that a bidder who had failed to place a tick next to the word 'yes' on a document to indicate technical compliance was nevertheless substantially compliant with the requirement. This was because the successful bidder had written on the form that it was able to comply with the technical requirement, thus effectively answering 'yes'.[207] The applicant, on the other hand, had simply left the form blank and was thus properly disqualified.[208] The application of the purposive approach is not limited to assessing responsiveness, but applies more broadly to assessing the materiality of any bid irregularity. Thus, in *Autozone Retail and Distribution (Pty) Ltd v National Commissioner of Police NO* the court found that the manner in which the organ of state had evaluated pricing amounted to a material irregularity, since the underlying purpose of the evaluation — to arrive at a proper price comparison — had not been achieved.[209] Likewise, in in *Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality* the court found that a local authority that had failed to plan and determine the costs of the works prior to issuing the RFP had failed to satisfy the underlying purpose of regulation 3(a)[210] of the Preferential Procurement Policy Framework Act regulations,[211] namely to establish an objective price upfront so as to obviate the potential for corrupt practices.[212]

Ikamva Architects CC v Coega Development Corporation[213] illustrates the principle discussed above, namely, that the materiality of a bid irregularity must be assessed in light of multiple factors, and ultimately the demands of fairness.[214] An inquiry into whether the purpose of the bid requirement was met will not always be sufficient to determine whether the deviation from the requirement was material. In this instance, the Coega Development Corporation (CDC) required contractors on its database to form consortia with each other when projects were put out to tender. The applicant, together with certain other companies, was required to form a consortium to bid against other consortia for a particular project. A mandatory and material requirement of the tender was that consortia had to provide a letter

[206] *Transcreations* (note 93 above).
[207] Ibid para 42.
[208] Ibid.
[209] *Autozone Retail and Distribution (Pty) Ltd v National Commissioner of Police NO* [2015] JOL 33089 (GJ) (hereafter *Autozone*) paras 34 – 30. See also *MTN* (note 128 above).
[210] The regulation provides that an organ of state must, prior to issuing an invitation for tenders 'properly plan for, and, as far as possible accurately estimate the costs of the provision of services, works or goods for which an invitation for tenders is to be made.'
[211] The PPPFA Regulations 2011 in GN 34350 *GG* 9544 of 8 June 2011.
[212] *Sethakatshipa* (note 33 above) paras 29 – 30.
[213] *Ikamva Architects CC v Coega Development Corporation* [2015] JOL 34289 (ECG) (hereafter *Ikamva*).
[214] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para 114.

signed by all members of the JV authorizing the lead member of the JV to sign documents on behalf of the consortium. The applicant duly complied with this requirement.

However, about a week before the closing date, the consortium was directed by the CDC not to submit its bid for the project in question, but instead to submit its bid for an entirely different project. The problem that arose as a result of this late change was that a new letter of authority had to be signed by all the members of the consortium, but the members of the JV were dispersed all over the country. Consequently, the applicant was unable to obtain the signature of one of the members of the consortium, as a result of which its bid was rejected by the CDC as non-responsive.

Had the court followed a purely purposive approach, it might have upheld the decision of the CDC. After all, the purpose behind the unfulfilled mandatory requirement was clear and no doubt legitimate — namely, to confirm that the person signing on behalf of the consortium members was duly authorized to do so. It was also clear that the applicant had failed to meet the purpose behind the requirement, either completely or substantively. Ordinarily, such lapses would justify elimination from a bidding process. However, the court refused to focus narrowly on the applicant's failure to meet a mandatory and material requirement but focused more broadly on the unfair manner in which the applicant had been treated. The court reasoned that if all bidders had been treated equally, the CDC would have had no discretion to condone non-compliance with mandatory and material requirements. However, the applicant had not been treated equally and its failure to provide the mandatory document was as a direct result of that unequal treatment. As such, fairness required that the CDC should have afforded the applicant a further opportunity to provide the outstanding document. This, said the court, would not have been unfair to other bidders who had the benefit of the full period within which to submit their tender.[215]

In *WDR Earthmoving Enterprises v Joe Gqabi District Municipality*, the SCA placed an unfortunate limitation on the purposive approach.[216] The court added a caveat, somewhat *obiter*, that the purposive approach would not find application when non-compliance with a peremptory provision is in issue.[217] In this instance, a bidder was disqualified for failing to provide 3 years annual financial statements, as prescribed by the relevant legislation. The court held that the local authority had no discretion to condone non-compliance with peremptory provisions. But the court went further by adding the caveat referred to above, suggesting that

[215] *Ikamva* (note 213 above) paras 19 – 22.
[216] *WDR Earthmoving Enterprises (SCA)* (note 128 above) para 40.
[217] Ibid.

the purposive approach was not applicable in this instance, as the bidder had failed to comply with a peremptory provision. The court further held that even if a purposive approach were to be applied, the bidder would be found to be non-responsive. This is because the purpose behind the requirement to provide audited financial statements — namely, to provide assurance of a bidder's financial viability and its ability to perform the contract — was not satisfied.[218]

But the approach in *WDR Earthmoving* does not find support in the existing case law.[219] Indeed, it will be recalled that in *AllPay 1*, the Constitutional Court applied the purposive approach in the context of CPS's failure to comply with a peremptory provision that bidders had to quote separately in respect of all nine provinces. [220] Also, in *African Christian Democratic Party v Electoral Commission*, the Constitutional Court applied the purposive approach in the context of non-compliance with a peremptory legislative requirement.[221] The leading authorities indicate that the peremptory nature of a legislative provision or bid condition is no obstacle to the application of a purposive approach.

There are other instances when the courts have not properly engaged with the question of purpose. In *B Braun Medical (Pty) Ltd v The Director General: National Treasury* the court set aside an award of tender for the supply of medical equipment on the basis that the winning bidder's equipment was not approved by the United States Food and Drug Administration (FDA), as required by the RFP. [222] The winning bidder was however compliant with European Conformity (EC) standards. The court failed to engage with the question whether the underlying purpose of the requirement of compliance with FDA standards — namely, to ensure that the equipment met prescribed minimum standards and was safe for use on humans— was satisfied by compliance with the EC standards as well. Instead, the court merely recited trite principles regarding the need for strict adherence to bid specifications.[223]

I do not suggest that deviation from FDA standards could simply have been overlooked. Indeed, it might have been unfair to allow deviation from FDA standards for a different reason. Compliance with stated requirements, such as FDA certification, usually come at a price. Assuming that it was more expensive for a supplier to provide FDA-approved equipment as opposed to EC-approved equipment, such a difference in input costs would no doubt have impacted upon the bidders' pricing. Under such circumstances, it might have been unfair to

[218] Ibid.
[219] See for example *Weenen* (note 116 above); *Maharaj v Rampersad* 1964 (4) SA 638 (A).
[220] *AllPay 1* (note 1 above) para 62.
[221] *ACDP* (note 117 above) paras 25 – 34.
[222] *B Braun Medical (Pty) Ltd v The Director General: National Treasury* [2016] ZAGPPHC 1114 (3 November 2016).
[223] Ibid paras 19 – 23.

allow Bidder A to provide the EC-approved equipment at a cheaper rate as opposed to the more expensive FDA-approved equipment prescribed by the RFP.[224] The point is simply that in light of *AllPay 1*, courts are required to inquire into whether the purpose behind a particular bid requirement was achieved, even if not in the precise format prescribed by the RFP.

(b) Deviation.

In *AllPay 1*, the Constitutional Court held that the obligation to observe prescribed norms did not mean that administrators could never depart from them.[225] The court explained that where administrators depart from such norms, the basis for doing so must be reasonable and justifiable and the process of change must be procedurally fair.[226] This aspect of the judgment is discussed briefly below and explored further in Chapter 6.

In *Searle v Road Accident Fund*, the court expressed 'considerable difficulty' with the notion espoused in *AllPay 1* that an administrator may depart from mandatory procedures, as it would render s 6(2)(*b*) of the PAJA and the legality principle nugatory.[227] According to Plasket J, what *AllPay 1* probably alluded to was 'the departure, in exceptional cases, from the usual requirements of a fair hearing listed in s 3(2) of the PAJA', rather than a deviation from mandatory bid requirements.[228]

In my view, the Constitutional Court probably meant exactly what it said, namely, that administrators may deviate from prescribed procedures when it is reasonable and justifiable to do so and after following a fair process. The suggestion that this would amount to 'watering down the principle of legality by freeing administrators from their duty to adhere to procedures that have been prescribed by empowering provisions'[229] is incorrect. Administrators are not 'freed' from their obligation to observe procedural requirements. Rather, implicit in *AllPay 1* is the recognition that procedural requirements should not exercise a stranglehold on administrative decision-making when there are rational and reasonable grounds to depart from them. *AllPay 1* was alive to the dangers inherent in deviation, as they may 'all too often be symptoms of corruption or malfeasance in the process'.[230] Hence the need for strict control to ensure that deviation is only allowed in certain circumstances. An example of this would be where an incorrect or unnecessary tender condition was stipulated in a bid document. The

[224] Ibid.
[225] *AllPay 1* (note 1 above) para 40.
[226] Ibid.
[227] *Searle v Road Accident Fund* 2014 (4) SA 148 (ECP) (hereafter *Searle*) para 82 – 83. Section 6(2)(*b*) of the PAJA states that administrative action may be set aside if 'a mandatory and material procedure prescribed by an empowering provision was not complied with'.
[228] Ibid para 87.
[229] Ibid.
[230] *AllPay 1* (note 1 above) para 27.

guidance provided by *AllPay 1* is that deviation from the stated criterion should follow a procedurally fair process. That is to say that as a general rule all bidders should be informed of the proposed deviation and the reasons therefor and be invited to make representations to the procuring entity. Those representations should, of course, be carefully considered before deciding on the deviation.[231]

Thus for example in *Air France-KLM SA v SAA Technical SOC Ltd*, the High Court held that a deviation from procedures mentioned in tender documents was justified, as all bidders had been treated on an equal footing and afforded the same opportunity to provide revised pricing.[232]

(c) The default position.

The default position as articulated in *AllPay 2* is that the consequences of invalidity have to be corrected or reversed where they can no longer be avoided.[233] Case law suggests that this often results in non-compliant tender awards being struck down. To mention a few examples: courts have struck down tenders for failure to adhere to the validity period of a tender;[234] failure to follow a public participation process in the disposal of municipal land;[235] failure to adhere strictly to the evaluation criteria for the award of tenders;[236] failure to observe legal requirements for the proper extension of a public contract;[237] failure to plan and determine the costs of the works prior to issuing the invitation to tender;[238] and failure to evaluate price properly.[239]

Quinot questions the wisdom of applying the default position within a procurement context and calls for traditional judicial remedies to be adapted to suit a procurement-specific regime.[240] He argues as follows:

> This trend [in favour of strong judicial involvement in procurement cases] is evident in the continued enthusiasm with which tender awards are simply set aside as the default response to reviewable irregularities in the award process; the uncritical voiding of tender contracts, even after partial performance, as an automatic result of the review; and the grant of interim relief

[231] Section 3 of the PAJA.
[232] *Air France-KLM SA v SAA Technical SOC Ltd* [2016] ZAGPPHC 877 (23 September 2016).
[233] *AllPay 2* (note 1 above) para 30.
[234] *Searle* (note 227 above).
[235] *Strata International (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2015] ZASCA 47 (26 March 2015).
[236] *Westinghouse* (note 94 above).
[237] *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA).
[238] *Sethakatshipa* (note 33 above) para 29. This requirement is imposed by reg 3(*b*) of the PPPFA regulations, 2011.
[239] *Autozone* (note 209 above).
[240] Quinot (note 179 above) 205 – 207.

> pending review on the strength of a prima facie case review case, regardless of the particular ground of review at stake. In my view this bias in favour of strong judicial enforcement must be reassessed in the development of a more appropriate public procurement remedies regime in South Africa.[241]

Quinot calls for a new remedies regime designed to give effect to the overarching values outlined in s 217, as understood within the South African context of enormous socio-economic needs and resource constraints.[242] The reasons why courts are not ideally placed to act as the 'primary enforcement agents' of the values enshrined in s 217(1), include the following: the inaccessibility of the courts; long delays in the adjudication process and consequent service delivery delays; multiple appeal/review opportunities; high cost of litigation; lack of technical understanding of the procurement process on the part of judges and the animosity bred by judicial interference in administrative processes.[243]

There is merit in Quinot's critique of strong judicial involvement in procurement matters, but the argument should not be taken too far. After all, concerns regarding the unsuitability of strong judicial involvement could apply equally to many other branches of the administrative process as well, such as the award of social grants, business licenses, permits or concessions. Arguably, a case could be made for specific, tailor-made remedies in virtually all fields of administrative decision-making. However, this might limit the courts' oversight role in ensuring that the exercise of public power — *in whatever context it is exercised* — is properly performed.

The answer, in my view, does not lie in the development of a plethora of bespoke administrative remedies for the numerous categories of administrative functions that are prevalent in a modern bureaucracy.[244] Rather, it lies in the courts exercising its discretion with due sensitivity to context.[245] As the SCA explained in the oft-cited passage in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[246] '[i]t is that discretion that accords to judicial review

[241] Ibid 206.
[242] Ibid 205 – 207.
[243] Ibid 207.
[244] Due recognition must of course be given to the important role that internal remedies play in correcting faulty administrative decisions. See *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) paras 36 – 38; *Syntell (Pty) Ltd v City of Cape To*wn [2008] ZAWCHC 120 (13 March 2008) paras 28 – 29. See also Hoexter (note 137 above) 538 – 543; Baxter (note 178 above) 255; Geo Quinot 'Expectations of the New Procurement Bill' 7 – 9 Paper presented at AdJASA's Launch of Special Interest Group on Public Procurement, Johannesburg (2018).
[245] As typified in *Millennium Waste* (note 20 above).
[246] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'[247] The proper exercise of judicial discretion and the dictates of 'pragmatism and practicality' may require that a contract not be invalidated despite the invalidity of the administrative act that gave rise to it.[248] Judicial discretion thus plays a pivotal role in ameliorating the potentially harsh effects of the default position.[249] This is not to say that tailor-made administrative remedies are not necessary, or indeed vital to resolving conflict between citizens and the bureaucracy in tender cases.[250] However, judicial review ought to remain the ultimate recourse of a person who feels aggrieved by an unfair award of tender.

I discuss the appropriate use of judicial remedies in more detail in Chapter 3.

(d) Standing

Case law suggests that the issue of bid compliance has occasionally been conflated with the question of *locus standi.* Our courts have held that bidders who submit non-responsive bids lack the necessary standing to challenge the award of the tender.[251] But this approach seems to be at odds with the principle established in *AllPay 1* that the fairness and lawfulness of a tender process must be regarded as independent of the outcome of the tender process.[252] Consequently, unsuccessful bidders ought to have a right to raise complaints regarding procedural lapses, irrespective of the merits of their own bids. Arguably, even a bidder who accepts that it was correctly disqualified as non-responsive is entitled to challenge a tender award if there were procedural irregularities in the award of the tender to the successful bidder. However, in T*ranscreations* the court ruled differently.[253] It found that the applicant lacked *locus standi* by virtue of the fact that it had not challenged the correctness of the City's decision to declare it non-responsive but had instead focused its challenge on the legality of the award to the winning

[247] Ibid para 36.
[248] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) paras 28−29; *Darson Construction (Pty) Ltd v City of Cape Town* [2007] 1 All SA 393 (C) 405.
[249] Hoexter (note 137 above) 550 – 551; *Bengwenyama Minerals* (note 53 above) para 85.
[250] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) paras 36 – 38. See also Karthy Govender 'Administrative Appeals Tribunals' in Hugh Corder & Fiona McLennan (eds) *Controlling Public Power: Administrative Justice through the Law* (1995) 71; Laurence Boulle 'ADR Applications in Administrative Law' in Hugh Corder & Fiona McLennan (eds) *Controlling Public Power: Administrative Justice through the Law* (1995) 160.
[251] *Kwafel* (note 93 above) para 17; *Rodpaul* (note 93 above) para 52; Transcreations (note 93 above) paras 11 – 19; *WDR Earthmoving Enterprises CC v Joe Gcabi District Municipality* [2017] ZAECGHC 45 (13 March 2017) (hereafter *WDR Earthmoving*) para 33.
[252] *AllPay 1* (note 1 above) paras 22, 26.
[253] *Transcreations* (note 93 above) paras 11 – 19.

bidder, arguing that the winning bidder ought to have been disqualified as well.[254] The court seemed to have accepted the City's argument that a bidder who had not challenged the rejection of its bid 'effectively placed itself out of the running in respect of the award of the tender to [the successful bidder]'.[255] But in *Metro Projects CC v Klerksdorp Municipality* the SCA held that where fundamental defects have occurred in a tender process 'participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not'. [256]

One might have thought that the generous approach that the Constitutional Court adopted to the issue of standing in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* would have settled the law on this issue. [257] In that instance, the court explained that an own-interest litigant has standing if it can be demonstrated that the impugned decision directly affects his or her rights or interests or potential rights or interests.[258] As such, standing under the Constitution is broader than the 'sufficient, personal and direct interest' required under the common law.[259] The court explained the position regarding *locus standi* during the constitutional era as follows:

> [T]he nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated'.[260]

To this, the court added a *caveat* about disposing of cases on the narrow basis of standing alone where broader concerns about accountability are at stake.[261] The court even suggested that 'there may be cases where the interests of justice or the public interest might compel a court to scrutinize action even if the applicant's standing is questionable'.[262] *Giant*

[254] Ibid. See also *WDR Earthmoving* (note 251 above) para 33.
[255] *Transcreations* (note 93 above) para 13.
[256] *Metro Projects* (note 30 above) para 13.
[257] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) (hereafter *Giant Concerts*). But compare the restrictive approach which the Constitutional Court adopted in *Areva* (note 36 above) regarding the issue of standing.
[258] *Giant Concerts* (note 257 above) paras 33 – 35 and 41.See also Grote (note 34 above) 501.
[259] *Giant Concerts* (note 257 above) para 41.
[260] Ibid para 33.
[261] Ibid para 35
[262] Ibid para 35.

Concerts makes it clear that the issue of standing ought to be separate from the merits or demerits of the decision in question.[263]

More recently, in *WDR Earthmoving Enterprises* the SCA held that a decision taken to disqualify a bidder on grounds of non-responsiveness is one that directly affects its rights.[264] The SCA made it clear that a non-responsive bidder has standing to challenge the tender award or its disqualification from the process.[265]

2.11 CONCLUSION

Public procurement represents the 'uneasy confluence of public and private interests and money'.[266] Procurement is corruption-prone and non-compliance with bid requirements is often (but not always) a symptom of corrupt practices. For this reason, *AllPay 1* requires strict adherence to tender requirements.[267] But the judgment is significant for the equilibrium it achieves in South African procurement law. Whilst it emphasizes the importance of compliance in public procurement, it also vindicates the view that not every misstep ought to sound a death knell to a tender process. *AllPay 1* made a decisive break with the formalistic, mechanical and rule-bound approach to bid irregularities that has dominated much of our case law in the past. The purposive approach places the emphasis where it belongs — on determining whether the purpose behind a bid requirement was achieved, despite the imperfections that might have existed in a bid submission. As such, the judgement is aligned with international law and academic opinion.[268]

However, *AllPay* contains 'theoretical gaps'.[269] The purposive approach does not provide a complete answer to the question how a bid irregularity ought to be evaluated. Other factors, such as causality, prejudice and ultimately fairness, are equally important to the evaluation of materiality. Hence, a broad approach is required. I therefore propose a slight adaptation to the three-step enquiry enunciated in *AllPay 1*:

(a) Determine whether an irregularity occurred ie whether there was a deviation from prescribed requirements;

(b) Determine whether the irregularity amounts to a ground of review under the PAJA. *Assess the materiality of the deviation viewed in the light of the circumstances of the case as a whole. This must include an assessment of the purpose of the requirement, a*

[263] Ibid para 33.
[264] *WDR Earthmoving Enterprises (SCA)* (note 128 above) paras 12 – 18.
[265] Ibid.
[266] Du Plessis & Coutsoudis (note 8 above) 766.
[267] Ibid 763.
[268] *RodPaul* (note 93 above) para 34.
[269] Finn (note 84 above) 258.

causal relationship between the irregularity and any prejudice suffered, the reasonableness and materiality of the bid requirement itself and the overall demands of fairness.

(c) Determine a just and equitable remedy.

Chapter 3

JURISDICTIONAL FACTS AND APPROPRIATE REMEDIES

3.1 INTRODUCTION

This chapter deals with two matters. First, it views the problem of non-compliance with bid requirements through the lens of the jurisdictional fact doctrine. Secondly, it discusses the application of 'just and equitable' judicial remedies in the context of public procurement.[1] This bifurcated approach was adopted by the Constitutional Court in *AllPay 1*[2] and earlier in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*.[3] Following upon *AllPay 1,* courts are required to make two *distinct* determinations when they consider the legal effect of bid irregularities: First the materiality (or merits) determination and secondly the remedy determination. This two-stage approach, mandated by s 172(1) of the Constitution, establishes a framework for the treatment of non-compliant bids. Rather like a criminal court takes different considerations into account during the conviction and sentencing stages of a trial, so a reviewing court considers different (but interrelated) factors during the merits and remedy stages of proceedings for judicial review.[4]

Part 1 of this chapter deals with the issue of jurisdictional facts. The term 'procedural jurisdictional facts' is commonly used to refer to procedural requirements or formalities that must be met for administrators to exercise their powers lawfully, whereas the term 'substantive jurisdictional fact' is used to refer to preconditions that must exist for a power to be exercised (such as a requirement that the administrator must be 'satisfied' about the existence of a particular state of affairs.) [5] In this chapter, bid formalities are regarded as procedural

[1] Section 8(1) of the PAJA.
[2] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) paras 25 – 26. This judgment is referred to as '*AllPay 1*' or the 'merits judgment' to distinguish it from the subsequent ruling of the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (6) BCLR 641 (CC), referred to as '*AllPay 2*' or the 'remedy judgment'. The ruling of the SCA in the *AllPay* case 2013 (4) SA 557 (SCA) will be referred to as *AllPay (SCA*).
[3] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) (hereafter *Bengwenyama Minerals*) paras 81 – 85.
[4] *Passenger Rail Agency of South Africa v Swifambo Rail (Pty) Ltd* 2017 (6) SA 223 (GJ) (hereafter *PRASA*) para 88.
[5] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 290. See also Yvonne Burns *Administrative Law* 4 ed (2013) 391; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) (hereafter *Kirland*) para 98.

jurisdictional facts. If the jurisdictional fact (the fulfillment of responsiveness requirements) is not met, the procuring entity lacks the authority to award the tender.[6]

The essence of the jurisdictional fact doctrine is that a decision taken by an administrator that does not comply with the conditions set out in an empowering provision renders such decision unlawful and thus reviewable. This core principle also finds application in the constitutional era, although the jurisdictional fact doctrine itself has lost much of its former currency, having been eclipsed by the language of lawfulness.[7]

Part 2 deals with the question of remedies. It explores the interplay between two principles: first, the corrective principle of constitutional and administrative law that requires that unlawful acts be set aside. This is referred to by Freund and Price as the 'principle of legal constraint'.[8] Secondly, the principle that administrative action must be certain and predictable, referred to as the 'principle of legal certainty'.[9] South African administrative law strives to achieve a pragmatic balance between legal constraint and certainty,[10] and this is nowhere more evident than in the context of public procurement. A finding by a court that an irregularity exists in the award of a tender does not automatically result in the tender's being declared a legal nullity. [11]

Indeed, there are many instances, *AllPay 2* being a prime example, where the courts have given legal effect to an invalid tender decision.[12] In *Asatico Civil Construction (Pty) Ltd v Ekurhuleni Metropolitan Municipality*, the court held that it would be unjust to deprive the service provider of payment for services in respect of which the public had already derived benefit.[13] As is apparent from the discussion in Chapter 2, the *AllPay* judgments have a direct bearing on both matters that are discussed in this chapter.[14] These judgments have effectively replaced the dogmatism and conceptualism of former years with a more nuanced approach —

[6] *Ferndale Crossroads Share Block (Pty) Ltd v City of Johannesburg Metropolitan Municipality* 2011 (1) SA 24 (SCA) para 22.
[7] *Kirland* (note 5 above) para 98.
[8] Daniel Freund & Alistair Price 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *SALJ* 184.
[9] Ibid 185.
[10] Ibid 193.
[11] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) (hereafter *JFE Sapela*) para 28.
[12] *AllPay 2* (note 2 above). See also *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) (hereafter *Tasima SCA*); *Asatico Civil Construction (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2016] ZAGPJHC 3 (21 January 2016) (hereafter *Asatico*).
[13] *Astico* (note 12 above) para 7.18. See also *JFE Sapela* (note 11 above) paras 27 – 29.
[14] Note 2 above.

one that seeks to vindicate legality and the rule of law, whilst at the same time balancing various (and often conflicting) interests that are at play in a procurement dispute.

Regarding the question of compliance, Grote suggests that the exercise of determining whether an instance of non-compliance with jurisdictional facts is 'material', is by no means a straight-forward 'tick-box' exercise. It involves a multi-faceted inquiry that takes into account a range of factors, such as the seriousness of the deviation, the purpose of the rule, the extent to which the rule was observed, as well as the requirements of legality and administrative efficiency.[15] However, if a deviation from a prescribed norm is found to be material, it must result in a finding of constitutional invalidity.[16]

In relation to the question of an appropriate remedy, *AllPay* signifies a departure from an earlier line of cases that drew a seamless connection between a finding of invalidity in a tender process and an order that the award of tender be set aside.[17] The once-rigid rule in our law that a thing done contrary to a direct prohibition is void and of no effect[18] has been substantially modified. The *AllPay* judgments make it clear that even constitutionally invalid contracts may in certain circumstances continue to have legally enforceable consequences. Despite certain minority judgments in the Constitutional Court[19] having cast 'unnecessary doubt' on the correctness of this principle, it remains good law.[20] A remedies regime must appreciate the multilateral nature of procurement disputes.[21] Hence, a default position that results in non-compliant tenders being struck down as a matter of course is neither justified nor appropriate in our constitutional dispensation.[22] The exercise of judicial discretion during the remedy stage of proceedings is essential for achieving an appropriate balance between the conflicting demands of legality, certainty and administrative efficiency.[23]

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[15] Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475.
[16] Section 172(1)(*a*) of the Constitution; *AllPay 1* (note 2 above) para 93.
[17] See eg *Provincial Government of the Eastern Cape v Contractprops 25 (Pty) Ltd* [2001] 4 All SA 273 (hereafter *Contractprops*); *Municipal Manager: Quakeni Local Authority v FV General Trading* 2010 (1) SA 198 (SCA) (hereafter *Quakeni*).
[18] *Schierhout v Minister of Justice* 1926 AD 99, 110 (hereafter *Schierhout*).
[19] In a series of minority judgments discussed below, Jafta J has voiced his disapproval of this principle.
[20] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) (hereafter *Tasima*) para 227.
[21] *AllPay 1* (note 2 above) para 56.
[22] Geo Quinot 'Worse Than Losing A Government Tender: Winning It.' (2008) 1 *Stell LR* 101, 118 – 119.
[23] Ibid; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) (hereafter *Oudekraal*) para 36.

PART 1

PROCEDURAL JURISDICTIONAL FACTS

3.2 THE POSITION AT THE COMMON LAW

The common-law concept of procedural jurisdictional facts is famously expressed in the formula: If X exists the public official may do Y.[24] X may consist of various elements, factual, legal or discretionary, that serve as conditions precedent for the lawful exercise of power.[25] Case law reveals numerous instances where the courts have struck down administrative decisions on account of non-compliance with legal requirements. A few examples will suffice. The courts have struck down decisions based on a failure on the part of a functionary to obtain the necessary approvals for the extension of a contract;[26] a decision taken by a regulatory body for not applying a prescribed methodology for evaluating an application for a tariff increase;[27] a decision by a liquor board to impose conditions on the award of a liquor licence that were not authorized by the relevant legislation;[28] and a failure by the board of SANRAL to take a proper decision to obtain ministerial approval before declaring a national road as a toll road.[29] Without the prescribed conditions being met, the administrators in question lacked the jurisdiction (authority) to make a lawful decision.

Various theories serve to explain the origin of the jurisdictional fact doctrine. One such theory is that the doctrine arose from a need to strike an appropriate balance between judicial control and administrative autonomy,[30] or to put it differently, to maintain the distinction between review and appeal.[31] According to Baxter, the jurisdictional fact doctrine evolved as a compromise between two competing theories of judicial review — the 'limited review' theory (also known as the 'pure' or 'general' theory) and the 'extensive review' theory.[32] The 'limited review' theory holds that where the determination of certain factors has been placed in the

[24] Paul Craig *Administrative Law* 7 ed (2012) 475; Hoexter (note 5 above) 290.
[25] Craig (note 24 above) 475.
[26] *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA) (hereafter *Prodiba*); *Tasima SCA* (note 12 above).
[27] *Borbet SA (Pty) Ltd v The National Energy Regulator of South Africa* [2016] ZAGPPHC 702 (16 August 2016) but overruled on appeal in *National Energy Regulator of South Africa v Borbet SA (Pty) Ltd* [2017] 3 All SA 559 (SCA) (hereafter *NERSA*).
[28] *Pick n Pay Retailers (Pty) Ltd v The Gauteng Provincial Liquor Board* [2016] ZAGPPHC 841 (16 February 2016).
[29] *South African National Roads Agency Ltd v City of Cape Town* 2017 (1) SA 468 (SCA).
[30] JR de Ville *Judicial Review of Administrative Action in South Africa* rev ed (2005) 149. See also Craig (note 24 above) 475.
[31] De Ville (note 30 above) 149.
[32] Baxter *Administrative Law* (1984) 453 – 457.

hands of a public authority, the assessment of those factors by the authority must stand, right or wrong.[33] Since the legislature entrusted the decision to the public body, the courts should not usurp the authority of the public body by upsetting its decision on review.[34] The extensive review theory on the other hand, subjects all aspects of the administrator's decision to judicial scrutiny. Judges who follow this approach 'would turn any error into a jurisdictional one, to make it reviewable'.[35] On this approach, errors made by an administrator will always be regarded as 'jurisdictional'.[36] These competing theories reflect 'the perpetual tension between the executive and the courts'[37]

Baxter explains that the 'jurisdictional fact' theory came about as a compromise between these extremes by treating only certain types of mistakes as reviewable. The jurisdictional fact theory regards only mistakes affecting the 'jurisdiction' of the administrator to act as being subject to review.[38] Because judicial review was focussed on the legality of official conduct, it was reasoned that a mistake of fact or error of law was reviewable only if officials exceeded their powers — acted beyond their jurisdiction.[39] On the other hand, mistakes made 'within jurisdiction' related to the merits and were therefore not reviewable in administrative law,[40] except on limited grounds listed in *Shidiack v Union Government*, such as mala fides, ulterior motive, unwarranted adherence to a fixed principle and failure to apply the mind.[41]

De Ville, on the other hand, attributes the doctrine to a Diceyan understanding of the rule of law, rooted as it is in a mistrust of executive and administrative power and the dominance of a policing or control model for the courts.[42] On the Diceyan approach, the courts patrol the boundaries of executive power, ever watchful for executive excesses. Actions of the

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[33] Ibid.
[34] Ibid 454.
[35] De Ville (note 30 above) 6.
[36] Baxter (note 32 above) 454.
[37] Ibid 453.
[38] Ibid 456.
[39] De Ville (note 30 above) 149; Hoexter (note 5 above) 303.
[40] De Ville (note 30 above) 149; *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C) is a good example of a mistake of fact 'within jurisdiction' which the court held was not reviewable at the time.
[41] *Shidiack v Union Government* 1912 AD 642 (hereafter *Shidiack*) 651 – 652; *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) (hereafter *Pepcor*) para 32.
[42] De Ville (note 30 above) 7, 12. See also D M Davis 'Administrative Justice in a Democratic South Africa' in Hugh Corder & Fiona McLennan (eds) *Controlling Public Power: Administrative Justice through the Law* (1995) 19, 21 – 22.

executive thus have to be 'controlled' and 'contained' by the courts, who are regarded as the ultimate authority on the interpretation of legislation.[43] De Ville argues that our Constitution requires a departure from Dicey's negative view of administrative power.[44] He points out that s 33(3) of the Constitution contemplates the passage of legislation that would 'promote an efficient administration' and argues that in our constitutional context, the role of the courts is not merely to control the administration but also to ensure greater administrative efficiency.[45]

Whether one sees the jurisdictional fact doctrine as a compromise between two extreme positions or as a Diceyan 'hang-over', one thing is certain — the doctrine was steeped in formalism and conceptual thinking. Labels were attached to different categories of jurisdictional facts in the belief that legal consequences depended on the particular label assigned to such categories. The famous ruling of Corbett J in *South African Defence and Aid Fund v Minister of Justice* is a prime example of this 'jurisdictional' approach.[46] But rigid categorizations were applied more easily in the realm of ideas than in practice, and ultimately proved to be unsustainable.[47] One of the main distinctions, namely the distinction between so-called 'jurisdictional' errors and 'non-jurisdictional' errors, began to crumble even during the pre-constitutional era,[48] and academic authors have long questioned the distinction between 'questions of fact' and 'questions of law'.[49] Baxter astutely observed that 'with sufficient ingenuity almost any question facing a decision-maker can be construed as a question of law'.[50]

Over time, the scope of the doctrine has expanded to increase the range of matters considered to be reviewable. Consequently, our law no longer confines itself to reviewing only errors of law or mistakes of fact that affect the 'jurisdiction' of the administrator. 'Non-jurisdictional' mistakes of both fact[51] and law[52] have also been included in the ambit of judicial review.

[43] Ibid 6.
[44] Ibid 6, 9.
[45] Ibid 10.
[46] *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).
[47] Baxter (note 32 above) 447; De Ville (note 30 above) 170.
[48] De Ville (note 30 above) 149 – 150.
[49] Ibid 156; Baxter (note 32 above) 455.
[50] Baxter (note 32 above) 457.
[51] *Pepcor* (note 41 above) para 47.
[52] *Hira v Booysen* 1992 (4) SA 69 (A) (hereafter *Hira*) at 90D – E; Hoexter (note 5 above) 286 – 290.

3.3 THE POSITION IN THE CONSTITUTIONAL ERA

The observance of empowering provisions is no less important in the constitutional era than it was under the common law, but the approach is different. In the constitutional era, the law is less concerned with the conceptualism and formalism that dominated the common law. The focus of the inquiry is on whether the administrator acted *lawfully,*[53] and the core of lawfulness is proper authorisation to act.[54] Of course, the democratic Constitution did not introduce the concept of lawfulness into South African administrative law. It has been part of the common law since time immemorial.[55] However, the jurisdictional language and conceptualism of the common law has yielded to the language of lawfulness in the Constitution and the PAJA.

The PAJA now provides for a number of grounds on which a challenge based on lawfulness could be founded. These well-known grounds for review are outlined in s 6 of the Act and need not be repeated here. However, if one converts the negative language employed in s 6 into positive obligations, the requirements for a valid and lawful decision may be summarized as follows: The decision must be taken by an administrator properly authorised to take the decision; the decision has to be in compliance with the Constitution, the law and all mandatory and material conditions and procedures; it should be based on a correct interpretation of the law; all relevant considerations must be properly considered and irrelevant considerations left out of account; and the decision must be rational, both in light of the purpose for which the power was given and the information that was placed before the administrator. [56]

Errors of law or mistakes of fact, whether jurisdictional or non-jurisdictional are reviewable against a standard of lawfulness.[57] Notably, the PAJA has dispensed with jurisdictional terminology altogether and now simply makes reference to error of law as a ground for review, without attaching any jurisdictional labels. However, the PAJA does not make reference to mistake of fact at all. De Ville points out that whilst earlier versions of the Administrative Justice Bill made reference to error of law or fact, the reference to error of fact was deleted from later versions of the Bill.[58] He points out that what used to be included in the category of

[53] Geo Quinot 'Lawfulness' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 136.
[54] Ibid 142 – 143; Clive Plasket 'Playing Catch-Up: The South African Constitution, Administrative Law and Jurisdictional Facts' in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 75, at 77.
[55] Cora Hoexter 'Just Administrative Action' in Iain Currie & Johan De Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 643, 666.
[56] Quinot (ed) (note 53 above) 142.
[57] Hoexter (note 5 above) 288.
[58] De Ville (note 30 above) 169.

jurisdictional facts has now been subsumed in s 6(2)(*b*) of the PAJA, such facts being referred to as 'mandatory and material procedures or conditions'.[59]

This does not mean that the common-law jurisprudence pertaining to jurisdictional facts has become obsolete, at least not all of it.[60] Although the jurisdictional fact doctrine has fallen into disuse, many of its underlying principles continue to influence the jurisprudence of the constitutional era.[61] The common-law principles that continue to find relevance today include the following:

a) Whenever a public body acts, it must determine the scope of its powers. It must determine whether the preconditions for its exercise of power exists.[62]
b) The administrator is clothed with authority to act lawfully only if the procedural requirements or conditions prescribed were fulfilled.[63] Absent the prescribed formalities (or if the administrator makes a mistake regarding their presence), the administrator lacks authority to act.[64]
c) A jurisdictional fact must be fulfilled *before* the administrator exercises his or her powers.[65]
d) The obligation to comply need not always be on the part of the administrator. Empowering provisions often place obligations on private entities to observe formalities and procedures.[66] The obligation placed on bidders to observe bid responsiveness requirements is a good example of this.
e) Compliance does not have to be exact or 'perfect' to be acceptable. An administrative decision may be upheld if the required standard was sufficiently met.[67]
f) Not every instance of non-compliance necessarily results in invalidity. A key question is whether the legislature intended non-compliance with the provision to result in a nullity.[68]

[59] Ibid 163. Non-jurisdictional (material) mistakes of fact are reviewable in terms of s 6(2)(*e*)(iii) (if relevant considerations were not considered). See *Pepcor* (note 41 above) para 46; *Chairperson's Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) para 48; *Dumani v Nair* 2013 (2) SA 274 (SCA) paras 29 – 32.
[60] De Ville (note 30 above) 170.
[61] Ibid.
[62] Baxter (note 32 above) 452.
[63] Hoexter (note 5 above) 290; De Ville (note 30 above) 156; Quinot (note 53 above) 136; Burns (note 5 above) 391.
[64] Hoexter (note 5 above) 290; De Ville (note 30 above) 157; *Paola v Jeeva* 2004 (1) SA 396 (SCA) para 16.
[65] Burns (note 5 above) 205.
[66] Baxter (note 30 above) 445.
[67] Ibid 450; *Maharaj v Rampersad* 1964 (4) SA 638 (A) 646.
[68] Baxter (note 32 above) 449. I argue below that this question has been subsumed by a broader question regarding the selection of a just and equitable remedy.

3.4 THE DEMISE OF THE JURISDICTIONAL FACT DOCTRINE

Baxter has described the jurisdictional fact doctrine as 'an anachronistic hangover from earlier times' and expressed a preference for the word 'power' as opposed to jurisdiction.[69] Other legal academics have described the doctrine as 'inappropriate' and have long called for the abandonment of jurisdictional terminology.[70] It is little wonder therefore that in *Kirland*, the Constitutional Court sent the clearest signal yet that the jurisdictional fact doctrine has reached the end of its useful life.[71] The court indicated that in the constitutional era, there is no longer a need to find that an administrator lacked jurisdiction whenever he or she fails to comply with a formality or precondition. The court explained that the concept of jurisdictional facts

> [d]erives from terminology used in a very different, and now defunct, context (namely where all errors, if they were to be capable of being reviewed at all, had to be construed as affecting the functionary's 'jurisdiction'). In our post-constitutional administrative law, there is no need to find that an administrator lacks jurisdiction whenever she fails to comply with the preconditions for lawfully exercising her powers. She acts, but acts wrongly, and her decision is capable of being set aside by proper process of law.[72]

The SCA, on the other hand, appears to be less convinced about the demise of doctrine. In *Pepcor Retirement Fund v Financial Services Board*, Cloete JA expressed his disagreement with the sentiments of Wade and Forsyth that one can safely 'consign much of the old law about jurisdictional fact, etc. to well-deserved oblivion'.[73]

I continue to employ jurisdictional language in this thesis, though mindful of its limitations. I do so more for reasons of practicality than for reasons of principle. Jurisdictional language is used to provide a familiar (though imperfect) metaphor for the legitimate exercise of power. The concept of jurisdiction denotes the idea of a legitimate domain — the notion that there are objective boundaries to the exercise of power.[74] Administrators are required to operate within those boundaries and not to misconstrue their powers.[75] Furthermore,

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[69] Ibid 453.
[70] De Ville (note 30 above) 12, 163 and 167; Quinot (note 53 above) 136.
[71] *Kirland* (note 5 above).
[72] Ibid para 98.
[73] *Pepcor* (note 41 above) para 48.
[74] Baxter (note 32 above) 453.
[75] Hoexter (note 5 above) 281; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 58 – 59; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148.

jurisdictional language has proven to be remarkably resilient during the constitutional era. [76] Despite the remarks of Cameron J in *Kirland* to the contrary, the courts (including the Constitutional Court itself) have continued to employ jurisdictional language in post-*Kirland* decisions. [77]

I therefore proceed on the basis that decisions relating to bid responsiveness relate to a procuring entity's power to make a tender award and are thus principally jurisdictional in nature.

3.5 EVALUATING THE SERIOUSNESS OF A DEVIATION FROM PRESCRIBED REQUIREMENTS: THE 'MATERIALITY' DETERMINATION

Section 33 of the Constitution guarantees the right to reasonable administrative action, not perfect administrative action,[78] hence not all deviations from prescribed norms should be regarded as fatal. Rather, every instance of non-compliance must be properly evaluated to determine its materiality. After all, non-compliance with legal requirements 'bears no brand of invalidity upon its forehead'.[79] In *Aurecon South Africa (Pty) Ltd v City of Cape Town* the SCA expressed the legal position as follows:

> [I]t is firmly established in our law that administrative action based on formal or procedural defects is not always invalid and that legal validity is concerned not with technical but also with substantial correctness which should not always be sacrificed to form.[80]

Baxter draws a distinction between three categories of legal requirements, namely: (a) enabling provisions, (b) provisions that constitute an essential prerequisite for validity and (c) requirements that are not an essential prerequisite for validity.[81] This differentiation was made in order to explain the common law's distinction between 'mandatory' and 'directory'

[76] De Ville (note 28 above) 160 −162; *Merafong City Local Municipality v Anglogold Ashanti* Ltd 2017 (2) SA 211 (CC) (hereafter *Merafong*) para 124.
[77] See for example *Merafong* (note 76 above) para 124; *Swart v Starbuck* 2017 (5) SA 370 (CC) paras 55, 77, 86 and 95; *Raduvha v Minister of Safety and Security* 2016 (10) BCLR 1326 (CC) paras 47, 48 and 63; *Baliso v Firstrand Bank Limited t/a Wesbank* 2017 (1) SA 292 (CC) paras 58, 59; *Earthlife Africa-Johannesburg v The Minister of Energy* [2017] ZAWCHC 50 (26 April 2017) para 126.
[78] *Kirland* (note 5 above) footnote 54. See also *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) (hereafter *Logbro*) para 17; *AllPay (SCA)* (note 2 above) para 21; *Westinghouse v Eskom (SOC) Ltd* 2016 (3) SA 1 (SCA) para 36.
[79] To borrow from the *dictum* of Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) 769 – 760, as quoted in *Oudekraal* (note 23 above) para 27.
[80] *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) para 43. The judgment of the SCA was confirmed on appeal in *City of Cape Town v Aurecon (Pty) Ltd* 2017 (6) BCLR 730 (CC). Also see Baxter (note 32 above) 446.
[81] Baxter (note 32 above) 448.

provisions. I submit that it is also a useful framework for explaining the implications of non-compliance with legal requirements in the constitutional era. (This thesis focusses mainly on the second category of requirements.) Baxter explains that enabling provisions do not impose a duty on an administrator to act in a particular manner. They merely enable the administrator to act if he or she deems such course of action necessary or desirable. Provided the administrator exercises his/her discretion properly, he/she will not be in contravention of the legislation if he/she chooses not to follow the course of action envisaged.[82] The use of permissive language, such as 'may' or 'can' may be an indication that the legislature intended the provision to be enabling, whilst the use of peremptory language, such as 'must' or 'shall' may indicate that the administrator is bound to follow the provision.[83] However, as Baxter points out, 'the uncertainties of language often preclude such a simple solution'.[84] Indeed, the word 'may' has sometimes been construed to mean 'must' and vice-versa.[85] Such words should, at best, be treated as 'tentative signposts' and 'prima facie guides'.[86]

Provisions that are an essential prerequisite for validity fall within the 'if X then Y' formula discussed above. Such provisions prescribe 'X' as a condition precedent for validity. But it does not follow that non-compliance with 'X" automatically results in a legal nullity. According to Baxter, one of the key questions to consider is 'whether the Legislature intended non-compliance to be visited with nullity'.[87] The relevant provision must therefore be interpreted in light of the general purpose of the legislation, the history of the legislation, its subject matter, the importance of the provision, its relation to the Act as a whole, and whether injustice would result from insistence upon strict compliance.[88] Baxter points out that in certain instances the legislature may have intended that non-compliance should attract a sanction other than invalidity, such as a criminal sanction.[89]

The third category are provisions that are not essential for validity. Baxter explains that although such provisions are not essential for validity, they should not be regarded as non-binding, since legislative provisions always bind the public authority to whom they are addressed.[90] These provisions must also be observed, the only difference being that non-

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid. See also Hoexter (note 5 above) 49 and 292.
[86] Baxter 449.
[87] Ibid.
[88] Ibid 447.
[89] Ibid 449; *Standard Bank v Estate Van Rhyn* 1925 AD 266 (hereafter *Estate Van Rhyn*).
[90] Ibid 451.

compliance does not result in invalidity.[91] However, non-compliance may attract other sanctions, such as an interdict, mandamus or a declaratory order.[92]

(a) Process v purpose

Competing principles are at play whenever the consequences of non-compliance with essential legal standards have to be determined. These are the need for consistency, impartiality and uniformity on the one hand and the need for individualized justice and flexibility in administrative decision-making on the other.[93] Our law promotes even-handed treatment, yet it also abhors a rigid adherence to a fixed principle.[94] It values consistency in administrative conduct, yet it places a premium on individualized justice. It seeks to uphold the integrity of administrative processes, yet it strives to reach beyond blind formalism to determine whether the purpose behind a particular procedure was met.[95]

The decision of the Constitutional Court in *African Christian Democratic Party v Electoral Commission*, provides a good example of the tension between process and purpose.[96] In this instance, the relevant legislation contained a clear provision that a party could contest municipal elections only if it submitted a notice of its intention to contest the elections, a party list and payment of a prescribed deposit by means of a bank-guaranteed cheque, before a cut-off date.[97] It also required ward candidates to submit nomination forms before the prescribed date.[98] The ACDP duly lodged its notice of intention to contest the elections in the Cape Town Metropole, its party list and a list of nominated award candidates at the local offices of the commission before the prescribed cut-off date. It also made a bulk payment of R283 000,00 at the head office of the commission by means of a bank-guaranteed cheque in respect of a number of municipalities in which it intended to contest elections. However, it erroneously omitted to include the Cape Town Metropole on the list. The party subsequently decided not to contest

[91] Ibid.
[92] Ibid; Hoexter (note 5 above) 292.
[93] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) paras 11 – 12; Peter Volmink 'Legal Consequences of Non-Compliance with Bid Requirements' (2014) 1 *African Public Procurement Journal* 41, 44 – 46.
[94] *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1998 (2) SA 308 (A) 321.
[95] *ABET Inspection Engineering (Pty) Ltd v Petrosa* [2018] ZAWCHC (1 February 2018) (hereafter *ABET*) para 7.
[96] *African Christian Democratic Party v The Electoral Commission* 2006 (3) SA 305 (CC) (hereafter *ACDP*).
[97] Section 14(1) of the Local Government: Municipal Electoral Act 27 of 2000 (referred to hereafter as the 'Municipal Electoral Act').
[98] Section 17 of the Municipal Electoral Act.

the elections in certain areas, with the result that the commission held a credit of R10 000,00 on its behalf.

When the commission pointed out to the Party that it had failed to make payment in respect of the Cape Town Metropole, the Party informed the commission that the surplus funds that were held on its behalf could be allocated for this purpose. The commission refused to accede to this request, with the result that the Party was disqualified from contesting municipal elections in the Cape Town Metropole. The Party challenged the decision in the Constitutional Court.

The minority judgment of Skweyiya J adopted a strict process-oriented approach and upheld the decision of the commission. The judgment stressed the enormity and complexity of the task of running an election and explained that a process by its very nature involves the operation and observance of procedures.[99] Adherence to such procedures, said the minority, is a critical precondition for the functioning of the process and the attainment of the ultimate objective of multi-party democracy.[100] The minority held that if the procedural underpinnings for the running of an election were to crumble, the right to vote would be rendered nugatory. For this reason, *absolute* compliance with the established procedures was required.[101] The minority stressed that the commission could not be expected to bear the responsibility of ensuring that all formalities were complied with by all the parties and that political parties were expected to bear their share of responsibilities for the effective functioning of the elections.[102]According to Skweyiya J 'the process is as important as the actual exercise of the citizen's right to vote'.[103]

The majority, on the other hand, adopted a purposive approach.[104] According to the majority, the primary purpose behind the particular statutory requirement was that candidates and political parties had to declare their intention to contest elections before a certain date and to provide the commission with enough information to organize the elections properly.[105] The payment of the deposit was simply to ensure that participation in the elections was not frivolous.[106] According to the majority, payment of the deposit was complementary to the

[99] *ACDP* (note 96 above) paras 53 – 64.
[100] Ibid para 54.
[101] Ibid para 64.
[102] Ibid para 48.
[103] Ibid para 64.
[104] Ibid paras 25 – 34.
[105] Ibid para 31.
[106] Ibid paras 27, 31.

primary purpose of notification by political parties of an intention to participate in elections and the submission of the details of candidates.[107] From this perspective, the Party satisfied the purpose behind the legislative requirement in that the Party notified the commission of its intention to contest the elections and had provided details of the ward candidates.[108]

As noted in Chapter 2, the tension between the process-oriented (strict) approach and the purpose-oriented (permissive) approach plays itself out most conspicuously in the public procurement space. Both approaches have their respective merits. Both place a premium on the protection of the public interest in public tenders. The approaches differ simply because they place the emphasis on different aspects of the public interest. The strict approach places the emphasis on the public interest in maintaining the integrity of the bidding process through equal treatment of all bidders and uniform observance of bid conditions, whilst the permissive approach recognizes the public interest in ensuring best value for money by avoiding a pedantic and formalistic approach that discards the wheat with the chaff.[109] As discussed in Chapter 2, the ruling of the Constitutional Court in *AllPay 1* managed to achieve an important balance between these competing objectives.[110]

(b) Reading the provision in context

Empowering provisions in general, and mandatory provisions in particular, must be read and understood in their contextual setting. As pointed out above, drawing firm conclusions based on the appearance of words such as 'shall' or 'must' is generally unhelpful. This point was vividly illustrated in *Steenkamp v Edcon,* in which the Constitutional Court reiterated that words such as 'shall' or 'must' do not necessarily point to a breach of the statutory provision resulting in a nullity.[111] *Steenkamp* was concerned with the consequences of non-compliance with labour legislation in a labour-law setting, and not with non-compliance with jurisdictional facts in an administrative-law setting. But it is mentioned here in order to illustrate the importance of reading mandatory language contextually.

In this case, the Constitutional Court reiterated that whether a violation of a statutory requirement results in a nullity depends on the statute's purpose and meaning, considered in

[107] Ibid para 31.
[108] Ibid para 32.
[109] *Minister of Social Development v Phoenix Cash and Carry Pmb CC* 2007 (9) BCLR 982 (SCA) para 21.
[110] *AllPay 1* (note 2 above).
[111] *Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC) (hereafter *Steenkamp*) paras 78, 99 and 182; Hoexter (note 5 above) 48 – 50; 292 – 293.

the light of multiple factors.[112] These include the purpose of the legislation as whole as well as the purpose of the particular provision in question; the mischief sought to be remedied; whether the Act made provision for remedies for its breach and if so, the adequacy of such remedies;[113] any prejudice that a finding of invalidity may bring about;[114] whether the breach related to an obligation that did not exist at common law and that had been specially created by statute; and whether, having regard to all relevant provisions of the statute, it could be said that the legislative purpose was that breach of its provisions would result in invalidity.[115]

In *Steenkamp* the Constitutional Court was confronted with the question whether retrenchments effected in breach of certain notice periods prescribed by the Labour Relations Act 66 of 1995 ('LRA') amounted to a nullity. To appreciate the judgment fully one would have to delve into the interstices of the LRA, but for present purposes a brief summary will suffice. The LRA creates a mandatory 'dismissal-free' (or 'standstill') period in cases involving mass retrenchments. The objective behind placing this freeze on the retrenchment process is to afford all parties the opportunity to rethink their positions and to consider alternatives to the proposed retrenchment.[116] The wording of the relevant provision is peremptory. Section 189A(2)(*a*) provides that 'an employer *must* give notice of termination in accordance with the provisions of this section' (own emphasis). Edcon failed to adhere to the mandatory 30-day notice period prescribed by s 189A(8). The employees argued that in light of this non-compliance the dismissals amounted to a legal nullity. Edcon, on the other hand, conceded that the dismissals were in breach of the statutory notice requirements but argued that whilst the non-compliance might have rendered the dismissals 'unfair' within the parlance of the LRA, it did not render them a legal nullity. [117] According to Edcon, the dismissals had to be dealt with in terms of the unfair dismissal regime created by the LRA.

In upholding Edcon's argument, the majority had regard to the following factors: that the purpose of the statutory notice obligation was to ensure compliance with fair procedure

[112] *Steenkamp* (note 111 above) para 74.
[113] Ibid paras 183 – 184. The court stated that this approach was consistent with rulings of the Appellate Division in *Estate Van Rhyn* (note 89 above) 274; *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) (hereafter *Ross*) 188 F – I; *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) (hereafter *Palm Fifteen*) 885 E – G; *Pottie v Kotze* 1954 (3) SA 719 (A) (hereafter *Pottie*) 726H – 727A; *Swart v Smuts* 1971 (1) SA 819 (A) (hereafter *Swart*) 829 E – H; *Absa Insurance Brokers (Pty) Ltd v Luttig* NO 1997 (4) SA 229 (SCA) 238J – 239A and 293B.
[114] *Steenkamp* (note 111 above) paras 74 and 183. See also *Palm Fifteen* (note 113 above) 885 E – G.
[115] Ibid para 99.
[116] In terms of s 189A(7) and (8) the notice periods vary depending on whether a facilitator was appointed to mediate the retrenchment process.
[117] *Steenkamp* (note 111 above) para 96.

before dismissals based on operational requirements could take place and to afford all the affected parties sufficient opportunity to reach agreement on key issues;[118] that the LRA was silent on whether non-compliance with the statutory provision resulted in a nullity;[119] and that although the LRA did not make breach of the provision a criminal offence, this did not mean that breach could take place with impunity. In fact, serious consequences attached to non-compliance, including an order for reinstatement that would effectively reverse the employer's decision until it complied with the procedural obligation requirements.[120]

The court held that the LRA did not contemplate an order declaring a dismissal 'invalid' and of no force and effect, but rather contemplated the notion of 'unfair dismissals'. Hence, an order declaring a dismissal invalid would be inappropriate for a breach of the LRA. Since adequate remedies were in place to address breaches of the mandatory notice period, there was no reason to believe that the LRA would require the invalidity of dismissals as a further consequence.[121] The court held that the exclusion of a remedy of invalid dismissal under the LRA was deliberate as it did not fit in with the dispensation of the LRA which required flexibility so as to achieve fairness and equity between employer and employee in each case.[122] If a litigant's case is based on a breach of the LRA, the dispute resolution mechanism it uses must be that of the LRA and the remedy must also be provided in the LRA. [123]

Also, in *National Energy Regulator of South Africa v Borbet SA (Pty) Ltd*, the SCA held that non-compliance by a licensee with a particular tariff methodology did not render unlawful the decision by the regulator to grant a tariff increase.[124] This was because of the availability of corrective or penal sanctions for non-compliance.[125]

It could be argued that non-compliance with mandatory tender requirements requires a stricter approach, one that leads to invalidation of the tender award by default. It could further be argued that the strong public interest in upholding the integrity of tender processes demands nothing less. Indeed, our case law suggests that in many instances non-compliance with mandatory requirements leads to the setting aside of the tender award. However, in Part 2 below

[118] Ibid para 185.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid para 119.
[123] Ibid paras 137 – 144. This was based on the approach of the Constitutional Court in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).
[124] *NERSA* (note 27 above).
[125] Ibid paras 102 – 104, 107 and 111.

I argue against a position that holds that non-compliance should *invariably* lead to the award of tender being declared a nullity. A contextual reading of a mandatory tender requirement is necessary in each instance to determine its materiality as well as the effect that non-compliance was intended to have.

(c) A standard of correctness?

De Ville calls for the jurisprudence regarding jurisdictional facts to be 'repositioned' in order to develop a variable standard of review for mistake of fact based on three distinct categories:[126]

(i) A 'correctness' standard, which would allow the courts to determine the correctness of facts that are objectively justiciable. De Ville believes that this approach would be appropriate for determining whether jurisdictional facts were met. Only in instances where the decision was materially influenced by the mistake of fact (in the sense that it would have made a difference to the outcome of the decision had the mistake not been made) should it lead to invalidity;

(ii) A reasonableness standard, which allows the court to determine whether a decision is rationally connected to the information before the public official. This standard would be appropriate when reviewing findings of fact of a disciplinary committee or cases involving findings of mixed law and fact; and

(iii) A rationality standard, which would allow the court to determine whether there is a rational basis for the decision, having regard to the information before the decision-maker. This standard would be appropriate when dealing with wide discretionary powers.

De Ville suggests that the appropriate standard should be determined with reference to the context, taking into account factors such as the wording of the provision, the nature of the powers to be exercised, the subject matter, interests affected by the decision, the status and qualifications of the official entrusted with the decision and the relative expertise of the court *vis-a vis* the administrator regarding the issues to be decided.[127]

In my view, de Ville's proposed standard of correctness is problematic, for at least three reasons. First, a standard of correctness (assuming that such a standard is at all appropriate within the context of judicial review of administrative action) might be appropriate when the

[126] De Ville (note 30 above) 170 −171.
[127] De Ville (note 30 above) 171.

finding of fact involves little room for discretion, value judgement, or subjectivity. A purely mechanical or administrative function, such as the issuing of a motor vehicle or television licence against payment of a set fee comes to mind. However, when determining whether there was sufficient compliance with procedural jurisdictional facts in the context of public procurement, a different approach is required. Far from involving a purely mechanical process, an evaluation of bid responsiveness requires a proper consideration of multiple factors, mainly the important issue of materiality. It does not involve a simple, straight-forward application of clear-cut rules. Baxter points out that arriving at the legally correct view 'can also be a matter for subjective assessment, affected by considerations of policy as well as clear-cut rules'.[128] De Ville himself points out that there is seldom one single correct answer to the interpretation of an empowering provision and that it is more appropriate to speak of a range of answers.[129] It is precisely for these reasons that the standards of lawfulness, proportionality and rationality are more suited to a review of a decision relating to responsiveness, as opposed to a standard of correctness.

Secondly, the argument that a mistake of fact is reviewable only if it would have made a difference to the outcome of the decision had the mistake not been made, was firmly rejected in *AllPay 1*.[130] It will be recalled that in *AllPay 1*, the Constitutional Court held that the inevitability of the outcome of a procurement event should play no role in determining the reviewability of a procurement decision.[131]

Thirdly, the language of correctness is redolent of the language of appeal, rather than review. Judicial review, says Baxter, 'is concerned with legality, not rectitude'.[132] Based on the traditional distinction between these two forms of relief, the purpose of a review is not to inquire into the correctness of an administrative decision, but rather to ask whether the decision was arrived at in a procedurally acceptable manner.[133] The distinction between these two forms of relief may have become blurred, but it still exists as part of our law. In fact, the SCA has described the distinction as both 'time-honoured and socially necessary'.[134]

[128] Baxter (note 32 above) 468, as quoted in Hoexter (note 5 above) 282.
[129] De Ville (note 30 above) 11.
[130] *AllPay 1* (note 2 above) para 23.
[131] Ibid.
[132] Baxter (note 32 above) 452.
[133] Hoexter (note 5 above) 282.
[134] *Pepkor* (note 41 above) para 48.

In *AllPay 1* the Constitutional Court emphasized 'materiality' rather than 'correctness' as the proper standard to apply when assessing the legal consequences of non-compliance with bid requirements. The assessment of materiality inevitably involves some sort of value judgment, for it cannot be done mechanically. A proper evaluation must be done of the relevant bid requirement in light of its purpose and tender process as a whole.

In summary, the standard of correctness is alien to the grounds of review listed in the PAJA. The grounds of review for lawfulness are those listed in s 6 of the PAJA. There is really no need to create a different standard of review for correctness.

PART 2

LEGAL CONSEQUENCES OF NON-COMPLIANCE WITH PROCEDURAL JURISDICTIONAL FACTS: THE REMEDY DETERMINATION

Part 2 focusses on the exercise of judicial discretion during the remedy stage of review proceedings. The remedy chosen must satisfy a number of objectives — it must vindicate the Constitution and the rule of law, but must also balance the multilateral interests at stake, such as those of the successful bidder, the unsuccessful bidder, the procuring entity and the public at large. Judicial discretion during the remedy stage is the indispensable moderating tool for minimizing injustice, not only when legality and certainty collide,[135] but also when legality and administrative efficiency collide.[136] According to Wade and Forsyth 'the denial of a remedy sometimes serves the public interest — for instance, by the avoidance of administrative chaos or the harm to innocent third parties that might otherwise result'.[137]

3.6 VOID AND VOIDABLE

The ruling of the Appellate Division in *Schierhout v Minister of Justice* handed down almost a century ago, adopted a hard-line position that non-compliance with mandatory requirements invariably resulted in a legal nullity. [138] Despite its pre-constitutional vintage, the *Schierhout* principle (as it has come to be known) continues to influence judicial reasoning, as evidenced

[135] *Oudekraal* (note 23 above) para 36.
[136] *Premier, Mpumalanga v Executive Committee of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) (hereafter *Premier, Mpumalanga*) para 41.
[137] William Wade & Christopher Forsyth *Administrative Law* 11 ed (2014) 597, as quoted in Freund & Price (note 8 above) 194.
[138] *Schierhout* (note 18 above) 110.

by certain minority judgments handed down in the Constitutional Court in recent times.[139] The *Schierhout* principle holds that 'a thing done contrary to the direct prohibition of the law is void and of no effect'.[140] Irrespective of whether this was expressly decreed, the mere prohibition nullifies the act.[141] This means it must be regarded as never having been done. Thus, strictly speaking, the illegal act need not be set aside, because 'it never existed in the first place: it is void *ab initio*'.[142] A corollary of the '*Schierhout* principle' is that an illegal contract may not be enforced by the courts,[143] since '[i]t is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal act'.[144]

Jafta J's minority judgment in *Cool Ideas CC v Hubbard*, reflects a tenacious insistence upon *Schierhout*-type thinking.[145] According to Jafta J '[i]t is not necessary for the prohibition to say non-compliance with it would lead to invalidity'.[146] Jafta J held that the *Schierhout* principle admits only one exception — if a provision amounts to a prohibition, an act performed would be invalid, unless it is clear from the wording of the statute that invalidity was not intended.[147] Jafta J's approach effectively creates a presumption of voidness, rebuttable only in limited circumstances where the text specifically indicates the contrary intention. Jafta J's *Schierhout*-style reasoning has never been endorsed by the majority in the Constitutional Court.[148] In any event, the 'pure' *Schierhout principle* has long been modified since it was first introduced in 1926.[149] Even under the common law, our courts refused to apply the rule in an inflexible manner.[150]

The opposite view is that illegal acts are 'voidable', that is to say that they remain valid until they are set aside.[151] If the illegal act is not challenged, it continues to exist and is indistinguishable from a valid decision.[152]

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[139] See the minority judgments of Jafta J in *Cool Ideas CC v Hubbard* 2014 (4) SA 474 (CC) (hereafter *Cool Ideas*); *Kirland* (note 5 above); *Merafong* (note 76 above) and *Tasim*a (note 20 above).
[140] *Schierhout* (note 18 above) 109.
[141] Ibid.
[142] Mark Elliot *Beatson, Matthews & Elliot's Administrative Law: Text and Materials* 4 ed (2011) 79, as quoted in Freund & Price (note 8 above) 186.
[143] *Cool Ideas* (note 139 above) para 77.
[144] Ibid.
[145] Ibid.
[146] Ibid para 102.
[147] Ibid paras 91, 102 and 105.
[148] See, for example, the majority judgment of Majiedt AJ in *Cool Ideas* (note 139 above) paras 48 ff.
[149] *Steenkamp* (note 111 above) para 74.
[150] *Cool Ideas* (note 143 above) para 168; Baxter (note 32 above) 445 – 446; *Ross* (note 113 above) 188F – H; *Dhlamini v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) 913H – 914C; *Swart* (note 113 above) 829C – 830C; *Estate Van Rhyn* (note 89 above) 274; *Pottie* (note 113 above) 726H – 727A.
[151] Freund & Price (note 8 above) 186 – 187.
[152] Ibid.

Legal debates as to whether an invalid administrative decision is 'void' or 'voidable' — interesting though they may be — are largely of historical value. Freund and Price observe that South African law rejected both options and has elected to follow a middle way.[153] Our law has adopted the approach that 'unlawful administrative acts are theoretically void, yet functionally voidable'[154] and that the 'administrative act is *treated* as though it is valid until a court pronounces authoritatively on its validity, but that does not mean that it is in fact valid'.[155] To put it differently, a legal fiction has been established: one that does not bestow legality on an illegal act, but which recognises that the act exists in fact and is capable of producing legal consequences until it is set aside by a court of law. This principle has been part of our law, at least since the ruling of the SCA in *Oudekraal Estates (Pty) Ltd v City of Cape Town*.[156] The Constitutional Court has since affirmed the principle on a number of occasions.[157]

However, in a series of minority judgments, Jafta J has voiced strident criticism of the principle.[158] He maintains that the notion that an illegal act is capable of producing legally valid consequences, defies both logic and the rule of law.[159] He insists that during the remedy stage of proceedings, courts must give effect to a finding of invalidity by declaring an illegal act null and void.[160] It is beyond the scope of this thesis to provide a detailed critique of Jafta J's approach, but a few comments will suffice.

Jafta J's criticism has arisen mainly in the context of 'self-help' cases, in which the courts have held that government bodies may not resort to 'self-help' by ignoring previous administrative decisions in the belief that those decisions were invalid.[161] If a public body believes that an administrative decision was wrongly taken, it must approach a court to declare the decision invalid.[162] This is what 'good constitutional citizenship' requires.[163] Until the decision is set aside in appropriate proceedings, the invalid act continues to have legally

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[153] Ibid 187.
[154] Christopher Forsyth 'The Theory of the Second Actor Revisited' 2006 *Acta Juridica* 209 at 210, as quoted in Freund & Price ibid.
[155] Hoexter (note 5 above) 546. See also *Merafong* (note 76 above) para 43.
[156] *Oudekraal* (note 23 above) para 26. In *Oudekraal* the SCA suggested (at para 26) that this principle has 'always' been part of our law. See also *Kirland* (note 5 above) para 101; *Merafong* (note 76 above) para 36; *Tasima* (note 20 above) paras 145 – 150; Hoexter (note 5 above) 547.
[157] *Merafong* (note 76 above) para 36; *Kirland* (note 5 above) paras 65, 90, 99 and 103; *Tasima* (note 20 above) para 225.
[158] See the minority judgments of Jafta J in *Cool Ideas* (note 143 above); *Kirland* (note 5 above); *Merafong* (note 76 above) and *Tasim*a (note 20 above).
[159] See Jafta's minority judgment in *Merafong* (note 76 above) paras 107 – 152.
[160] *Kirland Investments* (note 5 above) para 52.
[161] *Oudekraal* (note 23 above)*; Kirland* (note 5 above); *Merafong* (note 76 above); *Tasima* (note 20 above); *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (hereafter *EFF*).
[162] *EFF* (note 161 above) para 75.
[163] *Merafong* (note 76 above) paras 59.

enforceable consequences.[164] It is this latter principle that, according to Jafta J, 'collides head-on with the principle of legality'.[165]

Jafta J maintains that for an administrative act to be enforceable, it must be valid, and to be valid it must be lawful.[166] To hold otherwise would undermine the rule of law and the Constitution.[167] He states further that 'no court has the power of converting an unconstitutional and invalid act with no legal force into a valid act with binding effect'.[168] He maintains that an illegal administrative act is void *ab initio* regardless of the fact that it has not been set aside.[169] This, he says, is consistent with the constitutional principle of objective invalidity.[170] He agrees that public bodies are obliged to apply to court for the setting aside of decisions that they consider to be invalid, but insists that their failure to do so does not mean that the invalid act 'morphs into a valid act with binding legal effect'.[171] According to Jafta J, the majority judgment in *Kirland* has 'muddled up our law'.[172] It erroneously introduced a new brand of administrative action into our law — one that derives its validity not from compliance with an empowering provision, but from a failure on the part of public officials to institute review proceedings.[173]

Jafta J's main thesis is that in deciding upon a just and equitable remedy, the courts may not reverse what was done during the first stage of the hearing when it made a finding of invalidity.[174] He states that '[u]nder our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional. What may be done by the courts is to regulate the consequences of their declaration of invalidity.'[175] Courts therefore cannot enforce illegal administrative acts, because their duty is to uphold the Constitution and the law.[176] The

[164] Ibid para 41.
[165] Ibid paras 89 and 107.
[166] Ibid paras 95 and 107.
[167] Ibid para 95; *Tasima* (note 20 above) para 79.
[168] *Merafong* (note 76 above) para 116.
[169] Ibid para 130.
[170] Ibid para 134. In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 27, the Constitutional Court explained that courts do not invalidate a law, but merely declare the law to be invalid. Laws are either objectively valid or invalid, depending on whether they conflict with the Constitution. In *Merafong* (note 76 above) para 135, Jafta J states that the principle of objective invalidity applies equally to administrative conduct. See also *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33 paras 2 and 80.
[171] *Merafong* (note 76 above) para 131.
[172] Ibid para 107; *Tasima* (note 20 above) para 87.
[173] *Merafong* (note 76 above) para 141 – 142.
[174] *Kirland* (note 5 above) para 61.
[175] Ibid para 52.
[176] *Merafong* (note 76 above) para 96.

implication of this finding is that a court can never, during the remedy stage, give legal effect to an invalid administrative decision.

Jafta's approach presents a number of difficulties. First, if Jafta J is correct, then the Constitutional Court's ruling in *AllPay 2* (in which he concurred) is wrong! In *AllPay 2* the court declared an award of a contract constitutionally invalid, but suspended the declaration of invalidity pending the completion of a new tender process.[177] Indeed, the court went further and did precisely what Jafta J said it could not do. It held that if the new tender process was not awarded, the declaration of invalidity would be further suspended to allow the unlawfully awarded contract to run its course, thus effectively giving legal force to the contract despite its invalidity.[178] The court adopted this approach because a ruling that declared the contract void *ab initio* and unenforceable would have had disastrous consequences for the millions of beneficiaries.[179] The court has since further extended the suspension of the order of invalidity, effectively allowing the unlawful contract to continue.[180] An inflexible position that holds that courts can never give legal effect to an unlawful administrative act, is simply incompatible with the approach adopted in *AllPay 2.*

Secondly, Jafta J's approach does not accord with the distinction that exists between a mandatory finding of invalidity during the merits stage of review proceedings and the discretion that exists during the remedy stage. In his view, an unbroken line exists between a finding of invalidity and a declaration that the ensuing act amounts to a nullity. To hold otherwise, according to Jafta J would allow an invalid act to 'morph' into a valid act.[181] But, with respect, this is incorrect. As indicated above, an invalid act does not magically become valid but is *regarded* as valid, in order to meet various considerations that militate against the setting aside of the decision. The administrative act is treated as though it is valid until a court pronounces authoritatively on its validity, but that does not mean that it is in fact valid. Hoexter observes that 'It is does not mean that the act was in fact valid until declared invalid, or that an invalid act can somehow be validated — by the denial of a remedy for instance'.[182]

[177] *AllPay 2* (note 2 above) para 78.
[178] *AllPay 2* (note 2 above) para 78.
[179] *Merafong* (note 76 above) para 35.
[180] *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) (hereafter *Black Sash*).
[181] *Merafong* (note 76 above) para 131.
[182] Hoexter (note 5 above) 547.

Thirdly, Jafta J's approach may actually encourage self-help among public officials. Despite his view that public officials ought to approach the courts to set aside acts that they consider to be invalid, he holds that their failure to do so would not bestow validity and legality on an invalid act.[183] He states that '[t]he inaction on the part of the official cannot render valid an act that is inconsistent with the Constitution'.[184] Based on this approach, the impugned act remains invalid, unenforceable and cannot be treated otherwise regardless of whether it is set aside or remains unchallenged. What then is the incentive for public officials to act? To regard the act as void *ab initio* with no possibility of enforcement will surely serve as a disincentive to take concrete steps to have it set aside. This approach is likely to encourage the kind of attitude among public officials that the rulings of *Oudekraal*, *Kirland* and *Merafong* sought to discourage.

My criticism of Jafta J's approach does not ignore the legal conundrum that is inherent in the *Oudekraal* principle. In fact, it seems counter-intuitive and illogical to suggest that an invalid act is capable of producing legally effective consequences. The Australian High Court has stated that the problem posed by invalid administrative decisions 'presents one of the most vexing puzzles in administrative law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction.'[185] However, as acknowledged by Cameron J in *Merafong*, the conundrum does exist, but its existence is both constitutionally sustainable and indeed necessary.[186] Regrettably, the majority in *Merafong* did not explain the rationale for the principle clearly. The court simply stated that '[t]his is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it'.[187] But this merely re-states the conundrum, it does not explain the *raison d'etre* behind the principle.

Oudekraal offers a better explanation by placing the emphasis on the value of certainty in a modern bureaucratic state.[188] Certainty requires recognition of the principle that whilst a void administrative act might not exist in law, it exists in fact 'and its mere factual existence

[183] *Merafong* (note 76 above) para 131.
[184] Ibid.
[185] *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11 (14 March 2002) at para 101; (2002) 187 ALR 117 at 142, as quoted in Robert Orr & Robyn Briese 'Don't Think Twice? Can Administrative Decision-Makers Change Their Mind'? *AIAL Forum* 35, 15 last accessed from http://www5.austlii.edu.au/au/journals/AIAdminLawF/2002/14.pdf on 1 April 2018.
[186] *Merafong* (note 76 above) para 36.
[187] Ibid.
[188] *Oudekraal* (note 23 above) para 37.

may provide the foundation for legal validity of later decisions or acts'.[189] Thus, the court reasoned that the legislature could not have expected the Surveyor-General to satisfy himself that the Administrator's earlier approval was valid before he approved the plan.[190] In the interest of certainty (and depending on the wording of the legislation), certain consequences may flow merely from the fact that an administrative act exists.[191]

The court also explained the existence of the anomaly on the basis of the rule of law and the interests of good administration.[192] The SCA stated that '[t]he proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question'.[193] The principle was also attributed to the legal presumption that administrative acts are valid (*omnia praesumuntur rite esse acta*).[194] In addition, *Kirland* highlighted the potential prejudice that could be suffered by individuals who relied on the lawfulness of the decision in altering their circumstances.[195] Allowing administrators to ignore decisions that they regard as invalid when others have placed reliance on the legality of those decisions, would invite 'a vortex of uncertainty, unpredictability and irrationality'.[196]

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, the Constitutional Court adopted a more candid and pragmatic approach.[197] The court frankly admitted that the anomaly of allowing an unlawful act to produce legally effective consequences 'is not one that admits easy and consistently logical solutions' but explained that 'the law is often a pragmatic blend of logic and experience'.[198] The court further explained that the provision of a 'just and equitable' remedy seeks to ameliorate the potentially far-reaching effects of declaring invalid conduct that is in conflict with the Constitution and PAJA.[199] The remedy chosen must determine 'whether factual certainty required some amelioration of legality'.[200]

[189] Ibid para 29.
[190] Ibid para 39.
[191] Ibid para 37.
[192] Ibid para 37. See also *Kirland* (note 5 above) para 103 and *Merafong* (note 76 above) para 43.
[193] *Oudekraal* (note 23 above) para 26.
[194] Ibid para 27.
[195] *Kirland* (note 5 above) paras 65, 75 and 86.
[196] Ibid para 103.
[197] *Bengwenyama Minerals* (note 3 above). See also *Oudekraal* (note 23 above) para 27.
[198] Ibid para 85.
[199] Ibid.
[200] Ibid.

Whether its origins are attributable to lofty legal principle or pure pragmatism, the rule that until an invalid act is set aside it is capable of producing valid consequences, is firmly entrenched in our law. The question of a 'just and equitable' remedy must now be considered in more detail.

3.7 THE KEY QUESTION: WHAT DOES A 'JUST AND EQUITABLE' REMEDY REQUIRE?

According to Baxter, the key question to ask is 'whether the Legislature intended non-compliance to be visited with nullity'.[201] The answer to this question might be self-evident when the consequences of non-compliance are clearly spelt out in the applicable legislation.[202] But this is seldom the case.[203] The more common scenario is that Parliament may prescribe certain legal requirements for the validity of an act or proscribe certain conduct without spelling out what the consequences of non-compliance ought to be.[204] In such instances, the courts consider a variety of factors to determine the legislative intent, such as the language of the provision and the Act as a whole, the mischief it seeks to prevent and the consequences of visiting the transaction with invalidity.[205]

In the constitutional era, the key question is somewhat different. The key issue to consider is whether it would be 'just and equitable' to set the administrative act aside. This is not to suggest that the question identified by Baxter is no longer relevant. Rather, the question whether the legislature intended non-compliance to be visited with a nullity has been subsumed by the broader question regarding the selection of an appropriate remedy. Thus, in the context of tender litigation, the key question cannot be reduced to a narrow focus on whether procurement legislation was breached, but rather what the most appropriate order would be — taking into account the importance of vindicating the Constitution and the rule of law, but also considering the range of interests involved.

[201] Baxter (note 32 above) 449.
[202] A good example is to be found in s 20(3) of the Private Security Industry Regulation Act 56 of 2001 which provides that any contract concluded in breach of the requirement to register as a security service provider is invalid.
[203] De Ville (note 30 above) 262.
[204] Christo Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 175.
[205] *Contractprops* (note 17 above) para 4; De Ville (note 30 above) 262.

(a) Appropriate relief

It is in the search for a 'just and equitable' remedy that *AllPay* makes its best contribution to procurement law. Following its earlier ruling in *Bengwenyama Minerals*,[206] the Constitutional Court interpreted s 172(1) of the Constitution to require a clear distinction between a finding of invalidity during the merits stage and the imposition of an appropriate remedy during the remedy stage. The setting aside of an invalid tender award is not an automatic consequence of a finding of invalidity.[207] Section 172(1) of the Constitution reads as follows:

> 'When deciding a constitutional matter within its power, a court –
>
> (a) *Must* declare that any law or conduct inconsistent with the Constitution is invalid to the extent of the inconsistency; and
> (b) *May* make any order that is just and equitable, including –
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.' (own emphasis).

The following is apparent from s 172: The enquiry into lawfulness and remedy must be treated as separate issues.[208] When deciding a constitutional matter (such as the award of a tender),[209] a court *must* declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency.[210] Accordingly, a finding of constitutional invalidity is an automatic consequence of a finding that a constitutional breach has occurred — a court has no discretion in this regard.[211] But the courts have broad discretion in terms of s 172(1)(*b*) to determine remedies that are 'just and equitable'.[212] This is to ameliorate the rigour of declaring administrative conduct invalid.[213]

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[206] *Bengwenyama Minerals* (note 3 above) paras 81 – 85.
[207] *AllPay 2* (note 2 above) para 15; *CTP Ltd v Director General, Department of Basic Education* [2018] ZASCA 156 (20 November 2018) (hereafter *CTP*) para 30.
[208] *AllPay 1* (note 2 above) para 24.
[209] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (hereafter *Steenkamp NO*) paras 20 – 23.
[210] *AllPay 1* (note 2 above) para 25.
[211] *Kirland* (note 5 above) para 46; *Tasima* (note 20 above) para 77; *ABET* (note 95 above) para 5; Max du Plessis, Glenn Penfold & Jason Brickhill *Constitutional Litigation* (2013) 108.
[212] Max du Plessis *et al* (note 211 above) 108; *ABET* (note 95 above) para 8.
[213] *Bengwenyama Minerals* (note 3 above) para 85.

Section 38 of the Constitution reads in similar fashion. It provides that when a court considers a case involving a breach of the Bill of Rights, it may grant 'appropriate relief'. The concept of 'appropriate relief' has been defined to mean something that is 'specially fitted or suitable'.[214] If one may speak of a default position in the constitutional era, it is that the remedy chosen must be based on justice and equity. A default position that invariably leads to the courts setting aside invalid tender awards is simply unsuitable for considering the multiplicity of interests that have to be balanced in public procurement disputes.[215]

In *Bengwenyama Minerals,* the Constitutional Court explained that instances may arise where the relief granted stops short of giving full effect to a finding of invalidity, thus effectively keeping the invalid act in place.[216] The example given in this case is where third parties have altered their position on the basis that the administrative act was valid and would suffer prejudice if the act were to be set aside.[217] The practical difficulties that may flow from declaring an administrative act unconstitutional must therefore be properly considered when crafting a just and equitable remedy.[218]

(b) The corrective principle

The flexibility afforded by s 172(1)(*b*) to determine a 'just and equitable' remedy does not mean that courts may withhold effective remedies in all instances where 'practical difficulties' may arise.[219] The remedy must always be effective in addressing the constitutional breach.[220] In *Fose v Minister of Safety and Security* the Constitutional Court stated that in a country where few are able to afford legal remedies, 'on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, that it be effectively vindicated'.[221] The corrective (default) principle of constitutional and administrative law is that an unlawful administrative act must be set aside[222] and such orders must have retrospective effect.[223]

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[214] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (hereafter *Fose*) para 97.
[215] Quinot (note 21 above) 118 – 119.
[216] *Bengwenyama Minerals* (note 3 above) para 84.
[217] Ibid; *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9.
[218] *JFE Sapela* (note 11 above) paras 25 and 29.
[219] *Bengwenyama Minerals* (note 3 above) para 84; *AllPay 1* (note 2 above) para 25; *Kirland* (note 5 above) para 54.
[220] *Fose* (note 214 above) paras 96 – 97; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) para 17.
[221] *Fose* (note 214 above) para 69. See also *EFF* (note 161 above) para 54; *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23 (13 August 2018) (hereafter *Corruption Watch*) paras 68 – 69.
[222] *AllPay 2* (note 2 above) para 30.
[223] *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* 2015 (5) SA 370 (CC) paras 20 and 32.

The principle operates to pre-empt, correct or reverse an improper administrative function.[224] Ultimately, its purpose is 'to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law'.[225] Currie and De Waal argue that the harm caused by violating constitutional rights is not merely a harm to an individual but a harm to society as a whole, since the violation affects the realization of the constitutional ideal of creating a just and democratic society.[226] The remedy should therefore grant relief to the individual litigant but should also vindicate the Constitution and deter its further infringement by striking at its source.[227] As explained in *Fose*, 'certain harms, if not addressed, diminish faith in the Constitution'.[228]

But the corrective principle is not one-dimensional and inflexible.[229] It must be applied to correct the wrongs that have occurred but it must also be applied to protect the multi-dimensional nature of the public good.[230] In *PRASA v Swifambo Rail Agency (Pty) Ltd*, the court observed that the issue of finding an appropriate remedy 'is one of the most difficult decision[s] that a court must make in review applications'.[231] The court likened it to sentencing in criminal proceedings.[232] Just as there are various sentencing options available to a criminal court, having regard to factors such as the interests of the accused, the interest of the state, mitigating and aggravating circumstances etc, similarly in review proceedings the courts must consider a variety of factors such as 'the public interest, the nature of the irregularities that took place, any explanation for that, whether the person concerned is an innocent tenderer, what message the court will be sending out when it grants a certain remedy'.[233]

Freund and Price suggest that the following factors be considered for purposes of determining an appropriate remedy: the more serious the breach of the right to administrative justice, the stronger the case for setting aside the decision and the stronger the required justification for refusing to do so; serious flaws must be distinguished from trivial irregularities

[224] *Steenkamp* (note 111 above) para 29; *AllPay 2* (note 2 above) para 30; *PRASA* (note 4 above) para 83.
[225] *Steenkamp* (note 111 above) para 29; *PRASA* (note 4 above) para 83.
[226] Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 181.
[227] Ibid 181; *Fose* (note 214 above) paras 96 – 97.
[228] *Fose* (note 214) above) para 96.
[229] *AllPay 2* (note 2 above) paras 33 and 34.
[230] Ibid para 32.
[231] *PRASA* (note 4 above) para 88.
[232] Ibid.
[233] Ibid. See also *Overstrand Municipality v Water and Sanitation Services of South Africa (Pty) Ltd* [2018] ZASCA 50 (29 March 2018) (hereafter *Overstrand*) para 51.

through careful analysis of the nature of the defect in question;[234] and the number of people affected by the decision could also be a factor. Thus an invalid decision affecting only one person might be treated differently to invalid regulations or policies that have general application;[235] a situation involving undue delay and failure to pursue alternative remedies; culpability on the part of the applicant; the probable impact of a quashing order on the applicant, the organ of state, third parties and the public at large; and the availability of alternative options, such as interdicts, declaration of rights, costs orders, or an award of damages in public or private law.[236]

(c) The multilateral nature of tender disputes

Froneman explained in *AllPay 2* that the concept of the public good must be evaluated not only in relation to the immediate consequences of invalidity, but also in relation to how similar procurements are to be conducted in future.[237] He further explained that procurement contracts are not concluded on the state's behalf but on the public's behalf and thus the interests of those most closely associated with the benefits of the contract must be given due weight.[238] The rights and expectations of all affected persons (not only those of the unsuccessful bidder) must be taken into account.[239] This requires careful balancing of the interests of the unsuccessful tenderer, the interests of the successful tenderer and the public at large.[240]

However, finding an appropriate balance between conflicting interests is particularly challenging in a procurement context, since legal challenges are often brought after the impugned contract has been concluded and implemented.[241] Strict enforcement of legality could have catastrophic consequences for successful contractors who have had no hand in the irregularity committed by the organ of state, whereas an over-emphasis on 'pragmatism' could leave an aggrieved tenderer without an effective remedy. This dilemma was explained in

[234] *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) (hereafter *Moseme*) para 21.
[235] With reference to *Boddington v British Transport Police* [1998] 2 WLR 639 (HL) at 653D. However, the authors emphasise (at note 97) that 'there could be no rule that decisions affecting only an individual cannot be set aside'.
[236] Freund & Price (note 8 above) 207 – 207.
[237] *AllPay 2* (note 2 above) para 32.
[238] *AllPay 1* (note 2 above) para 56.
[239] Ibid; *AllPay 2* (note 2 above) para 33.
[240] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) (hereafter *Rainbow Civils*) paras 115 – 116.
[241] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) (hereafter *Millennium Waste*) para 23.

Moseme Road Construction CC v King Civil Engineering Contractors (Pty) in the following terms:

> If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract. Tendering has become risky business and courts are often placed in an invidious position in exercising their administrative law discretion — a discretion that may be academic in a particular case, leaving a wronged tenderer without an effective remedy.[242]

Case law suggests that the courts consider a wide range of factors when deciding upon an appropriate form of correction. These include: 'public interest' considerations;[243] delays in bringing review proceedings;[244] the lapse of time and the extent to which the work has already been completed;[245] whether it would be unjust to deprive the service provider of payment for services in respect of which the public has already derived benefit;[246] the extent to which an essential service may be disrupted by the setting aside of a tender award;[247] the inevitability of the outcome of re-evaluating the tenders;[248] 'unavoidable supervening circumstances' such as price increases;[249] whether the contract in question is divisible and 're-measurable';[250] whether the relief sought would have any practical effect;[251] the interests of vulnerable groups;[252] the degree of culpability on the part of the successful and unsuccessful bidders and that of the

[242] *Moseme* (note 234 above) para 1.
[243] *AllPay 2* (note 2 above) para 32*; Millennium Waste* (note 241 above) para 28.
[244] *Eskom Holding Ltd v The New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) (hereafter *New Reclamation*) paras 11 – 13.
[245] *JFE Sapela* (note 11 above) paras 20 and 23; *Asatico* (note 12 above) para 7.18; *Rainbow Civils* (note 240 above) para 120.
[246] *Asatico* (note 12 above) para 7.18.
[247] *Millennium Waste* (note 241 above).
[248] *AllPay 1* (note 2 above) para 29.
[249] *Industrial Development Corporation of South Africa Ltd v Trencon Construction (Pty) Ltd* [2014] 4 All SA 561 (SCA) para 19.
[250] *New Reclamation* (note 244 above) para 16.
[251] *RMR Commodity Enterprise CC v Chairman, Bid Adjudication Committee* [2009] 3 All SA 41 (SCA) paras 9 – 14.
[252] *AllPay 2* (note 2 above) paras 4 and 36.

procuring entity involved;[253] the extent or materiality of the breach;[254] any adverse impact that the setting aside of the contract may have on the successful contractor;[255] whether the successful bidder knew about any potential challenges to the award of the tender before concluding the contract;[256] whether the successful bidder has incurred expenses prematurely;[257] any potential reduction in the quality of services enjoyed by the public if the tender were to be set aside;[258] the time and cost implications of running a new tender process;[259] whether the immediate invalidation of the contract would leave the procuring entity without a service provider;[260] the amount of capital expenditure incurred by the successful bidder;[261] the extent to which the successful bidder has amortised its costs and made a profit from the contract;[262] unintended legal consequences that could arise from setting aside the contract; [263] the interests of efficient administration and the consequences for future generations if the invalid decision is allowed to stand.[264]

Needless to say, where the courts are faced with contracts influenced by corruption and maladministration, the only legitimate option would be to set the tender award and resultant contract aside. In *PRASA*, the court stated that

> Corruption is a cancer that is slow[ly] easting at the fabric of our society. If it is left unchecked it will devour our entire society. Chemotherapy is needed to curb it. The chemotherapy in this instance is an effective remedy that will nip the cancer in its bud. The remedy that the respondent is proposing will be making a mockery of the fight against unlawful tenders. It will send out a message that it pays to be involved in unlawful tenders and crime does pay. This is not the society that we fought for and

[253] *New Reclamation* (note 244 above) para 14; *TEB Properties CC v MEC for Department of Health & Social Development, North West* [2012] 1 All SA 479 (SCA) para 32; *Actaris South Africa (Pty) Ltd v Sol Plaatjie Municipality* [2008] 4 All SA 168 (NC) paras 27 – 28; *Rainbow Civils* (note 240 above) paras 124 – 125*; WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality* 2013 (5) SA 461 (KZD) para 22; *PRASA* (note 4 above) para 118; *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* [2018] ZASCA 167 (30 November 2018) (hereafter *Swifambo*) paras 43 – 48.
[254] *Bengwenyama Minerals* (note 3 above) para 85.
[255] *Millennium Waste* (note 241 above) para 27.
[256] *Quakeni* (note 17 above) para 29.
[257] *Superintendent-General: North West Department of Education v African Paper Products (Pty) Ltd* [2014] ZANWHC 29 (24 October 2014) para 105.
[258] *AllPay 2* (note 2 above) para 20.
[259] Ibid paras 6 – 7.
[260] *Mogale City Municipality v Fidelity Security Services (Pty) Ltd* 2015 (5) SA 590 (SCA) (hereafter *Mogale City*) para 19.
[261] *AllPay 2* (note 2 above) para 18.
[262] Ibid para 8.
[263] *Fose* (note 214 above) para 72; *Premier, Mpumalanga* (note 136 above) paras 39 – 41.
[264] *Oudekraal* (note 23 above) para 46.

> should live in. There is simply no reason why the respondent should benefit from an unlawful award that was peppered with so many irregularities.[265]

The instances where our courts have refused to set aside unlawful tenders fall broadly into two categories.[266] First, cases in which the courts have refused outright to set aside an unlawful tender on review, [267] or to grant an interdict to prevent the conclusion of a contract despite the presence of manifest irregularities.[268] Secondly, instances in which the courts have intervened conditionally. This latter category usually involves keeping the unlawful tender award temporarily in place, pending a re-evaluation of existing bids or a re-run of the tender process.[269] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*,[270] is a prime example of the first category where our courts have refused to set a constitutionally invalid contract aside on the grounds of 'pragmatism and practicality'.[271] The SCA placed much emphasis on the effluxion of time, and the fact that most of the work had already been completed.[272] Furthermore, in *Moseme*, the SCA raised concerns regarding unintended legal consequences that could arise if the invalid contract were set aside and awarded to the unsuccessful bidder.[273] Harms DP pointed out that the first contractor would not be able to claim under the revoked contract and would be left with an enrichment claim.[274] Furthermore, the public entity would not have a claim for defective workmanship against the first contractor, but the second contractor might have a claim for contractual damages against the public entity in respect of loss of profits on the part of the contract that had already been executed because it had become contractually entitled to the entire contract.[275]

However, a *Sapela*-type argument did not succeed in *Eskom Holdings Ltd v New Reclamation Group*.[276] In that case the SCA set aside an illegal tender award despite the fact that most of the contract period had already elapsed, since the work to be performed (the collection of scrap metal) was 'divisible'.[277]

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[265] *PRASA* (note 4 above) para 125. See also *Swifambo* (note 253 above) para 48.
[266] Quinot (note 53 above) 247 – 251.
[267] Du Plessis et al (note 211 above) 115.
[268] *Digital Horizons (Pty) Ltd v SABC* [2008] ZAGPHC 272 (8 September 2008).
[269] *AllPay 2* (note 2 above); *Millennium Waste* (note 241 above).
[270] *JFE Sapela* (note 11 above).
[271] Ibid para 28.
[272] Ibid Para 23.
[273] *Moseme* (note 234 above).
[274] Ibid para 20.
[275] Ibid
[276] *New Reclamation* (note 244 above).
[277] Ibid para 16.

A just and equitable remedy does not always lie in the choice between striking down an unlawful tender and maintaining the existing position.[278] More recently, our jurisprudence has developed around the second option, namely, conditional setting aside of a tender. In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* the SCA declared the appellant's disqualification from the tender process invalid but instead of setting the award of tender aside, it ordered a re-run of the bid evaluation process.[279] If the outcome of the re-run indicated that the tender ought to have been awarded to the appellant, then in that instance the tender award would be set aside, subject to some protection afforded to the entity that had previously been awarded the contract.[280] This approach was considered necessary to protect the various interests that had to be balanced against each other.[281] These included the interests of the appellant, the successful bidder, the public and the public purse.[282]

The approach adopted by Jafta J in *Millennium Waste* illustrates how courts are able to achieve a balance between the interests of legality and certainty.[283] However, the shortcoming in the *Millennium Waste*-type approach is that by the time tenders are eventually re-evaluated, a considerable period of time might have elapsed and supervening circumstances may have arisen. Market conditions may have changed considerably, new technology might in the interim have become available or bidders may no longer be prepared to provide the goods or services at the price initially offered. This is precisely what transpired in *Logbro Properties CC v Bedderson*.[284] In this instance, the court ordered that bids received for the purchase of certain state-owned property had to be re-evaluated. However, the organ of state concerned decided to cancel the tender process instead, on the basis that property prices had increased dramatically since the tender was first issued some five years earlier and that it was not in the interests of the state to consider bid prices that did not reflect current market prices.[285]

The Constitutional Court might possibly have anticipated this problem and therefor adopted a different approach in *AllPay 2*. Rather than ordering a re-run of the bid evaluation process, the court declared the contract between SASSA and CPS invalid, but suspended the declaration of invalidity pending a *new tender process*. The court went further and ruled that if

[278] *AllPay 2* (note 2 above) para 39.
[279] *Millennium Waste* (note 241 above) para 35.
[280] Ibid.
[281] Ibid paras 24 – 30.
[282] Ibid.
[283] Hoexter (note 5 above) 550.
[284] *Logbro* (note 78 above).
[285] Ibid para 19.

the new tender were not awarded, the declaration of invalidity would be further suspended until the completion of the initial five year contract period. This would afford CPS the opportunity to complete the contract. The court acknowledged that it was unable to predict the impact of a new tender process on a number of interests — such as the ability of bidders to provide truly competitive bids, whether a new system would disrupt existing payments and what advantages CPS could derive from its incumbency.[286] However, the new tender process would make it possible for SASSA to have more information available to it, when it made a final decision regarding the award of the tender process.[287]

A similar approach was adopted in *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Lt*d, but with more stringent timeframes. [288] In this instance, the SCA suspended the order of declaration pending the re-run of a tender process or the lapse of six months, whichever came first.

In *AllPay 2*, the Constitutional Court ensured that the process of re-running the tender remained under judicial supervision. The court required that regular progress reports be filed with the Registrar of the Court, and further required that if the tender were not awarded, SASSA would have to indicate when it would be ready to assume the duty to pay the grants itself.[289] However, in *Mogale City Municipality v Fidelity Security Services (Pty) Ltd*, the SCA seemed reluctant to take on this oversight role and suggested that any disputes arising out of the process of re-evaluation be dealt with by the High Court having jurisdiction.[290]

(d) Revisiting earlier case law

I argue against an earlier line of cases that dealt with tender disputes on the basis that a finding of invalidity would lead inexorably to the resultant contract being set aside. *Municipal Manager: Quakeni Local Municipality v FV General Trading* [291] is a case in point. In that instance a contract was set aside on the basis that the municipality had failed to follow statutorily prescribed procedures. The SCA rejected the notion that it had a discretion to give effect to the contract, having found it to be invalid, and dealt with the matter purely on the basis of legality.[292] The SCA placed reliance on its earlier decision in *Provincial Government of the*

[286] *AllPay 2* (note 2 above) para 40.
[287] Ibid.
[288] *Overstrand* (note 233 above) para 51.
[289] *AllPay 2* (note 2 above) para 78.
[290] *Mogale City* (note 260 above) para 20.
[291] *Quakeni* (note 17 above).
[292] Ibid para 14.

Eastern Cape v Contractprops 25 (Pty) Ltd, to conclude that the consequences of invalidity could not vary from case to case.[293] In *Contractprops* the SCA stated that '[s]uch transactions are either all valid or all invalid. Their invalidity cannot depend upon whether or not harshness is discernible in the particular case'.[294]

In my view, the reliance that *Quakeni* placed on *Contractprops* was misplaced. Read contextually, the statement in *Contractprops* quoted above was not intended as a general principle of law. In that instance, a provincial government department deliberately ignored the Provincial Tender Board and concluded a lease with a private entity without having the necessary legislative authority to do so. The court upheld the province's decision to terminate the lease agreement, despite the resultant prejudice to the lessor. The court considered the harsh consequences of termination on the lessor, but also took into account 'the potential countervailing harshness' to the taxpayer of holding the Province to a contract which could have been avoided had the tender board not been ignored.[295] The court held that consequences of declaring the lease invalid were not so one-sidedly harsh that it could be supposed that the legislature had not intended invalidity to be a consequence. [296] The court's remarks that transactions in breach of the legislative requirement 'are either all valid or all invalid' must be understood in this context. However, to the extent, that this statement could be interpreted as a general statement of law, it has been eclipsed by the rulings of the Constitutional Court in cases such as *Bengwenyama Minerals*[297] and *AllPay*.[298]

Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape[299] is an example of where the courts have failed to give due consideration to the impact of its orders on vulnerable groups. In this instance the High Court interdicted the Department of Education from concluding a contract with certain suppliers for the provision of learning materials for approximately 2300 of the poorest schools in the Province, on the grounds that the applicant had not been dealt with in a procedurally fair manner. In dealing with the impact of the order on the affected schools, the court merely expressed the hope that 'charities could be approached to provide the stationery in the interim or that the Department should search its depots for

[293] *Contractprops* (note 17 above) para 9.
[294] Ibid para 9; *Quakeni* (note 17 above) para 15.
[295] *Contractprops* (note 17 above) para 9.
[296] Ibid.
[297] *Bengenyama Minerals* (note 3 above).
[298] Note 2 above.
[299] *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* 2011 JOL 26927 (E).

leftover stock'.[300] This approach stands in sharp contrast to the carefully calibrated remedies adopted in cases such as *AllPay* and *Millennium Waste* and has been justly criticized for failing to give meaning to the phrase the 'child's best interests' within a public procurement context.[301]

Of course, it will not always be possible to protect the rights of all affected parties equally, and concerns about possible prejudice to an innocent contractor or the broader community will not necessarily prevail against an order setting aside an irregular tender award in all instances. The point however, is that these factors must be given due consideration before an appropriate remedy is chosen. Quinot's correctly criticizes the reflex position adopted by some courts that tender awards are to be set aside whenever reviewable irregularities are found in the process.[302] He describes this approach as 'unsophisticated'[303] and 'simplistic'.[304]

(e) Balancing legality and administrative efficiency

Finally, a word must be spoken about the importance of administrative efficiency, sometimes referred to as 'good government'.[305] The need to protect scarce state resources and enhance administrative efficiency, are unquestionably valid considerations when crafting a 'just and equitable' remedy. In *S v Bhulwana; S v Gwadiso* the Constitutional Court recognised that the interests of good government may outweigh the interests of individual litigants in certain instances.[306] The interests of individual litigants have to be weighed against the consequences of issuing an order of invalidity with retrospective effect 'to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute'.[307] These comments were made in the context of the rule that when the Constitutional Court declares legislation unconstitutional, the declaration will have prospective effect only, and that administrative action taken in terms of such legislation will generally remain in effect.[308] However, considerations of good government are equally relevant when the validity

[300] Ibid para 35.
[301] M Couzans 'Procurement Adjudication and the Rights of Children: Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape 2011 JOL 26927 (E)' (2012) 15 *PER/PELJ* 392, 399 – 404. Section 28(2) of the Constitution prescribes that '[a] child's best interests are of paramount importance in every matter concerning the child'. But compare the approach of the SCA in *CTP* (note 207 above) paras 49 – 51.
[302] Quinot (note 21 above) 118 – 119.
[303] Ibid 117.
[304] Ibid 118.
[305] De Ville (note 30 above) 477.
[306] *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC) para 32.
[307] *South African Municipal Workers Union v Minister of Cooperative Governance & Traditional Affairs* [2017] 5 BCLR 641 (CC) para 85, with reference to *S v Zuma* 1995 (4) BCLR 401 (CC) para 43.
[308] De Ville (note 30 above) 477.

of the administrative action itself is in issue.[309] Considerations of administrative efficiency and the need to preserve state resources have also been reasons cited by the SCA and the Constitutional Court for refusing to recognize delictual claims arising out of flawed tender processes.[310]

The principle of variability plays an important role in moderating the competing demands of legality and administrative efficiency. The concept of variability conveys the notion that public law rules ought to be applied in a flexible or 'variable' manner and not in an 'all-or-nothing fashion'.[311] Hoexter explains that the intensity of judicial review may vary according to context and could be influenced by factors such as the policy content of the decision, the breadth of discretion given to the decision-maker and the impact of the decision.[312] The notion of variability applies most commonly in the context of procedural fairness, but applies equally to other principles of good administration such as lawfulness, reasonableness and the duty to give reasons.[313] In *Joseph v City of Johannesbur*g the Constitutional Court acknowledged the 'spectre of administrative paralysis' as a legitimate concern, but endorsed Hoexter's argument that concerns about administrative efficiency should inform the *content* of the right to procedural fairness, but not its *scope*.[314] Quinot, too, argues that variability relates to the content or substance of the rules regarding procedural fairness rather than their formal application.[315] In other words, variability does not address the question whether the rules apply, but rather addresses what the rules require of the administrator.[316]

I am of the view that the notion of variability should not be confined to the scope of the right alone but should also be extended to the nature of the remedy. Considerations of administrative efficiency should, in appropriate cases, influence a court to vary both the scope of the right and of the nature of the remedy to meet the peculiar circumstances of the case at hand.

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[309] Ibid.
[310] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) paras 11, 41; *Steenkamp NO* (note 209 above) paras 39, 42 and 46; Geo Quinot *State Commercial Activity: A Legal Framework* (2009) 171 – 173. See also *Fose* (note 214 above) para 72.
[311] Cora Hoexter *The Future of Judicial Review in South African Administrative Law* (2000) 117 SALJ 484, 502 – 505.
[312] Ibid 503.
[313] Ibid; Quinot (note 310 above) 241.
[314] *Joseph v City of Johannesburg* 2010 (4) SA 555 (CC) para 29; Quinot (note 310 above) 240.
[315] Ibid.
[316] Ibid.

3.8 CONCLUSION

In light of the *AllPay* rulings, it is expected that the jurisprudence surrounding jurisdictional facts in the context of public procurement will coalesce around three key principles. First, compliance with jurisdictional requirements has intrinsic value. Absent compliance with the jurisdictional requirements for the award of a tender, a procuring entity lacks authority to make the award. Compliance with jurisdictional requirements is fundamental to the maintenance of integrity in the bidding process, as well as the promotion of equal treatment and optimality.[317]

Secondly, not every instance of non-compliance is legally significant. A contextual reading of the empowering provision is required to understand it purpose and materiality in relation to the bid document as a whole. Furthermore, the deviation itself must be material. A deviation will not be regarded as material if its underlying purpose was fulfilled despite the deviation. If a deviation is found to be material, the courts must declare a tender award flowing from a material deviation 'constitutionally invalid'.

Thirdly, the corrective principle of administrative law ensures vindication of the rule of law, correction of the administratively unfair decision and advancement of an efficient and effective public administration. But the corrective principle does not necessarily require that the invalid act be declared a nullity in all instances. Indeed, as the Constitutional Court has recently observed, there is no preordained consequence that must flow from a declaration of constitutional invalidity.[318] Multiple factors have to be considered in arriving at a remedy that is 'just and equitable'. Earlier jurisprudence (notably that arising from the ruling of the SCA in *Quakeni Municipality*[319]) that suggested that the consequences of invalidity cannot vary from case to case, must be revisited in the light of the *AllPay* judgments.

Finally, this chapter dealt with bid requirements as procedural jurisdictional facts, but they might also be regarded as substantive jurisdictional facts as well. For example, a bid provision might require bidders to prove 'to the satisfaction' of a procuring official that they have a sufficient level of financial capacity to participate in a bid. A procuring entity would have jurisdiction to make the award to the successful bidder only if the procuring official is so satisfied.[320] A bid requirement might also be expressed as a non-jurisdictional fact ie one that does not affect the 'jurisdiction' of the procuring entity, but which relates to a material aspect

[317] *AllPay 1* (note 2 above) para 27.
[318] *Corruption Watch* (note 221 above) para 68.
[319] *Quakeni* (note 17 above).
[320] See Plasket (note 54 above) for a discussion on subjectively worded jurisdictional facts.

that must be taken into account in the course of a bid evaluation.[321] Much depends on the wording of the RFP.

[321] *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* [2018] ZAGPJHC 476 (22 June 2018).

CHAPTER 4

CONDONATION, CORRECTION AND WAIVER

4.1 INTRODUCTION

Our courts have been rather reluctant to permit procuring entities to condone non-compliance with bid formalities, except in a few limited instances.[1] In this chapter, I argue in favour of a more general right to condone non-compliance with bid requirements. It is my contention that the principle of proportionality and the rule against 'fettering' require us to rethink the rigid position adopted by our courts in relation to condonation. I also contend that the right to condone would not undermine the integrity of a bidding process, provided that the prevailing circumstances justify condonation and that the power is properly exercised.

I begin with two observations that were made in previous chapters, but which bear repeating here. First, as highlighted in Chapter 1, the administration of justice often requires a careful balancing of competing ideals. Freund and Price observe that the rule of law is a 'complex political ideal [that] comprises several principles, which may be satisfied to a greater or lesser degree, and which may on occasion pull in different directions'.[2] The concept of 'legality' for instance, does not only mean one thing: it requires scrupulous adherence to legislative requirements,[3] but does not permit administrators to apply the law legalistically, and without regard to the broader principles of proportionality and rationality.[4] There are tensions (some may even say contradictions) in administrative law that cannot be denied, wished away or resolved completely but which, 'if properly understood, can be sensibly managed'.[5]

Secondly, the 'public interest' is a multi-dimensional concept.[6] Depending on the context, certain factors considered to be in the public interest may be emphasized over other

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[1] *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA) (hereafter *Pepper Bay*); *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA) (hereafter *Moroka*).

[2] Daniel Freund & Alistair Price 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *SALJ* 184.

[3] *Choice Decisions v MEC Department of Development, Planning and local Government, Gauteng* 2003 (6) SA 308 (W) (hereafter *Choice Decisions*) para 12.

[4] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 319; *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) (hereafter *Metro Projects*) para 13.

[5] Freund & Price (note 2 above) 186.

[6] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) para 33. This case is referred to throughout this thesis as *AllPay 2* or the 'remedy' judgment to distinguish it from *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) which is referred to as '*AllPay 1*' or the 'merits judgment'.

factors that are also in the public interest. This does not involve a choice between right and wrong, but rather a choice 'between right and right'.[7]

Prior to its ruling in *Dr J S Moroka Municipality v Betram (Pty) Ltd*, the SCA adopted a relatively flexible stance on the question of non-compliance with bid requirements.[8] However, its stance has been anything but consistent. Indeed, the SCA has offered *different* answers to the question whether public bodies may condone non-compliance with bid requirements. In *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo*[9] the SCA said 'yes', in *Moroka*[10] it said 'no' and in *National Lotteries Board v South African Education and Environment Project*, the court said 'maybe'.[11] In *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd*, the court avoided the question, but cautioned against invalidating tenders for minor deviations that do not materially alter the essential requirements of the tender.[12] In *WDR Earthmoving Enterprises v Joe Gcabi Municipality*, the SCA seemed to add a further dimension.[13] Not only did the SCA endorse the stance taken in *Moroka*, [14] but it went further by adding a *caveat* to the effect that that the purposive approach outlined in *AllPay 1*[15] did not apply in respect of non-compliance with peremptory requirements.[16] In Chapter 2, I argued that this places an unnecessary and unjustified limitation on the purposive approach, which is inconsistent with the ruling in *AllPay 1*.

[7] Albie Sachs *We, the People: Insights of an Activist Judge* (2016) 165.
[8] Compare the rulings of the SCA in *Moroka* and *Pepper Bay* (note 1 above) with *Metro Projects* (note 4 above); *Chairperson: Standing Tender Committee v JFE Sapela Electronics* (Pty) Ltd [2005] 4 All SA 487 (SCA) (hereafter *JFE Sapela*); *Minister of Social Development v Phoenix Cash & Carry – Pmb* [2007] 3 All SA 115 (SCA) (hereafter *Phoenix Cash & Carry*); *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) (hereafter *Millennium Waste*) and *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) (hereafter *National Lotteries Board*). See also P Bolton 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PER/PELJ* 2340, 2342.
[9] *Millennium Waste* (note 8 above).
[10] *Moroka* (note 1 above).
[11] *National Lotteries Board* (note 8 above). In this instance the court held at para 11 that if the purpose of the applicable guidelines was achieved 'then insignificant or technical instances of non-compliance should generally be condoned'. See also para 28.
[12] *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] 2 All SA 644 (SCA) (hereafter *Overstrand*) para 50.
[13] *WDR Earthmoving Enterprises v Joe Gcabi Municipality* [2018] ZASCA 72 (30 May 2018) (hereafter *WDR Earthmoving*).
[14] Ibid paras 30 – 31, 34 and 40. See also *Mobile Telephone Networks (Pty) Ltd v Transnet SOC Ltd* [2018] ZAGPJHC (18 June 2018) (hereafter *MTN*) paras 14 – 15.
[15] *AllPay 1* (note 6 above).
[16] *WDR Earthmoving* (note 13 above) para 40.

In *Moroka*, the court stated emphatically that an organ of state has no power to condone non-compliance with bid requirements unless it was specifically given such powers in the applicable regulatory framework.[17] In this instance, a bidder was disqualified for failing to provide an original tax clearance certificate. The bidder had provided a copy instead of an original. *Moroka* should, of course, be understood within its own peculiar factual setting, but the principles espoused in the judgment apply to all instances involving non-compliance with mandatory bid conditions.[18] To be clear: *Moroka* did not deny administrators the right to condone non-compliance. Rather, the court held that administrators may exercise such right only if they have clear legislative authority to do so.[19]

I am of the view that the question of condonation should be dealt with as the second step in a two-step exercise. The first step is to determine whether a bidder complied with bid requirements, either completely or substantively. A bidder that is substantively compliant, having satisfied the underlying purpose of the bid requirements, must be regarded as sufficiently compliant — in which case the question of condonation need not arise.[20] The question arises only if the bidder is found to be non-compliant. At the second step, a public authority must determine whether it is legally competent to condone the non-compliance.

In Chapter 2, I criticized the formalistic manner in which *Moroka* determined that the bidder was non-compliant during the first step. I argued that had the SCA adopted a purposive approach as outlined in *AllPay 1*, it might well have concluded that the bidder was sufficiently compliant.[21] In other words, the inquiry need not have passed the first step. In this chapter, my critique of *Moroka* focusses on how the question of condonation was dealt with during the second step. I argue that the even if the bidder was found to be non-compliant during the first step, the non-compliance was capable of being condoned during the second step. It is my contention that the right to condone should be upheld when disqualification of a non-compliant bidder would amount to a disproportionate response. The principle of proportionality informs good primary decision-making at administrative level, and serves as a restraint on

[17] *Moroka* (note 1 above) paras 12 – 13.
[18] Bolton (note 8 above) 2340.
[19] *Moroka* (note 1 above) para 12.
[20] *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) para 34.
[21] Ironically, the judgment in *Moroka* was handed down on the same day as the Constitutional Court's judgment in *AllPay 1*. Thus, at the time *Moroka* was decided, the SCA did not have the benefit of the Constitutional Court's reasoning in *AllPay 1*.

administrative excesses. Indeed, administrators are not only entitled but also *obliged* to avoid decisions that would amount to a disproportionate response.

4.2 CONDONATION AND WAIVER

The concepts of condonation and waiver are interrelated. Indeed, in *Moroka* the SCA used the concepts of condonation and waiver somewhat interchangeably.[22] The similarities between the two concepts are not difficult to find. Both condonation and waiver involve unilateral acts that do not require consensus between parties in order to have legal effect.[23] A bidder does not specifically have to request condonation or waiver for such acts to have force of law. However, condonation involves an act of 'pardoning' or overlooking an act of non-compliance, whereas waiver involves a decision not to enforce a particular right, remedy, privilege, power, interest or benefit.[24] Furthermore, condonation might result in a bidder being afforded an opportunity to correct a minor defect, such as the provision of an outstanding document, or a missing signature. [25] A refusal on the part of a bidder to correct a defect when required to do so, might lead to disqualification.[26]

But certain defects are incapable of rectification, such as an instance where a bidder lacks minimum experience or turnover. RFPs are sometimes drafted with inadequate information at hand, and procuring entities do not always appreciate what may reasonably be expected from bidders when bids are issued to market.[27] The difficulties that bidders encounter in meeting the stated criteria often come to light only during the stage of bid evaluation. The question whether compliance with an unfulfilled requirement may nevertheless be waived, is considered below.[28]

4.2.1 **Condonation**

(a) Proportionality

The principle of proportionality 'captures the [common-sense notion] that when the government acts, the means it chooses should be well-adapted to achieve the ends it is

[22] *Moroka* (note 1 above) para 18.
[23] *Bester v Sol Plaatje Municipality* [2004] 2 All SA 31 (NC) (hereafter *Bester*) para 14.4.
[24] *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (A) (hereafter *Mothupi*) para 15.
[25] See for example, article 43(1)(*b*) of the UNCITRAL Model Law on Public Procurement; article14.405 of the US Federal Acquisition Regulations, last accessed from https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf on 3 June 2018.
[26] Omer Dekel 'Improving Public Procurement Efficiency — Applying a Compliance Criterion' (2015) 3 *Public Procurement Law Review* 64.
[27] Ibid 68.
[28] Ibid.

pursuing'.[29] In essence, proportionality requires a reasonable relation between a decision, its objectives and the circumstances of a given case.[30] It finds application particularly in a constitutional-law context, when courts have to determine whether a limitation placed on a constitutional right by a law of general application is reasonable and justifiable in an open and democratic society.[31] This exercise involves a balancing of competing interests taking into account a range of factors, such as the nature of the right, the importance of the purpose of the limitation, the relationship between the limitation and its purpose and whether less restrictive means were available to achieve the purpose.[32]

The concept of proportionality is often explained by means of the somewhat overworked idiom of using a sledgehammer to crack a nut. However, as Sachs explains, actual cases seldom involve the use of the proverbial 'sledgehammer', but rather 'intricately mixed bags of competing claims'.[33] Proportionality does not apply only in cases that involve egregious overreaching on the part of the state, but also in cases where the choice between legitimate and illegitimate means is less clear cut. Sachs explains further:

> As I saw it, we were not so much dealing with determining the cut-off point between right and wrong, as handling the tension between right and right. In a modern pluralistic society there are divergent groups that all have genuine claims under the Constitution. What happens when these legitimate claims collide? That is where we have to harmonise and balance them out as well as we can, guided by the text, context and values of the Constitution. And this is where proportionality comes in.[34]

A proportionality analysis is highly contextual. The peculiar factual circumstances of each matter, the extent to which fundamental rights are affected and the public interest are all

[29] Jud Mathews 'Proportionality Review in Administrative Law' last accessed from https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_mathews_proportionality.pdf on 22 April 2017. For a discussion on the doctrine of proportionality in European law, see Harry Woolf, Jeffery Jowell, Catherine Donnelly & Ivan Hare *De Smith's Judicial Review of Administrative Action* 8 ed (2018) 634 – 638; J R de Ville 'Proportionality as a Requirement of Legality in Administrative Law in terms of the New Constitution' (1994) 9 *SA Public Law* 360.
[30] *S v Makwanyane* 1995 (3) SA 391 (CC) para 102; *S v Bhulwana* 1996 (1) SA 388 (CC) para 18; Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2015) 163-164; Yvonne Burns *Administrative Law* 4 ed (2013) 39.
[31] Ibid.
[32] Section 36(1) of the Constitution.
[33] Sachs (note 7 above) 165.
[34] Ibid.

key ingredients of the balancing exercise.[35] As such, '[a] degree of weighing and of making a value judgment is inevitable'.[36]

Proportionality analysis also finds application in administrative law review where it is used to determine whether the administration infringed the rights of subjects more than is necessary in the circumstances.[37] Although not specifically listed as a ground of review in s 6 of the PAJA, proportionality plays an important role in the evaluation of administrative action on grounds of reasonableness. [38] It allows a reviewing court to look beyond questions of procedural propriety, to inquire into the substance of a decision.[39] De Smith explains that proportionality is an effective tool for establishing (a) a test of fair balance (this involves a determination whether *disproportionate weight* was attached to one or other consideration) and (b) a structured test to determine whether interference with a fundamental right was justified (this involves a determination as to whether there was a disproportionate *interference* with a person's rights).[40]

The factors used to determine unreasonableness, as outlined in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[41] highlight the importance of proportionality as an analytical tool. These factors include the nature of the decision; the identity and expertise of the decision-maker; the range of factors relevant to the decision; the reasons given for the decision; the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.[42] Factors such as 'the nature of the competing interests involved' and 'the impact of the decision on the lives and well-being of those affected' strongly suggest that a proportionality-based inquiry is required.[43] Ultimately, the test for proportionality is a flexible one, taking into account the peculiar facts and circumstances of

[35] Ibid 166.
[36] Ibid.
[37] De Ville (note 29 above) 361.
[38] Burns (note 28 above) 37; Hoexter (note 4 above) 343 – 346 explains that rationality and proportionality form the twin pillars of review for reasonableness.
[39] *Roman v Williams NO* 1998 (1) SA 270 (C); Burns (note 30 above) 38 and 444.
[40] De Smith (note 29 above) 635 – 636. But for a different approach, see *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) (hereafter *Clairison's*) para 20; *South African National Road Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA) (hereafter *SANRAL*) paras 18 – 28.
[41] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) (hereafter *Bato Star*).
[42] Ibid para 45.
[43] Hoexter (note 4 above) 350; Burns (note 30 above) 444. See also the minority judgment of Mokgoro J and Sachs J in *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (9) BCLR 891 (CC) (hereafter *Bel Porto*) paras 164 – 166; *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) (hereafter *Peter Klein*) para 36; *Schoombee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T) 885; *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk) paras 14 – 15.

each case and 'bearing in mind the problems of the country, the complexities of government and the need for officials to exercise a genuine discretion in the fulfillment of their functions'.[44]

The context-sensitive nature of the proportionality exercise can be illustrated with reference to the English case of *J B Leadbitter & Co Ltd v Devon County Council.*[45] In this instance a bidder submitted its tender electronically to a secure portal, but discovered shortly before the closing time that certain mandatory case studies had not been attached. Its subsequent attempts to upload the case studies before the closing time proved unsuccessful, since the electronic system had been configured to allow for a 'once-only' opportunity to submit bids. This meant that bidders were effectively locked out of the system once they had submitted their bids. The local authority took the view that 'a deadline is a deadline' and disqualified the bid on the grounds that all necessary documentation had not been received before the deadline. [46] A proportionality-based challenge against this decision failed on the basis that the local authority had acted within the margin of discretion afforded contracting authorities.[47] Bidders were forewarned about the 'once-only' opportunity to submit bids as well as the importance of checking whether all documentation was in order before submission.[48] The court reasoned that

> there may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of the tender, most obviously where it results from fault on the part of the procuring entity. But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer.[49]

(b) Balance, necessity and suitability

According to de Smith, the core elements of proportionality are fair balance, necessity and suitability.[50] The concept of balance requires proportionality in the narrow sense, namely, a balance between the means applied and the ends sought to be achieved.[51] The injury to the rights of the individual or the broader public interest caused by the administrative decision in

[44] *Bel Porto* (note 43 above) para 164.
[45] *J B Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch) (hereafter *JB Leadbitter*).
[46] Ibid para 66.
[47] For the full reasoning of the court in *J B Leadbitter* (note 43 above) see paras 48 – 69.
[48] Ibid.
[49] Ibid para 68.
[50] De Smith (note 29 above) 637; Hoexter (note 4 above) 344; Burns (note 30 above) 444; De Ville (note 29 above) 365 – 367; *Roman v Williams* (note 39 above) para 12.
[51] De Smith (note 29 above) 636.

question should not be out of proportion to the benefits of the decision.[52] The concept of necessity requires that the least harmful means available to achieve a stated objective be chosen.[53] This requires that 'the extent to which administrative action may infringe the rights of the individual, should not exceed the degree necessary to serve the public interest'.[54] The concept of suitability requires that methods that are appropriate to the facts and circumstances of the case be employed.[55] Its purpose is to 'encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end'.[56]

Had *Moroka* [57] been decided on the basis of proportionality, the court might well have held that the decision to disqualify the bidder did not meet the requirements of balance, necessity and suitability. To explain this point further, it is necessary to highlight two key features of the applicable regulatory framework relating to the production of tax clearance certificates. First, the PPPFA regulations applicable at the time did not specifically require bidders to produce an original tax clearance certificate. The regulations stipulated that no tender could be awarded to 'any person whose tax matters have not been declared by the South African Revenue Service to be in order'.[58] Secondly, the regulatory framework actually placed an *obligation* on local authorities to take proactive steps to ascertain a tenderer's tax status. The Municipal Supply Chain Regulations specifically require a municipality to check with SARS whether a bidder's tax affairs are in order before making an award. [59] The regulations further provide that if SARS does not respond within seven days, such person's tax affairs may be presumed to be in order. Therefore, not only was the production of a tax clearance certificate not a regulatory requirement, but the municipality actually had a positive obligation to clear the bidder's tax status with the relevant tax authorities.

However, the SCA reasoned that although the production of an original tax clearance certificate was not specifically required by legislation, 'it was for the municipality, and not the court to decide what should be a prerequisite for a valid tender'.[60] According to Leach JA,

[52] Ibid 638 – 639; Burns (note 30 above) 40.
[53] De Ville (note 29 above) 366.
[54] Burns (note 30 above) 38.
[55] Ibid 40.
[56] Ibid.
[57] *Moroka* (note 1 above).
[58] Regulation 14 of the Preferential Procurement Policy Regulations, published in GN 502 *GG* 9544 of 8 June 2011.
[59] Regulation 43 of the Municipal Supply Chain Regulations published in GN 868 *GG* 27636 of 30 May 2005.
[60] *Moroka* (note 9 above) para 10.

failure to comply with the conditions set by the municipality would result in disqualification, since the bid would not have met the requirements of an 'acceptable tender' as defined in the PPPFA.[61] The court reasoned that condonation of an 'unacceptable' tender would also offend the principle of legality, since the PPPFA contemplated that only 'acceptable tenders' would be eligible for evaluation.[62] In essence, *Moroka* held that it was the prerogative of the procuring entity to decide whether it required a particular bid condition to be met.

The only exception permitted was if the bid condition in question was 'immaterial, unreasonable or unconstitutional'.[63] But the exception is anomalous, for it is by no means clear how a procuring entity should determine that a bid condition set by itself is 'immaterial' and 'unreasonable', let alone 'unconstitutional'.

It is not disputed that procuring entities have the prerogative both to determine their own bid conditions as well as the manner in which such conditions are to be evaluated.[64] But that is no answer to the proportionality argument. If one accepts that the municipality should have clarified the tax status of the bidder with the relevant authorities, then it follows that the bidder's disqualification was neither 'necessary' nor 'suitable', as there were less harmful means readily available to the administrative body to ensure that its objective was accomplished. A decision to disqualify a bidder is disproportionate when the procuring entity fails to obtain clarification regarding an anomaly '[that] probably had a simple explanation and that was capable of being easily resolved'.[65]

The SCA opined that the secrecy provisions of the Income tax Act 58 of 1962 would have made it very difficult for the municipality to investigate the tax affairs of the bidder.[66] But the court also acknowledged that the bidder could have provided its consent to any information being made available under s 4(2B) of the Act.[67] That is precisely the point! The municipality could simply have sought the consent of the bidder to obtain its information from SARS before disqualifying it in such a perfunctory manner.[68] There was no reason to believe that the bidder's

[61] Section 1 of the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA) defines an 'acceptable tender' as 'a tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.
[62] *Moroka* (note 1 above) para 18. The court based its ruling on *JFE Sapela* (note 8 above) para 11.
[63] *Moroka* (note 1 above) para 10. See also *Millennium Waste* (note 8 above) para 19; *Westinghouse v Eskom* 2016 (3) SA 1 (SCA) para 36.
[64] *SANRAL* (note 40 above) paras 18 – 28.
[65] *J B Leadbitter* (note 45 above) para 52.
[66] *Moroka* (note 1 above) para 10.
[67] Ibid.
[68] Bolton (note 8 above) 2341; *Imvusa Trading 134 CC v Dr Ruth Mompati District Municipality* [2008] ZANWHC 46 (20 November 2008) para 14.

tax affairs were not in order or that the copy of the tax clearance certificate that had been provided had been falsified. What was lacking was exact compliance with the type of proof required. The municipality, having chosen not to make the necessary enquiries at SARS as it was required to do, instead awarded the tender to a bidder that was more expensive than the applicant.

Furthermore, condonation or waiver of the requirement to produce the original tax clearance certificate would not have afforded the bidder an unfair opportunity to improve its overall score or to improve on the substance of its bid.[69] The requirement of 'balance' demanded careful consideration of the impact that the decision to disqualify would have had on the broader public interest. The public interest in promoting fair tendering practices and in achieving fair market value ought to have been afforded greater emphasis than was the case.

Moroka invoked a rather truncated view of the legality principle. As indicated, the court held that condonation would offend against the legality principle since the PPPFA contemplated that only 'acceptable tenders' would be eligible for evaluation. But the notion of what constitutes an 'acceptable tender' should not be defined too narrowly.[70] More importantly, the legality principle requires full recognition of *all* applicable legal principles, including the principle of proportionality. Arguably, a failure to give heed to broader constitutional and legal principles might itself offend the principle of legality. Bolton argues that the definition of 'acceptable tender' in the PPPFA, properly interpreted in the light of s 217(1), allows for flexibility when evaluating compliance with bid requirements, even when the requirements in question are *not* 'immaterial, unreasonable, or unconstitutional'.[71] I support the argument and would add that the absence of an express right to condone non-compliance does not entitle administrators to disregard the impact that their decisions might have on the individuals concerned or the broader public interest.

(c) A presumption of disqualification

Dekel highlights the tension that often exists between the demands of compliance and equal treatment of bidders on the one hand and economic efficiency on the other.[72] He argues that an overly strict approach 'can frequently lead to the endorsement of distorted outcomes that run

[69] Bolton (note 8 above) 2341.
[70] *Millennium Waste* (note 8 above) para 19.
[71] Bolton (note 8 above) 2342.
[72] Omer Dekel 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237.

counter to basic intuitions of justice and common sense and to the endorsement of outcomes that will inevitably detract from the trust placed in the public tender system by both government and the public at large'.[73] Instead, he calls for the application of a 'disqualification presumption'.[74] The starting point of this presumption is that a non-compliant bid ought to be disqualified if condonation or rectification of the defective bid would offend against the equality principle or other important public procurement values.[75] However, 'weighty considerations' may justify a departure from this approach.[76] The presumption of disqualification has a built-in bias in favour of the equality principle, and a heavy onus is placed on procuring entities to justify their preference for other, efficiency-oriented outcomes.

The factors that might influence this process of decision-making include the following: whether rectification or condonation might give the non-compliant bidder an unfair and material advantage over other bidders; the circumstances that led to the non-compliance; the efficiency implications of disqualifying the bid or accepting it; and how the decision is likely to affect the public's faith in public tendering process.[77] The greater the violation of the equality principle and/or the smaller the economic harm that might arise from rejecting the offer, the greater the justification for strict compliance.[78] Conversely, the slighter the violation of the equality principle and 'the more significant the economic gap between the faulty offer and the next best offer, the greater the justification for overlooking the flaw'.[79]

Dekel's 'disqualification presumption' amounts to a proportionality-based approach. It involves a balancing exercise in which the weighting is loaded in favour of compliance and equal treatment of bidders, whilst also recognizing that circumstances may arise that may tip the balance in favour of efficiency-driven outcomes. Dekel's approach regarding so-called 'correctable defects' is also discussed below.

[73] Ibid 265.
[74] Ibid.
[75] Ibid 237, 266.
[76] Ibid.
[77] Ibid 260.
[78] Ibid.
[79] Ibid.

(d) Corruption and condonation

It is widely accepted that the South African public procurement system is 'notoriously prone to corruption'.[80] The question that arises is whether it is at all desirable to grant discretion to procurement officials to condone non-compliance in a context where the opportunity for malfeasance 'lurks in every dark corner'.[81] It could be argued that the interests of legality, predictability, consistency and ultimately, integrity in procurement transactions is best served by ensuring an unwavering and unyielding application of bid requirements and procurement rules. A procurement system that 'would run itself with a minimum recourse to the exercise of discretion' is sometimes held up as an antidote to corrupt practices.[82] This is probably the reason why our courts have some affinity for *Moroka*-type reasoning.[83]

Also, there are significant evidentiary problems with proving the existence of corruption in a public tender process.[84] It is much easier to establish that bidders were treated unequally or that bid requirements were not adhered to.[85] Unequal treatment of bidders and non-compliance with bid requirements, is often (though not invariably) symptomatic of corrupt practices.[86] Courts adopt a rigid approach 'not because they prefer equality of opportunity to economic efficiency as an objective of the public tender mechanism, but because such an approach is the only way to fight corruption, by widening the net in which corrupt offerors or [public officials] may be caught.'[87]

But discretionary powers are ubiquitous in an administrative state and a classic Diceyan mistrust of discretionary power is simply incompatible with modern administration.[88] The correct approach is not to wish away discretionary powers, but rather to ask how such powers

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[80] *RodPaul Construction CC v Ethekwini Municipality* [2014] ZAKZDHC 18 (2 June 2014) (hereafter *RodPaul Construction*) para 17. See also *Phoenix Cash & Carry* (note 8 above) para 1; *Superintendent-General: North West Department of Education v African Paper Products (Pty) Ltd* [2014] ZANWHC 29 (24 October 2014) (hereafter *African Paper Products*) para 57; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) (hereafter *Goodman Brothers*) para 42. For further analysis see Sope Williams 'Public Procurement and Corruption: The South African Response' 2007 (124) *SALJ* 339.
[81] *Goodman Brothers* (note 80 above) para 42.
[82] *RodPaul Construction* (note 80 above) para 70.
[83] See for example *WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality* [2017] ZAECGHC 45 (17 March 2017) confirmed on appeal in *WDR Earthmoving* (note 13 above); *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform* [2016] 3 All SA 686 (WCC); *Asla Construction (Pty) Ltd v The Head of the Department of Rural Development and Reform* [2016] 3 All SA 686 (WCC); *African Paper Products* (note 78 above); *B Braun Medical (Pty) Ltd v The Director General: National Treasury* [2016] ZAGPPHC 1114 (3 November 2016).
[84] Dekel (note 72 above) 263.
[85] Ibid.
[86] *AllPay* 1 (note 1 above) para 27.
[87] Dekel (note 72 above) 264.
[88] Wade & Forsyth *Administrative Law* 11 ed (2014) 286.

should be defined (widely or narrowly) and more importantly, what controls or limits are to be placed on the exercise of such powers.[89] Wade and Forsyth explain that the exercise of discretion is bound by the rule of reason[90] that demands of public officials that they exercise their powers in good faith and in the public interest.[91] The PAJA also makes it clear that abuse of discretion, such as acting 'for an ulterior purpose or motive' or 'in bad faith' are self-standing grounds of review.[92]

An overly-rigid approach that seeks to remove discretion from the public procurement process is hardly the answer to the problem of corruption. The current regulatory framework governing public procurement, couched as it is in peremptory language, already allows for very little discretion. Yet, the absence of discretion has done very little to discourage corrupt practices. On the contrary, an overly-rigid approach could actually facilitate corrupt practices by providing the perfect subterfuge for corrupt officials wishing to eliminate deserving but unwanted bidders for minor instances of non-compliance.[93]

Nevertheless, the abuse of discretionary powers remains an ever-present danger. If appeals to good conscience and for administrators to act in the public interest prove to be an inadequate safeguard against maladministration, perhaps adverse costs orders will have the desired effect. Our courts have expressed a growing appetite for imposing adverse costs orders on public officials in their personal capacity in cases involving gross dereliction of duty.[94] This should help to focus the minds of delinquent public officials on the importance of performing their functions in good faith and in the public interest.

[89] Ibid 286 – 287.
[90] Ibid 293 ─ 295.
[91] Ibid 286, 297.
[92] Section 6(2)(*d*)(*ii*) and (*v*) of the PAJA.
[93] *Phoenix Cash & Carry* (note 8 above) para 2.
[94] *South African Social Security Agency v Minister of Social Development* [2018] ZACC 26 (30 August 2018) para 38; *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) para 72; *Black Sash Trust v Minister of Social Development* 2017 (9) BCLR 1089 paras 5 – 9; *Black Sash Trust v Minister of Social Development* [2018] ZACC 36 (27 September 2018) paras 10 – 16; *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 54; *Mogale City Municipality v Fidelity Security Services (Pty) Ltd* 2015 (5) SA 590 (SCA) para 21; *Solidarity v South African Broadcasting Corporation* 2016 (6) SA 73 (LC) paras 74 – 78; *Democratic Alliance v SABC; Democratic Alliance v Motsoeneng* [2017] 1 All SA 530 (WCC) para 223; *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Municipality* [2016] ZAKZDHC 46 (8 December 2016) para 61; *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Municipality* [2017] ZAKZDHC 15 (5 April 2017) para 96. See also Clive Plasket 'Protecting the Public Purse: Appropriate Relief and Costs Orders against Officials' 2000 (117) *SALJ* 151.

4.2.2 **Correction**

Baxter states that 'in special circumstances greater good might be achieved by overlooking technical defects'.[95] But what might such 'special circumstances' entail? The answer suggested by the UNCITRAL Model Law on Public Procurement is that correction of defective bids may take place if (a) the bid contains minor deviations that do not materially alter or depart from the bid requirements and (b) the bid contains 'errors and oversights that can be corrected without touching on the substance of the tender'.[96] The Model Law thus allows for correction of immaterial defects that do not relate to substantive aspects of the bid, such as functionality, price and preference.

The CIDB's Standard Conditions of Tender ('the Standard Conditions') adopts a similar stance.[97] It regards a responsive tender as 'one that conforms to all the terms, conditions and specifications of the tender documents without material deviation or qualification'.[98] By implication, an immaterial deviation or qualification would not result in a bid being regarded as non-responsive. A material deviation or qualification is defined as one which, in the employer's opinion, would (a) detrimentally affect the scope, quality or performance of the works, services or supply identified in the scope of works (b) significantly change the employer's or the tenderer's risks and responsibilities under the contract, or (c) affect the competitive position of other tenderers presenting responsive tenders if it were to be rectified.[99] Once again, the implication is that a defect that is capable of correction without affecting the competitive position of other bidders would not be regarded as material. The Standard further provides that employers are to 'reject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation'.[100] Clearly, a non-responsive tender cannot be corrected. But equally, a bid that contains immaterial defects may be corrected.

Unfortunately, this principle was not applied in *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality.*[101] The case involved a construction-related tender

[95] Lawrence Baxter *Administrative Law* (1984) 446.
[96] Article 43(1) of the UNCITRAL Model Law (note 25 above). See Appendix 1 for a critique of the Model Law's provisions pertaining to defective bids.
[97] Clause F.3.8.2 of the CIDB Standard Conditions of Tender. Last accessed from http://www.cidb.org.za/publications/Documents/StandardforUniformityinContructionProcurement20-20July202015.pdf on 3 June 2018.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality* [2010] JOL 26195 (ECM) (hereafter *Sizabonke Civils*).

in which a bidder was disqualified for what was arguably a minor defect, namely, failure to provide a certified copy of the entity's registration documents as well as certified copies of the identity documents of its owners. The municipality argued that the submission of certified copies of the company registration documents and identity documents was important in order to combat fraud.[102] It need hardly be mentioned that combatting fraud and corruption in tender processes is an important objective, but the issue that required consideration was whether the failure to submit the certified copies justified outright disqualification.

In this instance the RFP actually allowed the municipality to request any outstanding material from bidders 'for the purpose of full and fair risk assessment'.[103] On the face of it, this provision allowed the procuring entity to obtain the outstanding certified copies from the bidder. Nonetheless, the court held that the municipality was correct not to request the certified copies, as it would have advantaged the bidder by making its non-responsive bid responsive.[104] The court further held that the tender invitation was lucid and for that reason the municipality was not required to enquire from bidders why they had not submitted certified documentation.[105] The principle that organs of state ought not to be saddled with the responsibility of enquiring from bidders why they had not complied with 'an essential, simple and sufficiently highlighted provision of its conditions of tender', is supported.[106] However, in my view, the court ought first to have considered whether the deviation was 'material', for if it was not then it was capable of being corrected.

Dekel argues that defective bids that contain 'correctable defects' should be allowed to remain in the bid process once the defect has been rectified, but penalized with a reduction in score.[107] A non-compliant bidder will be disqualified only if the bidder refuses to correct the defect.[108] He points out that not all defects may be corrected, hence procuring entities are to state upfront in the RFP those defects that are capable of rectification.

Dekel identifies four categories of 'correctable defects'.[109] First, *defects that do not affect an element of competition among bidders*. Examples include missing signatures, failure to attach proof of business registration and submission of photocopies when originals were

[102] Ibid para 20.
[103] Ibid para 19.
[104] Ibid paras 22 and 28.
[105] Ibid para 28.
[106] Ibid para 29. See further discussion on *Sizabonke Civils* in chapter 6, in relation to procedural fairness.
[107] Dekel (note 26 above).
[108] Ibid 64.
[109] Ibid 66 – 68.

required. Secondly, defects that require the *submission or completion of evidence* confirming the veracity of information already submitted. Bidders could be afforded an opportunity to provide evidence that they were required to submit as part of their bid, subject to the imposition of a penalty. The evidence, though submitted after the closing date, must reflect the situation as at the closing date of the bid. Examples include submission of a professional certificate, proof of prior experience, number of employees and turnover. The third category relates to the *correction of objective information* pertaining to the bidder or the goods or services being procured. The information that may be corrected must be unequivocal and relate to the position that pertained as at the closing date of the bid. Examples include the correction of incomplete or inaccurate information pertaining to the number of employees, turnover, ownership structure and previous experience. The fourth category refers to defective bids where the *correction of the defect cannot affect the bid scoring and compliance can only be achieved in one way*. Examples cited include an instance where bidders were asked to provide insurance on certain terms and conditions and a bidder offers a non-compliant insurance policy, or a situation in which bidders were asked to provide a three-year warranty but a bidder offers only a two-year warranty.

According to Dekel, all four categories share two features. First, the defects can only be corrected in one way and secondly the correction cannot affect the scoring of the bids. Thus no bidder gains an advantage from correcting its bid.[110] Bidders would have an unfair advantage if they were to be afforded an opportunity to correct defects in more than one way or if the correction would help them to improve their scoring. For example, a bidder cannot be allowed to correct its bid price (except for *bona fide* arithmetical or calculation errors) or to correct information pertaining to its goods or services if the correction would affect its scoring or give it an advantage over other bidders.[111]

Dekel argues that this approach helps to promote economic efficiency by ensuring that meritorious but defective bids are not disqualified but rather penalized in points. Officials are given no discretion to deal with defective bids in a manner that is different to that set out in the RFP. Furthermore, the approach also promotes equality by reducing the risk of discriminatory treatment.[112]

But there is a weakness in Dekel's argument. Contrary to what is asserted, the rectification of certain 'correctable defects' *could* result in an improvement in a non-compliant

[110] Ibid 67.
[111] Ibid 67 – 68.
[112] Ibid 71 – 72.

bidder's score. For example, evaluation points are often awarded based on criteria such as the number of employees, annual turnover, previous experience and the like. It is difficult to see how the correction of incomplete or inaccurate information pertaining to such criteria would *not* result in an improvement in a bidder's score. The same could be said regarding the correction of defects that fall into the fourth category. The submission of a defective insurance policy or warranty would usually result in a lowered score, if not outright disqualification, and to allow non-compliant bidders 'a second bite at the cherry' would result in unfairness toward other bidders. Dekel's idea of setting out a list of 'correctable defects' has merit, but the list of defects that he regards as 'correctable' is simply too wide.

4.2.3 **Waiver**

The common-law rule regarding the power of public bodies to waive compliance with statutory enactments can be summarized as follows: where a statutory provision was enacted for the benefit of an individual or body, such benefit may be waived by that body, provided that no public interest is negatively affected thereby.[113] In *Millennium Waste*, the SCA applied the common-law rule somewhat differently to mean that 'our law permits condonation of non-compliance with peremptory requirements in cases where condonation *is not incompatible with the public interest*'.[114] There is a subtle, yet important, distinction between the two approaches. The traditional common-law approach prohibits waiver if any public interest is negatively affected thereby. On the other hand, *Millennium Waste* suggests a broader approach, one which weighs up multiple (and sometimes conflicting) public-interest considerations to determine whether a waiver of requirements would be compatible with the public interest.

Moroka vindicated the traditional common-law approach[115] and rejected the approach followed in *Millennium Waste* as incorrect.[116] *Millennium Waste* could perhaps be criticized for misstating the common-law position, but on a careful reading of the judgment it would appear that Jafta JA (as he then was) actually sought to *develop* the existing common-law position. *Millennium Waste* suggests that our law ought to permit organs of state to waive

[113] *SA Eagle Insurance Co Ltd v Bavuma* [1985] 2 All SA 190 (A) (hereafter *SA Eagle Insurance*)192; *Bester* (note 23 above) para 14.4; *Mothupi* (note 24 above) para 15; *Montagu Springs (Pty) Ltd t/a Avalon Springs Hotel v Liquor Board, Western Cape* [1999] 2 All SA 549 (C) 555 (hereafter *Montagu Springs*); *Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid* [1997] 2 All SA 321 (A) 326 (hereafter *Sitrusbeurs*); *Moroka* (note 1 above) para 18. For academic analysis see J R de Ville *Judicial Review of Administrative Action in South Africa* (2005) 97 – 99 and 441– 443.
[114] *Millennium Waste* (note 8 above) para 17 (own emphasis).
[115] As enunciated in *SA Eagle Insurance* (note 113 above).
[116] *Moroka* (note 1 above) para 18.

compliance or condone non-compliance with mandatory requirements in cases where such steps would *promote* the public interest.

The common-law principle has its origins in the maxim *quilibet potest renuntiare juri pro se introducto* (anyone may renounce a right introduced for his own benefit.)[117] Importantly, the right or provision in question must be '*pro se*', that is to say that it must be introduced for the sole benefit of the public body.[118] It is for this reason that waiver may not take place where the provision was enacted also for the benefit of or in the interests of the public.[119] But the notion of 'sole benefit' is something of an enigma as it is not always clear whether a provision was enacted for the sole benefit of the public body or for the public benefit.[120] By way of example, cases involving waiver of time limits for the institution of claims against public bodies offer differing views on whether the time bar in question exists for the sole benefit of the organ of state or whether it exists also to promote the public interest.[121]

Academic writers have expressed different views on the question whether a public body may waive compliance with statutory or bid requirements. In the context of English law, Arrowsmith argues that procuring entities have a right to waive compliance with bid formalities or to allow for corrections, regardless of whether the right to waive was specifically reserved in the bidding documents.[122] This is based on the notion that formalities are introduced largely for the convenience of the procuring entity. However, 'fundamental formalities' require strict compliance.[123]

De Ville holds the view that waiver of legislative enactments is generally not permissible. He contends that save for a few limited exceptions, notably instances where a public authority is permitted to waive compliance with time limitations in civil proceedings, '[waiver] does not appear to be possible in so far as (other) legislative powers are concerned'.[124] He further argues that where a provision has been enacted for the benefit of the public, the

[117] De Ville (note 113 above) 97, 441. For a discussion of the general requirements of waiver see *Mothupi* (note 24 above) paras 15 – 20.
[118] *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 735, as quoted in *Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs* (note 113) at 327.
[119] De Ville (note 113 above) 97.
[120] Wade & Forsyth (note 88 above) 200.
[121] Compare *Minister van Polisie v Gamble* 1979 (4) SA 759 (A), *Sitrusbeurs* (note 113 above) and *Montagu Springs* (note 111 above).
[122] Sue Arrowsmith *The Law of Public and Utilities Procurement* (2005) paras 7.94 – 7.96, as quoted in *J B Leadbitter* (note 45 above) paras 61 – 62. See also Sue Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and the UK* Vol 1 3 ed (2014) para 7-157.
[123] Ibid.
[124] De Ville (note 113 above) 98.

courts ought not to defer to the interpretation of public bodies as to the scope of their powers.[125] A standard of 'correctness' is required. Anything less than strict compliance would result in procedural unfairness.[126]

Wade and Forsyth are also generally opposed to waiver by public bodies. They argue that 'the primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses'.[127] They view waiver as akin to estoppel in that it cannot be invoked to legitimize administrative action that is *ultra vires.*[128] They explain further that 'where something more than mere procedure or formality is in question, a public authority cannot exercise a dispensing power by waiving compliance with the law. For this would amount to an unauthorized power of legislation'.[129]

Our law follows a more flexible approach. As already indicated, the existing common-law position allows for waiver of legislative requirements enacted solely for the benefit of the public body. This is the case even if the provision in question is worded in peremptory terms.[130]

Arrowsmith's argument suggests that compliance with administrative formalities may be waived with some ease. But this is not entirely compatible with the jurisprudence of the Constitutional Court.[131] As discussed in Chapter 2, *AllPay 1* placed considerable weight on compliance with bid formalities. The court held that bid formalities are enacted to protect the public interest in ensuring fairness, optimality, efficiency and integrity in bid processes. As such, bid formalities do not exist merely for the benefit of a procuring entity and may not readily be waived, regardless of whether they are 'fundamental formalities' or 'administrative formalities'. But *AllPay 1* also made it clear that organs of state are permitted to deviate from bid requirements, provided that prevailing circumstances justify the deviation and that a procedurally fair process is followed.[132] Arrowsmith's more liberal approach may not be entirely compatible with our jurisprudence. But, arguably, if organs of state are permitted to deviate from bid requirements, they should also be permitted to waive compliance with bid requirements when there are compelling reasons to do so.

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[125] Ibid.
[126] Ibid 268.
[127] Wade & Forsyth (note 88 above) 198.
[128] Ibid.
[129] Ibid 201.
[130] *Bester* (note 23 above) para 14.4.
[131] *AllPay 1* (note 6 above) para 23. However in the third edition of Arrowsmith's work (note 122 above) para 7-157, the author adds various qualifications to this position.
[132] Ibid para 81.

It is important not to lose sight of the multi-layered character of the public interest.[133] Undoubtedly, the public has an interest in the uniform application of tender rules since they are enacted to protect the public interest in the integrity of the bid process.[134] But the public also has an interest in the fair-minded and proportionate application of bid requirements. The public interest is often served by requiring strict compliance with bid requirements,[135] but is sometimes best served by *not* insisting on strict compliance and instead requiring condonation or waiver of the unfulfilled requirement.[136]

The common-law rule regarding waiver could possibly be reformulated along the following lines:

(i) As a general rule, if a provision has been enacted for the protection of the public interest, waiver of such provision is not permitted. Strict compliance is required.

(ii) Waiver may, however, be permitted when the public interest would best be served by waiving the requirement of strict compliance.

To illustrate the point, let us assume that all bidders responding to a tender to clean up a spillage of hazardous substances are found to be non-responsive for reason of non-compliance with a requirement to provide a certified copy of a particular certificate. In terms of the existing regulatory framework, the procuring entity would be entitled to cancel the tender on the grounds that 'no acceptable tenders were received'. [137] In fact, in the absence of a right to waive non-compliance with the requirement, the organ of state would have no choice but to cancel the tender and start the entire process afresh. But arguably, the public interest would be better served if the procuring entity were empowered to waive compliance with the stated requirement altogether, alternatively, to afford all bidders who responded to the RFP a fresh opportunity to provide the certificate.[138] In doing so, the procuring entity would, of course, have to follow a procedurally fair process. This would at least entail informing all bidders of the proposed change and inviting representations.

It might be argued that waiver of the requirement would work an injustice toward other potential bidders who may have decided not to respond based on their inability to meet the

[133] *AllPay 2* (note 6 above) para 33.
[134] *AllPay 1* (note 6 above) para 23.
[135] *Choice Decisions* (note 3 above) para 12.
[136] Dekel (note 72 above) 266.
[137] Regulation 13 of the Preferential Procurement Policy Regulations, published in GN 40553 *GG* 10684 of 20 January 2017.
[138] Bolton (note 8 above) 2318.

stated requirement.[139] It might be considered unfair to such bidders if the requirement were to be waived without affording them a fresh opportunity to respond. But proportionality involves weighing a number of competing claims against each other and in the example discussed, the interests of potential bidders would have to be weighed against the interests of the broader society in the urgent removal of hazardous substances. Arguably, the latter interest would outweigh the former.

Finally, a brief comment should be made regarding the approach adopted in *RodPaul Construction CC v Ethekwini Municipality* to the question of waiver. [140] In this instance, the court held that a non-compliant bidder could request a public body to waive strict compliance, but that the public body had no obligation to grant such waiver.[141] However, the public body had discretion to waive strict compliance provided that in doing so it upheld the five principles of public procurement enshrined in s 217(1).[142] The judgment clearly signaled that waiver of bid requirements is legally permissible. However, the court also opined that 'a non-compliant bidder has no right to insist that the authority investigate its grounds for claiming waiver'.[143] The court's characterization of waiver as a mere indulgence to be granted at the behest of a public body is somewhat overstated.[144] A decision to waive or not to waive amounts to the exercise of public power and is reviewable either as administrative action in terms of the PAJA or the principle of legality. In *Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Direkteur Generaal: Handel en Nywerheid*, the question was raised whether waiver amounts to administrative action, but ultimately the question was left unanswered.[145] Arguably, a decision to waive or a refusal to waive a particular bid requirement does constitute an administrative act, reviewable at the instance of an aggrieved party.[146]

[139] *VE Reticulation (Pty) Ltd v Mossel Bay Municipality* [2013] 2 All SA 489 (WCC) paras 38 and 54.
[140] *RodPaul Construction* (note 80 above).
[141] Ibid para 52.
[142] Ibid.
[143] Ibid para 53.
[144] Ibid.
[145] *Sitrusbeurs* (note 113 above) 328.
[146] It is beyond the scope of this thesis to deal extensively with this aspect, save to say that a decision taken by a public body to waive or not to waive compliance would probably meet all seven elements of administrative action identified in *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 33. See also Hoexter (note 4 above) 197.

4.3 **THE RULE AGAINST 'FETTERING'**

The treatment of defective bids must also be viewed in light of the rule against unlawful fettering of discretion. Wade and Forsyth state that '[i]t is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time'.[147] An organ of state cannot bind itself irrevocably (whether by contract or policy) to act in a certain manner in future.[148] However, the fact that a policy or procedure places considerable restriction on the exercise of discretion does not necessarily amount to unlawful fettering, provided that at least some discretion is allowed.[149]

The problem that often arises in administrative decision-making is that policies and procedures are applied inflexibly and by so doing 'one loses the benefits of individualized discretionary decision-making'.[150] Whilst it is generally considered prudent for administrators to develop standard guidelines or evaluation criteria to assist with an evaluation process, particularly when large numbers of applicants are involved,[151] it is impermissible to apply the guidelines, policies or criteria in a rigid, thoughtless or inflexible manner. Administrators must strive to find an appropriate balance between competing factors[152] and to 'be alert to features of the case that justify a departure from a policy or a precedent'.[153]

This principle is well illustrated in *National Lotteries Board v South African Education and Environment Project* in which the SCA overturned a decision taken by the National Lotteries Board to reject applications for funding on the basis of perceived non-compliance with various requirements set out in its guidelines.[154] The board maintained that it was not unreasonable to insist upon strict compliance with requirements that were clear and 'not unduly burdensome'.[155] It also argued that its limited staff could not be expected to investigate every

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[147] Wade & Forsyth (note 88 above) 272; Hoexter (note 4 above) 318 – 319.
[148] Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 86.
[149] *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association* 2017 (3) SA 95 (SCA) para 45; *Clairison's CC* (note 40 above) paras 29 – 32.
[150] Hoexter (note 4 above) 319. See also Wade & Forsyth (note 88 above) 271 – 273.
[151] *Bato Star* (note 41above) para 57; *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 SCA para 17.
[152] Hoexter (note 4 above) 319.
[153] Ibid 320, with reference to *Britten v Pope* 1916 AD 150.
[154] *National Lotteries Board* (note 8 above). The defects in question involved an inconsistent use of the name of one of the applicant organizations in its application form. Furthermore, certain applicants had either submitted unsigned financial statements or financial statements prepared by auditors who were not registered with a professional body.
[155] Ibid para 7.

application that failed to adhere to its requirements, particularly in view of the large number of applications involved.[156]

But the SCA rejected this argument and criticized the board for adopting a 'rigidly formulaic approach to the application of the guidelines, treating them as "peremptory requirements" without exception'.[157] The court acknowledged the tension between the obligation to apply guidelines strictly and consistently on the one hand, and the need to apply guidelines flexibly on the other, but pointed out that this tension is inherent to all situations involving multiple applicants.[158] However, this did not relieve the board of having to consider each case individually and to justify every decision. The court held that the board was not entitled to treat every departure from the literal prescriptions of the guidelines as fatal, since not even deviations from legislative formalities were treated in this manner.[159] The court reiterated the purposive approach to determining the materiality of non-compliance and held that if the purpose of the guidelines was achieved, 'then insignificant or technical instances of non-compliance should generally be condoned'.[160] The court held that a simple telephone call to the organization or its auditors would have resolved any uncertainty regarding the status of the financial statements in question.[161]

According to Bolton, the determination whether an administrative act involves unlawful fettering involves a value judgment in which the public and private interests involved are weighed against each other.[162] The rule against fettering requires that bid criteria not be applied in an all-or-nothing manner, but with due consideration to individual circumstance. The receipt of late tenders is a case in point. The default position in public procurement is that tenders received after the closing date are not considered and are returned unopened to the bidder.[163] This strengthens public confidence in government tendering 'that overrides the short-term gain that might be obtained from legitimizing a particular late offer'.[164] Yet, as noted in

[156] Ibid .
[157] Ibid para 38.
[158] Ibid para 10.
[159] Ibid para 11.
[160] Ibid paras 11 and 28.
[161]Ibid para 23.
[162] Bolton (note 148 above) 92 – 93.
[163] Ibid 135, 148; *Cape Book & College Supplies CC t/a University Bookshop v Northlink TVET College* [2015] ZAWCHC 191 (24 December 2015) para 36. See also art 30(1) of the UNCITRAL Model Law (note 25 above); Dekel (note 72 above) 260 – 262.
[164] Dekel (note 72 above) 261.

the English case of *J B Leadbitter*, late bids may be accepted when there are special and exceptional reasons for accepting a late tender, including fault by the procuring entity. [165]

South African courts have also recognized that, exceptionally, late tenders may be received. In *Claude Neon Ltd v City Council of Germiston* a local authority reneged on its undertaking to inform a supplier when a particular contract was to be put out to tender. The supplier got to know about the fact that the tender had been issued only after the closing date and then submitted its bid for consideration. However, the local authority refused to consider the bid on account of its lateness. The court set aside the decision on the basis that the local authority had created a legitimate expectation that it would inform the supplier when the contract would be put out to tender. [166] In *Tecmed (Pty) Ltd v Eastern Cape Provincial Tender Board*,[167] the successful bidder dispatched its tender timeously by means of a courier service, but it was delivered late as a result of industrial action on the part of airline staff. However, the late delivery had not given the bidder an unfair advantage over its competitors.[168] The SCA set aside the award of tender not on the grounds of its being late *per se*, but rather that the tender board was not informed that the bid had been delivered late and was therefore precluded from exercising its discretion in favour of the bidder.[169] The case law thus suggests that even the sacrosanct principle that late bids are not to be considered should not fetter the discretion of administrators when circumstances require a different response.

As indicated in *Tecmed*, an organ of state can only exercise its right of condonation or waiver if it is aware of the non-compliance. If an organ of state is unaware of the non-compliance, the argument cannot be raised that the organ of state would have condoned the non-compliance had it been aware of it.[170]

Although internal policies do not enjoy the same status as legislation, officials are not at liberty to ignore policies and must act in accordance with them.[171] Nevertheless, officials are

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[165] *J B Leadbitter* (note 45 above) para 61. See also the Irish case of *BAM PPP v National Treasury Management Agency and Ministry for Education and Skills* [2015 No 176 JR] and comment on the case by Eversheds 'Late Tenders: Acceptance of Late Tenders Found to be Lawful' last accessed from http://www.eversheds- sutherland.com/documents/global/ireland/acceptance-of-late-tender-documents.pdf on 17 April 2017.

[166] *Claude Neon Ltd v City Council of Germiston* 1995 (5) BCLR 554 (W) 562.

[167] *Tecmed (Pty) Ltd v Eastern Cape Provincial Tender Board* 2001 (3) SA 735 (SCA) (hereafter *Tecmed*).

[168] Ibid para 7.

[169] Ibid paras 9 – 10.

[170] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) para 87; *Tecmed* (note 167 above) para 9.

[171] *CTP Ltd v Director-General Department of Basic Education* [2018] ZASCA 156 (20 November 2018) para 30.

permitted to deviate from policies if there is a reasonable and properly articulated basis for the deviation.[172]

4.4 CONCLUSION

Administrators often find themselves on the horns of a dilemma when confronted with a defective bid. There is general anxiety about allowing deviations from stated criteria,[173] for administrators are called upon to apply evaluation criteria strictly and uniformly, yet chastised when they do not do so flexibly. But this duality is unavoidable. South African procurement law is prescriptive, yet it does not justify a thoughtless, sterile and overly-rigid application of tender rules. The implication of this is that the law ought not to place a 'rigid doctrinal limitation' on the right to condone non-compliance with bid criteria.[174]

The watchword is proportionality. The principle of reasonableness, which requires that the exercise of power be proportional to the objective sought to be achieved, is incompatible with unyielding formalism. I have argued that disqualification of a defective bid may in certain circumstances amount to a disproportionate response. Much depends on factors such as the nature of the defect, the reasons for the non-compliance, the purpose of the bid requirement, its importance in relation to key objectives of the tender, such as functionality and price, the nature of the public interests involved and the potential for prejudice to other bidders if the defect were to be condoned. Proportionality also plays a key role in enhancing the transparency of both judicial and administrative decision-making.[175]

I have further argued that the right to condone should be exercised, irrespective of whether such right was expressly reserved in the bid documents or regulatory framework. I have also argued that the common-law principle of waiver should be developed to allow for instances where the public interest in waiving compliance outweighs the public interest in strict compliance with the requirement.

Our law is unsettled on the question of condonation[176] and awaits a definitive ruling from the Constitutional Court. In the interim, it would be prudent for public bodies to insert a provision in their bid documents that allows for some degree of discretion to condone non-

[172] Ibid.
[173] *National Lotteries Board* (note 8 above) para 10.
[174] To borrow a phrase used in *Merafong City Local Municipality v Anglogold Ashanti* Ltd 2017 (2) SA 211 (CC) para 30.
[175] Sachs (note 7 above) 166.
[176] *Overstrand* (note 12 above) para 46.

compliance.[177] Naturally, the exercise of such discretion in particular instances should be rational and free of bias.[178]

[177] Bolton (note 8 above) 2343 – 2345.
[178] Ibid.

CHAPTER 5
ESTOPPEL

5.1 INTRODUCTION

It happens, not infrequently, that public contracts are cancelled for some or other legal or procedural infirmity affecting the process leading up to the tender award.[1] For example, a tender might have been awarded to a bidder who should have been disqualified at the outset for reasons of non-compliance with bid requirements. Such 'administratively unjust' contracts are considered to be *ultra vires* and unlawful.[2] The problem that often arises is that contractors alter their position to their prejudice when they receive confirmation from a public body regarding an award of contract. Typically, this involves assuming financial or other obligations that are required to fulfil their contractual commitments. It is not difficult to imagine the kind of prejudice suffered by contractors, as well as their employees, suppliers, financiers and sub-contractors,[3] when a public body decides to resile from an unlawfully awarded contract. [4] The quest to strike a balance in such instances between the interests of legality and the demands of equity poses a 'particularly complex problem' for administrative law.[5] Indeed, the thorny issue of how to approach an act prohibited by law is one that 'troubled even the ancients'.[6]

Broadly speaking, there are two schools of thought on the appropriate legal response to *ultra vires* contracts. The conventional view is that the law does not countenance illegality, hence *ultra vires* contracts have no force or effect. [7] This is justified on the basis of a compelling public interest in upholding legality. In this way, lawfulness in a strict sense trumps everything else.[8] The alternative view sees legality as an important, but by no means the sole or dominant

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[1] See eg *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck).
[2] Quinot adopts the useful phrase 'administratively unjust contract' in reference to contracts awarded in breach of the applicable regulatory framework. See Geo Quinot 'Worse Than Losing A Government Tender: Winning It' (2008) 19 *Stell LR* 101. I use this term in relation to contracts that were erroneously awarded to non-responsive bidders.
[3] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) (hereafter *Millennium Waste*) para 23; *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) (hereafter *Country Cloud*).
[4] *Millennium Waste* (note 3 above) para 23; Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 39.
[5] V M Movshovich *Ultra Vires Representations and Unlawful Decisions in English Administrative Law, in Comparative Perspective* (MLitt thesis, Oxford University, 2006) 16.
[6] See the minority judgment of Willis JA in *Hubbard v Cool Ideas 1186 CC* 2013 (5) SA 112 (SCA) (hereafter *Hubbard*) para 18 and the authorities referred to therein.
[7] *Provincial Government of the Eastern Cape v Contractprops 25 (Pty) Ltd* [2001] 4 All SA 273 (A) (hereafter *Contractprops*) para 10; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) (hereafter *RPM Bricks*) para 16.
[8] Movshovich (note 5 above) 16.

factor in the judicial control of administrative power.[9] This alternative approach – one that appears to have growing appeal amongst legal academics, and to some extent amongst members of the judiciary[10] – calls for a balancing of competing values (such as proportionality, reasonableness, certainty, protection of reliance interests and preventing the abuse of power) in order to determine whether an unlawful act should be upheld despite its illegality.[11] The principle that government (as public guardian) ought not to be bound by the *ultra vires* actions of its agents is both logical and compelling, but 'it should be balanced against the harm to the public when the Government is dishonest, or unconscientious'.[12]

In this chapter I argue that the estoppel doctrine ought to evolve in line with our constitutional ethos. However, so far, the courts have not shown much enthusiasm for developing the doctrine beyond the limitations imposed during the early days of Union Government.[13] This discussion therefore explores alternative paths to estoppel, including the exercise of the courts' remedial powers. Recently, in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd,* the Constitutional Court found that a contract that was entered into in breach of legislative prescripts was invalid, but added a rider that the order of invalidity would not divest the contractor of rights that would have accrued to it under the contract.[14] The *Gijima* judgment thus vindicated the interests of legality whilst also providing a remedy for the contractor. *Gijima* seems to disturb the orthodox view that invalid contracts do not produce any legal consequences for contracting parties. It also suggests that alternative avenues of redress present themselves more readily during the remedy stage of review proceedings, when the courts enjoy wide remedial powers. If this reading of the judgment is correct, the need to develop the doctrine of estoppel may well have diminished.

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[9] Ibid 18.

[10] G M Ferreira '"Estoppel by Representation"' in die Publiekreg' (1991) 54 *THRHR* 398; JR de Ville *Judicial Review of Administrative Action in South Africa* (2005) 97, 122; Alfred Cockrell 'Can You Paradigm? – Another Perspective on the Public Law/Private Law Divide' 1993 *Acta Juridica* 227, 239 – 240; Yvonne Burns *Administrative Law* 4 ed (2013) 461; Franziska Myburgh 'On Constitutive Formalities, Estoppel and Breaking the Rule' (2016) 27 *Stell LR* 254; Daniel Freund & Alistair Price 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *SALJ* 184; Movshovich (note 5 above) 159 – 162; minority judgment of Froneman J in *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) (hereafter *Cool Ideas*) para 134; minority judgment of Cachalia JA in *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2017] 3 All SA 382 (SCA) (hereafter *Home Talk*); *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) (hereafter *Peter Klein*).

[11] Movshovich (note 5 above) 18, 20.

[12] Alan Saltman 'Estoppel against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Cases?' 45 *Fordham Law Review* 497 (1976) 501, 508 – 514 last accessed from http://ir.lawnet.fordham.edu/flr/vol45/iss3/2/ on 18 November 2017.

[13] *Hoisain v Town Clerk, Wynberg* 1916 AD 236 (hereafter *Hoisain*).

[14] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (hereafter *Gijima*).

Other legal avenues are also explored, such as the doctrine of substantive legitimate expectation and the somewhat enigmatic 'public law' principle that the Constitutional Court discovered (some might say invented) in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal.*[15]

5.2 ESTOPPEL

(a) The functions and dysfunctions of form

In a recent article, Myburgh discusses what she refers to as 'the functions and dysfunctions of form'.[16] She highlights important social objectives that legal formalities seek to achieve. For example, the requirement that contracts for the sale of land and suretyship agreements be reduced to writing[17] serve to promote certainty as to what the parties intended and to prevent fraud.[18] Myburgh also highlights the main drawback or 'dysfunction' associated with legal formalities, namely, that they create 'the risk of becoming "a refuge for contract-breakers" by permitting a party to rely on a technical defence of formal non-compliance to escape an otherwise validly concluded contract'.[19] She observes that '[t]his abuse of formalities, whether self – or statutorily-imposed, is variously described as a type of fraud, unconscionable or contrary to good faith'.[20] She argues for a balancing of competing interests and asserts that it may sometimes be in the public interest to allow estoppel to operate in order to give effect to a formally defective contract.[21]

Arguably, Myburgh's observations are equally apposite in the context of public procurement. Indeed, our case law suggests that public bodies are by no means averse to raising technical defenses regarding the invalidity of a contract in order to resist claims for payment.[22] A good example is to be found in *MEC: Department of Police, Roads and Transport, Free*

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[15] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) (hereafter *KZN Joint Liaison Committee*).
[16] Myburgh (note 10 above).
[17] See s 2(1) of the Alienation of Land Act 68 of 1981 in respect of the sale of land and s 6 of the General Law Amendment Act 50 of 1956 in respect of suretyship agreements.
[18] Myburgh (note 10 above) 256.
[19] Ibid; *Cool Ideas* (note 10 above) para 134.
[20] Myburgh (note 10 above) 256 – 257.
[21] Ibid 254 – 255.
[22] See for example *Country Cloud* (note 3 above); *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC); *Gijima* (note 14 above); *Contractprops* (note 7 above) para 3*; Gauteng MEC For Health v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA); *RPM Bricks* (note 7 above) paras 8 – 9; *Umgungundlovu District Municipality v Amaraka Investments 37 (Pty) Ltd* [2018] ZAKZPHC 10 (11 April 2018) (hereafter *Umgungundlovu*) paras 26 and 36; *Madibeng Local Authority v Public Investment Corporatio*n [2018] ZASCA 93 (1 June 2018); *Nkonkobe Municipality v Water Services South Africa (Pty) Ltd* [2001] ZAECHC 3 (14 December 2001) (hereafter *Nkonkobe*).

State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works.[23] In this instance, a provincial government department had contracted with a supplier to resurface roads in the Free State province. However, after services had been rendered and the project successfully completed, the Department stopped payments to the supplier, ostensibly because the project had not been budgeted for as required by legislation[24] and that further expenditure would have given rise to irregular expenditure. But the SCA rejected this defence and berated the department for 'behaving unconscionably' and 'without any integrity'.[25]

Nevertheless, cases such as *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*[26] and *Provincial Government of the Eastern Cape v Contractprops 25 (Pty) Ltd*[27] insist that the innocent contractor should bear the incidence of loss arising from *ultra vires* representations made by public officials. But such one-sided apportionment of loss makes the cost of protecting government against its own mistakes simply too high.[28] I agree with the sentiments expressed by Lithuanian scholar Petrylaite that 'if government does not create a well-functioning body of honest and qualified officers, it is not the particular individuals that should bear the costs. [In particular instances] government should pay for the mistakes of its employees, thus spreading the [cost] of government's mistake.'[29] In *Gijima*, the Constitutional Court signaled that the costs of government's mistakes should not invariably be borne by the private sector.[30]

(b) Estoppel: The conventional approach

The principle of estoppel allows 'justice to prevail over truth'.[31] It operates to ensure that a person who made a representation to another, causing the latter to act to his detriment in reliance on the correctness of the representation, cannot later deny the truth of the representation, even if it is untrue. [32] Estoppel is therefore 'a powerful tool for achieving

[23] *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works* 2016 (3) SA 130 (SCA) (hereafter *Terra Graphics*).
[24] Section 21(1)(*b*)(*i*) and 24(1)(*a*)(*i*) of the PFMA.
[25] *Terra Graphics* (note 23 above) para 1.
[26] *RPM Bricks* (note 7 above).
[27] *Contractprops* (note 7 above).
[28] Movshovich (note 5 above) 43.
[29] Renata Petrylaite 'Can the Doctrine of Equitable Estoppel Be Applied Against a Government?' (2004) 1 *International Journal of Baltic La*w 111 last accessed from https://www.fcsl.edu/sites/fcsl.edu/files/ART206.pdf on 18 November 2017.
[30] *Gijima* (note 14 above).
[31] William Wade & Christopher Forsyth *Administrative Law* 11 ed (2014) 196.
[32] *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) 291 D – F; J C Sonnekus *The Law of Estoppel in South Africa* 3 ed (2012) 2; Dale Hutchinson & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 93; Myburgh (note 10 above) 259.

individual justice'.[33] Space constraints do not permit an extensive discussion of the elements of estoppel, but essentially the operation of estoppel requires a representation by a representor; detrimental reliance on the part of a representee; and a causal relationship between the representation and the detriment.[34]

The conventional view is that the estoppel doctrine cannot be invoked to give effect to an *ultra vires* contract. The state's protection against estoppel has been traced back to the theory of sovereign immunity and the idea that 'the King can do no harm'.[35] More contemporary justification for the conventional rule is based on the interrelated concepts of legality and the public interest.[36] The legality argument is premised on the notion that the principle of estoppel cannot be used to legitimize *ultra vires* acts. [37] The public interest argument is that estoppel cannot operate to prevent a public body from exercising powers that were specifically conferred on it for the protection of the public interest.[38] As representatives of the broader populace, public bodies are charged with the duty to protect the public purse and are thus to be treated differently to private parties.[39] Public bodies should therefore not be estopped by a person who is merely protecting his or her private financial interests.[40] Here, the logic seems to be that it is better to have a rule under which citizens may suffer occasionally than to have a rule 'subjecting the public to injury through the possibility of carelessness or corruption of public officials'. [41]

Further support for the conventional approach is based on the following rationales: A public body cannot by virtue of its mistake or negligence be compelled to bring about a state of affairs that it had no power in law to create of its own free will;[42] estoppel cannot vest public bodies with 'dispensing powers' by permitting them to excuse persons from compliance with the law;[43] estoppel could interfere with the efficient performance of governmental functions;[44]

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[33] Movshovich (note 5 above) 27.
[34] Myburgh (note 10 above) 260.
[35] Kenneth D Dean 'Equitable Estoppel Against The Government – The Missouri Experience: Time To Rethink the Concept'(1992) 63 *St Louis University Law Journal* 107 last accessed from *http://scholarship.law.missouri.edu/facpubs* on 24 September 2015; Walter Gellhorn, Clark Byse, Peter Strauss, Todd Rakoff & Roy Schotland *Administrative Law: Cases and Comments University Casebook Series* (1987), 524; Saltman (note 12 above) 500; Movshovich (note 5 above) 35.
[36] Petrylaite (note 29 above) 106; *Nkonkobe* (note 22 above) 16 – 17.
[37] Wade & Forsyth (note 31 above) 197; *Strydom v Land - en Landbou Bank van Suid Afrika* 1972 (1) SA 801 (AD) at 815G – 816B; *Nkonkobe* (note 22 above) at 15.
[38] *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) 477 (hereafter *Glenore Supermarket*).
[39] Dean (note 35 above) 92 – 95.
[40] Saltman (note 12 above) 500.
[41] *Donovan v Kansas City* 175 S W 2d 874, 885 (Mo 1943) as cited in Dean (note 35 above) 85 – 86.
[42] *Hoisain* (note 13 above) 240; *Glenore Supermarket* (note 38 above) 478.
[43] Baxter *Administrative Law* (1984) 402.
[44] Petrylaite (note 29 above) 102 -103.

an act which would be rendered invalid if it was done in direct conflict with a statutory provision cannot be made valid indirectly by means of estoppel;[45] the deleterious consequences of holding government to a contract that imposes burdens upon the taxpayer that could have been avoided had proper procedures been followed, cannot be ignored;[46] the validity of an act cannot be determined with reference to whether harshness would follow on its being set aside;[47] there is a strong public interest in not constraining the flexibility of administrative bodies to change their rules or policies, as this would amount to an unlawful fettering of discretion;[48] holding administrative bodies bound by the improper representations of its agents could promote fraud and corruption;[49] sanctioning an illegality would 'subvert the legitimate purpose of [the legislation] by lending the court's imprimatur to the very mischief which the statute seeks to prevent';[50] the principle of estoppel would erode the separation-of-powers doctrine, by allowing functionaries to 'legislate' by misinterpreting or ignoring statutory requirements;[51] there is a need to protect the public from 'heedless and ill-considered engagements' by public officials;[52] and allowing estoppel to operate may cause government representatives to provide *less* advice, not more reliable advice.[53]

Sonnekus argues that the problem is one of 'maintainability'.[54] According to Sonnekus, the purpose of estoppel is to ensure that the representor maintains the represented state of affairs.[55] However, if the represented state of affairs is not 'maintainable' the plea of estoppel cannot be upheld.'[56] He argues that a representation that is *ultra vires*, illegal and in conflict with the public interest is not maintainable.[57]

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[45] *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) (hereafter *Trust Bank*) 411H; Sonnekus (note 32 above) 300.
[46] *Contractprops* (note 7 above) para 9.
[47] Ibid.
[48] Laurence Boulle, Bede Harris & Cora Hoexter *Constitutional and Administrative Law* (1989) 308; Gellhorn (note 35) 525.
[49] Movshovich (note 5 above) 40 – 42; Gellhorn (note 35 above) 524.
[50] *Cool Ideas* (note 6 above) para 53. This case did not deal with estoppel *per se*, but the court relied on well-known estoppel cases to support its ruling (see para 15). See also *Trust Bank* (note 45 above) 411H; *HNR Properties CC v Standard Bank of South Africa Ltd* 2004 (4) SA 471 (SCA) para 21.
[51] Movshovich (note 5 above) 36 – 38; Gellhorn (note 35 above) 524.
[52] Dean (note 35 above) 85.
[53] Petrylaite (note 36 above) 104, with reference to *Office of Personnel Management v Richmond*, 496 US 414 (1990).
[54] Sonnekus (note 32 above) 285–287. See also Hutchinson & Pretorius (note 32 above) 93.
[55] Ibid 285.
[56] Ibid.
[57] Ibid 287.

Perhaps the least convincing of the justifications for the conventional rule is that everyone is presumed to know the law and therefore the limits on an official's legal authority.[58]

The conventional approach is epitomized in *RPM Bricks,* in which the SCA declared that it is 'settled law' that a state of affairs prohibited by law in the public interest cannot be continued by reliance on the doctrine of estoppel.[59] Wade and Forsyth argue that to legitimate *ultra vires* acts cannot be a sound policy, 'being a negation of the fundamental canons of administrative law'.[60] They argue that claims for compensation would be a more appropriate form of redress.[61]

The conventional rule places formidable obstacles in the path of a contractor in search of relief when public bodies resile from contracts on account of their own administrative failures.[62] Nevertheless, I am of the view that the fundamental issue raised in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*,[63] — namely, that the common law principle of estoppel calls for reappraisal in light of our constitutional norms and values — was not properly addressed by *RPM Bricks*.[64] Our law still awaits a definitive ruling on this matter by the Constitutional Court. Before dealing with this aspect, I discuss various mechanisms that the law uses to mitigate the harsh effects of the conventional rule.

(c) Ameliorating the harsh effects of the conventional approach

The fundamental problem with the conventional approach is the blanket rule that estoppel cannot apply if an award of contract is *ultra vires*, no matter how strong the case for an equitable outcome may be. The rule has no 'flex in the joints'.[65] As a consequence, judges and legal scholars have developed various interpretative techniques to ameliorate the potentially harsh effects of the conventional rule. In essence, these interpretive techniques highlight the importance of achieving an appropriate balance between competing public and private interests.[66]

[58] Baxter (note 43 above) 401. See also Saltman (note 12 above) 498; *Federal Crop Insurance Corp v Merrill* 332 U.S. 380 (1947), as quoted in Gellhorn et al (note 35 above) 528.
[59] *RPM Bricks* (note 7 above) 16.
[60] Wade & Forsyth (note 31 above) 284.
[61] Ibid 284 – 285.
[62] *Contractprops* (note 7 above) para 11.
[63] *Peter Klein* (note 10 above).
[64] *RPM Bricks* (note 7) above.
[65] Dean (note 35 above) 115. See also Movshovich (note 5 above) 22.
[66] Cockrell (note 10 above) 227, 239.

One such technique is to draw a distinction between 'mere formalities' or internal policies of a public authority on the one hand, and the legislative authority of a public authority to act, on the other.[67] Baxter explains that whilst the defence of estoppel would not succeed in respect of non-compliance with legislative authority, the courts do not regard the internal requirements of a public body as inviolate.[68] Thus, in *RPM Bricks*, the SCA stated that persons contracting in good faith with a public body are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal formalities have been satisfied but are entitled to assume that all necessary formalities were complied with.[69] As a general rule, a state body may be estopped from relying on non-compliance with its own internal prescripts as a basis for cancelling a contract.[70]

At first glance, this approach seems to offer a solution to the problem of administratively unjust contracts, ie contracts awarded to non-responsive bidders. Responsiveness requirements often reflect a procuring entity's own internal choices regarding formalities that must be complied with for participation in a procurement event. Examples include a requirement to have certain minimum experience or a particular annual turnover. These are not statutorily prescribed and on the reasoning of *RPM Bricks*, it is arguable that the application of estoppel would be allowed to operate in such instances.

But there are a number of difficulties with this argument. First, as Baxter observes, the distinction between 'mere formalities' and legislative requirements is blurred and often difficult to draw in practice.[71] In fact, certain responsiveness requirements may well be based on an underlying legislative prescription and thus cannot simply be ascribed to the internal policy choices of a public body. Secondly, in *AllPay 1* the Constitutional Court rejected the notion propagated by the SCA that non-compliance with internal procurement policies of procuring entities was not fatal.[72] Instead, the Constitutional Court declared that internal

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[67] Baxter (note 43 above) 402; *Hoisain* (note 13 above) 239 – 240; *Roodepoort Settlement Committee v Retief* 1951 (1) SA 73 (O) (hereafter *Roodepoort Settlement*); *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) (hereafter *Potato Board*) 480A – E; *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A) 622 D – G; *Khanyi v Premier, Vrystaat en Andere* 1999 (2) SA 863 (O) 868 C-I; *Mossel Bay Municipality v Ebrahim* 1952 (1) SA 567 (C) (hereafter *Mossel Bay*).

[68] Baxter (note 43 above) 402. See also *Mossel Bay* (note 67 above); *Roodeport Settlement* (note 67 above); *Hoisain* (note 13 above) 240; *Potato Board* (note 67 above) 480.

[69] *RPM Bricks* (note 7 above) para 12. See also Baxter (note 43 above) 402 – 403; *Potato Board* (note 67 above). See also ss 20(7) and (8) of the Companies Act 71 of 2008 and discussion thereof in Dennis Davis & Walter Geach *Companies and other Business Structures in South Africa* 3 ed (2013) 54 – 57.

[70] *Potato Board* (note 67 above); *Transnet v Vusa-Isizwe Security Services (Pty) Ltd* [2011] ZAGPJHC 81 (11 February 2011).

[71] Baxter (note 43 above) 403; Petrylaite (note 29 above) 110.

[72] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) (hereafter *AllPay 1*) paras 38 – 40.

prescripts may not be disregarded at whim.[73] The court made it clear that legislative prescripts as well as internal procurement policies *together* constitute the applicable regulatory framework that requires strict observance. This suggests that it may no longer be appropriate to refer to 'mere' internal policies, as though internal prescripts are relegated to a lower order of legal requirements. To hold otherwise, said the court, 'would undermine the demands of equal treatment, transparency and efficiency under the Constitution'.[74]

Thirdly, failure to apply responsiveness criteria (whether statutorily imposed or the product of internal choice) could amount to a breach of legislation, being a contravention of s 217(1) of the Constitution and s 51(1)(*a*)(*iii*) of the PFMA.[75] By way of example, failure on the part of a procuring entity to disqualify a late bid in breach of its internal procurement policy will also contravene the fairness requirement prescribed by s 217(1). In the context of public procurement, there is certainly no bright line of distinction to be drawn between internal rules and legislative requirements.

Fourthly, the distinction lends itself to judicial manipulation. Dean observes that 'when confronted with an issue of power or authority to act, coupled with patently unfair or egregious actions by the government causing harm to the private party, it was more likely a court would find that the act was merely irregular and not *ultra vires*'.[76]

A different technique involves drawing a distinction between a 'procedural misrepresentation' and a 'substantive misrepresentation'.[77] A procedural misrepresentation takes place when a person was substantively entitled to a benefit but, as a result of an official misrepresentation, failed to meet certain statutory requirements for claiming the benefit.[78] Examples would include instances where a particular document was not provided or certain time limits were not observed. On the other hand, a 'substantive misrepresentation' takes place when the misrepresentation forms the basis for the representee qualifying substantively for certain benefits.[79] In such instances, the misrepresentation relates to the substantive requirements for the benefits, without which the representee would not have had any entitlement. [80] Movshovich argues that estoppel could be raised to safeguard claims involving procedural misrepresentation, whereas in instances involving substantive misrepresentation,

[73] Ibid para 40.
[74] Ibid.
[75] *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* [2009] JOL 23397 (ECG) paras 16 – 35.
[76] Dean (note 35 above) 83. See also Movshovich (note 5 above) 64.
[77] Movshovich (note 5 above) 44.
[78] Ibid.
[79] Ibid.
[80] Ibid

estoppel would have the effect of approving a benefit for which the legislature made no substantive provision.[81]

Baxter adopts yet another approach. He distinguishes between instances in which the assurance given by a public body actually amounts to a *decision* and instances involving mere misrepresentations.[82] He argues that if the exercise of an administrative discretion amounts to taking a decision, the need to hold a public body to its promises by means of estoppel falls away, as the public body is *functus officio* and cannot simply renege on its undertakings. [83] In such instances, '[t]he courts are likely to reject technical quibbles to the effect that the public authority was not acting within the scope of its powers'.[84] Baxter's argument offers a short-term solution, for once a public body has decided to award a contract it cannot summarily cancel the contract on the grounds that the award was *ultra vires*.

But ultimately, the award of an *ultra vires* contract cannot be defended on the basis that it resulted from a 'decision' and not a mere 'representation'. The mere fact that a public body is *functus officio* does not prevent it from resiling from an unlawful contract — it merely requires that the public body take a further step of applying for a court order that would permit it to cancel the contract. The *functus* argument serves only to delay the estoppel issue until such time as the matter is heard in court. Moreover, given the wide definition of 'decision' in the PAJA, there is no clear distinction to be drawn between a 'decision' and a 'representation' in administrative law. In terms of s 1 of the PAJA, a 'decision' includes giving a 'direction' to any person and performing any act or doing anything of an administrative nature. Indeed, some 'directions', representations or assurances given by administrative bodies may well qualify as 'decisions'.

Baxter also places considerable emphasis on proper statutory interpretation.[85] He suggests that where a legal duty has been misrepresented and the duty is not mandatory or peremptory but merely directory, estoppel should be allowed to operate. [86] In other words, estoppel applies more readily when the duty imposed does not have binding effect. Although the distinction between mandatory and directory requirements no longer carries the same

[81] Ibid 44 – 45.
[82] Baxter (note 43 above) 425.
[83] Boulle (note 48 above) 190. See also Hoexter (note 4 above) 42 – 43.
[84] Baxter (note 43 above) 425.
[85] Ibid 403.
[86] Baxter (note 43 above) 403; De Ville (note 10 above) 121; *Glenore Supermarket* (note 38 above) 478 A – B.

significance as it did at the time Baxter expressed his views,[87] it still remains relevant in determining whether the legislature intended that non-compliance be visited with invalidity. [88]

Myburgh, too, places the emphasis on proper interpretation of statutory formalities.[89] She points out that statutory formalities are imposed for different reasons and therefore cannot all be treated with the same brush.[90] What is required is 'an examination of the statutory provision, its purpose and the social policy behind it, before deciding whether estoppel will be successful'.[91] Certain formalities have as their core objective the protection of vulnerable groups (such as debtors, protected tenants or minors) and are essentially prohibitory in nature. To allow estoppel to operate when such formalities have not been complied with would clearly defeat the protective purpose of the statute.[92] Other formalities seek to achieve different purposes, such as the avoidance of unnecessary litigation or the prevention of liability based on verbal undertakings.[93] Whilst this latter class of objectives is no less in the public interest than the former, it is also in the public interest to discourage unconscionable behaviour by not permitting contracting parties to invoke technical arguments in order to escape liability.[94] According to Myburgh, the German and English courts do not preclude the operation of estoppel when the purpose of the statutory formality is not essentially prohibitory. [95]

Wade and Forsyth maintain that instead of manipulating the law to uphold acts which are *ultra vires* or contrary to the public interest, persons who have suffered harm as a result of official misrepresentations should be compensated for their losses.[96] However, any student of South Africa law will attest to the fact that our courts are far less generous than their English counterparts in recognizing claims for damages arising out of maladministration. The general position in our law is that Aquilian liability does not arise from a negligent, but bona fide exercise of an administrative function.[97] An exception is made in respect of acts of dishonesty,

[87] *AllPay 1* (note 72 above) para 30.
[88] *Contractprops* (note 7 above) para 4; *Afriforum v University of the Free State* 2018 (2) SA 185 (CC) paras 43 – 45.
[89] Myburgh (note 10 above) 261.
[90] Ibid 260 – 261.
[91] Ibid 260. See also the minority judgments of Willis JA in *Hubbard* (note 6 above) paras 23 – 26 and Cachalia JA in *Home Talk* (note 10 above) para 216.
[92] Myburgh (note 10 above) 261.
[93] Ibid 272.
[94] Ibid.
[95] Ibid 260 – 261.
[96] Wade & Forsyth (note 31 above) 284.
[97] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (hereafter *Steenkamp*) para 29; *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).

such as corruption or fraud.[98] Although this approach has been strongly criticized,[99] it remains the current position. A similarly conservative approach has been adopted in respect of administrative-law damages, based on s 8(1)(*c*)(*ii*) of the PAJA.[100]

Claims for compensation could potentially be based on the principle of unjustified enrichment,[101] but as Quinot observes, the requirements of the various *condictiones* may not be easy to satisfy.[102] Space constraints prohibit a detailed discussion of unjustified enrichment. However, if the mistake is one of law, the requirement of the *condictio indebiti* that the mistake giving rise to the transfer of wealth must be 'excusable' may create an obstacle. A plaintiff's mistake regarding the legal capacity of the state to award a tender may not be excusable if the plaintiff was able to verify the state's capacity with reference to the applicable legal requirements.[103] I should add that the requirement that wealth must have transferred from the plaintiff to the defendant could itself prove to be an obstacle in instances where the plaintiff has suffered prejudice, but is unable to prove that a transfer of wealth actually occurred. For example, if company A, acting on the representation by an organ of state that it was awarded a tender, incurs obligations in the form of bank loans, etc, it will have suffered enormous prejudice if the award of contract is subsequently cancelled. But it may not as yet have performed under the contract and as such no transfer of wealth would have occurred. The *condictio indebiti* will probably not be available to the plaintiff in such instances.[104]

Ultimately, the discovery of *ad hoc* exceptions in order to deal with the harshness of the conventional approach creates an 'amorphous jurisprudence, providing scant guidance to practitioners and compounding the uncertainty of individuals who deal with the government'.[105] It is therefore necessary to rethink the principle of estoppel itself.

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[98] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA); *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA). For academic analysis see C J Pretorius 'Damages in Delict for Prospective Loss of Profit' 2006 *TSAR* 385; Chuks Okpaluba 'Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in the Tender Process' (2014) 26 *SA Merc LJ* 387.

[99] See the minority judgments of Langa CJ and O'Regan J in *Steenkamp* (note 97 above) at paras 64 ff. See also Quinot (note 2 above) 101; R Cachalia, 'Government Contracts in South Africa: Constructing the Framework' (2016) 27 *Stellenbosch Law Review* 88, 110 – 111.

[100] *The Trustees of the Simcha Trust v De Jong* 2015 (4) SA 229 (SCA).

[101] Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 364; *Nkonkobe* (note 22 above) 14 – 15.

[102] Geo Quinot *State Commercial Activity: A Legal Framework* (2009) 181 – 185.

[103] Ibid 183.

[104] For further discussion in the limitations of the doctrine of unjustified enrichment see Quinot (note 102 above) 181 – 185.

[105] Movshovich (note 5 above) 29. See also Petrylaite (note 29 above) 111.

(d) Rethinking estoppel

The principle that administrative conduct must be lawful is hardly contentious. However, the issue at stake is whether legality (or rather, an unduly truncated view of legality) should be allowed to displace all other democratic values.[106] In *Peter Klein,* the court sought to develop the doctrine of estoppel in line with broad constitutional values.[107] The court opined that the problem did not lie with the doctrine of estoppel itself but rather with the blanket rule that estoppel finds no application in the context of *ultra vires* acts.[108] This approach, said the court, was inconsistent with the entrenched constitutional value of reasonable public administration.[109]

But this progressive stance was short-lived. In *RPM Bricks*, the SCA denounced this approach as 'fallacious' and as 'the antithesis of that demanded of the Constitution'.[110] According to Ponnan JA, the approach advocated by the High Court 'would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the *ultra vires* doctrine nugatory'.[111]

Myburgh supports the ruling in *RPM Bricks* on the basis that had the defence of estoppel been upheld, it might have condoned nepotism and patronage.[112] There is merit in this argument. Indeed, the facts of the matter hardly presented the ideal opportunity for developing the doctrine beyond the current confines of the common law. *RPM Bricks* dealt with the unlawful extension of a contract, in contravention of s 38(1) of the Gauteng Rationalisation of Local Government Affairs Act 10 of 1998. The municipality did not comply with the procedures for contract extension outlined in s 38, in that the extension was not approved by the municipal council. As stated by the SCA, the objective of the section is 'to eliminate nepotism, patronage or worse' by entrusting the council with the sole power to approve contract extensions.[113] Seen in that light, 'if the conclusion of contracts were to be permitted without any reference to the defendant's council and without any sanction of invalidity, the very mischief which the legislation seeks to combat could be perpetuated'.[114] The strong public

[106] Movshovich (note 5 above) 19, 23.
[107] *Peter Klein* (note 10 above).
[108] Ibid para 34.
[109] Ibid para 37.
[110] *RPM Bricks* (note 7 above) paras 23 – 24.
[111] Ibid para 24.
[112] Myburgh (note 10 above) 269.
[113] *RPM Bricks* (note 7 above) para 15.
[114] Ibid.

interest in ensuring strict control over contract extensions, coupled with the fact that the plaintiff might have been overpaid,[115] tilted the scales against the use of estoppel.

However, the difficulty with *RPM Bricks* is that the SCA went much further than it was required to, and declared that there was *no need at all* to develop the common law doctrine of estoppel in line with constitutional values.[116] Ponnan JA held that in developing the common law a court is required to follow a two-step inquiry. The first is to ask itself whether the existing common-law principle needs to be developed beyond its existing rules and if so, the second step is to determine how that development should occur.[117] According to Ponnan JA, had this inquiry been undertaken, it would not have passed the first leg. The court cited the usual authorities to justify the conventional position that estoppel cannot give effect to what is not permitted by law.[118] But therein lies the problem with the judgment. Apart from reciting the current common-law position and cautioning against 'overzealous judicial reform', the SCA added nothing to the discourse that was not known before. In a classic display of formalistic reasoning, [119] the court emphasized the pedigree of the estoppel doctrine over the substance of the constitutional argument. Yet, the constitutional point cannot be dismissed by restating the existing rules.

The SCA offered no explanation as to why the inquiry would not have passed the first stage of determining whether the conventional rule ought to be developed. Instead, the SCA criticized *Peter Klein* for not stating which fundamental rights or which constitutional values the existing rules on estoppel were said to breach.[120] But that criticism was not entirely fair. Admittedly, the court in *Peter Klein* could have been clearer about the constitutional rights that were negatively impacted by the existing rule, [121] but the court made it abundantly clear that the doctrine of estoppel had to be viewed through the lens of a proportionality analysis, which is central to constitutional review.[122] This requires a weighing up of competing values and a

[115] Ibid para 7.
[116] Ibid para 20.
[117] Ibid para 21.
[118] Ibid para 23.
[119] See Cora Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 *SALJ* 207, 215.
[120] *RPM Bricks* (note 7 above) para 19.
[121] But see para 18 for an overview of counsel's argument regarding the fundamental rights of the defendant that were affected.
[122] *Peter Klein* (note 10 above) para 36.

reasonable relationship between an administrative act, its objectives and the facts and circumstances of a case.[123]

The point of departure in *Peter Klein* is that as a matter of constitutional principle, citizens are entitled to reasonable conduct on the part of public officials.[124] The determination of reasonableness necessarily involves a balancing exercise based on proportionality. Instead of focusing solely on the nature of the statutory obligation at play, a court should be able to balance *all* the competing interests at stake and consider the degree of prejudice to the party raising the defence of estoppel.[125] This is hardly a novel approach. As stated in *Peter Klein*, the seeds for this balancing approach were sown in the minority judgment of Hoexter JA in *Trust Bank van Afrika v Eksteen*[126] and it enjoys considerable academic support. Academic writers such as Ferreira,[127] Cockrell,[128] de Ville,[129] Quinot[130] and Myburgh[131] argue for a proportionality-based approach, in which public and private interests are balanced in a flexible manner. Quinot is of the view that if estoppel is developed along the lines indicated in *Peter Klein*, '[it] may be able to provide effective regulation of at least some of the concerns regarding capacity in state commercial activity'.[132] Myburgh argues that policy considerations such as *ubuntu* and *pacta sunt servanda* militate against resorting to formal invalidity in a legalistic manner.[133]

But what then of the *ultra vires* issue? Would a successful plea of estoppel have the effect of 'curing' an *ultra vires* act of its unlawfulness? The courts have long grappled with the anomaly of allowing an unlawful act to produce legally effective consequences. This issue was discussed in Chapter 3 and therefore need not be repeated here. Ferreira argues that the operation of estoppel would not render an *ultra vires* act *intra vires*, nor would it vest public bodies with powers that they do not possess.[134] Rather, estoppel operates to hold public authorities to the *consequences* of their decisions.[135] This view is shared by De Ville, who

[123] Ibid. In *Nkonkobe* (note 22 above) at 14, the High Court did not follow *Peter Klein*, but recognised the importance of ensuring that the underlying values and objectives of the Constitution were achieved.
[124] Ibid para 35.
[125] Ibid para 28.
[126] *Trust Bank* (note 45 above) 415H – 416C.
[127] Ferreira (note 10 above).
[128] Cockrell (note 10 above).
[129] De Ville (note 10 above).
[130] Quinot (note 10 above).
[131] Myburgh (note 10 above).
[132] Quinot (note 10 above) 180.
[133] Myburgh (note 10 above) 270.
[134] Feirreira (note 10 above) 398.
[135] Ibid.

argues that in certain instances estoppel should be allowed to operate, even if the administrative act is conflict with a peremptory duty enacted in the public interest.[136] Nevertheless, the prohibited act itself remains unlawful and in principle 'invalid'.[137] According to De Ville, the application of estoppel would not have the effect of 'repealing' a statutory provision or allowing public officials to create new duties and responsibilities for the government through their mistakes.[138] I agree with this argument and would draw an analogy with the delay rule of administrative law. Unreasonable delay does not have the effect of creating new rights or duties, nor does it 'cure' the illegality of the administrative act. Rather, the public interest in the avoidance of prejudice and promotion of certainty results in the denial of the requested remedy.[139]

(e) Egregious misconduct

Nevertheless, the principle that government cannot be compelled to commit an illegality is strong and cannot be dislodged merely through broad appeals to 'equity'[140] or 'state accountability'.[141] It is certainly not suggested that our courts ought to go about 'wielding some Denningesque sword of justice, to rescue a miscalculating, improvident or optimistic [claimant] from the commercially unattractive, or even ruthless, actions of a [defendant] which are lawful at common law'.[142] Nor is it suggested that the common law be developed to allow for the operation of estoppel in every instance when innocent representees are likely to suffer prejudice as a result of an *ultra vires* act of a public authority. It would in all likelihood drain the public treasury if 'government [were to be] held responsible for every negligent statement of any of its thousands of employees'.[143] My argument is that when faced with particularly *egregious misconduct* on the part of a public official, the law ought not to dispense with the matter on the basis of the *ultra vires* issue alone. Other competing democratic values should then be brought into the equation in order to reach a just outcome.

According to Myburgh, unconscionable behaviour is the 'extra ingredient' that is required in order to trigger the defence of estoppel when confronted with *ultra vires* conduct. For instance, where a representor gives an assurance that the agreement is immediately enforceable

[136] De Ville (note 10 above) 96 – 97; 122.
[137] Ibid 97.
[138] Ibid.
[139] Hoexter (note 4 above) 532.
[140] *Cool Ideas* (note 10 above) para 52. But see the minority judgment of Froneman J at paras – 168.
[141] *Country Cloud* (note 3 above) paras 44 – 50.
[142] Neuberger LJ 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 *Cambridge Law Journal* 537, 541, as quoted in Myburgh (note 10 above) 265.
[143] Petrylaite (note 29 above) 111.

or that the representor will give effect to it despite its non-compliance, it would be unconscionable for the representor to make an opportunistic about-turn at a later stage.[144] Indeed, there are indications in our case law that the denial of the truth of a representation could, in certain circumstances, amount to *dolus*.[145] The position advocated by Myburgh is reminiscent of the position in US federal law, where estoppel is allowed against the government in cases involving 'affirmative misconduct' on the part of government officials, where the interests of the public would not suffer unduly if the defence of estoppel were to be upheld and where the application of the doctrine is required 'by right and justice'.[146] Where a public official acted unconscionably in the award of non-responsive tender to an innocent contractor, a balance must be found between the public interest in ensuring that the government is able to enforce the law and the interests of citizens in 'some minimum standard of decency, [honour] and reliability in their dealing with the Government'.[147]

Myburgh draws on German and English law to advocate for reform of our law of estoppel.[148] According to Myburgh, German law recognizes that circumstances could arise in which 'the need to do particular justice on the facts outweighs the policy considerations informing statutory formalities'.[149] The remedies available to an injured party are to be found in s 242 of the German Civil Code[150] and in the doctrine of *culpa in contrahendo*, respectively.[151] Although s 242 is worded in rather nebulous terms (it simply requires contracting parties to 'perform according to the requirements of good faith'),[152] German courts have invoked the section to intervene in cases when reliance on formal invalidity would amount to a breach of the duty to act in good faith. The German courts consider a range of factors in deciding this issue, such as: whether the defendant knew that the contract was defective; whether the plaintiff lacked such knowledge; detrimental reliance on the part of the plaintiff; and the adequacy of alternative forms of relief provided by enrichment remedies or in terms of the doctrine of *culpa in contrahendo*.[153] German courts have held that alternative remedial

[144] Myburgh (note 10 above) 265.
[145] See the minority judgment of Hoexter JA in *Trust Bank* (note 45 above) 416B.
[146] Dean (note 35 above) 65.
[147] Gellhorn (note 35 above) 523, citing *Heckler v Community Health Services of Crawford County* 467 US 51 (1984).
[148] Myburgh (note 10 above).
[149] Ibid 259.
[150] The *Burgerliches Gesetzbuch* ('BGB').
[151] Myburgh (note 10 above) 257.
[152] See English translation of the German Civil Code last accessed from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731 on 22 October 2017.
[153] Myburgh (note 10 above) 258.

measures are inadequate when faced with a 'totally unbearable situation', such as when 'the economic existence of the innocent party would be "destroyed or substantially endangered" by not giving effect to the contract' or where the guilty party has displayed a particularly serious breach of good faith by relying on the formal defect.[154]

The *culpa in contrahendo* doctrine is based on the notion that parties incur a duty of care towards each other during contract negotiations. Relief will be granted if one party knew or ought to have known that it was non-compliant with a statutory requirement, while the other party did not and was not under a duty to inquire further.[155]

Under English law, the doctrine of estoppel cannot be raised as a defence to the cancellation of an *ultra vires* contract purely on the basis that the representee acted on the assurances given by the representor. Something more is required, such as a positive undertaking that the representor would honour the agreement despite the lack of compliance with the required formalities.[156] As discussed, this 'extra ingredient' is said to be present when the representor acted in an unconscionable manner.[157] Thus, for example, the extra ingredient would be present where the estoppel denier made a representation to the estoppel raiser that the agreement was valid or that he would abide by the agreement despite its invalidity.[158] Furthermore, it should not have been possible to discern *ex facie* the contract, that it was defective.[159] Although South African courts have not engaged in the kind of policy-based approach followed in German and English courts, Myburgh argues that there is no reason why they ought not to.[160]

5.3 ALTERNATIVE PATHS

The primary issue being addressed in this chapter concerns the legal remedies that ought to be made available to persons whose contracts are cancelled for legal breaches committed by public officials over whom they have no control. So far, I have argued for the development of the doctrine of estoppel to achieve this objective. But, as Froneman J observed in *KZN Joint Liaison Committee*, the precise label that one attaches to a legal remedy is by no means

[154] Ibid.
[155] Ibid 259
[156] Ibid 263.
[157] Ibid 264.
[158] Myburgh (note 10 above) 270.
[159] Ibid.
[160] Ibid 269.

decisive.[161] Indeed, other avenues of redress have opened up to aggrieved contractors, notably through the exercise of the court's remedial powers. This development is now discussed in relation to the recent *Gijima* judgment.[162]

(a) Remedial powers

Our courts have previously exercised their remedial powers to preserve contracts found to have been concluded in breach of tender processes. Typically, the courts would find that the award of contract was constitutionally invalid, but then suspend the order of invalidity pending a re-run of the tender process or a re-evaluation of the tender.[163] However in *Gijima,* the Constitutional Court followed a different approach. The court declared the contract constitutionally invalid, without suspending the order of invalidity. This meant that the order of invalidity took effect immediately. The court nevertheless found an equitable outcome for Gijima by preserving the rights 'it would have been entitled to under the contract, but for the declaration of invalidity'.[164]

In this instance, SITA applied to court to review and set aside its own decision to award a contract to Gijima on the grounds that the award was contrary to the prescripts of s 217(1) of the Constitution. The background facts are these: SITA and Gijima had concluded a contract pursuant to a settlement agreement reached between the parties in terms of which Gijima was appointed to deliver IT-related services to various public entities. Although Gijima raised concerns about the legality of the procurement processes that had been followed, SITA's representatives repeatedly provided it with false assurances that they had the necessary authority to conclude the contract. However, when a payment dispute arose between the parties, SITA claimed that the contract was invalid due to non-compliance with s 217(1) of the Constitution. On appeal, the Constitutional Court agreed that the award of contract was constitutionally invalid, but further held that SITA ought not to derive benefit from the untruthful assurances it had given Gijima and from its own undue delay in bringing the review application.[165] Consequently, the court ruled that the declaration of invalidity ought not to

[161] *KZN Joint Liaison Committee* (note 15 above) para 74. See also Hoexter (note 116 above) 210.
[162] *Gijima* (note 14 above).
[163] *AllPay Consolidated Holdings (Pty) Ltd and Others v Chief Executive, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (hereafter '*AllPay* 2') para 78; *Millennium Waste* (note 3 above) para 35.
[164] *Gijima* (note 14 above) para 55.
[165] *Gijima* (note 14 above) para 54. The court held at paras 38 – 40 that an organ of state ought to follow the path of legality review, rather than the PAJA, when seeking to have its own decisions reviewed and set aside.

divest Gijima of rights which, but for the declaration of invalidity, it would have been entitled under the contract.[166]

The opportunistic *volte-face* on the part of SITA no doubt played a significant role in the court's decision. As the SCA observed, SITA's true objective in seeking to nullify the contract was based purely on self-interest, as it sought merely to avoid having to deal with the payment dispute.[167] The SCA added that 'the courts cannot countenance such dishonourable conduct, particularly from an organ of state'.[168] This illustrates the point made above that when confronted with unconscionable behaviour on the part of public officials, the law ought to offer a more thoughtful, value-laden response, as opposed to the sledgehammer approach of the conventional rule.

However, *Gijima* has its own shortcomings. First, the judgment is somewhat opaque regarding the rights that it sought to preserve. The court held that the order of invalidity would not divest Gijima of any rights, without deciding what those rights were. Presumably, the rights in question included Gijima's right to payment. But the court merely noted that the issue of Gijima's rights remained a contested issue during arbitration proceedings that was left undetermined, as the arbitrator held that he lacked jurisdiction to decide on the constitutional validity of the procurement process.[169]

Secondly, and perhaps more importantly, the Constitutional Court did not articulate the legal basis on which it had preserved the rights of a contracting party to an invalid contract. The South African legal community would no doubt have benefitted from a clear exposition of the basis upon which the rights of a contracting party were preserved, despite the contract itself having been declared invalid. This lack of clarity is unlikely to satisfy adherents of the conventional position that illegal contracts are regarded as never having been concluded and as such produce no legal consequences.[170]

Despite this unsatisfactory conclusion, the ruling is significant because it demonstrates the inherent flexibility of the remedial powers that courts exercise to afford relief to those on

[166] Ibid para 54.
[167] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) (hereafter *Gijima (SCA)*) para 39.
[168] Ibid.
[169] *Gijima* (note 14 above) para 54.
[170] *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Cool Ideas* (note 10 above) paras 53, 77, 90 – 91 and 101 – 102; *Home Talk* (note 10 above) paras 68 – 72.

the receiving end of *ultra vires* representations.[171] If this reading of the judgment is correct, the need to develop the doctrine of estoppel as a means of achieving greater equity may be greatly diminished. Indeed, shifting the focus to the relief stage avoids the controversy that arises when an illegal contract is allowed to stand – an issue that clearly troubled the minority in the SCA.[172] By declaring the contract constitutionally invalid, the Constitutional Court neutralised the legality issue, but then proceeded to find a solution based on considerations of 'justice and equity'.[173]

Considerations of justice and equity also motivated the court in *Umgungundlovu District Municipality v Amaraka Investments 37 (Pty) Ltd* to adopt a novel approach.[174] The court suspended an order of constitutional invalidity, but ordered the municipality to remedy the breaches of legislation that it had complained about. In this instance, a municipal entity contracted with a private body to provide services for the removal of effluent from a private hospital. After running up an account in excess of R9 million, the municipality sought to rescind the contract on grounds that it had not been concluded in accordance with the s 78 of the Municipal Systems Act 32 of 2000. This section requires *inter alia* that when a municipality provides a municipal service through an external mechanism, it must give notice to the local community of its intention to do so, assess different service delivery options, conduct a feasibility study and follow a proper procurement process.

The court held that the municipality had acted unconscionably in that it had represented that the contract accorded with legal prescripts and had unreasonably delayed the institution of review proceedings, whilst it continued to use the services of the respondent.[175] Without expressly invoking *Gijima*, the court held that 'the declaration of invalidity must not have the effect of divesting the respondents of rights which – but for the declaration of invalidity – it might be entitled to'.[176] The court declared the contract invalid, but suspended the order of invalidity and ordered the municipality to correct the errors that had occurred.

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[171] In *AllPay 2* (note 163 above) the Constitutional Court exercised its remedial powers to suspend an order of constitutional invalidity in respect of an invalid contract in order to allow for a re-run of a tender process. However, to the best of the author's knowledge *Gijima* was the first time that the court used its remedial powers to preserve the rights of a party to an *ultra vires* contract.

[172] In his minority judgment in *Gijima (SCA)* (note 167 above) paras 46 – 70, Bosielo JA remarked that the decision by the majority to dismiss the appeal purely on the basis that SITA ought to have proceeded by way of the PAJA rather than the principle of legality, compelled it to comply with an invalid contract, which according to him, was antithetical to the rule of law and the principle of legality.

[173] *Gijima* (note 14 above) para 53.

[174] *Umgungundlovu* (note 22 above) para 45.

[175] Ibid.

[176] Ibid.

The approach in *Umgungundlovu* serves four key objectives: it gives effect to the importance of legality; it recognises that in some instances, legislative breaches that have affected the validity of a contract may be remedied; it preserves the rights of innocent contractors; and affords the public body the opportunity to remedy the breaches that it is concerned about.

(b) Substantive legitimate expectation

The English law doctrine of substantive legitimate expectation overlaps considerably with the doctrine of estoppel in that both concepts seek to hold public officials to their undertakings.[177] South Africa has yet to adopt the doctrine, although this is seen as an inevitable next step in our law.[178] In fact, the courts have on various occasions afforded substantive relief based on legitimate expectation, without formally invoking the doctrine by name. [179] The question that arises is whether the doctrine holds the key to the riddle regarding *ultra vires* contracts.[180] I think not.

English law authorities have not provided a definitive answer to this question. Indeed, *dicta* contained in the leading cases such as *R v North and East Devon Health Authority, ex parte Coughlan*[181] and *R (Abdi and Nadarajah) v Secretary of State for the Home Department*[182] could be interpreted either way. In *Coughlan's* case, the *ultra vires* issue did not arise, since in this instance the officials who had promised a severely disabled woman that she would have a home for life, were acting within their powers. Nevertheless, the approach developed by the Court of Appeal could potentially provide a framework for dealing with *ultra vires* promises as well. The Court of Appeal held that the interests of fairness had to be balanced against any overriding interest relied on by the public body. The test to be applied is whether the denial of the expectation would be so unfair as to amount to an abuse of power.[183] Arguably,

[177] Hoexter (note 4 above) 427.
[178] Hoexter (note 119 above) 224; Cora Hoexter 'The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa' in Matthew Groves & Greg Weeks (eds) *Legitimate Expectations in the Common Law* World (2017) 65, 166 and 178.
[179] Hoexter (note 4 above) 432 – 433; Hoexter (note 178 above) 166. See also John Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *SALJ* 315.
[180] See Hoexter (note 4 above) 434 – 436 for a discussion on the various options for adopting substantive legitimate expectation into South African law.
[181] *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 (CA) (hereafter *Coughlan*).
[182] *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 (hereafter *Nadarajah*).
[183] *Coughlan* (note 181 above) para 57.

a denial of an expectation could amount to an abuse of power when the denial of the representation results in an injustice to the individual, without any overriding public benefit.[184]

Coughlan's balancing exercise could also involve weighing the demands of legality against the interests of legal certainty.[185] But Campbell takes issue with this and maintains that legal certainty cannot be used as a counterweight to legality, on the grounds that 'legal certainty is an immutable value that takes no account of the actual and variable prejudice flowing from frustrated expectations in each case.'[186] He further argues that legal certainty is one of the core values of legality and is therefore 'too closely intertwined with legality to be set up in opposition to it'.[187] He also argues that given the pivotal role that the doctrine of legality plays in South Africa, it would require a 'constitutional revolution' to permit legal certainty to trump legality.[188]

But the argument that legal certainty takes no account of prejudice is questionable, for surely the opposite is true. The reason why legal certainty is afforded considerable weight in various areas of administrative law, such as the delay rule and the *functus officio* doctrine, is precisely to prevent the prejudice that might otherwise arise.[189] Furthermore, the argument that it would take nothing short of a 'constitutional revolution' to uphold *ultra vires* decisions is somewhat exaggerated, particularly if one proceeds from the premise that the rule of law is made up of competing ideals that need to be balanced against each other in a proportionate manner.

The proportionality-based approach inherent in *Coughlan'*s balancing exercise was given clearer expression in *Nadarajah's* case. In this case, the court held somewhat *obiter* that a legitimate expectation could be denied only 'in circumstances where to do so is the public body's legal duty or is otherwise a proportionate response, having regard to the legitimate aim pursued by the public body in the public interest'.[190] This was said to be based on the requirements of good administration that obliges public bodies to deal 'straightforwardly and consistently' with the public.[191] The court explained that a refusal by a public body to fulfil its promises has to be 'objectively justified as a proportionate measure in the circumstances'.[192]

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[184] Movshovich (note 5 above) 154.
[185] Campbell (note 176 above) 319.
[186] Ibid 318.
[187] Ibid 319.
[188] Ibid.
[189] *MEC for Health, Province of Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 219 (SCA) para 21.
[190] *Nadarajah* (note 182 above) para 68.
[191] Ibid para 51.
[192] Ibid para 68.

The notion that a substantive legitimate expectation may be denied when it is the public body's *legal duty* to do so, suggests that the *ultra vires* issue would easily defeat a claim based on substantive legitimate expectation. After all, it would always be the legal duty of a public body to resist *ultra vires* acts.[193] However, Movshovich argues otherwise.[194] He argues that implicit in the *Nadarajah* judgment is the idea that *ultra vires* representations can in certain circumstances give rise to enforceable expectations and that the issue of legal duty arises mainly to determine whether the frustration of the expectation would amount to an abuse of power. The legal duty is thus subject to a justification exercise, based on a proportionality assessment.[195] He argues further that if a public body wishes to rely on a legal duty to frustrate an expectation, it would have to show that the law mandates (and not merely permits) it to do so.[196]

Another approach to enforcing substantive legitimate expectation is based on the English-law concept of '*Wednesbury* unreasonableness'.[197] In terms of this approach, an administrative decision can be set aside if it is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'[198] Thus, the absence of a reasonable and rational basis for denying a substantive benefit would form the basis for judicial review. However, the threshold required to establish unreasonableness is very high, and it is usually left to the administrator to determine whether the public interest justifying the denial of the substantive expectation outweighs the expectation.[199] The obvious drawback of this approach is that it allows unreasonable decisions that do *not* meet the *Wednesbury* standard to slip through the net.[200] Therefore, the denial of a substantive benefit based on an *ultra vires* representation is unlikely to pass the *Wednesbury* test for review.

Campbell advocates for a modified form of 'Wednesbury' unreasonableness.[201] Unlike the strict *Wednesbury* approach, the modified approach permits the denial of a substantive legitimate interest only when there is an 'imperative public interest' in doing so.[202] The

[193] Hoexter (note 4 above) 431.
[194] Movshovich (note 5 above) 159 – 162.
[195] Ibid 160; Hoexter (note 4 above) 431.
[196] Movshovich (note 5 above) 160.
[197] Based on the test established in the UK Court of Appeals judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (CA) at 682H – 683A.
[198] *CCSU v Minister for the Civil Service* [1985] AC 374 (HL) at 410D – H.
[199] Geo Quinot 'The Developing Doctrine of Substantive legitimate Expectations in South African Administrative Law' (2004) 19 *SA Public Law* 543, at 559.
[200] Ibid.
[201] Campbell (note 179 above) 310 – 316.
[202] Ibid. See also Hoexter (note 4 above) 434 – 435.

'modified *Wednesbury*' approach begins with the traditional requirement of procedural fairness, in terms of which the administrator must first afford the person whose legitimate expectations are to be denied a fair hearing. After hearing the affected person, and having been apprised of the legitimate expectations, the administrator must act rationally and reasonably in reaching his or her decision. This requires that the legitimate expectation of the affected person be given sufficient weight in the decision making process. However, in terms of the 'modified *Wednesbury*' approach the rationality and reasonableness of the decision would not be tested against the traditional *Wednesbury* standard, but against a lower threshold, in terms of which a decision to deny a substantive legitimate expectation will be regarded as rational only if there is some 'imperative public interest' to justify its denial.[203]

Where a court finds that the decision to deny the substantive benefit was unreasonable in that it was not based on any imperative public interest, it may make any order which is 'just and equitable' in the circumstances. This may include substituting the decision of the administrator with the court's own decision in exceptional circumstances. The court may also remit the matter back to the administrator with a directive to compel the administrator not to depart from the undertaking or policy on which the legitimate expectation was based,[204] or it could decide not to grant relief to the person negatively affected by the decision for reasons of 'good public administration.'[205]

Quinot is justifiably critical about the lack of clarity of the standard of review in both the *Wednesbury* and modified *Wednesbury* approach.[206] He argues that the lack of clarity as to the factors that inform an 'imperative public interest' serves to obscure rather than spell out the competing interests involved.[207] It also seems unlikely that *ultra vires* promises will be afforded any kind of substantive protection, even on the basis of the lowered threshold of the modified *Wednesbury* approach. Indeed, the courts are likely to show considerable deference to an administrator's view of what constitutes 'imperative public interest' and are therefore unlikely to interfere with a denial of legitimate expectation due to illegality. [208]

The current position in our law regarding *procedural* protection for legitimate expectation is that the promise or practice relied upon must have been competent and lawful

[203] Campbell (note 179 above) 313 and 316.
[204] Ibid.
[205] Ibid.
[206] Quinot (note 199 above) 561 – 563.
[207] Ibid.
[208] Ibid 559.

for the public official to make or adopt[209] — they must have been *intra vires*. As a rule, procedural protection of a legitimate expectation will not arise from an *ultra vires* representation.[210] It is unlikely that this requirement will be any different when our courts eventually takes the plunge by affording substantive protection to legitimately held expectations. When they take the plunge, the courts would have to deal with numerous complexities such as ensuring that substantive expectations are not treated as rights, and that the principle of separation of powers and the rule against fettering are afforded due weight.[211] Given the cautious approach of our courts to affording substantive protection even in cases involving *intra vires* representations,[212] it is unlikely that the courts will embrace the doctrine of substantive legitimate expectation in cases that involve the added complexity of *ultra vires* representations.

(c) The 'public law remedy'

But there could be more than one route to protecting substantive expectations without relying on the doctrine of substantive legitimate expectations.[213] In *KZN Joint Liaison Committee* the Constitutional Court gave effect to a substantive expectation without invoking the doctrine of substantive legitimate expectation or indeed any other principle of administrative law, but instead based its decision on 'broader public law and regulatory grounds'.[214] The case apparently establishes the principle that once the due date for payment has passed, a public body cannot renege on a 'publicly promulgated promise to pay', absent an overriding public interest.[215] This is because 'the entitlement to receive a payment "solidifies" from an expectation, when indicative amounts are announced, to an accrued right once the payment deadline has passed.'[216] Once the due date for payment passes a legal obligation is created, unilaterally enforceable at the instance of those who were intended to benefit from the promise to pay.[217] This is based on the requirements of reliance, accountability and rationality.[218]

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[209] *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para 28; *Khani v Premier, Vrystaat* 1999 (2) SA 863 (O) at 869 H-I. See also *Van Schalkwyk v Mkiva NO* [2007] ZAFSHC 69 (5 July 2007).
[210] Hoexter (note 4 above) 424;
[211] Campbell (note 179 above) 294.
[212] Hoexter (note 4 above) 432.
[213] Geo Quinot (note 199 above) 553 – 554.
[214] *KZN Joint Liaison Committee* (note 15 above) para 58.
[215] Ibid para 48.
[216] Ibid para 60.
[217] Ibid. Apparently, this principle is not new to our law. The Constitutional Court pointed out that In *Dilokeng Chrome Mines (Edms) Bpk v Direkteur Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A) (at 18C - I), the Appellate Division said that it would be strange if the government's undertaking to pay a purely beneficial grant could be made enforceable only when a contract was created.
[218] *KZN Joint Liaison Committee* (note 15 above) paras 63 – 66.

But if the Constitutional Court had indeed discovered a new path to enforce substantive expectations, its benefit for administrative law remains rather obscure. I agree with Murcott that the public-law principle seems to apply to a very narrow set of circumstances, namely, where a public authority made an express promise to pay and the due date for payment had already passed.[219] However, most substantive expectations arise without reference to a due date and do not always involve the payment of money. Hoexter expresses greater optimism in the potential of *KZN Joint Liaison Committee*.[220] According to Hoexter, the public-law principle as developed in the minority judgment of Froneman J 'could be used substantively to protect reliance on a broad range of representations in future, thus possibly bypassing the doctrine of legitimate expectations – and procedural fairness – altogether'.[221]

The public-law principle could possibly be developed in future as an alternate path to enforcing substantive expectations, and the fact that our law is infused with the constitutional values of human dignity and ubuntu[222] serves to provide a particularly South African flavour to the concept. But in my view, the public-law principle does not offer a clear solution to the problem of *ultra vires* contracts. First, *KZN Joint Liaison Committee* was not concerned with *ultra vires* representations at all, because in that instance the promise to pay the subsidies was entirely lawful. Even if one were to apply Froneman J's equity-based approach, it does not seem that the public law principle was designed to deal with *ultra vires* undertakings by public bodies. Secondly, as we have seen in the context of estoppel and substantive legitimate expectation, a public body can renege upon a promise if there is an 'overriding public interest' in doing so, a concept all too easily invoked to allow a narrow view of legality to trump broader-rule-of-law considerations.

5.4 CONCLUSION

American legal scholars have observed that the case law involving estoppel in that country 'presents an uninspiring picture of injustice, anachronism, and rampant confusion'.[223] Some might say that this serves as an apt description of the current state of our law in relation to estoppel as well. Perhaps the anachronistic nature of the doctrine is unavoidable, for although

[219] Melanie Murcott 'A Future for the Doctrine of Substantive Legitimate Expectation? The Implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*' (2015) 18 *Potchefstroom Electronic Law Journal* 3133, 3154. See also Hoexter (note 119 above) 228; Hoexter (note 178 above)186;
[220] Hoexter (note 178 above) 186.
[221] Ibid 187.
[222] *KZN Joint Liaison Committee* (note 15 above) para 17.
[223] Gellhorn (note 35 above) 522 – 523.

the law does not countenance illegality, it also does not tolerate injustice. It is by no means an easy feat to achieve both objectives when courts have to deal with *ultra vires* representations that have resulted in prejudice to innocent representees.

I have argued that the principle of estoppel ought to be developed beyond the principles that held sway during the early days of Union. As a consequence of modernity, our lives are regulated 'to an extent that would have been unimaginable a generation ago'.[224] Citizens rely on the promises and representations made by government officials in just about every area of life and usually make key decisions based on such promises and undertakings. The notion that an *ultra vires* award of contract should always prevail against a defence of estoppel is out of step with modern-day reality and calls for reappraisal in light of the constitutional norms of proportionality.

The law should not bestow on government 'the dubious privilege of not being bound by the representations of its employees in routine commercial transactions'.[225] This is particularly the case in instances involving egregious misconduct on the part of its officials, such as where public officials deliberately mislead bidders into believing that they have legal authority to award a tender, whereas they do not,[226] or where bidders are assured that their failure to meet responsiveness criteria would have no effect on the validity of the tender award. Naturally, the degree of egregiousness required cannot be defined with any degree of precision. What is important is that the courts be given sufficient latitude to determine when a departure from the conventional approach would accord with the principles of justice.

Willis JA observes that formalism in law has come under increasing scrutiny.[227] Anti-formalism recognizes that different aspects of the rule of law require differential weighting, depending on the circumstances.[228] Hence, an unduly restricted view of the rule of law, as being concerned only with the avoidance of *ultra vires* acts, is inappropriate in a modern

[224] *Hubbard* (note 6 above) para 22.
[225] *Portmann v United States* 674 F.2d 1155, as quoted in Gellhorn (note 35 above) 527.
[226] *Gijima (*note 14 above).
[227] *Hubbard* (note 6 above) para 22, with reference to Christopher Forsyth 'Showing the Fly the Way Out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66 *Cambridge Law Journal* 325.
[228] Daniel Freund & Alistair Price 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *SALJ* 184. See also Hoexter (note 119 above) 218.

constitutional state. In any event, the law has long abandoned its former inflexible position that a thing done contrary to law is void and of no effect.[229]

More importantly, the law should as far as possible protect the sanctity of the public trust. After all, citizens 'naturally trust in their government, and ought to do so, and they ought not to suffer for it'.[230] Baxter observes that the public trust would be undermined if representations made by public authorities turn out to be meaningless or unreliable.[231] According to Baxter, '[w]e expect public authorities to be consistent and reliable; planning one's affairs would become impossible if one could not rely on official advice. For this reason it is important not to interpret the official immunity from estoppel too liberally.'[232] In *Standard Bank v Estate Van Rhyn*, the AD stated that care should be taken to ensure that 'greater inconveniences and impropriety' do not result than 'would follow the act itself done contrary to law'.[233] In essence, this dictum cautions against the use of 'legislative sledgehammers'.[234]

Theoretically, the doctrine of substantive legitimate expectation could serve as a basis for protecting substantive expectations arising from *ultra vires* representations. However, it is unlikely that the courts will be receptive to this approach when they take their first tentative steps to adopt the doctrine into our law. But perhaps *Gijima* has opened up an altogether different path for aggrieved contractors. [235] The ruling in *Gijima* suggests that the remedial powers of the courts are flexible enough to give effect to the principle of legality, whilst at the same time preserving the rights of innocent contractors. Doubtless the approach adopted in *Gijima* requires further elucidation, as the legal basis for preserving the rights of a contracting party to an illegal contract was not fully explained. Nevertheless, *Gijima* is an encouraging development for parties in search of some form of relief when public bodies rely on their own non-compliance with statutory requirements to renege on their contractual undertakings.

[229] *Standard Bank v Estate Van Rhyn* 1925 AD 266 (hereafter *Estate Van Rhyn*) 274. See also *Hubbard* (note 6 above) para 19.
[230] *Menges v Dentler* 33 Pa.495, 500 (1859) as quoted in Dean (note 35 above).
[231] Baxter (note 43 above) 425. See also Movshovich (note 5 above) 47 – 48.
[232] Baxter (note 44 above) 425.
[233] *Estate Van Rhyn* (note 226 above) 274. See also *Hubbard* (note 6 above) para 19.
[234] *Hubbard* (note 6 above) paras 19 and 43.
[235] *Gijima* (note 14 above).

CHAPTER 6
PROCEDURAL FAIRNESS

6.1 INTRODUCTION

This chapter examines the application of procedural fairness rights when decisions are made to disqualify bidders on grounds of non-responsiveness. Three key themes are explored:

(a) An analysis of the administrative setting in which procurement-related decisions are made;
(b) The implications of the ruling of the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*[1] for how the right to procedural fairness applies within the context of public procurement, and
(c) The application of procedural fairness to preliminary decisions involving non-responsive bids.

Administrative bodies, such as procuring entities and licensing authorities, wield what might be called 'powers of commercial life or death over a person's trade or livelihood'.[2] As such, disqualification from a tender process could sound a death knell for affected entities. The constitutionally protected right to procedural fairness[3] demands of government that it act in a manner that is 'responsive, respectful and fair' when making administrative decisions that impact on people's lives.[4]

It is also universally recognized that the content of the right depends on the administrative setting in which decisions are made. The right to procedural fairness is highly variable,[5] and is 'not to be applied by rote' in equal portions and in all administrative contexts.[6] Our law has discarded an 'all-or-nothing' approach, the erroneous notion that procedural

[1] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) (hereafter *AllPay 1*).
[2] William Wade & Christopher Forsyth *Administrative Law* 11ed (2014) 463.
[3] Section 33(1) of the Constitution.
[4] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (hereafter *Joseph*) para 46. See also *Walele v City of Cape Town* 2008 (6) SA 129 (CC) (hereafter *Walele*) para 27; *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) (hereafter *Masethla*) para 187.
[5] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 368; Laurence Boulle, Bede Harris & Cora Hoexter *Constitutional and Administrative Law: Basic Principles* (1989) 327.
[6] *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 (HL) 106 d – h, approved by the SCA in *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) (hereafter *Du Preez*) at 231I – 232C.

fairness necessarily demands a full hearing whenever the right was applied, or provides no protection at all.[7] The right to procedural fairness does not necessarily require that bidders be afforded full *audi* whenever a procuring entity takes adverse decisions throughout the multiple stages of the procurement cycle. Therefore, procedural fairness protection need not be denied for fear of overburdening the administration with the obligation to have interminable hearings.[8] The principle of variability also addresses concerns regarding administrative paralysis.

Bolton suggests that the right to procedural fairness applies to two relationships within a public procurement context.[9] First, the relationship between an organ of state and bidders. This entails that procuring entities must provide sufficient access to the procurement process.[10] Bids should be widely advertised, potential bidders should be aware of the rules of the bidding process and be afforded enough time to participate in the process.[11] Secondly, the relationship between an organ of state and bidders in relation to each other.[12] This entails that procuring entities should treat bidders fairly and equally in relation to each other.[13]

I agree with this perspective, but would add that a further dimension must be considered, namely, how the right to procedural fairness *mutates* throughout the different stages of the procurement cycle. It is my contention that the right to procedural fairness does not apply uniformly throughout all stages of the procurement cycle. The principle of variability requires an understanding of the administrative setting within which procurement decisions are made in order to determine the extent to which the right should be applied. The inter-relationship between the right to procedural fairness and the different stages of the procurement cycle has not been adequately explored in the available literature.

In the discussion below, I juxtapose the position of a bidder disqualified on grounds of non-responsiveness during the early stages of the procurement cycle with that of a bidder who was identified as the highest-ranked bidder during the final stages of the cycle, but ultimately rejected due to risk factors such as negative reports regarding previous performance and the

[7] Hoexter (note 5 above) 405; Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 504.
[8] *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) (hereafter *Thabo Mogudi*) para 43; *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George* [2005] JOL 1368 (C) (hereafter *Milnerton Lagoon*) para 31.
[9] Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 47 – 48.
[10] Ibid 48.
[11] Ibid.
[12] Ibid.
[13] Ibid.

like. I contend that although both categories of bidders are entitled to some form of procedural fairness, the degree of the protection afforded the two categories of bidders is different. I draw on the reasoning of the Constitutional Court in *AllPay 1*[14] to make the following propositions regarding a bidder disqualified for non-responsiveness: Bidders are afforded procedural fairness, first and foremost, when they are invited to participate in a bidding process. The invitation to tender constitutes 'notice' whilst the bidders' responses constitute their 'representations'. It is incumbent upon bidders to ensure that their representations fully address the terms and conditions of the bid. With the exception of a few instances when non-responsive bidders ought to be given an opportunity to explain their non-compliance, there is no *general duty* on procuring entities to afford non-responsive bidders a further opportunity to explain their failure to comply with clear, mandatory and material terms of a tender before being disqualified.

I further contend that the situation is different when a decision is taken not to award a tender to a highest-ranked bidder. In such instances, the right to procedural fairness demands additional protection.

This chapter also discusses the troublesome issue regarding the observance of procedural fairness when preliminary decisions are made. Decisions with potentially adverse consequences are taken throughout the procurement cycle. Some have final effect, whilst others are preliminary in nature. I explore the question whether procedural fairness protection should be afforded when a procuring entity makes a preliminary decision to disqualify a bidder on grounds of non-responsiveness.

Although the right to procedural fairness is usually discussed in the context of the twin maxims of *audi alteram partem* and *neo iudex in sua causa*, it is not limited to these two maxims. A court will look at the totality of the facts to determine whether a person was treated fairly.[15] In this chapter I focus mainly on the *audi* principle.

[14] *AllPay 1* (note 1 above) paras 88 – 90.
[15] *De Lange v Smuts NO* 1998 (3) SA 785 (CC) (hereafter *De Lange*) paras 131 – 132; *Carlson Investments Share Block (Pty) Ltd v Commissioner, SA Revenue Servic*e 2001 (3) SA 210 (W) at 222 I – J.

6.2 UNIVERSALITY AND FLEXIBILITY

Two cardinal features of the right to procedural fairness are emphasized throughout the literature and the case law. The first is its *universality*.[16] English legal authority suggests, perhaps in somewhat hyperbolical terms, that the obligation to observe natural justice is 'a duty lying upon everyone who decides anything'.[17] Section 33(1) of the Constitution also describes the right in broad, sweeping terms by declaring that 'everyone' enjoys the right to procedurally fair administrative action. In similar vein, s 3(1) of the PAJA affords the right to procedural fairness to 'any person', albeit that the right is provided for in a more attenuated form.[18] Section 3(1) limits the duty to observe procedural fairness to administrative action which 'materially and adversely affects the rights or legitimate expectations of any person'. Despite its truncated scope, the Constitutional Court had held that s 3(1) must be interpreted in a manner that is consistent with the broader constitutional right to administrative justice as enshrined in section 33.[19]

The universality of the right to procedural fairness creates a particular default position: procedural fairness requirements must be observed in some form or another whenever an administrator makes an administrative decision that affects someone's rights or legitimate expectations. This ensures that everyone enjoys at least the minimum content of fairness.[20] The right must be observed irrespective of whether the applicable legislation, policy or procedure in terms of which the administrative decision is taken, makes express provision for the right.[21] At common law *audi alteram partem* applied unless it was clear that Parliament had expressly or by necessary implication enacted that it should not apply,[22] but in the constitutional era it is a fundamental right that must be observed whenever administrative action affects rights or legitimate expectations.[23]

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[16] Hoexter (note 5 above) 363 – 364; Wade & Forsyth (note 2 above) 405 – 408.
[17] *Board of Education v Rice* [1911] AC 179 at 182 as quoted in Wade & Forsyth (note 2 above) 420.
[18] South African Law Commission Discussion Paper 112 (Project 25), *Statutory Revision: Review of the Interpretation Act 33 of 1957* (September 2006) para 4.6.
[19] *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 35; see also the minority judgment of O'Regan J in *Walele* (note 4 above) para 23; and see *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) (hereafter *Grey's Marine*) para 22.
[20] Hoexter (note 7 above) 504.
[21] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (hereafter *Zondi*) para 101; Hoexter (note 5 above) 368; Wade & Forsyth (note 2 above) 417.
[22] *R v Ngwevela* 1954 (1) SA 123 (A) at 131H; *Du Preez* (note 6 above) at 231G.
[23] *Joseph* (note 4 above) paras 22 – 25.

The second cardinal feature of procedural fairness is its *flexibility*.[24] The right to procedural fairness is 'contextual and relative'.[25] Despite its universal application, our law has never required 'a knee-jerk response of affording a right to a hearing in every case regardless of the context or circumstances of those affected.'[26] Ultimately, a fair administrative process depends on the circumstances of each case.[27] As explained by Ngcobo J in *Masetlha v President of the Republic of South Africa*, 'the precise form and occasion for respecting [the right to procedural fairness] are matters of flexibility and sensibility and ought to conform maximally to the exigencies and practicalities of the circumstances'.[28] However, s 3(2)(*b*) of the PAJA sets out the minimum requirements that must be observed when administrative action materially and adversely affects the rights and legitimate expectations of any person. As a minimum, affected persons must be given adequate notice of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal; and adequate notice of the right to request reasons.[29]

The fundamental premise underpinning the right to procedural fairness is that people should be afforded an opportunity to influence the outcome of decisions that affect them.[30] This serves both an 'instrumental' purpose (in the sense that procedural fairness contributes to better quality decisions), as well as a 'non-instrumental' purpose (process rights protects human dignity and the rule of law).[31] In *Psychological Society of South Africa v Qwelane*,[32] the Constitutional Court emphasized that the right to procedural fairness promotes two important constitutional values: first, recognizing the subject's self-worth and dignity and secondly,

[24] Hoexter (note 5 above) 362; *Masetlha* (note 4 above) para 190.
[25] *Chairman of the Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) (hereafter *Brenco*) para 13. See also *Walele* (note 4 above) para 28; *Joseph* (note 4 above) para 56; *Zondi* (note 21 above) para 114; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) (hereafter *Kyalami Ridge*) para 101; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91(CC) (hereafter *Premier, Mpumalanga*) para 39; *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) (hereafter *SARFU*) para 219; Hoexter (note 5 above) 362 – 365.
[25] Hoexter (note 5 above) 362 – 365.
[26] O' Regan ADCJ in *Walele* (note 4 above) para 123.
[27] Section 3(2)(*a*) of the PAJA.
[28] *Masetlha* (note 4 above) para 190. See also *Joseph* (note 4 above) para 56; *Zondi* (note 20 above) para 114; *SARFU* (note 24 above) para 219.
[29] However, in *Joseph* (note 4 above) para 59, the Constitutional Court held that s 3(2)(*a*) allows the courts some discretion to enforce compliance with the minimum requirements. For further discussion see Hoexter (note 5 above) 366 – 378.
[30] Hoexter (note 6 above) 363; *Masetlha* (note 4 above) para 75.
[31] Paul Craig *Administrative Law* 7 ed (2012) 12-001.
[32] *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC) para 34.

recognizing that an opportunity to be heard invariably conduces to better justice.[33] The protection of self-worth and dignity is ensured by giving effect to the idea that 'people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision'.[34] Better quality decision-making at the administrative level and in turn, better justice, is ensured by removing ignorance and bias from the decision-making process.[35]

Procedural fairness is also key to promoting rationality, 'the sworn enemy of arbitrariness'.[36] This principle was vividly illustrated in *South African Reserve Bank v Public Protector*, in which the Public Protector was excoriated for issuing a final report in which she recommended certain constitutional amendments aimed at changing the primary object of the Reserve Bank. [37] The Public Protector had done so without having mentioned such recommendations in her preliminary report. Consequently, the Reserve Bank was not afforded a proper opportunity to inform the Public Protector about the potential consequences of such decision. The court held that '[t]he Public Protector failed in her duty in this respect with consequences that were severely damaging not only to the economy but to the reputation of her own office'.[38]

6.3 A QUESTION OF 'RIGHTS'

Much ink has been spilled on an old bugbear, namely, whether an unsuccessful bidder can lay claim to any rights that are negatively affected by a decision to disqualify it from a bidding process. The debate is perhaps less important nowadays, but in the early years of our constitutional jurisprudence some courts poured scorn on the notion that in the award of a tender an unsuccessful bidder had any rights whatsoever that were worthy of constitutional protection.[39] This matter was settled in *AllPay 1* when the Constitutional Court pronounced definitively that tenderers enjoy a right to a fair tender process, irrespective of whether they are

[33] See Hoexter (note 5 above) 363; *Joseph* (note 4 above) para 42; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 13 B – C.
[34] *Masetlha* (note 4 above) paras 75 and 187.
[35] *De Lange* (note 15 above) para 131; *Masetlha* (note 4 above) para 187.
[36] *Masetlha* (note 4 above) para 187.
[37] *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) (hereafter *SARB*) para 58.
[38] Ibid.
[39] See for example *SA Metal Machinery v Transnet Ltd* [1998] JOL 3984 (W) (hereafter *SA Metal*) 12 – 15.

awarded the contract.[40] But administrative lawyers could be forgiven if they thought that the matter had been settled much earlier.[41]

Notwithstanding definitive judicial pronouncements to this effect, the debate about the nature of rights that bidders enjoy during a tender process resurfaces from time to time, sometimes in the very courts that had earlier pronounced on the matter! For example, in the *AllPay* matter, the SCA invoked the discarded notion that an aggrieved bidder was not entitled to procedural fairness protection, as it enjoyed neither any rights to the contract nor a legitimate expectation of being awarded the contract.[42] Hence the need for a brief comment on the topic.

The notion that the award of tenders does not affect a bidder's rights was strongly influenced by 'purely contractual' reasoning,[43] a formalistic approach inherited from pre-constitutional times that sought to exclude public law considerations from matters relating to public contracts.[44] 'Purely contractual' reasoning still prevailed during the first decade of the democratic dispensation[45] and gave rise to the notion that the authority of an organ of state to award tenders flowed from its contractual powers to invite members of the public to submit offers, which it was free to accept or reject at will.[46] This 'contractual' approach led to the conclusion that the award of tenders did not constitute administrative action. In *SA Metal Machinery Co Ltd v Transnet Ltd*,[47] the High Court opined that until a bidder's tender was accepted he or she was effectively a 'stranger' to the tender process and participated in the tender process 'at risk'. The court concluded that unsuccessful bidders did not have a legitimate expectation, let alone an enforceable right that their bids would be considered.[48] This, despite the broad wording of s 24(c) of the interim Constitution and the Appellate Division's ruling in

[40] *AllPay 1* (note 1 above) para 60.
[41] See for example *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A) (hereafter *Umfolozi Transport*); *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 176 (SCA) (hereafter *Aquafund*).
[42] *AllPay Consolidated investment Holdings v Chief Executive officer, South African Social Security Agency* 2013 (4) SA 557 (SCA) (hereafter *AllPay (SCA)*) para 95. See also *Khani v Premier Vrystaat* 1999 (2) SA 863 (O) at 869.
[43] Epitomized in *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A).
[44] Hoexter (note 5 above) 445. For academic analysis of the interrelationship between public law and the law of contract, see Geo Quinot *State Commercial Activity: A Legal Framework* (2009); Hoexter (note 5 above) 443 – 451; Cora Hoexter 'Contracts in Administrative Law: Life After Formalism?' (2004) 121 *SALJ* 595; Alfred Cockrell ' "Can you Paradigm?" – Another Perspective on the Public Law/Private Law Divide' in T W Bennet et al (eds) *Administrative Law Reform* (1993) 35, 231; Raisa Cachalia 'Government Contracts in South Africa: Constructing the Framework' (2016) 27 *Stellenbosch Law Review* 88.
[45] See for example *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 (3) SA 1013 (SCA) para 18.
[46] See the argument advanced by the respondent in *Aquafund (Pty) Ltd v Premier of Western Cape* 1997 (7) BCLR 907 (C) at 916.
[47] *SA Metal Machinery.*
[48] Ibid 14.

Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere that the award of tenders amounted to administrative action.[49]

The 'purely contractual' approach was finally overruled in *Logbro Properties CC v Bedderson NO,*[50] although the shift had already occurred in an earlier line of cases.[51] This line of thinking was developed further in *Joseph v City of Johannesburg* in which the Constitutional Court embraced the 'determination theory' of rights.[52] The court held that procedural fairness had to be observed not only when a 'breach' of a right occurred, but also when administrative action materially and adversely 'affects' or 'determines' a right or legitimate expectation.[53]

This jurisprudence culminated in the definitive statement by the Constitutional Court in *AllPay 1* that the right that tenderers enjoy is the right to a fair tender process, irrespective of whether they are ultimately awarded the tender.[54] The Constitutional Court explained that irregularities in the process that affected the fairness of the outcome in that case certainly had the *capacity* to affect legal rights and that this was sufficient to establish that the aggrieved bidder's rights had been 'materially and adversely' affected. [55]

It is now settled law that the primary right an aggrieved bidder seeks to protect is its right to administrative justice and a fair tender process.[56] The courts have also held that other tender-related decisions, such as a decision to disqualify a bidder on grounds of non-responsiveness,[57] to cancel a tender process[58] or to restrict an entity from doing business with the state[59] also constitutes administrative action. However, some areas of uncertainty remain. For example, the

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[49] *Umfolozi Transport* (note 41 above).
[50] *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) (hereafter *Logbro*).
[51] *Aquafund* (note 39 above); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 176 (SCA); *Du Bois v Stompdrift – Kamanassie Besproeingsraa*d 2002 (5) SA 186 (hereafter *Du Bois*).
[52] *Joseph* (note 4 above) para 31. For a critique of the determination theory, see Etienne Mureinik 'Reconsidering Review: Participation and Accountablity' in Hugh Corder & Fiona McLennan (eds) *Controlling Public Power: Administrative Justice through the Law* (1995) 28, 29 – 31.
[53] *Joseph* (note 4 above) para 31
[54] *AllPay 1* (note 1 above) para 60. The Constitutional Court followed a similar line of reasoning in *Minister of Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC), in which it held (at para 30) that prisoners had no right to be pardoned, but that the power conferred on the President to pardon entailed a corresponding right to have a pardon application considered timeously, rationally, in good faith and in accordance with the principle of legality. See also *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 all SA 336 (T) (hereafter *Grinaker*) para 32; *Nextcom (Pty) Ltd v Funde NO* 2000 (4) SA 491 (T) 504.
[55] The court relied on the authority of *Grey's Marine* (note 19 above) para 23.
[56] Geo Quinot 'Enforcement of Procurement Law from a South African Perspective' (2011) 6 *Public Procurement Law Review* 193 at 199.
[57] *VDZ Construction (Pty) Ltd v Makana Municipality* [2011] JOL 28061 (ECG) (hereafter *VDZ Construction*) para 11.
[58] *Logbro Properties* (note 50 above).
[59] *Chairman of the State Tender Board v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA) para 14.

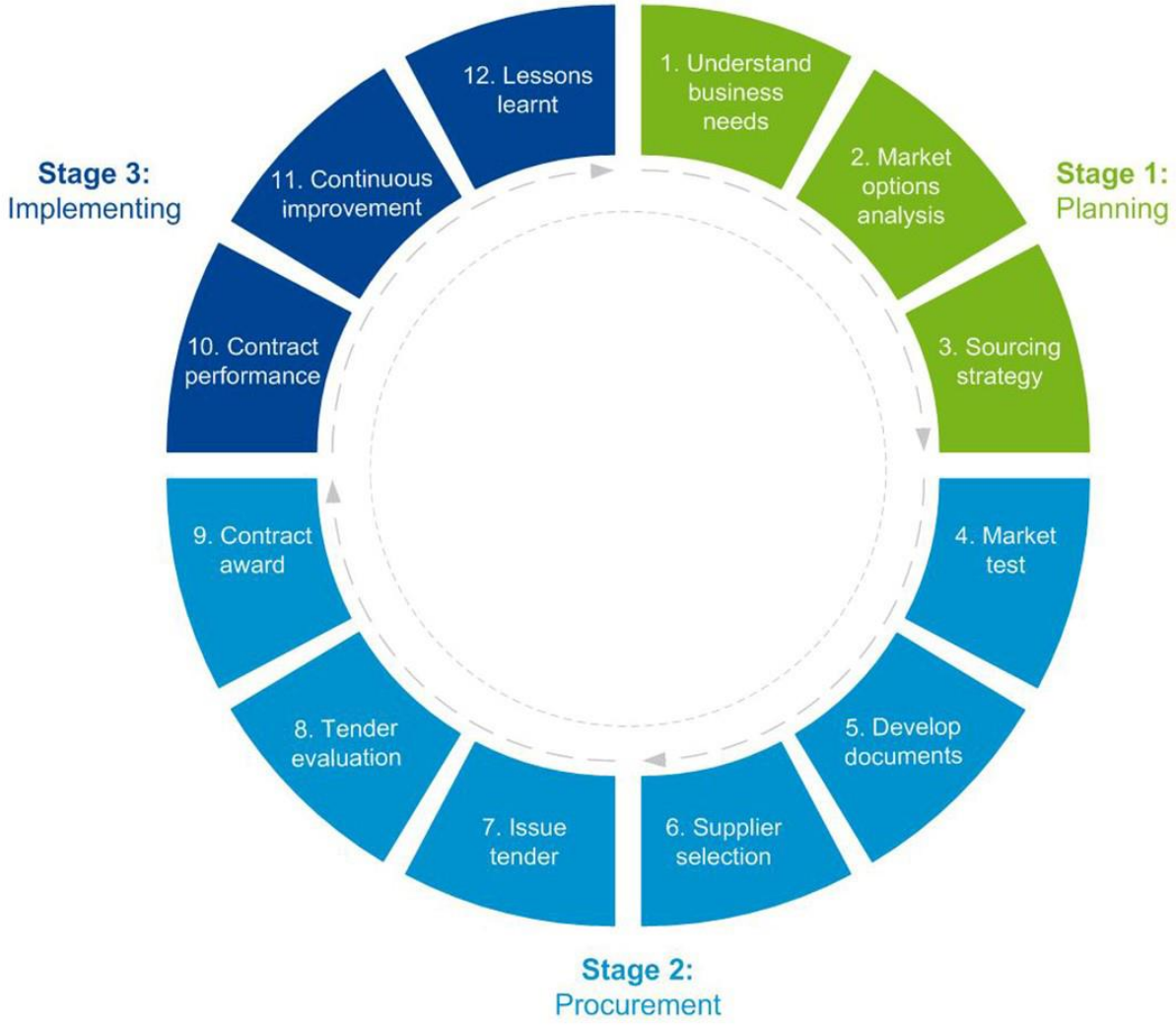
SCA has recently adopted conflicting positions on whether a decision to cancel a tender constitutes administrative action.[60]

6.4 THE PROCUREMENT CYCLE

The content of the right to procedural fairness is influenced by various factors that affect the 'margin of appreciation given by the judge to the agency'.[61] It is my contention that in the context of public procurement, the content of the right to procedural fairness is influenced by factors such as the *stage* of the tendering process under consideration and the impact of the decision on the affected entity. It is therefore necessary to discuss the procurement cycle in order to understand the administrative context in which procurement decisions are made.

The procurement cycle consists of a series of consecutive steps that must be followed before a procurement transaction is concluded.[62] The diagram below depicts the steps that are followed in a typical procurement cycle. [63]

[60] Compare the approach adopted by the SCA in *City of Tshwane and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) (hereafter *Nambiti Technologies*) and *SAAB Grintek Defence (Pty) Ltd v SAPS* [2016] 3 All SA 669 (SCA) to *Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others* [2017] ZASCA 30 (29 March 2017).
[61] Hoexter (note 7 above) 503.
[62] W M J Hugo & J A Badenhorst-Weiss (ed) *Purchasing and Supply Management* 6 ed (2011) 12.
[63] Procurement cycle diagram last accessed from https://www.google.co.za/search?q=the+procurement+cycle&source on 11 September 2018. See also Hugo & Badenhorst-Weiss (note 62 above) 12 – 15; Transnet's *Procurement Procedures Manual* (2015) (unpublished).



As will be evident from the above diagram, the procurement cycle typically consists of a series of steps covering roughly three stages of procurement: the pre-tender (planning) stage, the procurement stage and the post-tender (contract implementation) stage.[64] During the first stage, that is the pre-tender stage, business needs are analysed to determine the scope and estimated cost of the requirement. Key decisions are made in relation to whether the goods or services need to be procured from outside the organization or internally, the purpose of the procurement event and how its main objectives such as pricing, technical requirements, total cost of ownership and socio-economic objectives, etc are to be achieved.

Many of the problems associated with public procurement have their origins in this stage of the process. These include biased specifications, unbudgeted procurement,

[64] National Treasury *Public Sector Supply Chain Management Review* (2015) 16 – 20.

unnecessary contract extensions, abuse of non-competitive procedures and inadequate needs assessment.[65] The key objectives of the pre-tender stage are to ensure that the procurement of goods and services is properly planned and aligned to the strategic goals and resource plan of the procuring entity.[66] Demand planning and management, procurement planning, specification management and supplier management are key to ensuring that goods and services are delivered 'at the right time, place and price, in the right quantity and of the right quality'.[67]

During this stage, organs of state have considerable discretion to decide *whether* to buy, *what* to buy, *when* to buy, and *how* to buy. Decisions regarding the selection of the evaluation criteria, the weight of each criterion, applicable values, and the minimum qualifying score for functionality fall squarely within the domain of the procuring entity.[68] However, some legal prescripts must nevertheless be observed during the pre-procurement stage. For example, the goods and services being procured must appear on an 'annual procurement plan'.[69] Furthermore, procuring entities must, as a rule, procure in terms of an open, competitive bidding process, or obtain prior approval from National Treasury to deviate from this requirement.[70]

The second stage of the cycle — the tender stage — could be regarded as the core of the tender process. It covers a number of steps, including preparation and issuing of the RFP, evaluation of bids and contract award. The common ills associated with this tender stage include inadequate public notification of the procurement event, conflict of interests, changing of evaluation criteria during bid evaluation, manipulation of scores, political interference and poor record-keeping.[71] Given its propensity for procedural impropriety, this stage is more closely regulated than the other two stages in the process. During this stage, strict observance of procurement rules is necessary to ensure the integrity of the process. This does not mean

[65] Ibid 17.

[66] Ibid 16.

[67] Ibid.

[68] Ibid 17.

[69] National Treasury SCM Instruction 2 of 2016/17 'Procurement Plans – Submission and Reporting' last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 23 September 2017.

[70] National Treasury SCM Instruction 3 of 2016/17 'Preventing and Combatting Abuse in the Supply Chain Management System' para 8, last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 15 September 2018.

[71] National Treasury *SCM Review* (note 64 above) 18.

that procuring entities may never deviate from procurement rules, but decisions to deviate must be based on justifiable grounds and follow a procedurally fair process.[72]

The watchwords during the tender stage are 'transparency' and 'objectivity'.[73] As explained in *SANRAL v Toll Collect Consortium*, transparency ensures that 'the tender process is not abused to favour those who have influence within the institutions of the state or those whose interests the relevant officials and office bearers in organs of state wish to advance'.[74] Transparency requires that the tender process be subject to public scrutiny;[75] that tenders be advertised publicly; that the terms and conditions of tender clearly set out what is required; that the tender adjudication be impartial and the results be publicly available; and that there is a record that discloses how the tender process was conducted.[76] However, except as otherwise required by law,[77] transparency does not require disclosure of the intricate details of the applicable point-scoring system.[78]

Likewise, 'objectivity' requires that tender evaluations take place 'by means that are explicable and clear and by standards that do not permit individual bias.'[79] However, this is not a purely mechanical process, since the tender evaluation often requires skill, expertise and the exercise of judgment.[80] A court is unlikely to interfere with a tender decision simply because the tender could have been clearer or more explicit, or because it disagrees with the relative importance attached to different evaluation criteria.[81] A court will interfere if a tender is unacceptably vague, or infected with illegality, impropriety or corruption.[82] At the end of this stage, a bidder is selected on the basis of scoring the highest points overall.

The third stage of the cycle focusses on contract management. During this phase, the contract must be managed to ensure that both the supplier and the procuring entity comply with the terms and conditions of the contract. Common problems that occur during this stage include

[72] *AllPay 1* (note 1 above) paras 34 – 40.
[73] *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA) (hereafter *SANRAL*) paras 17 – 22.
[74] Ibid paras 18.
[75] Ibid.
[76] Ibid.
[77] Regulation 5 of the PPPFA regulations in GN 10684 in *GG* 40553 of 20 January 2017 requires that bid documents disclose the points for each criterion and sub-criterion as well as the minimum qualifying score for functionality.
[78] *SANRAL* (note 73 above) paras 18.
[79] Ibid para 20.
[80] Ibid paras 20 – 22.
[81] Ibid paras 20 and 27.
[82] Ibid para 20.

poor supplier management, submission of fictitious invoices, delivery of poor quality goods or services and abuse of contract variation procedures, resulting in cost escalations.[83] Certain aspects of the post-tender stage are regulated. For example, there are limitations on the extent to which an organ of state may increase the value of a contract.[84]

A bidder's status, interests and rights undergo a significant metamorphosis during the various stages of the procurement cycle, which in turn affects the manner in which its right to procedural fairness must be observed. To illustrate this point, let us track the progression of hypothetical bidder X from the initial pre-tender stage to the contract award stage. It is my argument that during the pre-tender stage, the mere interest that bidder X has in a forthcoming procurement event cannot be equated with a right, a legitimate expectation or even a potential right. Indeed, the interest that bidder X has in the forthcoming opportunity is indistinguishable from that of the public at large.[85] As a potential bidder, X would not ordinarily have a right to be consulted regarding the strategic decisions made by a procuring entity during this early stage regarding the terms and conditions of tender, technical specifications, evaluation methodologies and the like.[86] However, exceptions may arise. An obvious example is when the decision to procure in a particular manner frustrates the legitimate expectations of existing suppliers based on an established practice[87] or a promise made.[88]

The position is different during the tender stage. When the RFP is issued to the public, bidders are invited to participate in the bidding process on an equal footing. When bidder X submits its bid and becomes a participant in the bidding process, it no longer has a mere interest, but a right — not a right to be awarded the contract, but rather a right to be treated fairly during the bidding process alongside all other bidders. Its right to be heard is protected by affording it

[83] National Treasury *SCM Review* (note 64 above) 19.
[84] National Treasury SCM Instruction 3 of 2016/17 'Preventing and Combatting Abuse in the Supply Chain Management System' para 9, last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 15 September 2018.
[85] *Grey's Marine* (note 19 above) paras 30 – 31.
[86] *SANRAL* (note 73 above) paras 18 – 22; *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 18; *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA) (hereafter *Moroka*) para 10.
[87] *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* 2009 (4) SA 639 (SCA).
[88] *Claude Neon Ltd v Germiston City Council* 1995 (3) SA 710 (W). In her minority judgment in *Walele* (note 4 above), O'Regan ADCJ suggested (at para 133) that legitimate expectation is not limited to the 'narrow' requirement of a promise or a practice and that a broader understanding of the concept would be appropriate given the expansive language used in s 33. For recent academic analysis of the doctrine of legitimate expectation, see Cora Hoexter 'The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa' in Matthew Groves & Greg Weeks (eds) *Legitimate Expectations in the Common Law* World (2017) 165.

equal treatment, adequate information and ample time to submit its representations to the bidding entity.[89]

Assuming that bidder X emerges as the preferred bidder on the basis of having scored the highest evaluation points overall, its status would undergo yet a further change. Section 2(1)(*f*) of the PPPFA prescribes that a tender *must* be awarded to a bidder that scored the highest points, unless 'objective criteria' justify the award to a lower-ranked bidder. This means that an organ of state is obliged to award a contract to the bidder with the highest points.[90] Absent objective criteria (whatever that may mean), bidder X is entitled to be awarded the contract. I argue below that during this stage, bidder X's right to procedural fairness requires additional protection. Bidder X is entitled to be heard should a procuring entity have misgivings at this late stage in the process about awarding the tender to it.

In summary, a public procurement event does not involve a straightforward process of purchasing goods or services from the market. It is a multi-staged process involving various considerations that impact the decision-making process differently during each stage. Decision-making is impacted by regulatory provisions applicable during each stage, the degree of discretion afforded to the decision maker, the extent to which rights or legitimate expectations are affected and the degree of finality that attaches to key decisions. With this in mind, I now discuss how the right to procedural fairness applies when a decision is made to disqualify a bidder on grounds of non-responsiveness.

6.5 APPLICATION OF PROCEDURAL FAIRNESS TO DISQUALIFICATION OF BIDDERS ON GROUNDS OF NON-RESPONSIVENESS

Our courts have adopted different approaches to the observance of procedural fairness in tender processes. These approaches have oscillated between flat-out refusal to recognize the right to procedural fairness on the one hand, to an acceptance of the right as axiomatic, on the other. *Simunye Developers CC v Lovedale Public FET College* is an example of the former.[91] In this instance a preferred bidder was overlooked based on negative reports about its workmanship on previous projects. In upholding the bidder's disqualification the court declared that

> Any individual or entity that submits a tender in response to a tender invitation which clearly stipulates applicable specifications and conditions, must be taken as having

[89] Bolton (note 9 above) 47 – 48.
[90] *ABET Inspection Engineering (Pty) Ltd v Petrosa* [2018] ZAWCHC (1 February 2018) para 3.
[91] *Simunye Developers CC v Lovedale Public FET College* [2010] ZAECGHC 121 (9 December 2010) (hereafter *Simunye Developers*).

> submitted to that procedure and must accept that the relevant information, either provided by the tenderers or unearthed by the organ of state through independent investigation, is invariably considered in secret and without reference to the tenderers.[92]

The judgment was properly criticized as 'a quintessential example of one-sided decision making that defies procedural fairness'. [93] In my view, *AllPay 1* provides a better framework within which to understand the right to procedural fairness.[94] *AllPay 1* holds important implications not only for the manner in which notice of the tender is to be issued by procuring entities, but also for the quality of the representations that bidders have to provide by way of bid responses. In explaining the relevance of *AllPay 1* in relation to non-responsive bidders, I contrast the position of non-responsive bidders with that of highest-ranked bidders who find themselves disqualified based on risk-related (and other) concerns raised by a procuring entity.

(a) The position of a non-responsive bidder

As already indicated, the ruling of the Constitutional Court in *AllPay 1*[95] explained that an RFP should be regarded as constituting notice of the proposed administrative action, whilst the bidder's submissions constitute the representations received before a final decision is made.[96] This approach had previously been proposed by Quinot, who argued that 'from such a perspective, the rules of procedural fairness are not excluded, but the original application (or tender) submitted will constitute a reasonable opportunity to make representations'.[97] Quinot maintains that there is no need to provide a tenderer (or any applicant) with an opportunity to make further representations, in so far as the decision-maker relies solely on the information provided by the relevant tender or application documents and depends on the veracity of such information.[98]

The corollary of this approach is that the duty to apply procedural fairness must be observed, first and foremost, at the stage when the procuring entity approaches the market by way of an invitation to bid. This holds significant implications both for procuring entities as well as bidders. The requirement to observe procedural fairness when notice is issued to the bidding public, places an obligation on procuring entities to provide clarity in bid documents.

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[92] Ibid para 37.
[93] Geo Quinot 'Administrative Law' 2010 *Annual Survey of South African Law* 41, 62 – 63.
[94] *AllPay 1* (note 1 above) paras 88 – 90.
[95] Note 1 above.
[96] *AllPay 1*(note 1 above) paras 88 – 90.
[97] Quinot (note 93 above) 62 – 63.
[98] Ibid 63.

It is trite that vagueness and uncertainty in any aspect of a tender document is likely to affect the validity of the tender process.[99] After all, '[t]he purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions'.[100] The standard expected is that of reasonable certainty, not perfect lucidity.[101]

The principle that bid submissions constitute representations also holds important implications for how bidders respond. This principle was not fully developed in *AllPay 1*, but a logical consequence of the principle is that bidders have a responsibility to make full use of the opportunity afforded them to respond, in order for their representations to be properly considered. This means that all aspects of the bid, including responsiveness criteria, must be properly addressed. It should be understood that all bidders are afforded some procedural fairness when they are invited on equal terms to respond to an RFP in the first instance. It is therefore incumbent on bidders to fully comply with the responsiveness criteria set out in the RFP or provide reasons for their failure to do so.

It follows that, as a general rule, a bidder who fails to meet responsiveness criteria or who does not provide a full explanation upfront for failing to meet such criteria, cannot bemoan a lack of procedural fairness when he or she is disqualified later. There is therefore no obligation to afford non-compliant entities further opportunities to explain their non-compliance. I agree with the sentiment expressed in *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality* that a public entity should not be obliged to ask a non-compliant bidder to explain why it failed to comply with a straightforward, sufficiently highlighted and mandatory tender requirement. [102] Public bodies regularly issue invitations of various kinds to the public, including employment, tendering, concessioning or licensing opportunities. But as stated in *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry*, it would be 'most expansive' to find that whenever members of the public respond to such opportunities, they are entitled to be heard before their

[99] *Minister of Social Development v Phoenix Cash & Carry PmB CC* [2007] 3 All SA (SCA) (hereafter *Phoenix Cash & Carry*) para 2; *Superintendent-General: North West Department of Education v African Paper Products (Pty) Ltd* [2014] ZANWHC 29 (24 October 2014) (hereafter *African Paper Products*) para 90; *Inyameko Trading 189 CC v Minister of Education* [2007] ZAWCHC 74 (10 December 2007) paras 29.3 and 41.1; *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) (hereafter *ACSA*) paras 120 – 124.
[100] *AllPay 1* (note 1 above) para 92.
[101] Ibid.
[102] *Sizabonke Civils CC t/a Plascon Projects v OR Tambo District Municipality* [2010] JOL 26195 (ECM) para 28. However, in Chapter 4, I criticized the manner in which the court applied the principle to the facts of the case.

responses are rejected.[103] There is after all 'nothing onerous or harsh in excluding a tenderer for failing administrative compliance specifications'[104] — assuming of course, that the specifications in issue are clear, mandatory and material and that the decision to disqualify the tenderer is not disproportionate in light of the specific circumstances of the case. This is not to suggest that the duty to observe procedural fairness never arises when non-responsive bidders are disqualified, but the starting point, in my view, is to regard the opportunity to provide representations as the primary opportunity afforded bidders to be heard.

In limited instances, a non-compliant bidder may well be able to claim further procedural fairness protection. Typically, these might include instances where the organ of state ought to have obtained clarity on an aspect of the bidder's submission before a final decision was made regarding its non-compliance. If any uncertainty or ambiguity exists regarding a bidder's compliance with a particular requirement, the bidder must be approached to provide clarification. The 'ever-flexible duty to act fairly' demands nothing less.[105] Procedural fairness should also be afforded to correct an innocent mistake of an immaterial nature.[106] Of course, it is not possible (or desirable) to produce a closed list of instances that might trigger the need for further procedural fairness, but in essence these would involve exceptional circumstances. The duty to obtain clarification will now be discussed in further detail.

The obligation on an organ of state to seek clarification of a bidder's response has been highlighted in various decisions.[107] In *MTN v Transnet*, the court explained that clarification serves 'to explain, eliminate obscurity of meaning, or settle which of the contending possible interpretations about the capacity of the bidder should prevail'.[108] In *Dimension Data (Pty) Ltd v State Information Technology Agency SOC Ltd*, the court was critical of SITA's decision to disqualify a JV from a bidding process on the grounds that one of the partners to the JV lacked capacity to carry out the work.[109] The court held that SITA ought not to have disqualified the

[103] *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) para 55.
[104] *African Paper Products* (note 99 above) para 71.
[105] *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) (hereafter *Metro Projects*) para 13. See also Sue Arrowsmith *The Law of Public Utilities Procurement: Regulation in the EU and the UK* Vol 1 3 ed (2014) para 7-74.
[106] *Metro Projects* (note 105 above) para 13; See also Arrowsmith (note 105 above) paras 8-92 – 8-94. See Chapter 4 for a discussion on rectification of mistakes made during a bid process.
[107] *MTN (Pty) Ltd v Transnet SOC Ltd* [2018] ZAGPJHC (18 June 2018) (hereafter *MTN*) para 32; *ACSA* (note 99 above) paras 120 – 124; *VDZ Construction* (note 57 above) para 16.
[108] *MTN* (note 107 above) para 32.
[109] *Dimension Data (Pty) Ltd v State Information Technology Agency SOC Ltd* [2016] ZAGPPHC 351 (13 May 2016) para 83.

bidder without first seeking clarification regarding the role that the JV partner was meant to perform. Likewise, in *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* the court held that the department should have afforded the applicant an opportunity to explain its tax status before disqualifying it. [110]

Two points require emphasis. First, if any uncertainty exists regarding a bidder's compliance with stated criteria, it would be fundamentally unfair to disqualify the bidder without obtaining the necessary clarification.[111] Secondly, the process of obtaining clarification must be dealt with judiciously as it has the potential to create unfairness to other bidders if handled incorrectly. Hence, the UNCITRAL Model Law on Public Procurement cautions that the opportunity to provide clarification should not result in any 'substantive change to qualification information or to a submission, including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive'.[112] The purpose of clarification is to allow for uncertainties to be resolved, to avoid unnecessary disqualification of a supplier or unnecessary cancellation of a procurement event.[113] But it is not to allow for improvements to be made on information already submitted.[114]

I mention a few examples from the case law to illustrate both points. The first two examples, *VDZ Construction (Pty) Ltd v Makana Municipality*[115] and *Freedom Stationery (Pty) Ltd v MEC For Education, Eastern Cape*[116] are, in my view, examples of where the courts have correctly held that procuring entities failed in their duty to obtain clarification from bidders. In the third example, *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform,*[117] the court upheld a decision taken by an organ of state not to obtain further clarification from a bidder. But I argue below that the court erred in its decision, as the facts of the case called out

[110] *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* [2011] ZAECELLC 1 (16 March 2011) (hereafter *Freedom Stationery*) para 27. But compare *MTN* (note 107 above) paras 16 – 19.
[111] Clause F3. 10 of the Construction Industry Development Board's 'Standards for Uniformity' last accessed from http://www.cidb.org.za/publications/Documents/StandardforUniformityinContructionProcurement on 24 September 2017. See also Article 16 of the UNCITRAL Model Law on Public Procurement last accessed from https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf on 24 September 2017.
[112] Article 16(3) of the UNCITRAL Model Law (note 111 above). See also Arrowsmith (note 105 above) paras 8-92 – 8.94.
[113] Guide to Enactment to the UNCITRAL Model Law on Public Procurement 96, last accessed from http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf on 24 September 2017.
[114] Ibid 95 – 96.
[115] *VDZ Construction* (note 57 above).
[116] *Freedom Stationery* (note 110 above).
[117] *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform* [2016] 3 All SA 686 (WCC) (hereafter *Afriline*) .

for clarification. In the fourth example, *Imvusa Trading 134 CC v Dr Ruth Mompati District Municipality*,[118] the court erred at the other extreme. It upheld a decision of a procuring entity to allow a non-compliant bidder to submit outstanding information, in circumstances where, in my view, it ought not to have been permitted to do so. These examples will now be briefly discussed.

In *VDZ Construction*[119] bidders were required to submit an original valid municipal billing clearance certificate. The applicant's transgression in this instance was that it had provided only one page in the original whereas the second page was a copy. This was apparently as a result of a mistake made by the municipality that issued the certificate during the process of collation. The court held that a quick telephone call by the respondent municipality to its sister municipality would have cleared up the matter regarding the bidder's clearance status.[120] I agree with this approach. When the procurement officials noticed that one page of the clearance certificate was in the original and one page was a copy, they should have been alerted to the possibility of an 'innocent mistake' that required clarification. A simple telephone call to clear up the matter would not have been unduly onerous for the administrators, nor would it have afforded the bidder an unfair opportunity to make substantive improvements to its bid submission. The court could also have approached the matter on the basis that the bidder had substantially complied with the bid requirement and was therefore sufficiently compliant.[121]

The facts of *Freedom Stationery* also illustrate how clarification of apparent anomalies can obviate needless disqualification.[122] In this instance, a bidder submitted a valid tax clearance certificate with its bid submission, as required by the invitation to tender. After it had been selected as the preferred bidder, it was disqualified on the grounds that SARS had withdrawn its certificate due to amounts that were owing. However, it transpired that SARS had withdrawn the certificate in error since the bidder was able to provide proof that timeous payment had been made to SARS for the amounts in question. Apparently, SARS had misallocated the payments, hence the amounts were reflected as owing. The court held that had

[118] *Imvusa Trading 134 CC v Dr Ruth Mompati District Municipality* [2008] ZANWHC 46 (20 November 2008) (hereafter *Imvusa*).
[119] *VDZ Construction* (note 57 above).
[120] Ibid para 16. See also *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 502 (SCA) paras 20, 23.
[121] See Chapter 2 for a discussion of substantial compliance.
[122] *Freedom Stationery* (note 110 above).

the bidder been afforded an opportunity to explain itself, it could easily have proved that its tax affairs were in order and that SARS had acted incorrectly.[123]

In *Afriline Civils* there appeared to have been considerable uncertainty about whether a particular entity, TT Innovations, had merged with a different company or remained a separate legal entity. [124] However, the court opined that the department was entitled to disqualify the bidder without first seeking clarification. In this instance, the RFP required bidders to submit tax clearance certificates for themselves as well as any subcontractors that they intended to use. The applicant was disqualified for failing to provide an original tax clearance certificate for its nominated subcontractor, TT Innovations. The applicant had submitted an original tax clearance certificate for a different company, Martin & East, but had explained in a letter to the department that TT Innovations was no longer a legal entity in its own right, but had been absorbed as a division of Martin & East. However, the department would have none of it, and disqualified the bidder for failure to provide a tax clearance certificate for its nominated subcontractor. The disqualified bidder argued that the department ought not to have disqualified it in such a perfunctory manner, but should have sought clarification. The court disagreed. It criticized the applicant for having nominated TT Innovations in its tender document, but then having provided a tax clearance certificate for Martin & East. The court pointed out that another bidder, who had also nominated TT Innovations as its subcontractor, had been able to submit a tax clearance certificate for that entity. The court concluded that Martin & East and TT Innovations were indeed independently registered with SARS and that the applicant had impermissibly attempted to substitute its subcontractor.[125]

Admittedly, the fact that another bidder was able to provide a tax clearance certificate for TT Innovations, whereas the applicant maintained that it had merged with Martin & East, raised questions about the veracity of the applicant's version. But this anomaly surely strengthened, rather than weakened, the case for clarification. The bidder who managed to obtain a tax clearance certificate for TT innovations, might have done so at a point when TT innovations still remained a separate entity. The point is that the applicant might well have been able to explain the anomaly, had it been afforded an opportunity to do so.

Furthermore, I disagree with the court's assessment that it would have afforded the applicant an unfair opportunity to improve its bid, had the department sought clarity regarding

[123] Ibid para 27.
[124] *Afriline Civils* (note 117 above).
[125] Ibid paras 31 – 33.

the subcontractor.[126] Clarification would not have resulted in any substantive changes to the bid, nor would it have allowed an unqualified supplier to be qualified.[127] Instead, it would have allowed the department to be properly appraised of all the facts before making a final decision.

In *Imvusa Trading*[128] a municipal entity allowed a bidder to replace an expired tax clearance certificate with a fresh certificate several weeks after the closing date of the bid. In upholding this decision, the court drew a distinction between the establishment of a material fact (namely, whether the bidder was tax complaint at the relevant time) and the evidence required to prove that fact (namely, provision of a tax clearance certificate).[129] The court reasoned that the successful bidder was tax compliant at the relevant time, but that what was lacking was proof of this fact in the form of an updated certificate. [130]

The approach adopted in *Imvusa Trading* has been described as 'questionable'.[131] Indeed, in my view, the distinction drawn between establishing a material fact and the evidence required to prove the fact is inappropriate in a procurement context. This is because responsiveness criteria typically require bidders to prove the existence of a fact through the *simultaneous* submission of the evidence required to prove the fact. In other words, both the fact that has to be established and the evidence required to establish the fact are intrinsically linked and equally important. For example, a bid requiring the provision of security services would typically require that bidders be registered with the Private Security Industry Regulator and that proof thereof be submitted in the form of a certificate of registration by the closing date of the bid. A registered bidder who fails to provide a copy of the relevant certificate and an unregistered bidder must be regarded as equally non-compliant. The registered bidder who failed to provide proof of registration cannot raise the argument that it ought not to be disqualified as it was registered at all relevant times, but simply omitted to provide proof of registration. Such an approach ignores the pivotal role that compliance with bid formalities plays in ensuring equal treatment of bidders and a process that is free from corruption.[132]

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[126] *Afriline Civils* (note 117 above) para 33.
[127] Article 16(3) of the UNCITRAL Model Law (note 102 above).
[128] *Imvusa Trading* (note 118 above).
[129] Ibid para 7. The court invoked *Phoenix Cash & Carry* (note 99 above) as authority for its ruling. See also *Azcon Projects CC v National Minister, Department of Public Works, Mthatha* [2011] JOL 27630 (ECM) para 22.
[130] *Imvusa* (note 118 above) para 16.
[131] *Rodpaul Construction CC and Another v Ethekwini Municipality and Others* [2014] ZAKZDHC 18 (2 June 2014) para 48.
[132] *AllPay 1* (note 1 above) para 27.

Exceptional circumstances that might trigger the obligation to provide a non-responsive bidder with further procedural fairness are by no means limited to the duty to seek clarification. The overarching duty to act fairly remains the guiding principle.[133] For example, in *Ikamva Architects CC v Coega Development Corporation*[134] the court held that a procuring entity ought to have afforded a non-responsive bidder an opportunity to provide an outstanding mandatory document, since in the circumstances of that case, the bidder had not been treated equally with other bidders.[135] I discuss the court's reasoning in *Ikamva Architects* in more detail in Chapter 2.

However, in the main, a non-responsive bidder cannot demand further procedural fairness before being disqualified. In this limited sense, the SCA was correct when it stated in *AllPay (SCA)* that bidders could not be afforded hearings in the course of a tender evaluation process, as this would result in the evaluation of bids becoming interminable.[136] An analogy might be drawn with students writing an examination. It would be far-reaching to suggest that the duty to observe procedural fairness requires that students be afforded an opportunity to be heard before a negative score is allocated. No doubt, exceptional circumstances might arise when a student would be afforded a further opportunity to demonstrate that he or she has met minimum requirements. For example, a student whose handwriting is illegible might be afforded an opportunity to read the answer out aloud to the lecturer. However, the primary opportunity to be heard is afforded when students are required to sit the examination. Similarly, it is incumbent on bidders to make full use of the opportunity to respond when submitting bid responses. However, the position is different when procuring entities deviate from the principle of awarding a bid to the top-ranked bidder.

(b) The position of top-ranked bidders

Our courts have occasionally denied procedural fairness protection to bidders who were initially identified as the preferred bidder, but subsequently excluded. *Thabo Mogudi Security Services CC v Randfontein Local Municipality* is an example of this denial of due-process rights.[137] The relevant facts are these: The applicant had emerged as the highest-scoring bidder, following an evaluation process and had been recommended for the award of the tender.[138]

[133] *Metro Projects* (note 105 above) para 13.
[134] *Ikamva Architects CC v Coega Development Corporation* [2015] JOL 34289 (ECG).
[135] Ibid paras 19 – 22.
[136] *AllPay (SCA)* (note 42 above) para 95.
[137] *Thabo Mogudi* (note 8 above.)
[138] Ibid para 7.

However the adjudication committee required that, as a precondition for signing the contract, an inspection of the bidder's premises had to be carried out.[139] During this inspection, certain deficiencies were detected in respect of the applicant's vehicles, firearms and staff, which resulted in the tender not being awarded to the applicant, and cancelled.

The court rejected the applicant's procedural fairness challenge on the basis that 'a tender process is ordinarily a process which would not demand that the *audi alteram partem* principle be applied'.[140] The spectre of administrative paralysis loomed large in the court's reasoning, as it found that observance of procedural fairness rights would place an 'impossible burden' on the tendering system.[141] The upshot of *Thabo Mogudi* is that a procuring entity may validly exclude a top-ranked bidder based on an assessment of certain risk factors, without affording the affected bidder an opportunity to respond. I disagree. But it should be mentioned that the denialist position was reflected in various other judgments as well. In *Milnerton Lagoon*, the court stated that a bidder's right to be heard in relation to its failure to comply with tender conditions was 'unheard of' as this would take the duty to act fairly to 'new and far horizons'.[142] Similarly, in *Simunye Developers*, the court opined that affording a bidder an opportunity to respond to negative reports about its previous performance was 'anathema to tender procedures, it would be impractical and make it almost impossible for organs of state to procure effectively for goods and services'.[143]

The danger of overburdening the administration with 'hearings' during a tender process should not be treated lightly. [144] Our courts have consistently cautioned against judicial decisions that result in administrative inefficiency.[145] Judgments that appear to be indifferent to legitimate concerns about the need for administrative efficiency have the potential to fuel perceptions of unwarranted judicial interference in administrative processes that Quinot warns about.[146] Wade and Forsyth remind us that '[l]awyers are a procedurally minded race, and it is natural that administrators should be tempted to regard procedural restrictions, invented by

[139] Ibid para 8.
[140] Ibid para 43.
[141] Ibid para 36.
[142] *Milnerton Lagoon* (note 8 above) para 31.
[143] *Simunye Developers* (note 91 above) para 37.
[144] Hoexter (note 5 above) 404.
[145] *Joseph* (note 4 above) paras 28 – 29 and 61 – 63; *Premier, Mpumalanga* (note 24 above) para 4; *Masetlha* (note 4 above) para 184; Hoexter (note 5 above) 404 – 406.
[146] Quinot (note 56 above) 14 – 15.

lawyers, as an obstacle to efficiency'.[147] However, the authors go on to make the following apt observations:

> It is true that the rules of natural justice restrict the freedom of administrative action and that their observance costs a certain amount of time and money. But time and money are likely to be well spent if they reduce friction in the machinery of government; and it is because they are essentially rules for upholding fairness and so reducing grievances that the rules of natural justice can be said to promote efficiency rather than impede it. Provided that the courts do not let them run riot, and keep them in touch with the standards which good administration demands in any case, they should be regarded as a protection not only to citizens but also to officials. Moreover, a decision which is made without bias, and with proper consideration of the views of those affected by it, will not only be more acceptable; it will also be of better quality. Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements.[148]

The problem with judgments such as *Thabo Mogudi* and others, is that they seemed not to have appreciated the variable nature of the content of the right to procedural fairness in a procurement context.[149] The better approach is to be found in *Du Bois*[150] in which the court rejected a *Thabo Mogudi*-type argument that affording procedural fairness would render the tender processes '*onhanteerbaar en onuitvoerbaar*'.[151] The court disagreed with this 'all-or-nothing' approach to procedural fairness and instead repeated the truism that observance of procedural justice does not always require full observance of trial-like procedures such as leading of evidence and cross-examination. [152]

In *Thabo Mogudi* [153] the court sought to justify its decision not to afford procedural fairness rights to the preferred bidder by drawing an analogy with the process of point allocation during bid evaluation. The court reasoned that in every tender evaluation process some bids will be found to be inadequate on aspects such as price and quality, but 'I have never known it to be required that the tender adjudicator must afford each such tenderer whose bid is

[147] Wade & Forsyth (note 2 above) 373.
[148] Ibid 373 – 374.
[149] Hoexter (note 5 above) 362 – 365; *Joseph* (note 4 above) paras 58 – 59.
[150] *Du Bois* (note 51 above) at 197 – 198.
[151] Roughly translated as 'unmanageable and impractical'.
[152] *Du Bois* (note 51 above) at 195. See also *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 (1) SA 701 (O) (hereafter *National and Overseas Modular*); *Kawari Wholesalers (Pty) Ltd v MEC: Department of Health* [2008] ZANWHC 12 (6 March 2008); *W J Building & Civil Engineering Contractors CC v Umhlatuze Municipality* 2013 (5) SA 461 (KZD).
[153] *Thabo Mogudi* (note 8 above).

rejected a hearing'.[154] Why should the situation be any different, asked the court, when an adjudication committee requires that the tenderer be inspected more thoroughly?[155]

The analogy was inapt, since both the legislative and administrative setting within which a decision is taken not to award a tender to a top-ranked bidder is fundamentally different to that involving tender evaluation. As explained above, a bidder is recommended for the award of business after he or she has passed the technical threshold and scores the highest points out of 100 for price and preference. That was precisely what had happened in *Thabo Mogudi.*[156] Not only would a bidder in such a position have a legitimate expectation to be awarded the contract, but based on s 2(1)(*f*) of the PPPFA it would have a clear right to the contract. This is because s 2(1)(*f*) requires that a contract 'must' be awarded to the bidder who scores the highest points unless 'objective criteria' justify the award of business to another bidder. [157] Although the term 'objective criteria' has not been defined in Act, it has been the subject of various judicial decisions.[158] Our courts have interpreted the term as referring to factors other than criteria on which the bidder has been evaluated, to avoid the problem of 'double-counting'.[159] Typical examples of 'objective criteria' would include risk-based considerations that did not form part of the technical evaluation stage.[160] However, absent 'objective criteria', the highest-scoring bidder must be awarded the business.[161]

Not only does a top-ranked bidder enjoy a general administrative-law right to be treated fairly during a bidding process alongside all other bidders, it also has a legal entitlement to the contract. The adverse impact that the decision not to award a tender has on the rights or legitimate expectations of a top-ranked bidder, necessitates that it be afforded an opportunity to deal with perceived deficiencies. In fact, it would appear from *Thabo Mogudi* that the applicant had a clear explanation for how the identified risks would be mitigated. In

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[154] Ibid para 36.
[155] Ibid para 42.
[156] Ibid para 7.
[157] The term 'objective criteria' is not defined in the PPPFA. In *Simunye Developers* (note 91 above) para 33, the court observed that it would be impossible to provide a *numerus clausus* of all objective criteria.
[158] *Rainbow Civils v Minister of Transport and Public Works* (21158/2012)[2013] ZAWCHC 3 (6 February 2013); *RHI Joint Venture v Minister of Roads & Public Works, Eastern Cape* [2008] JOL 21887 (CK) (hereafter *RHI Joint Venture*); *Grinaker* (note 54 above); *First Avenue Base Construction CC v Ukhahlamba District Municipality* [2006] JOL 16724 (E); *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport & Roads* [2007] JOL 19022 (B); *WJ Building & Civil Engineering Contractors v Umhlathuze Municipality* 2013 (5) SA 461 (KZD); *Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality* [2016] ZAFSHC 159 (8 September 2016).
[159] *Grinaker* (note 54 above) para 60; *RHI Joint Venture* (note 158 above) paras 27 – 28.
[160] *Simunye Developers* (note 91 above) para 34. See also Transnet's Procurement Procedures Manual (note 63 above) para 18.7.3 (*b*).
[161] *Grinaker* (note 54 above) paras 40 and 54.

Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (SOC) Ltd the SCA overturned a decision taken by Eskom's Board not to award a tender to a top-ranked bidder as the Board had not afforded the bidder an opportunity to deal with the perceived deficiencies in its bid.[162] The Constitutional Court subsequently overturned the *Westinghouse* judgment on the narrow issue of standing, but the SCA's stance in relation to the procedural fairness point was not called into question.[163]

There are also important contextual differences that distinguish top-ranked bidders from those undergoing evaluation. The process of bid evaluation usually involves poring over voluminous documentation submitted by large numbers of bidders. Often, this exercise must be completed within limited time frames. The imperatives of administrative efficiency would doubtless be undermined if procuring entities were to follow a stop-start approach of affording each bidder an opportunity to respond if a poor score is to be allocated. On the other hand, a decision not to award a tender to a preferred bidder typically involves a single bidder, as opposed to many. Furthermore, as already explained, a bidder would only be selected for the award of tender on the basis that it has met all the bid requirements and has scored the highest points based on price and preference. The only factor that would justify the award of tender to the highest-ranked bidder is the existence of so-called 'objective criteria'. Whilst the PPPFA does not expressly make provision for *audi* when objective criteria are invoked, the Act must be interpreted so as to give effect to the right to administrative justice.[164] Hoexter correctly observes that '[i]f the administrator is in possession of material that is adverse or prejudicial to the person concerned, it will generally be unfair not to disclose that information and give the person an opportunity of dealing with it'.[165]

The fundamental misdirection that occurred in *Thabo Mogudi* was the mistaken belief that giving effect to the right to procedural fairness would oblige procuring entities to afford bidders an opportunity to be heard 'whenever some adverse consideration is to be taken into account against [the] tenderer'.[166] Were such an approach to be adopted, it would indeed cause the entire tender process to get bogged down in a stop-start process of evaluation. [167] But that

[162] *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (SOC) Ltd* 2016 (3) SA 1 (SCA) paras 48, 54 and 64.
[163] See *Areva NP Incorporated in France v Eskom holdings SOC Ltd* 2017 (6) BCLR 675 (CC).
[164] *Zondi* (note 21 above) para 101.
[165] Hoexter (note 5 above) 373.
[166] *Thabo Mogudi* (note 8 above) para 42.
[167] Ibid.

was not what the applicant in *Thabo Mogudi* had asked for or what the exigencies of that case demanded.

The court in *Thabo Mogudi* sought to distinguish cases such as *Du Bois*[168] and *National & Overseas Modular*[169] on the basis that in the latter instance, the adjudication committee based its assessment on factors that were extraneous to the bid document, rather than factors that were inherent to the tender specifications.[170] Quinot approves of this approach as 'sensible'.[171] I have a different view. The argument that I have sought to advance is that a top-ranked bidder is differently situated to other bidders and that it should not matter whether a top-ranked bidder is excluded on the basis of extraneous factors or its perceived non-compliance with bid requirements. In both instances, the top-ranked bidder must be afforded an opportunity to comment on the factors that count against it before being rejected.[172] In any event, there is not always a clear line of distinction between factors that are extraneous to a bid and factors that are inherent to the bid itself.

6.6 PRELIMINARY DECISIONS

This section addresses the application of procedural fairness rights to preliminary decisions involving bid responsiveness. Preliminary decisions having potentially adverse consequences for bidders could be made at various points throughout the procurement cycle.[173] These may include recommendations made by an administrator to a higher authority that a bidder be disqualified on grounds of non-responsiveness. A decision to include certain responsiveness criteria in an RFP could also be regarded as preliminary, in the sense that the inclusion of the criteria by itself does not disqualify a non-compliant bidder.[174] A further step in the process would be required for that to happen, namely a final decision that the bidder is non-compliant with the stated criteria. Can a bidder who feels aggrieved by a preliminary decision but who has not as yet been disqualified from the process, raise a procedural fairness challenge?

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[168] *Du Bois* (note 51 above).
[169] *National and Overseas Modular* (note 152 above).
[170] *Thabo Mogudi* (note 8 above) para 44.
[171] Quinot (note 93 above) 63.
[172] Transnet's Procurement Procedures Manual (note 63 above) para 20.3 requires that before a preferred bidder is disqualified based on risk-related considerations, the bidder should be afforded an opportunity to indicate how the identified risks will be mitigated.
[173] See Hoexter (note 5 above) 441–443 for a discussion of multi-staged decision-making and the PAJA.
[174] *Relmar Holdings (Pty) Ltd v The Minister of Agriculture and Fisheries* [2015] ZAWCHC 103 (30 July 2015) (hereafter *Relmar Holdings*) para 95.

The application of procedural fairness requirements to preliminary decisions has rightly been described as 'one of the most troublesome problems in relation to procedural fairness'.[175] In my view, the difficulty does not lie with the idea that preliminary decisions could be subject to procedural fairness protection, but rather with finding a coherent set of governing principles to determine when procedural fairness norms should be applied to such situations. Despite being preliminary in nature, recommendations made by one committee to another are usually likely to affect the outcome of the final decision, and therefore ideally, affected persons should be heard during preliminary stages of administrative decision-making and not only at the final stage when the outcome is practically a *fait accompli*.[176] On the other hand, a balance must be struck between the need for informed decision-making and the demands of administrative efficiency,[177] for to demand of administrative bodies that they observe procedural fairness whenever they make preliminary decisions with potentially adverse consequences for individuals, would impose an exacting burden on both the efficiency and effectiveness of the administration. Given the conflicting authorities on the topic, both at home and abroad, 'it is unlikely that any neat set of answers will emerge'.[178] Perhaps the best that could be expected of judges, lawyers and administrators is to search for the *best available answer* within a particular administrative, legislative and factual context.[179]

(a) Broad principles

The authorities are at least agreed on two broad, interrelated principles. The first is that the right to procedural fairness is not necessarily limited to final decisions. Wade and Forsyth explain that '[t]he citizen's right to have his case properly heard, before he suffers in some way under the official rod, can cover a whole series of procedural steps, from the initial objection to the final decision'.[180] But even this broad principle is not without qualification. The doctrine of ripeness prevents premature challenges being brought against administrative decisions and courts are therefore reluctant to entertain challenges to inchoate decisions that may yet undergo further changes before a final decision is made.[181] According to Baxter, the test for ripeness is 'whether prejudice has already resulted or is inevitable, irrespective of whether the action is

[175] Harry Woolf, Jeffery Jowell, Catherine Donnelly & Ivan Hare *De Smith's Judicial Review* 8 ed (2018) 499. See Also Hoexter (note 5 above) 437.
[176] Hoexter (note 5 above) 437.
[177] Ibid.
[178] De Smith (note 175 above) 500.
[179] Ibid.
[180] Wade & Forsyth (note 2 above) 373 and 466 – 467.
[181] *Afriforum NPC v Eskom Holdings SOC Ltd* [2017] 3 All SA 663 (GP) (hereafter *Afriforum*) para 106; Hoexter (note 5 above) 229.

complete or not'.[182] Perhaps the requirement of inevitability sets the standard too high and a lesser standard of *proximity* between a preliminary decision and its prejudicial consequences would suffice.[183] The point though is that whilst preliminary decisions are susceptible to review, '[t]he courts must be astute to distinguish between a fear resting on speculative apprehensiveness and a probable threat of specific future harm; and should refuse to give advance expressions of legal judgment upon issues which remain unfocussed.'[184]

The second principle on which there is general agreement is that in certain instances, preliminary decisions that impact severely on the rights of persons ought to be subject to the *audi* principle.[185] This is because a preliminary decision may also be final in the sense of having far-reaching and highly prejudicial consequences for an individual. [186] An oft-cited example is a recommendation made by an investigative body that a person be suspended or disciplined for misconduct.[187] As stated in the English case of *Re Pergamon Press Ltd,* such investigative processes could result in findings of fact that are damaging to identified persons, lead to criminal or civil action and ruin reputations and careers.[188]

Our courts, having displayed an earlier willingness to apply procedural fairness norms to preliminary decisions, appear to have retreated somewhat from this position.[189] More recently, our courts have displayed an increasing tendency to draw a dichotomous distinction between a preparatory step and the final step, the latter requiring greater observance of procedural fairness than the former.[190] For example, in *National Treasury v Kubukeli*, the National Treasury conducted an investigation into the misuse of rented vehicles at a municipality and recommended that the cost of damage to the vehicles be recovered from the respondent.[191] The respondent raised a procedural fairness challenge on the basis that he was

[182] Baxter *Administrative Law* (1984) 720.
[183] See discussion below on the principle of proximity.
[184] *Afriforum* (note 181 above) para 108. See also R C Williams 'The Concept of a "Decision" as the Threshold Requirement for Judicial Review in Terms of the Promotion of Administrative Justice Act' (2011) 14 *PER* 230.
[185] J R de Ville *Judicial Review of Administrative Action in South Africa* (2005) 240; *Van Wyk NO v Van Der Merwe* 1957 (1) SA 181 (A) 188 B-D; *Director General: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) (hereafter *Save the Vaal*) para 17;
[186] De Ville (note185 above) 240.
[187] Hoexter (note 5 above) 436 – 437.
[188] Ibid 437, with reference to *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA) at 539 d-f.
[189] Ibid 439 – 441.
[190] *Simelane NNO v Seven Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) paras 11 and 17; *National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) (hereafter *Kubukeli*); *Du Preez* (note 6 above); *Buffalo City Municipality v Gauss* 2006 (10) BCLR 1172 (SCA) (hereafter *Buffalo City*); *Harksen v President of the Republic of South Africa* 1998 (2) SA 1011 (C) (hereafter *Harksen*); *Relmar Holdings* (note 174 above); *Chairman: Board of Tariffs and Trade v Brenco Incorporated* 2001 (4) SA 511 (SCA); *Walele* (note 4 above) paras 31 and 52.
[191] *Kubukeli* (note 190 above).

not afforded an opportunity to be heard before the recommendations were made.[192] The respondent disavowed any reliance on the PAJA and argued his case on the basis of the principle of legality, contending that the decision not to afford him *audi* was irrational under the circumstances.[193]

The SCA held that the purpose of the empowering statute did not require the observance of procedural fairness. The court pointed out that Treasury's investigative powers were sourced in s 5(1) of the MFMA that empowered it to investigate any system of financial management and internal control within the municipal sphere and to recommend improvements thereto. The court reasoned that the purpose for which the power was given was not to investigate the conduct of any particular person or to make final findings in relation thereto and that findings regarding what a particular person did or did not do were purely incidental to the primary object of the power. [194] The SCA concluded that the purpose for which the power was given had been achieved in that shortcomings in the system of financial management and internal control were identified.[195] The court also held that the recommendations were not binding and that the municipality was under no obligation to accept any recommendations made by the National Treasury.[196] The court further held that the respondent would be afforded a full opportunity to present his case in due course should further disciplinary steps be taken.[197]

In my view, the court erred by over-emphasizing the legislative context in which the decision was taken. Doubtless, the legislative context in which administrative decisions are taken is an important consideration. But the difficulty with *Kubukeli* is that it failed to deal adequately with the central question that was before it, namely, whether the potentially adverse effects of the investigation and the recommendations made called for observance of the right to procedural fairness. The fact that the primary purpose of the legislation was to investigate weaknesses in the system of financial management and internal control, and not to investigate individuals, was not dispositive of the primary question whether Mr Kubukeli was entitled to some form of procedural fairness protection before adverse findings and recommendations were made. Although the purpose of the enabling provision in *Kubukeli* was to investigate systems of financial management and control, the *effect* of the investigation and the

[192] Ibid para 12.
[193] The respondent relied on authorities such as *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) and *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA).
[194] *Kubukeli* (note 190 above) para 24.
[195] Ibid para 25.
[196] Ibid.
[197] Ibid para 26.

recommendations made was that an individual was implicated in wrongdoing. The Constitutional Court has made it clear that statutes that authorise administrative action must be read in a manner that is consistent with the PAJA, not the other way round. [198]

Furthermore, the distinction drawn between investigations focussed on individual misconduct and investigations into systemic weaknesses seems rather artificial in the context of the facts of the case. From a plain reading of the judgment, it would appear that the need for the investigation arose not out of general concern about inadequate financial controls within the municipality, but because of specific allegations concerning the abuse of rented vehicles by individuals employed within the municipality. It is precisely for that reason that the investigation into the systemic weaknesses focussed on the individuals who were implicated in the abuse of state assets.

There must be a great number of statutes that empower agencies to address systemic issues as opposed to individual acts or omissions.[199] But it would be fallacious to conclude that in such instances, agencies are exempted from the duty to observe procedural fairness, simply because the enabling legislation has as its primary purpose the identification of systemic issues and not individual misconduct. The default application of the right to procedural fairness was overlooked in *Kubuleli* with the result that the judgment diminished the pivotal role that procedural fairness plays in ensuring fair decision-making.[200]

Our courts have been rather inconsistent in affording protection to individuals affected by preliminary decisions. Cases such as *Walele*[201] suggest that the courts are generally reluctant to afford procedural fairness protection in respect of preliminary decisions involving consents given by public bodies to let or otherwise utilize land for a particular purpose. The prevailing view seems to be that such consents do not in themselves impact on the rights of adjoining property owners, but that a legitimate complaint could arise if development on the land took place in contravention of zoning, environmental and other legislation.[202] The rationale for this approach, as expressed in the minority judgment of O' Regan ADCJ in *Walele*, is that it may disrupt the administration of urban spaces if courts were to hold that whenever the use and

[198] *Zondi* (note 21 above) para 101; *Masetlha* (note 4 above) para 187.
[199] For example, s11(1) of the National Ports Act 12 of 2005 states that the main function of the National Ports Regulator is to own, manage, control and administer ports to ensure their efficient and economic functioning.
[200] See Hoexter (note 5 above) with reference to *Pretoria City Council v Modimola* 1966 (3) SA 250 (a) 262F.
[201] Note 4 above.
[202] *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) paras 59 and 105; *Grey's Marine* (note 19 above) paras 15 – 16; *Walele* (note 4 above) para 132.

enjoyment of property is affected by an administrative decision, that will constitute the 'material and adverse' effect on rights as contemplated by s 3(1) of PAJA.[203] However, the courts have been more willing to recognise the application of procedural fairness to preliminary decisions affecting environmental rights.[204] No doubt, 'difficult boundaries' will have to be drawn between preliminary acts that require observance of the right to procedural fairness and those that do not. Furthermore, the application of the right must be brought within sensible parameters to avoid judicial overreach. In my view, the principle of 'proximity' is a sensible yardstick to apply.

(b) The 'proximity' principle

According to *De Smith*, courts are unlikely to interfere with a preliminary step in a process unless it can culminate in a decision which has binding force or could acquire binding force upon confirmation by another body.[205] An element of 'proximity' or 'immediacy' is required between the preliminary step and the final decision to trigger the application of procedural fairness norms.[206] As the authors put it, the observance of *audi* would be required 'if the investigation is an integral and necessary part of a process which may terminate in action adverse to the interests of a person claiming to be heard before him'.[207] Conversely, a body is not under any duty to observe fairness 'if it cannot do more than recommend or advise on action which another body may take in its own name and in its own discretion'.[208]

Perhaps an illustration from the current procurement regulatory framework will help to illustrate the point. Instructions issued by National Treasury regarding investigations into 'allegations of abuse' in the supply chain management system state that an organ of state 'must' implement recommended remedial action within 14 days of receipt of an investigation report, failing which Treasury 'must' implement the remedial action on behalf of the organ of state.[209] The National Treasury instruction makes provision for a variety of remedial measures, all of which have potentially far-reaching consequences for affected persons, including criminal and civil sanctions, disqualification of bidders, contract cancellation and restrictions on doing

[203] *Walele* (note 4 above) para 132.
[204] *Save the Vaal* (note 185 above); *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) (hereafter *Earthlife Africa*).
[205] De Smith (note 164 above) 504.
[206] Ibid 500 – 501.
[207] Ibid.
[208] De Smith (note 164 above) 504. This general proposition is also not without qualification, since the authors acknowledge (at 504) that 'justice will sometimes demand that an investigation preceding a discretionary administrative decision be conducted in accordance with the requirements of procedural fairness'.
[209] National Treasury SCM Instruction 3 of 2016/17 paras 5.1 – 5.3 (note 84 above).

business with the state. The obligation placed on organs of state to implement the recommended remedial action suggests an inexorable link between the recommended action and the final outcome. Furthermore, in light of the ruling of the Constitutional Court in *Economic Freedom Fighters v Speaker of National Assembly*, it is arguable that the recommendations of constitutional bodies such as National Treasury,[210] like those of the Public Protector, are binding unless set aside.[211] The proximity between the recommendations made and the final decision would therefore require the observance of procedural fairness during the preliminary investigation phase.

Director General: Mineral Development, Gauteng Region v Save the Vaal Environment is a good example of the proximity principle in operation.[212] In this instance, the SCA held that a preliminary decision by the Director-General to grant a mining licence set in motion a chain of events that would ordinarily lead to the commencement of mining operations.[213] Furthermore, the granting of the licence enabled the DG to grant temporary authorisation for mining to commence, pending the approval of an environmental management plan. The holder of a mining licence could possibly be exempted from the obligation to submit such a plan.[214] The proximity between the preliminary decision to grant a mining license and the commencement of mining activities that the respondents sought to avoid necessitated the observance of procedural fairness.[215] The emphasis on proximity between the preliminary decision and adverse consequences helps to define the boundaries within which the principle should be applied. The proximity principle also helps to address the problem of ripeness, because it filters out of judicial review those cases where the prejudice is too remote, uncertain or unformed.

However, there are troubling instances where our courts have refused to apply procedural fairness norms even when there was considerable 'proximity' between the preliminary decision and the anticipated harm. For example in *Buffalo City Municipality v Gauss* the SCA rejected the argument that the respondent was entitled to be heard before the municipality issued a preliminary notice of expropriation, even though the effect of the notice was to place immediate restrictions on the owner's use of the property.[216] The SCA reasoned

[210] Section 216 of the Constitution requires that national legislation must be establish a national treasury.
[211] *Economic Freedom Fighters v Speaker of National Assembly* 2016 (3) SA 580 (CC).
[212] *Save the Vaal* (note 185).
[213] Ibid para 17.
[214] Ibid para 19.
[215] See also *Earthlife Africa* (note 204 above) paras 35 – 37.
[216] *Buffalo City* (note 190 above) para 10.

that the restrictions did not have any practical effect as there was no indication that the property owner had intended to deal with his property in a manner that had been prevented by the issuing of the notice.[217] The court held that the effect of the notice was simply to preserve the status quo and that the owner would be afforded a full opportunity to be heard before further steps could be taken to dispossess him of his property.[218] Hoexter questions whether the result might have been different if the court recognised that the preliminary notice paved the way for the expropriation. [219] I would add that the mere fact that the owner had no immediate plans to 'deal with' his property by no means diminished the prejudicial effect of the notice. Prejudice to the respondent lay in the fact that as a consequence of the notice, he was immediately restricted from acting with the same liberty as any other property owner was entitled to.

Ultimately, there is no 'scientific' test to determine the applicability of the right to procedural fairness to preliminary decisions. The courts have to take a range of factors into account, such as potentially serious legal consequences for the affected person, the proximity of the interim step to the final decision, the need for administrative efficiency, and the opportunities afforded to the affected person to minimise or reverse any prejudice suffered at a later stage.[220]

(c) A 'decision' having 'direct, external, legal effect'

The requirement in the PAJA that the impugned administrative act must amount to a 'decision' having 'direct, external legal effect', suggests that only final decisions are reviewable and that intermediate stages of decision-making are necessarily excluded.[221] On the other hand, the reference in the definition of 'decision' in s 1 of the PAJA to include decisions 'proposed to be made or required to be made' suggests that the term is not confined to final decisions.[222] Williams criticizes the PAJA for defining the concept of a 'decision' in circular terms 'that throw no light on the core meaning of the word'.[223] Judicial attempts at casting light on this

[217] Ibid para 11.
[218] Ibid para 14.
[219] Hoexter (note 5 above) 439.
[220] De Ville (note 185 above) 239; *Harksen* (note 190 above) paras 95 – 108.
[221] Hoexter (note 5 above) 199 and 441; See Loammi Wolf 'In Search of a Definition for Administrative Action' (2017) 33 *SAJHR* 313 at 332. See also Wolf *op cit* at 322 – 325 for an analysis of how the term 'direct, external legal effect' is understood in German law.
[222] Hoexter (note 5 above) 199.
[223] Williams (note 184 above) 234.
[223] De Ville (note 185 above) 24

terminological opaqueness, have not been particularly helpful either.[224] Hoexter argues that the term decision must be interpreted broadly. [225]

Grey's Marine had a significant 'liberalising effect' on how the term 'adversely affects rights' must be understood.[226] In *Grey's Marine*, the SCA held that the term 'adversely affects the rights of any person' should not be interpreted literally[227] and that the notion of 'rights' included 'prospective rights that are yet to accrue'.[228] But the concept is not so expansive so as to include mere interests enjoyed by the public at large.[229] The court also held that a decision affects rights adversely if it impacts 'directly and immediately' on individuals or has the 'capacity' to affect rights.[230] It should perhaps be noted *en passant* that the liberalising effect of *Grey's Marine* has not always been evident in the case law. As pointed out above, in the *AllPay* case the SCA seemed not to apply its own jurisprudence when it adopted a decidedly more conservative approach to the notion of rights.[231]

Nevertheless, *Grey's Marine* still serves as authority for the view that preliminary decisions are reviewable insofar as they have the capacity to impact upon rights or even 'prospective rights'. Despite the interpretive difficulties with the PAJA, *Grey's Marine* cautions against the adoption of a dogmatic and formulaic approach regarding the exclusion of preliminary decisions from the ambit of judicial review.

(d) Preliminary decisions and bid responsiveness

The abovementioned principles will now be discussed in relation to two scenarios. The first is whether an aspirant bidder has a right to be heard regarding the inclusion of bid criteria that may impact adversely on him or her during the bid process. The second scenario relates to the application of *audi* when *recommendations* are made to disqualify a bidder on grounds of non-responsiveness.

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[224] *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ). For academic criticism of the judgment see Williams (note 222 above); Hoexter (note 5 above) 203.
[225] Hoexter (note 5 above) 202.
[226] *Grey's Marine* (note 19 above); Hoexter (note 5 above) 401, 441.
[227] *Grey's Marine* (note 19 above) para 23.
[228] Ibid para 30.
[229] Ibid.
[230] Ibid para 23.
[231] *AllPay (SCA)* (note 42 above) para 95. See also *Envitech Solutions (Pty) Ltd v Saldahna Bay Municipality* [2015] ZAWCHC 108 (13 August 2015) in which the court held (at para 79) that a decision to select a particular scoring methodology did not constitute administrative action, because it was not a decision which in itself 'adversely affects the rights of any person' or had direct external legal effect.

With regard to the first scenario, *Relmar Holdings (Pty) Ltd v Minister of Agriculture and Fisheries* is an instance in which a potential bidder raised a legal challenge to certain restrictions placed upon it by conditions in an RFP.[232] In this instance, the Department of Agriculture and Fisheries issued a tender for the auctioning off of confiscated abalone. The RFP contained a condition that persons who had been convicted of an offence under the Marine Living Resources Act 18 of 1998, or who were under investigation for such offence, would not be eligible to participate in the auction. The director of the applicant company was under investigation for smuggling in abalone, and consequently the company was disqualified from participating in the tender process.

The applicant mounted a procedural fairness challenge to the decision to disqualify it from the process. Its case was not that, as an aspirant bidder, it should have been heard prior to the introduction of the exclusionary provision in the RFP, but rather that some form of *audi* had to be built into the provision itself to afford persons under investigation an opportunity to be heard before being disqualified.[233] The applicant's argument, based on the principle of legality, was that the rule was irrational for failing to provide for *audi*. However, the court dismissed the applicant's case on the basis that the lack of an express provision for *audi* did not make the provision invalid, as the issue of not being heard did not lie with the provision itself but rather with the manner in which it was applied.[234] The court held that nothing in the provision *per se* excluded the possibility that a person under investigation is heard before an auction took place.[235] Depending on the circumstances, the right would only be breached if the disqualification criterion were applied without hearing the applicant.

I approach the first scenario differently, by applying the distinction that *Grey's Marine* drew between 'rights' and 'interests'.[236] The issue under discussion is whether an *aspirant* bidder has a right to be heard regarding the introduction of a restrictive provision. Although *Grey's Marine* adopts a liberal approach to the notion of 'rights' and even 'prospective rights', the judgment makes it clear that 'interests' falling short of such rights do not enjoy procedural fairness protection.[237] In *Grey's Marine* the appellants were unable to show that their rights of occupation of their own property had been compromised as a result of the Minister's decision

[232] *Relmar Holdings* (note 174 above).
[233] Ibid para 94.
[234] Ibid para 95.
[235] Ibid para 96.
[236] *Grey's Marine* (note 19 above paras 30 – 31.
[237] Ibid.

to let the adjoining property, nor could they show that they had any right to use the let property or to restrict its use by others.[238] Similarly, an aspirant bidder whose hopes of participating in a tender process are disappointed as a result of a restrictive bid condition cannot point to any legitimate expectations, let alone any rights or even 'prospective rights' that are affected by the restrictive provision. At best, the aspirant bidder has an 'interest' in participating in the tender that is no different to that of the bidding public at large. An aspirant bidder's sense of disappointment at not meeting the stated criteria cannot, without more, trigger the duty to observe procedural fairness. [239]

Furthermore, various practical considerations militate against affording aspirant bidders an opportunity to be heard. There is usually a myriad restrictive conditions that could potentially be included in an RFP, including matters such as tax compliance, minimum qualifications, registration with regulatory bodies and the like. It would have very deleterious implications for administrative efficiency if the choices made by procuring entities in relation to all such provisions were subjected to procedural fairness requirements. Also, in most cases the identity of persons likely to be affected by restrictive bid conditions will not be known in advance, and therefore the procuring entity would not know whom to invite to make representations.

As explained above, a bidder's right to procedural fairness must be observed at the point when the RFP is issued to market. This requires that the notice in the form of the RFP must be clear regarding all the terms and conditions of tender and that the representations in the form of the bidder's submissions meet the bid conditions, or at least provide an explanation for their inability to do so. This does not mean that an aspirant bidder may not challenge the inclusion of restrictive conditions on other grounds, such as reasonableness. Despite the deferential approach that our courts have adopted in respect of a procuring entity's choice of evaluation criteria,[240] the principles of rationality and proportionality remain paramount.[241] Consequently, functionaries must weigh up the effect of their decisions on the persons affected thereby.[242]

The second scenario to be discussed relates to the application of *audi* when recommendations are made to disqualify a bidder on grounds of non-responsiveness. I have

[238] Ibid.
[239] *Nambiti Technologies* (note 60 above) para 32.
[240] *Moroka Municipality* (note 86 above) para 10; *SANRAL* (note 73 above) para 22; *Nambiti Technologies* (note 60 above) paras 37– 41 and 43.
[241] *Medirite (Pty) Ltd v South African Pharmacy Council* [2015] ZASCA 27 (20 March 2015) (hereafter *Medirite*) paras 15 – 22; *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) para 42.
[242] *Medirite* (note 241 above) paras 15 – 22.

argued that, subject to a few exceptions, bidders do not have a general right to be afforded further procedural fairness at the point when a final decision is made to disqualify them for non-responsiveness. I should add that this principle ought to apply irrespective of whether the decision is final or preliminary in nature.

Furthermore, the element of proximity is absent when recommendations are made to disqualify a bidder, since such recommendations do not have immediate consequences for the bidder. This is because a mere recommendation would not inevitably result in the bidder's disqualification. A Bid Adjudication Committee is required to bring its own independent judgment to bear on any recommendation made to it by a Bid Evaluation Committee, and it may well reject the recommendation. A procedural fairness challenge to a recommendation made to a Bid Adjudication Committee would probably fall foul of the doctrine of ripeness, as the decision regarding the disqualification of the bidder may yet undergo further change at the point that the final decision is made.

6.7 CONCLUSION

In *Joint Anti-Fascist Refugee Committee v McGrath*, US Supreme Court Justice Frankfurter made the following remarks that continue to have universal appeal despite their expression some 66 years ago, within a peculiar factual, legal, constitutional[243] and historical setting:

> That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it is reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[244]

The legitimacy of an administrative decision depends, in large measure, not on whether it is the 'right' decision, but on the process that was followed in arriving at the decision.[245] It is for this reason that the right to procedural fairness applies by default. Public procurement is, quintessentially, a process that derives its legitimacy from the *manner* in which procurement

[243] Both the fifth and the fourteenth amendments to the US Constitution provide that no person shall be deprived of life, liberty or property without due process of law.
[244] *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123 (1951) 171.
[245] Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475 at 495.

decisions are made and therefore requires scrupulous observance of the right to procedural fairness.

However, as Justice Frankfurter went on to explain, 'due process of law' is not a mechanical instrument nor a yardstick, it is a *process*.[246] 'It is a delicate process of adjustment inescapably involving the *exercise of judgment* by those whom the Constitution entrusted with the unfolding of the process' (own emphasis). [247] Whilst the default position requires that the right to procedural fairness always be observed, the principle of variability recognizes the need to adjust the content of the right, depending on the administrative context within which it is applied. I have argued that an appreciation of the procurement cycle is necessary to understand the administrative setting within which procurement decisions are made and in turn, how much procedural fairness must be applied in any given situation. Finding an appropriate 'dosage' of procedural fairness is also essential to promoting administrative efficiency in public procurement matters.[248]

The degree of procedural fairness protection varies throughout the procurement cycle. Bidders who are disqualified on grounds of non-responsiveness are entitled to procedural fairness. However, that right must be observed first and foremost when an organ of state issues a notice in the form of an RFP that affords bidders an opportunity to make representations in the form of their bid submissions. Procedural fairness requires that bidders be afforded timeous and accurate information, they be treated equally in relation to each other and that bid documents be written with reasonable clarity. It also requires of bidders that they make full use of the opportunity to make representations by demonstrating their compliance with responsiveness criteria or explaining their failure to do so. As a general rule, a non-responsive bidder may not demand further procedural fairness before a (preliminary or final) decision is made to disqualify it from the process. Nor can an aspirant bidder insist on being heard before responsiveness criteria are included in an RFP. However, this is not an iron-clad formula, for situations may well arise in which non-responsive bidders would have a right to be heard before they are disqualified.

The right to procedural fairness applies more intensely when a procuring entity decides not to award a tender to a preferred bidder based on perceived risks. A preferred bidder has a legitimate expectation of, if not a clear right to, the award of a tender. Hence, a decision not to

[246] *Joint Anti-Fascist Refugee Committee* (note 244 above) 163.
[247] Ibid.
[248] Hoexter (note 5 above) 222.

award a tender may be taken only after affording a preferred bidder an opportunity to be heard. The essential point is that a one-size-fits-all approach is entirely inapposite in a procurement context, given the manner in which rights and interests undergo change throughout the procurement cycle. The fundamental question is always 'what does fairness demand in the circumstances of a particular case?'[249]

[249] *Du Preez* (note 6 above) at 233E; *Zondi* (note 21 above) para 114.

CHAPTER 7

SELF-HELP, SELF-CORRECTION AND THE *FUNCTUS OFFICIO* PRINCIPLE

7.1 INTRODUCTION

The ability of public bodies to revise, revoke or rectify their own decisions has been described as a matter 'of great practical importance in administrative law'.[1] This is particularly so in relation to public procurement, where a myriad mistakes could potentially occur during the course of a bidding process. Of particular interest for purposes of this study is the situation that arises when an administrator erroneously disqualifies a bidder as non-responsive or treats a non-responsive bidder as responsive. But other slips commonly occur as well. For example, evaluation points may be incorrectly awarded; the wrong bidder may be nominated for award; the Bid Evaluation Committee (BEC) or Bid Adjudication Committee (BAC) may misinterpret the applicable procurement rules, or may be improperly constituted at the time it considers a tender. The list goes on. In which of these circumstances, if any, may the procuring entity revoke its own decision without judicial authorization? The question posed is intensely practical, and it also touches on important public-law themes such as the need to balance the requirements of finality, legality, good decision-making and administrative efficiency.[2]

It should perhaps be added that the need for revocation does not arise only when administrative errors must be rectified. Administrators may also wish to revoke or alter their decisions as circumstances dictate. For example, conditions may have changed or new information may have come to light since the initial decision was taken (eg a building where certain works were to be carried out has been destroyed by fire); it emerges that a tender award was influenced by a bidder's misrepresentation; or a suspensive condition stipulated in a tender award has not been met.

According to Grote, the benefits to rectification are obvious: it would result in greater 'economy of process', that is to say that the speediness and efficiency of administrative processes would be enhanced, which in turn would promote a climate more conducive to investment.[3] Furthermore, courts would not have to refer matters back to administrators on

[1] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 276. I use the verbs 'revise', 'revoke', 'rectify' and 'self-correct' interchangeably.
[2] Robert Orr & Robyn Briese 'Don't Think Twice? Can Administrative Decision-Makers Change Their Mind'? *AIAL Forum* 11, last accessed from http://www5.austlii.edu.au/au/journals/AIAdminLawF/2002/14.pdf on 1 April 2018.
[3] Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475 at 499.

purely procedural grounds and would therefore be freed to deal with more substantive matters.[4] Orr and Briese suggest that the right of revocation helps to promote one of the key objectives of administrative law, which is good decision-making.[5] By allowing administrators to revisit their decisions, they are more likely to arrive at better decisions.[6] Furthermore, the expense and time associated with litigious processes would be avoided.

But revocation also has certain drawbacks. First, it undermines certainty in administrative decision-making.[7] Good decision-making not only involves making 'quality' decisions, it also involves making decisions that are certain, reliable and timely.[8] Secondly, the possibility of revocation may reduce incentives for 'upfront' compliance by creating the impression that formalities can safely be ignored at the start of the process and rectified later on should the decision be challenged.[9] Grote states that 'it is highly questionable, at least in some instances, whether a procedural requirement can fulfill its purpose if it is not complied with at that stage of the proceedings for which it has originally been prescribed'.[10] This is particularly so for the right to a hearing.[11] Thirdly, it is not always self-evident whether an administrative act is invalid on account of a mistake of fact or law, and it is best left to the courts to determine this question.[12]

This discussion regarding the *functus officio* doctrine must be understood in the context of the ongoing quest of administrative law to find an appropriate balance between the efficient functioning of an administrative state, on one hand, and the need to protect individuals against the abuse of power, on the other.[13] In this chapter, I argue that the need for self-correction is not incompatible with the need for certainty, finality and legality in administrative decision-making. I argue for a limited form of self-correction in public procurement where this would not cause material prejudice, deprive anyone of vested rights or undermine the legitimacy of the bidding process. I draw a distinction between 'self-help' that the Constitutional Court

[4] Grote (note 3 above) 480.
[5] Orr & Briese (note 2 above) 12.
[6] Ibid.
[7] Hoexter (note 1 above) 277.
[8] Orr & Briese (note 2 above) 12.
[9] Grote (note 3 above) 484.
[10] Ibid 480. See also *Gidani (Pty) Ltd v Minister of Trade and Industry* [2015] ZAGPPHC 457 (4 July 2015) paras 83 – 86.
[11] Grote (note 3 above) 480.
[12] South African Law Reform Commission Discussion Paper 112 (Project 25), *Statutory Revision: Review of the Interpretation Act 33 of 1957* (September 2006) para 4.79.
[13] Orr & Briese (note 2 above) 37.

warned against in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*[14] and legitimate forms of self-correction. The notion of self-correction is hardly a new concept. Indeed, the existing common-law exceptions to the *functus* doctrine currently allow public bodies to self-correct, albeit that some of these exceptions are framed rather tenuously.[15] I end this chapter with a brief comment on certain proposed changes to the Interpretation Act 33 of 1957 that would serve further to clarify the legal authority of public bodies to revoke their decisions.

7.2 THE *FUNCTUS OFFICIO* PRINCIPLE

The doctrine of *functus officio*[16] serves to mediate two competing interests: finality and certainty on one hand and administrative efficiency and flexibility on the other.[17] It should be stated in parenthesis that the word 'doctrine' may be too grandiose a term to describe what some see as nothing more than a rule of interpretation. [18] Orr and Briese argue that the concept of *functus officio* is a conclusion to be reached based on an interpretation of the statutory power conferred on an administrator, and not a presumption or 'doctrine' to be applied in order to reach a conclusion.[19] From this perspective, the *functus* doctrine simply requires that the rules of statutory interpretation be applied to determine whether the power of revocation exists. I therefore use the word 'doctrine' advisedly and also interchangeably with 'principle' or 'rule'.

The importance of certainty and finality to administrative decision-making is self-evident. This is expressed in various administrative-law principles, such as the delay rule, the doctrine of issue estoppel, the maxim *omnia praesumuntur rite esse acta* and the doctrine of legitimate expectation.[20] The *functus* rule operates to preclude a decision-maker from

[14] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) (hereafter *Kirland*) paras 89 and 103.
[15] Discussion Paper 112 (note 12 above) 4.36, with reference to *Thompson, Trading as Maharaj & Sons v Chief Constable Durban* 1965 (4) SA 662 (D) 668D - E.
[16] The *functus officio* doctrine has its origins in civil law where it operates by precluding a judge who has pronounced on a matter from retracting his or her own judgment. See Daniel Pretorius 'The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law' (2005) 122 *SALJ* 832 at 842. See also *Zondi v MEC for Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) paras 28, 48.
[17] *Mohamed v Minister of Home Affairs* [2016] ZAWCHC 13 (12 February 2016) (hereafter *Mohamed*) para16; *Retail Motor Industry Organisation v Minister of Water and Environmental Affairs* 2014 (3) SA 251 (SCA) (hereafter *Retail Motor Industry*)) para 25; Hoexter (note 1 above) 277.
[18] Orr & Briese (note 2 above) at 13 – 14. See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11 (14 March 2002) (hereafter *Bhardwaj*) para 8, as quoted in Orr & Briese (note 2 above) 13.
[19] Orr & Briese (note 2 above) 14.
[20] Pretorius (note 16 above) 833.

exercising his or her discretion more than once in relation to the same matter.[21] The rule holds that once a functionary has taken a final decision on a matter, he or she cannot later revisit or revoke the decision in the absence of statutory authority.[22]

A decision is generally considered to be revocable before it has been communicated to affected parties, that is to say whilst it is still a preliminary decision.[23] But once a decision has been published (communicated), it becomes final and 'the administrator is no longer legally qualified to decide upon the issue because he or she has completed his her or task' and therefore has no further authority to deal with matter.[24] As explained in Discussion Paper 112 issued by the South African Law Reform Commission, it is not a requirement that the decision actually came to the affected person's attention, less still that he or she relied on it.[25] 'It would suffice if the decision has, through a deliberate act of the decision-maker, passed into the public domain'.[26]

Although reliance is not a prerequisite to establish the fact of publication, citizens ought nevertheless to be able to rely on governmental decisions and to be protected from the injustice that could arise from a change of mind on the part of government functionaries.[27] In *Kirland*, the Constitutional Court expressed the importance of certainty as follows:

> For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organizing our lives, would be imperiled if irregular or invalid administrative acts could be ignored because officials consider them invalid.[28]

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[21] Ibid 832; Daniel Pretorius 'The *Functus Officio* Doctrine and Statutory Authorisation to Vary or Revoke Administrative Acts or Decisions' (2006) 68 *THRHR* 396 at 397; William Wade & Christopher Forsyth *Administrative Law* 11 ed (2014) 193; Discussion Paper 112 (note 12 above) para 4.4.

[22] Hoexter (note 1 above) at 277 – 278. A good illustration of the rule is to be found in *Blue Horison Investments 10 (Pty) Ltd v Regional Land Claims Commissioner* [2012] ZALCC 18 (30 January 2012) (hereafter *Blue Horison Investments*).

[23] Hoexter (note 1 above) 278; *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) para 44; *MEC for Health, Eastern Cape NO v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 219 (SCA) (hereafter *Kirland (SCA)*) para 15; *Mohamed* (note 17 above) para 29; Discussion Paper 112 (note 12 above) 4.29.

[24] Yvonne Burns *Administrative Law* 4 ed (2013) 226; Pretorius (note 16 above) 833.

[25] Discussion Paper 112 (note 12 above) 4.19 and 4.30, with reference to David Foulkes *Administrative Law* 8 ed (1995) 229 and *R v Criminal Injuries Compensation Board, ex p Tong* [1952] 2 All ER 799.

[26] Discussion Paper 112 (note 12 above) 4.19.

[27] Hoexter (note 1 above) 277. See also Wade & Forsyth (note 21 above) 191; *Welgemoed v The Master* 1976 (1) SA 513 (T) at 520E-F.

[28] *Kirland* (note 14 above) para 103.

Not only does the *functus* doctrine seek to promote certainty, it also seeks to uphold the principle of legality. Legality requires that lawful authority should exist for everything administrators decide to do, or undo.[29] An administrator's powers are restricted to those outlined in the enabling provision, and unless empowered to revisit his decision, the administrator may not do so.[30] An unauthorized revocation of an administrative decision undermines the principles of certainty and legality and is challengeable on any number of grounds listed in s 6 of the PAJA.[31]

Based on the general proposition that a decision is considered to be revocable before it has been communicated, one might have assumed that before an award of tender is formally communicated to a successful bidder the award may be revoked.[32] But in Chapter 5 I pointed out that in terms of the PPPFA, a bidder acquires a right (or at very least a legitimate expectation) of being awarded a contract at the point when the bidder is identified as having scored the highest number of evaluation points overall. This is because s 2(1)(*f*) stipulates that the top-ranked bidder 'must' be awarded the contract unless there are 'objective criteria' which justify the award of the contract to a lower-ranked bidder. Arguably, formal publication of the award is not a prerequisite for the acquisition of rights by the top-ranked bidder. To put it differently, if a decision has been made that no 'objective criteria' exist that might justify a different outcome, an award of tender to the top-ranked bidder is irrevocable despite the absence of publication.

At face value, s 10(1) of the Interpretation Act 33 of 1957 would appear to contradict the *functus* principle, for it provides that 'when a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires'. This suggests that statutory power may continuously be exercised 'as occasion requires'.[33] However, Wade and Forsyth point out that this interpretation is highly misleading.[34] The authors draw a distinction between powers of a 'continuing character' on the one hand, and powers 'which once exercised, are finally

[29] Hoexter (note 1 above) 277.
[30] Pretorius (note 16 above) 844 at 859, with reference to *Osterloh v Civil Commissioner of Caledon* (1856) 2 Searle 240 d.
[31] J R de Ville *Judicial Review of Administrative Action in South Africa* (2005) 68; *Kirland* (note 14 above) para 18.
[32] *Pamo Trading Enterprises CC v Chairperson of the Tender Board of Namibia* NAHCMD 268 (18 September 2017) paras 43 – 47.
[33] Hoexter (note 1 above) 277.
[34] See Wade & Forsyth (note 21 above) 191, in relation to the English counterpart to s 10 of the Interpretation Act, namely, s 12 of the Interpretation Act 1978.

expended' on the other.[35] The right of the state to expropriate property or to maintain highways is cited as an example that fall into the first category.[36] However, once the amount of compensation has been determined, there is a need for finality and public officials would not be able to re-exercise their discretion in relation to the same matter. This is because 'citizens whose legal rights are determined administratively are entitled to know where they stand'.[37] Hoexter thus suggests that s 10(1) 'merely enables administrators to exercise their powers anew in different situations, and not to revisit or revoke their existing decisions whenever they like'.[38]

A rigid application of the *functus* principle would create hardship for citizens who find themselves on the receiving end of erroneous decisions, as it would prevent administrative bodies from rectifying their errors or responding to the dictates of changing circumstances.[39] But the *functus* doctrine is not inflexible.[40] The following common-law exceptions have been recognized to a greater or lesser extent to give the rule some flexibility:[41]

(a) It is always open to a legislative body to revoke a law made by it;[42]

(b) The instrument from which an administrator derives his or her decision-making power may expressly or impliedly[43] authorize the administrator to revoke his or her decision;[44]

(c) A decision may possibly be revoked in cases involving 'serious illegality', such as fraud, lack of jurisdiction, or improper authorization.[45]

(d) A valid unfavourable decision affecting only the rights of an applicant may possibly be revoked by the administrator, eg a refusal to grant a right of immigration or a

[35] Wade and Forsyth (note 21 above) 277.
[36] Ibid.
[37] Ibid.
[38] Hoexter (note 1 above) 277.
[39] Pretorius (note 21 above) 397.
[40] Hoexter (note 1 above) 277; Pretorius (note 16 above) 832; Pretorius (note 21 above) 418.
[41] Pretorius (note 21 above) 397.
[42] Section 10 (3) of the Interpretation Act 33 of 1957; Lawrence Baxter *Administrative Law* (1984) 372; Burns (note 24 above) 226; *Retail Motor Industry Organisation* (note 17 above) paras 25 and 32.
[43] See De Ville (note 31 above) 78 – 79 for a discussion of implied powers of revocation. See also Orr & Briese (note 2 above) 32 – 35.
[44] Wade & Forsyth (note 21 above) 191. See also Pretorius (note 16 above) 862 – 864; De Ville (note 31 above) 70 and in particular footnotes 316 and 317 for various examples of legislation that permit the revocation of administrative decisions. Hoexter (note 1 above) 279; Pretorius (note 16 above) 862.
[45] Wade & Forsyth (note 21 above) 193. Hoexter (note 1 above) 277, 280; Burns (note 24 above) 226 – 227; Discussion Paper 112 (note 12 above) 4.36 – 4.37; 19; De Ville (note 31 above) 72, 74 – 75, 81 fn 398. As stated by Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712, 'fraud unravels everything'.

decision to cancel a licence may be revoked, provided that no other rights are affected by the decision;[46]

(e) A decision may possibly be revoked if all parties consent or if it can be demonstrated that the revocation would be to the advantage of all interested parties;[47]

(f) Administrators have an implied power to correct small technical errors, 'mere slips' or ambiguities in decisions, provided that such corrections do not amount to a variation or revocation of the substance of the decision.[48]

(g) A decision may possibly be revoked where the mistake comes to light as soon as the administrative body has made its pronouncement but before it has adjourned.[49]

The state of the law in relation to the *functus* principle was succinctly summarized in *Retail Motor Industry Organisation v Minister of Water and Environmental Affairs* as follows:

> [F]irst, the principle applies only to final decisions; secondly, it usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorizes him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions); fourthly, the *functus officio* principle does not apply to the amendment or repeal of subordinate legislation.[50]

Grote explains that the degree of tolerance for rectification in European jurisdictions is influenced to a large extent by whether the legal system in question adopts a 'substantive' approach or a 'procedural' approach.[51] A substantive approach places the emphasis on the link between the formal requirement and the substantive quality of the decision. If the defect has no impact (actual or potential) on the merits of the decision, it will not affect the validity of the

[46] De Ville (note 31 above) 69, 73 – 74, 79; Burns (note 24 above) 228; Baxter (note 42 above) 373. But see Hoexter (note 1 above) 280, where the author expresses her doubts about this exception.
[47] Burns (note 24 above) 227; De Ville (note 31 above) 74, 79; Baxter (note 42 above) 373. But see Wade & Forsyth (note 21 above) 193, where the authors cast doubt on the proposition that a conclusive decision may be revoked by consent 'since consent by itself cannot confer power which does not exist'. See further discussion by the authors at 198 – 201. See also Discussion Paper 112 (note 12 above) 4.81.
[48] Hoexter (note 1 above) 281; Wade & Forsyth (note 21 above) 191 – 192.
[49] Hoexter (note 1 above) 278 makes reference to Daniel Pretorius *The Functus Officio Doctrine in South African Administrative Law, with reference to Analogous Principles in the Administrative Law of Other Commonwealth Jurisdictions* (unpublished PhD thesis, University of the Witwatersrand, 2004), where the author cites this example.
[50] *Retail Motor Industry* (note 17 above) para 18.
[51] Grote (note 3 above) 499.

decision.[52] Germany is an example of a legal system that follows a substantive approach.[53] In Germany, administrative failures can be rectified during the course of an administrative process.[54] Administrators may even be afforded an opportunity to rectify administrative errors during a process of judicial review.[55] German tolerance for rectification of administrative failures is influenced by a desire to increase 'economy of process' and to promote a climate more conducive to investment.[56]

The procedural approach, on the other hand, emphasizes the link between observance of the formality and the protection of the rights of the affected person.[57] France is an example of a legal system that follows the procedural approach. The default position in French law is that an administrative decision that came about as a result of a procedural impropriety must be restarted and a fresh decision has to be taken.[58]

Our constitutional dispensation seems to follow a hybrid approach. During the merits stage of review proceedings, our law places a premium on procedural propriety — particularly in the context of public procurement. In terms of s 172(1)(*a*) of the Constitution, a court 'must' declare invalid any conduct that is inconsistent with the Constitution. In *AllPay 1*, the Constitutional Court explained that procedural requirements do not merely serve a utilitarian purpose, in the sense of promoting good decision-making, but have value in themselves, and that their observance promotes key public-interest objectives.[59]

A material irregularity that occurred during a bidding process will therefore result in an order of constitutional invalidity. However, during the remedy stage of proceedings, the court has a freer hand in determining the outcome of a matter. It may make any order that is 'just and equitable', including the suspension of the declaration of invalidity 'to allow the competent authority to correct the defect'.[60] The court's remedial powers are thus sufficiently flexible to allow a public body to remedy an 'invalid' decision. However, a court must first declare the

[52] Ibid.
[53] Ibid 488.
[54] Ibid 483 – 484.
[55] Ibid.
[56] Ibid 499.
[57] Ibid.
[58] Ibid 480.
[59] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) para 27.
[60] Section 172(1)(*b*)(ii) of the Constitution.

conduct constitutionally invalid before it affords a public body an opportunity to rectify its errors.

That is precisely what transpired in *Umgungundlovu District Municipality v Amaraka Investments 37 (Pty) Ltd*, in which the court declared a contract constitutionally invalid owing to certain breaches of legislation, but suspended the order of invalidity to afford the municipality an opportunity to remedy the breaches and to follow a competitive bidding process.[61] In this instance, a municipal entity contracted with a private body to provide services for the removal of effluent from a private hospital, a function that the municipality itself was constitutionally obliged but was not able to perform. After running up an account in excess of R9 million, the municipality sought to rescind the contract on grounds that it was not concluded in accordance with the s 78 of the Municipal Systems Act 32 of 2000. Section 78 requires *inter alia* that when a municipality provides a municipal service through an external mechanism, it must give notice to the local community of its intention to do so, assess different service delivery options, conduct a feasibility study and follow a proper procurement process. The court held that the municipality had acted unconscionably in that it had unreasonably delayed the institution of review proceedings while continuing to use the services of the private body.[62] The court further held that 'the declaration of invalidity must not have the effect of divesting the respondent of rights which – but for the declaration of invalidity – it might be entitled to'.[63] The court therefore suspended the order of invalidity and ordered the municipality to take steps to correct the errors that it had complained about. *Umgungundlovu* provides an interesting example of the use of the court's remedial powers to allow a public body to self-correct.

I now consider the implications of the *Kirland* judgment. Unlike the SCA, the Constitutional Court's judgment in *Kirland* hardly made any reference to the *functus* rule.[64] Nevertheless, the principles that the court espoused have a direct bearing on the rule. It is therefore important to understand the judgment both in relation to what it says and also in relation to what is does *not* say regarding the *functus* rule.

[61] *Umgungundlovu District Municipality v Amaraka Investments 37 (Pty) Ltd* [2018] ZAKZPHC 10 (11 April 2018) (hereafter *Umgungundlovu*) para 49.
[62] Ibid para 45.
[63] Ibid.
[64] See the brief references to the *functus* principle in paras 18, 25 and 48 of the Constitutional Court's judgment.

7.3 THE *KIRLAND* JUDGMENT

In *Kirland* an acting departmental head succumbed to political pressure and, while the head was on sick leave, approved an application to build private hospitals. On his return to work the head revoked what he regarded as an unlawful decision. The majority framed the question before it as follows: 'Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court *even when government has not applied (or counter-applied) for the court to do so*'?[65] (Emphasis added). The main issue before the court thus involved a question of procedural impropriety, in that the department concerned had not taken the trouble to bring a substantive review application to have its own unlawful decision set aside by a court of law.[66] The department preferred to treat its earlier approval as a 'non-decision' that could be withdrawn or ignored.[67] This, said the Constitutional Court, was wrong.[68] The gravamen of the judgment was that a public body may not revoke a final decision without following a judicial process. In this respect, the judgment said nothing new.

The relevance of the judgment for purposes of this discussion is the impact it had on the common-law exception (to the extent that one existed at all) that a public body may revoke a decision it regards as unlawful or 'invalid'. The legal position pre-*Kirland* regarding the right of public bodies to revoke decisions considered to be invalid was tenuous at best.[69] Certain authors have suggested that public bodies may revoke their decisions in instances involving serious illegality, such as lack of jurisdiction, absence of authority or fraud.[70] Sometimes the dubious distinction between 'void' and 'voidable' decisions has been used as a guideline, the former being considered to be revocable, whereas the latter was not. [71]

The Constitutional Court in *Kirland* settled the debate by ruling that a decision could not simply be regarded as a 'non-decision' on account of its unlawfulness.[72] The court explained that by ignoring a decision considered to be unlawful, a public body would be acting

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[65] *Kirland* (note 14 above) para 64 (emphasis added). The factual matrix is set out in *Kirland* (note 14 above) paras 6 – 16 and *Kirland (SCA)* (note 23 above) paras 2 – 12.
[66] *Nelson Mandela Bay Metropolitan Municipality v Erastyle (Pty) Ltd* [2018] ZAECPEHC 61 (6 November 2018) para 23. Quinot & Maree correctly point out that underlying the procedural issue was the lack of clarity as to what the validity of administrative action actually means. See Geo Quinot & P J H Maree 'The Puzzle of Pronouncing on the Validity of Administrative Action on Review' (2015) 7 *CCR* 27 at 38.
[67] *Kirland* (note 14 above) para 66.
[68] Ibid paras 70 – 90.
[69] De Ville (note 31 above) 77; 74 – 75 and 81 fn 398.
[70] Hoexter (note 1 above) 277; Discussion Paper 112 (note 12 above) 4.36 – 4.37; 19; De Ville (note 35 above) 74 – 75, 79, 81 fn 398.
[71] De Ville (note 35 above) 74, 79; Marius Wiechers *Administrative Law* (1985) 168.
[72] *Kirland* (note 14 above) paras 87 – 106.

contrary to the well-established *Oudekraal* principle — that until an administrative decision is set aside by a court 'it exists in fact and it has legal consequences that cannot simply be overlooked'.[73] The court further held that it would give license to 'self-help', by encouraging officials to ignore administrative conduct they consider to be incorrect, thereby taking the law into their own hands.[74]

According to Cameron J, if the administrator could simply regard a decision taken under unlawful dictation as a non-decision, there would be no need for the PAJA.[75] After all, the PAJA's definition of administrative action is not limited to administrative action that is 'just', but plainly includes unjust (unlawful) administrative action as well.[76] *All* administrative acts are reviewable on the grounds listed in s 6 of the PAJA,[77] and the 'obviousness' of the illegality does not give a public authority licence to ignore its decision.[78] To hold otherwise would cause detriment to persons in whose favour the initial decision was granted.[79]

The implication of *Kirland* is that, in the absence of legislative authorization, a final decision may not be revoked on grounds of lack of jurisdiction, improper authorization, 'invalidity' or even fraud, without following a proper judicial process. The *Oudekraal* and *Kirland* principles were subsequently affirmed in *Merafong City Local Municipality v Anglogold Ashanti Ltd*.[80]

But *Kirland* should not be understood to mean that revocation would amount to illegitimate expressions of self-help in *all* instances. The principle that preliminary (and thus not final) decisions may be revoked remains unaffected by *Kirland*. So, too, the possible exception that decisions that do not affect the rights or interests of third parties may be revoked. Furthermore, the judgment does not detract from the principle that legislation may expressly permit the revocation of decisions considered to be invalid. This latter point is important in the context of

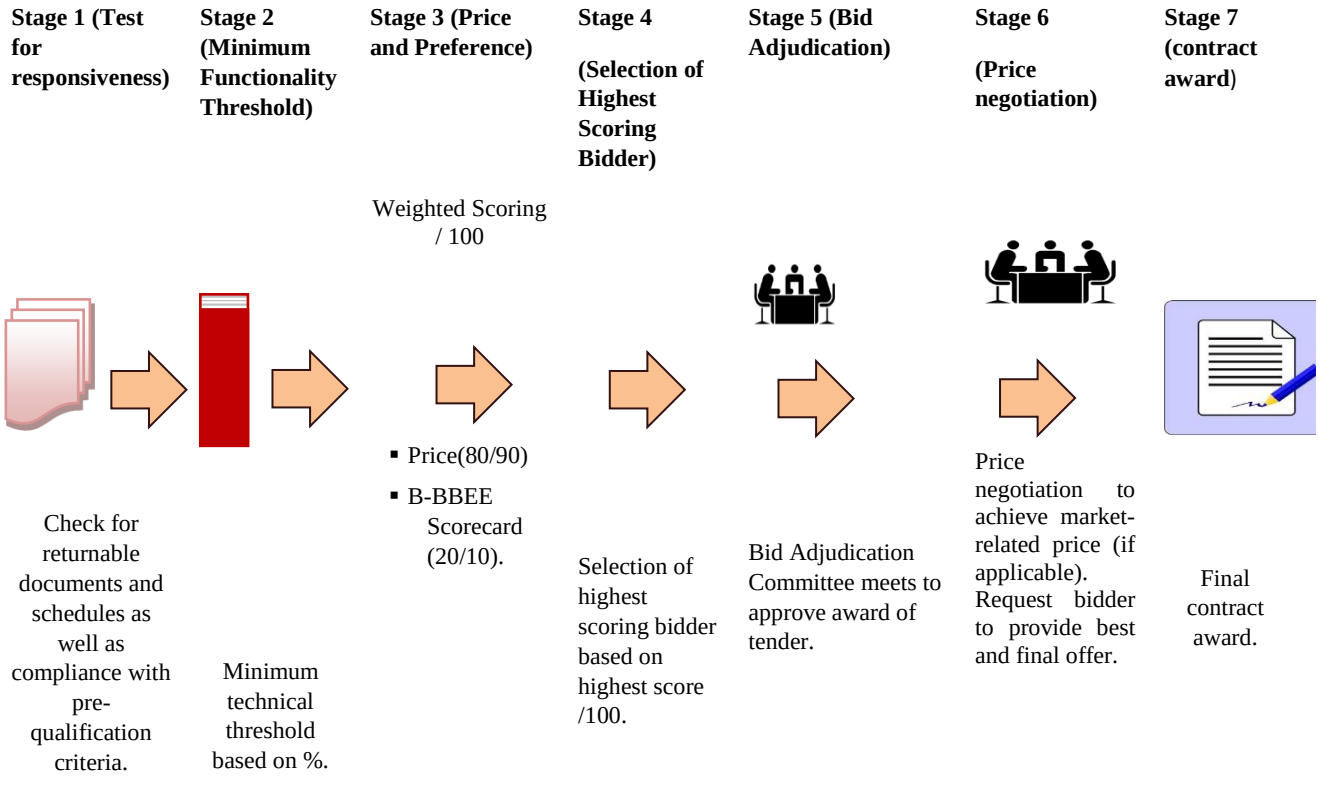
[73] Ibid paras 100 – 102, with reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26. See also *Queenstown Girls High School v MEC, Department of Education, Eastern Cap*e 2009 (5) SA 183 (Ck) para 20; *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy, Republic of South Africa* [2011] 3 All SA 610 (SCA) paras 46 – 47; *Merafong City Local Municipality v Anglogold Ashanti* Ltd 2017 (2) SA 211 (CC) (hereafter *Merafong*) paras 39 – 44.
[74] *Kirland* (note 14 above) para 89. But for a different approach, see the judgment of the Australian High Court in *Bhardwaj* (note 18 above).
[75] *Kirland* (note 14 above) para 96.
[76] Ibid para 93 – 97.
[77] Ibid para 99.
[78] *Kirland (SCA)* (note 23 above) para 21; Hoexter (note 1 above) 547.
[79] *Kirland (SCA)* (note 23 above) para 21.
[80] *Merafong* (note 73 above) paras 39 – 44 and 54.

procurement law, as reg 13(1)(*d*) of the PPPFA regulations expressly provides that a tender process may be cancelled if a 'material irregularity' is discovered in the tender process. I argue below that although the term 'material irregularity' is undefined, it may well include instances of fraud, lack of jurisdiction, improper authorization, etc. These and other serious irregularities may well justify the revocation of a tender process without the need for judicial sanction. In my view, this approach is not inconsistent with the principles established in *Kirland*.

7.4 THE BID EVALUATION PROCESS

In Chapter 5, I highlighted the importance of understanding the administrative setting in which procurement decisions are taken. I explained that the right to procedural fairness must be understood in relation to the particular step in the bid evaluation process at which a decision was taken. Similarly, the revocability of a procurement decision must be understood in the context of the stage of the bid process at which the decision was taken. Therefore, it is necessary to provide a brief explanation of the various steps that are followed in the process of bid evaluation. Figure 1 below largely depicts the bid evaluation process followed in Transnet SOC Ltd, but variants of the process are to be found throughout the public sector.

Figure 1[81]



[81] Adapted from Transnet's *Procurement Procedures Manual* (unpublished) (hereafter *PPM*) 95.

As appears from figure 1, the process of bid evaluation and award follows roughly seven stages.[82] During stage 1 bidders are evaluated for responsiveness. This involves a determination whether the bidder submitted key documents and has met minimum pre-qualification criteria, such as local production, B-BBEE levels and other mandatory requirements set by the procuring entity. Bidders who meet the requirements at stage 1 qualify for technical evaluation at stage 2 (the threshold stage). During this stage, bidders are evaluated to determine whether they meet the minimum threshold score for functionality (technical compliance). Only those bidders who meet the minimum threshold score qualify for further consideration during stage 3 (the price and preference stage). During stage 3 bidders are scored out of 100 points (90 or 80 points are assigned to price and 20 or 10 points to B-BBEE, depending on the value of the contract).[83] During stage 4 bidders are ranked based on their score out of 100 evaluation points. The bidder who scores the highest points is recommended for the award, unless 'objective criteria' justify the award to a lower-ranked bidder. The decisions taken during stages 1 to 4 are usually of a preliminary (internal) nature and are subject to validation by the Bid Adjudication Committee (BAC).

During stage 5, the BAC considers the recommendation to award and either approves or rejects the recommendation. There are various reasons why a BAC might reject a recommendation. The BAC may detect an error that occurred during the evaluation process, in which case, the matter would be referred back to the Bid Evaluation Committee (BEC) for reconsideration and rectification; the BAC might consider that 'objective criteria' justify the award to a bidder other than the top-ranked bidder; the BAC might hold the view that the price of the top-ranked bidder is not market-related, in which case it may require the procuring entity to negotiate a market-related price with the top-ranked bidder, and so on. [84]

Price negotiations take place during stage 6. If a bidder is invited to participate in price negotiations, the bidder will usually be issued with a 'letter of intent' informing it of its selection as a 'preferred bidder'. The bidder will also be informed that the award of contract is made conditional upon the successful completion of price negotiations. If price negotiations

[82] This is based on the evaluation methodology prescribed in regulations 4 to 8 of the PPPFA regulations in GN 40553 *GG* 10684 of 20 January 2017 (hereafter *the PPPFA regulations*).
[83] In terms of regs 6 and 7 of the PPPFA regulations, if the value of the tender is less than R50 million, 80 points are assigned to price and 20 to B-BBEE. If the tender is above R50 million, 90 points are assigned to price and 10 to B-BBEE.
[84] Regulations 6(9) and 7(9) of the PPPFA regulations (note 82 above).

are successful, the bidder progresses to stage 7 during which the contract is awarded and concluded.[85] Unsuccessful bidders are usually informed of the outcome of the process at the end of stages 6 or 7. If negotiations are unsuccessful, the procuring entity may negotiate a market-related price with the next-ranked bidder or it may cancel the contract.[86] The award of tender is published during stage 7.[87]

The point that must be emphasized is this: the revocability of a decision will depend on the stage of the bid evaluation process at which the decision was taken, whether the revocation was authorized by legislation, the nature of the decision (whether preliminary, conditional or affecting rights), and the effects of the decision (whether favourable or unfavourable).[88] With these principles in mind, I now discuss the circumstances in which decisions taken in a procurement context may be revoked, with particular reference to decisions affecting bid responsiveness**.**

7.5 PRELIMINARY DECISIONS

I use the term 'preliminary decision' to describe a purely internal decision that has not been communicated to an outside party. It is common practice for public bodies to correct erroneous preliminary decisions taken during the course of a bid process, for example, the correction of wrong evaluation scores. The South African Law Reform Commission observes that 'it is in the interests of sound administration that there be some latitude during internal processes to allow reconsideration of an initial decision, whether the need to do so arises from earlier mistakes as to the facts or the applicable law, the availability of fresh information relevant to the decision, the desirability of correction of an error, or simply further reflection by the decision-maker'.[89]

As indicated above, preliminary decisions made at various stages of a procurement process are usually subject to validation by a higher approval body before they are made final. It is trite that the reversal of a preliminary decision does not amount to a breach of the *functus* principle**.**

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[85] There may be variants of the process described, throughout the public sector.
[86] Regulations 6(9) and 7(9) of the PPPFA regulations (note 82 above).
[87] National Treasury requires that the award of tenders be published on the e-tender portal. See para 4 of National Treasury Instruction 1 of 2015/16 on 'Advertisement of Bids and Publication of Awards on the e-Tender Publication Portal' last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 23 March 2018.
[88] De Ville (note 31 above) 77.
[89] Discussion Paper 112 (note 12 above) 4.28. See also Baxter (note 42 above) 372.

7.6 REVOCATION AUTHORIZED BY AN EMPOWERING PROVISION

Acts of Parliament often provide for an express power of revocation.[90] In *Carlson Investments Share Block (Pty) Ltd v Commissioner, SARS*, it was recognized that legislative authorization to revisit a previous decision obtains a more 'acceptable aura' if it is to be exercised in the public interest.[91] Legislation will usually provide for jurisdictional facts and time periods to be observed when a decision is to be revoked, as these serve as checks on the arbitrary exercise of power.[92]

Procurement legislation permits the revocation of procurement decisions in various instances. One such instance involves the cancellation of a tender. Regulation 13 of the PPPFA regulations, 2017 reads as follows:

> 13(1) An organ of state may, before the award of a tender, cancel a tender invitation if –
>
> (a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;
> (b) funds are no longer available to cover the total envisaged expenditure;
> (c) no acceptable tender is received; or
> (d) there is a material irregularity in the tender process.
>
> (2) The decision to cancel a tender invitation in terms of subregulation (1) must be published in the same manner in which the original tender invitation was advertised.
>
> (3) An organ of state may only with the prior approval of the relevant treasury cancel a tender invitation for the second time.

It is evident from reg 13 that a tender may be cancelled on any of the listed grounds, provided that the cancellation takes place *before* the tender is awarded.[93] Regulation 13(1)(*d*) provides legislative authority for the revocation of a tender process considered to be irregular. The term 'material irregularity' is not defined and could conceivably include a range of infirmities, such as where a tender process was tainted by improper authorization, lack of jurisdiction, fraud, corruption or other forms of malfeasance. In my view, this interpretation is not inconsistent with the Constitutional Court's ruling in *Kirland*, for in *Kirland* the court was

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[90] Pretorius (note 21 above) 400; *Carlson Investments Share Block (Pty) Ltd v Commissioner, SARS* 2001 (3) SA 210 (W) (hereafter *Carlson Investments*) at 225 F – J. See also De Ville (note 31 above) 70 and in particular footnotes 316 and 317 as well as Baxter (note 42 above) 375 – 376 for various examples from the statute books where revocation is expressly authorized.

[91] *Carlson Investments* (note 90 above) at 221 G – H, 226 G – H.

[92] Ibid 227 F – G.

[93] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) (hereafter *Trencon*) para 71.

confronted with the revocation of a final decision in circumstances where no legislative authority existed for such revocation.[94] In contradistinction, reg 13(1)(*d*) expressly provides for the revocation of a tender process based on the existence of a 'material irregularity'. Furthermore, reg 13(1)(*d*) only allows for revocation to take place *before* the award of a tender. (With reference to figure 1, cancellation may take place at any point until stage 6 (price negotiations)). Once a tender is finally awarded (at stage 7), the decision cannot be revoked without judicial authorization.[95]

Furthermore, it is important to distinguish between the right of revocation as provided for in reg 13(1)(*d*) and the *manner* in which it is exercised.[96] There are conflicting SCA rulings on whether the cancellation of a tender is governed by the PAJA or the principle of legality,[97] but on either approach, a decision to cancel a tender process remains subject to the constraints imposed by the rule of law.[98] Procuring entities are therefore required to observe the requirements of rationality, proportionality and procedural fairness when they decide to exercise their rights of revocation.[99]

The problem with reg 13(1)(*d*) is that it does not differentiate between instances that require cancellation and those that require rectification. After all, not all material irregularities require cancellation. Some irregularities are capable of being rectified without negatively affecting rights or the legitimacy of the tender process. For example, the discovery *before* the award of a tender that a bidder was erroneously disqualified on grounds of non-responsiveness would not necessarily require that the process be cancelled, but rather that the bidder be included for purposes of evaluation.

Another example of where procurement legislation permits revocation involves bidders whose prices are not 'market-related'. The PPPFA regulations provide that a tender may not be awarded to the top-ranked bidder if that bidder's pricing is not market-related.[100] In such instances, the procuring entity may negotiate a market-related price with the bidder, failing which the procuring entity may negotiate with other bidders or it may cancel the contract. Based

[94] *Kirland* (note 14 above).
[95] *Trencon* (note 93 above) para 71.
[96] Pretorius (note 21 above) 404.
[97] Compare *Logbro Properties CC v Bedderson N.O and Others* [2003] 1 All SA 424 (SCA); *City of Tshwane Metropolitan Municipality v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA); *SAAB Grintek Defence (Pty) Ltd v South African Police Services* [2016] 3 All SA 669 (SCA) and *Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others* [2017] ZASCA 30 (29 March 2017).
[98] Pretorius (note 21 above) 398.
[99] De Ville (note 31 above) 71, 73; Pretorius (note 21 above) 396, 398, 403, 418.
[100] Regulations 6(9) and 7(9) of PPPFA regulations (note 82 above).

on the legislative proscription on the award of tenders to bidders who prices are not market-related, it can safely be concluded that a procuring entity would not be considered to be *functus* when it informs a bidder that an award of a tender is subject to successful price negotiations. A binding contractual relationship is entered into only once the bid is finally accepted,[101] and a tender award that is made conditional upon the successful completion of price negotiations does not constitute unequivocal acceptance.[102] Therefore, a procuring entity would be entitled to revoke a conditional award if the pricing condition is not met.[103]

Section 2(1)(*f*) of the PPPFA also provides for a revocation of sorts. As already indicated, the section requires that a tender be awarded to the top-ranked bidder, but it allows the procuring entity to bypass that bidder if 'objective criteria' justify such a decision.[104] It is my contention that publication of the award to the top-ranked bidder is not required for the bidder to acquire rights. Rights are acquired at the point when a bidder is identified as the bidder who scored the highest points overall and a decision is made that no 'objective criteria' exist that may justify the award to a lower-ranked bidder. It is therefore arguable that, in the absence of a decision regarding the existence of objective criteria, a procuring entity may be considered to be *functus* by virtue of having identified a bidder as the top-scoring bidder.

There might be some debate about whether the award of a tender in terms of s 2(1)(*f*) involves an actual 'decision' or an 'act'. Pretorius acknowledges that administrators sometimes perform acts that cannot be classified as decisions, since acts do not involve the exercise of discretion or a choice between various alternatives.[105] Arguably, there is no choice involved in the award of tender to a top-ranked bidder in terms of s 2(1)(*f*), for once the top-ranked bidder is identified then (absent a decision regarding the existence of objective criteria) the award of tender must flow as an inevitable consequence. But ultimately, regardless of how the award to the highest-scoring bidder is classified (whether as a 'decision' or an 'act'), the section clearly authorizes procuring entities to decide not to make an award to the top-ranked bidder, if objective criteria are found to exist. The clear legislative authorization makes it unnecessary to

[101] *Sakhiwo Health Solutions (Limpopo) (Pty) Ltd v MEC of Health, Limpopo Provincial Government* [2014] ZASCA 206 (28 November 2014) para 26.
[102] *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA) paras 19 – 25.
[103] *United Teachers Association of South Africa v Minister of Education and Culture, House of Representatives; Isaacs v Minister of Education and Culture, House of Representatives* 1993 (2) SA 828 at 840H – 841D; De Ville (note 31 above) 70.
[104] Section 2(1)(*f*) of the Preferential Procurement Policy Framework Act, 2000 (hereafter *PPPFA*), read with reg 11(1) of the PPPFA regulations, 2017 (note 102 above).
[105] Discussion Paper 112 (note 12 above) 4.101.

resolve the 'decision/ act' debate in the context of s 2(1)(*f*). Nevertheless, Pretorius' proposal that amendments to the Interpretation Act should expressly allow for the revocation of both 'decisions' and 'acts' is sound.[106]

7.7 ERRONEOUS FINAL DECISIONS

I will now consider the revocability of both favourable and unfavourable final decisions on grounds of error. Based on the authority of *Kirland*, it is clear that a final, favourable decision to award a tender to a non-responsive bidder cannot later be revoked or ignored as a non-decision, but can only be set aside by judicial pronouncement.[107] Similarly, an erroneous unfavourable decision, such as an incorrect decision to disqualify a bidder on grounds of non-responsiveness, cannot be revoked if a contract has since been awarded to a competing bidder. However, some authority exists for the proposition that a decision that confers rights may (in the absence of legislative authority) be revoked by consent.[108]

But what about an unfavourable final decision made during a bid process that affects only the rights or interests of the affected party and no-one else? Let us assume that an erroneous decision was taken to disqualify bidder A as non-responsive and that bidder A was informed about its disqualification as soon as the decision was made (say at stage 1 in figure 1). Let us also assume that no other bidder was informed about the disqualification. Although the decision is final in nature, in the sense that bidder A was informed about the decision, no rights or legitimate expectations would have vested in any other bidder as a consequence of bidder A's disqualification.

Academic authors are agreed that a refusal to grant a right in circumstances that affect no one apart from an applicant (such as a refusal to grant an immigration permit or a social grant) is revocable.[109] By parity of reasoning, a final decision taken to disqualify a bidder as non-responsive would be revocable if no other party was affected by the decision. Of course, there are limitations to the analogy between a refusal to bestow a social grant or an immigration permit on the one hand and the disqualification of a bidder during a tender process on the other — for the latter involves a competitive bidding process, whereas the former does not. But the

[106] Ibid.
[107] *Kirland* (note 14 above) para 89.
[108] De Ville (note 31 above) 74, with reference to *Cape Coast Exploration Ltd v Scholtz* 1933 AD 56 at 65. See also *Blue Horison Investment* (note 22 above) para 35. But as indicated in note 47 above, Wade & Forsyth doubt that a final decision may be revoked by consent. See also Hoexter (note 1 above) 281.
[109] De Ville (note 31 above) 69, 73, with reference to *Holden v Minister of the Interior* 1952 (1) SA 98 (T) at 101B – 103B; Baxter (note 42 above) 373.

imperfection in the analogy should not detract from the underlying principle, that a decision is considered to be revocable if rights of third parties were not affected by the decision. It is my contention that our law should not demand the observance of judicial rituals to reverse administrative errors, even if no rights were negatively affected. In such instances, the demands of administrative efficiency and common sense ought to prevail.

This point may be illustrated by the ruling of the SCA in *Aurecon South Africa (Pty) Ltd v City of Cape Town.*[110] In this instance, the City sought to have its tender award to Aurecon set aside on grounds of alleged irregularities that were detected during the tender process. One of these related to the fact that Aurecon was initially declared non-responsive for failing to submit annual financial statements and then later afforded an opportunity to provide the financial statements. The tender conditions provided that a bidder 'may' be rejected as non-responsive if the bidder failed to comply with the request. Aurecon had in fact submitted summarized financial statements and offered to make the actual financial statements available for perusal at its offices.[111] As such, Aurecon had not refused to provide financial statements. Nevertheless, Aurecon was informed that it had been declared non-responsive, and since it was the only remaining bidder, preparations were made to cancel the tender and to have it re-issued.[112] However, Aurecon explained to the City's officials that it had not refused to give the City access to the requested information and that it was willing to accede to the City's request. On strength of this explanation, the City relented and allowed Aurecon to submit its financials. It also transpired that the functionary who had informed Aurecon that it had been declared non-responsive had no authority to do so, and that the letter had been issued merely as a threat to ensure Aurecon's compliance.

Although the question of *functus officio* was not expressly addressed in the judgment, the SCA rejected the argument advanced on behalf of the City that once Aurecon's tender was deemed non-responsive it could not be revived. The court held that in view of the functionary's lack of authority to issue the letter in the first instance, the use of the permissive word 'may' in the tender conditions and the fact that Aurecon had not refused to comply with the City's request, the decision to allow Aurecon to submit its financials was not invalid.[113] It was clear

[110] *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) (hereafter *Aurecon*) paras 28 – 30.
[111] Ibid para 29.
[112] It does not appear from the judgment that any other bidder was informed that Aurecon had been declared non-responsive, nor were any bidders informed about the planned cancellation of the tender.
[113] *Aurecon* (note 142 above) para 30.

that the decision to disqualify Aurecon as non-responsive had been taken in error. Furthermore, the decision to revoke the erroneous decision would not have impacted negatively on any other bidder. As indicated, Aurecon was the only bidder left in the process at that stage and furthermore, the decision to cancel the tender had not been made public. [114]

In summary, as a general rule, erroneous final decisions cannot be revoked without judicial authorization. However, some authority exists for the proposition that an unfavourable, final but erroneous decision may be revoked if the decision affects only the rights or interests of the affected party and no-one else. It is therefore my argument that a final but incorrect decision to disqualify a bidder as non-responsive may be revoked if no other rights would be affected by the revocation.

7.8 VALID FINAL (FAVOURABLE AND UNFAVOURABLE) DECISIONS

Circumstances that would justify the revocation of a valid favourable decision in a procurement context are rare, but include the revocation of a tender award that was made subject to an unfulfilled condition that a market-related price be agreed with the preferred bidder.[115] As discussed above, the regulatory framework specifically provides for revocation if the condition is not fulfilled.

De Ville maintains that even a valid unfavourable decision may be revoked, provided that only the rights or interests of the applicant were affected.[116] Circumstances that might justify the revocation of a valid unfavourable decision in the context of public procurement are also rare, but the following example comes to mind: If a valid decision was taken not to award a tender to a successful bidder for reasons of budgetary constraints, the decision may be revoked if sufficient funds later become available. It happens not infrequently that budgets of public entities are reprioritized, with the result that funds that were available at the time the bid was advertised are no longer available at the time of award. [117] In such circumstances, procuring entities are entitled to cancel the tender, [118] provided that the decision to cancel is publicly

[114] On appeal, the Constitutional Court did not deal with the alleged irregularities, but focused instead on the City's undue delay in instituting review proceedings. See *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC).
[115] De Ville (note 31 above) 78.
[116] Ibid 73.
[117] It is a basic principle of public procurement that procuring entities may not start a procurement event without an approved budget in place. See para 11 of National Treasury Instruction 3 of 2016/17 on 'Prevention and Combatting abuse in the Supply chain Management System' last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 18 April 2018. However, budgetary amounts are often re-allocated during the course of a financial year.
[118] Regulation 13(1)(*b*) of the PPPFA regulations (note 82 above).

advertised.[119] It is arguable that a decision to cancel a tender may itself be revoked if sufficient funds subsequently become available. But this is subject to the following *caveats*: The decision to revoke the cancellation must be made within a reasonable time of the funds becoming available. The revocation of a tender cancellation after a considerable period of time has elapsed could be seen as unfair since market conditions might have changed considerably in the interim. Furthermore, the revocation of the decision to cancel the tender must have occured before the decision was publicly advertised. For once the decision to cancel is publicly advertised, the bidding public would have reason to believe that finality has been achieved and that no award of business would take place. Subject to these *caveats*, I would argue that the revocation of a decision not to award a tender to a successful bidder on grounds of budgetary constraints, would not affect the rights of any other (unsuccessful) bidder and would thus not fall foul of the *functus* rule.

However, insofar as the issue of responsiveness is concerned, it is hard to imagine any circumstances that would justify the revocation of a valid unfavourable decision to disqualify a bidder as non-responsive or a valid favourable decision to regard a bidder as responsive.

7.9 LEGISLATIVE REFORM

Ultimately, legislative intervention is required to resolve the tension between certainty and legality.[120] Discussion Paper 112 issued by the South African Law Reform Commission (SALRC) contains various proposals on how the Interpretation Act 33 of 1957 could be amended to accommodate the right of public bodies to revoke their decisions.[121] Since the reform measures were first introduced in 2006, not much progress has been made with their implementation.[122] The divergent proposals of the SALRC on the one hand, and Pretorius (supported by Hoexter) on the other, make for interesting reading. (For ease of reference, the proposed amendments of the SALC and Pretorius are annexed as 'Appendix 2' and 'Appendix 3', respectively). The fundamental point of distinction between the two proposals relates to whether public bodies ought to enjoy a general power of revocation subject to certain exceptions, or the other way around — whether a final decision should remain unchanged,

[119] Regulation 13 (2) of the PPPFA regulations (note 82 above).
[120] Hoexter (note 1 above) 278.
[121] Discussion Paper 112 (note 12 above) 4.98.
[122] Hoexter (note 1 above) 281.

subject to certain exceptions to allow for revocation or amendment. The SALRC advocates the former approach, whereas Pretorius and Hoexter, the latter.[123]

In my view, the difference between the two approaches is perhaps one of *emphasis*, rather than substance. In essence, the *functus* rule seeks to protect two pivotal principles: the *finality* of decisions and *rights* that might have accrued as a result of such decisions. Any proposal that undermines these principles is unlikely to withstand judicial scrutiny. However, upon a close reading of the SALRC's proposals it is apparent that these principles have not been diminished in any manner. Although the SALRC's proposal appears to bestow a general power of revocation, this power is curtailed by four important considerations. First, it is subject to the general principle that a final decision may not be altered.[124] Secondly, it expressly protects accrued rights.[125] Thirdly, the circumstances in which an organ of state may revoke a final decision are circumscribed. These are if the affected person consents to the revocation, the decision was procured by fraudulent means, or if the decision is for other reason invalid (though, admittedly, this last ground is rather broad). Fourthly, it specifically prohibits the revocation in any circumstances of a decision that is the subject of judicial and other proceedings. Read cumulatively, the SALRC's proposal leaves the core common-law principles intact. The effect of the SALRC's proposals is that the right of revocation is provided for in the general power bestowed by clause 50(1) of the proposed amendment and therefore need not be sourced in the specific legislation governing the decision in question. I therefore disagree with Pretorius' view that the SALRC's proposal is contrary to the rule of law and the principle of legality.[126] The source of the power to revoke is clear, albeit that it is worded in general rather than specific terms. A power bestowed in general terms, but which is subject to clear controls and limitations, cannot be contrary to the rule of law.

However, Pretorius and Hoexter highlight various other shortcomings in the SALRC's proposed amendments that must be taken into account in future drafts of the SALRC's proposal.[127] I have taken the liberty of proposing certain amendments to the SALRC's draft, as set out in 'appendix 4'. These amendments are based on the comments made by Pretorius and

[123] Discussion Paper 112 (note 12 above) 4.98 – 4.106.
[124] Clause 50(3) of the SALC's proposal.
[125] Ibid.
[126] Discussion Paper 112 (note 12 above) 4.99.
[127] Ibid 4.99 – 4.106.

Hoexter[128] as well as Pretorius's legislative draft. Some of my own proposals are also included. The effect of my proposed changes to the SALRC's proposal can be summarized as follows:

i. The nature of the power or duty is clarified. The power or duty in question is that of an organ of state, rather than a private person or body;[129]
ii. The power of revocation relates to both 'decisions' and 'acts';
iii. Subject to the recognized exceptions, a final decision or act may be rescinded only through judicial authorization;
iv. A presumption is created that unless a decision or act is pronounced, it does not affect the rights or legitimate expectations of any person. The effect of this presumption is that a preliminary decision to disqualify a bidder for whatever reason is presumed to be revocable;
v. The list of circumstances in which a final decision may be revoked is limited to instances of fraud, absence of authority, lack of jurisdiction, the correction of clerical errors, where all parties consent to the revocation, and where the revocation will not affect the rights or legitimate expectations of any person.

Hoexter states that legislative authority to revoke administrative decisions should not be too extensive, as that would undermine the rule of law.[130] Furthermore, the right to procedural fairness must be observed where the revocation will affect rights.[131]

7.10 CONCLUSION

The precise parameters of the doctrine of *functus officio* are far from clear, but the doctrine itself performs an important function in a modern administrative state: to protect the public interest in ensuring the reliability of administrative decisions.[132] To allow administrators to chop and change their decisions would be to create a 'vortex of uncertainty' that would not only undermine public confidence, but also erode investor confidence in the reliability of governmental decision-making.[133] Hence the need for judicial control over changes to administrative decisions.

[128] Ibid.
[129] Ibid 4.102.
[130] Hoexter (note 1 above) 278.
[131] Ibid 278 – 279.
[132] Discussion Paper 112 (note 12 above) 4.74.
[133] *Kirland* (note 14 above) para 103.

But the *functus* doctrine does not insist on the observance of judicial rituals to reverse administrative errors in all instances. It recognizes the right to revoke administrative decisions when there is legislative authority to this effect, when the decision is of a preliminary nature, and when rights have not been adversely affected. Modern administration probably takes (and retakes) thousands of decisions on a daily basis, hence a degree of flexibility is necessary simply to make the administration work. Baxter recognizes that 'effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and reversal of decisions previously made'.[134]

The Constitutional Court's decision in *Kirland* does not negate the need for flexibility in administrative decision-making, nor does it place the process of reversing administrative decisions in a judicial strangle-hold. *Kirland* was primarily concerned with the reversal of a final, advantageous decision that had bestowed rights on the recipient. Such decisions, said the court, could not be reversed without judicial sanction. But there is a wide range of administrative decisions that fall outside the ambit of the judgment.

This can be illustrated with reference to the process of bid evaluation as depicted in figure 1. During the course of a bid evaluation process, preliminary decisions may be taken and reversed without impacting on the rights or legitimate expectations of bidders. Until a final tender award is published, decisions may be revisited, revised or revoked without breaching the *functus* principle, provided of course that the principles of rationality, proportionality, legality and procedural fairness are observed. An erroneous decision to disqualify a bidder as non-responsive may be reversed at any point before the decision is made public. Once the decision is publicly announced, other bidders may acquire a legitimate expectation that the tender process would proceed without the participation of the excluded bidder(s), and that the competitive pool would thereby be decreased. Revocation in such circumstances should only take place with judicial approval.

Procurement legislation makes provision for procurement-related decisions to be revoked in a variety of circumstances. I have argued that the reference to 'material irregularity' as a ground for cancellation in reg 13(1)(*d*) of the PPPFA regulations, 2017, is wide enough to justify the cancellation of a tender process for a range of infirmities, including fraud, lack of jurisdiction, etc. This is not incompatible with the *Kirland* judgment.

[134] Baxter (note 46 above) 372.

Ultimately, legislative reform is required to clarify the legal contours of the *functus* doctrine. I am of the view that the proposal put forward by the SALRC, with a few amendments added, provides a sound basis for such reform. A properly structured system that allows for self-correction in defined circumstances would not only enhance the overall efficiency of the administrative process, but also contribute to better decision-making and enhance the overall fairness and integrity of the bidding process.

CHAPTER 8

CONCLUSION:

THE TREATMENT OF NON-RESPONSIVE BIDS IN SOUTH AFRICAN PUBLIC PROCUREMENT LAW

8.1 INTRODUCTION

Our courts have on numerous occasions grappled with the troublesome question how to deal with non-compliance with bid conditions, often with vastly different outcomes. There has been little coherence in the approach adopted to determine when non-compliance with bid requirements is legally significant. Our courts are also divided as to the circumstances under which non-compliance may be condoned. Other areas of uncertainty persist. The legal status of contracts awarded to non-responsive bidders is unclear. It is also unclear to what extent procuring entities must observe the right to procedural fairness when non-compliant bidders are disqualified, and the right of procuring entities to rectify errors made during the course of a bidding process remains uncertain.

In light of these shortcomings, this thesis set out to answer five key questions:

(vi) How should the materiality of a deviation from prescribed bidding requirements be determined?

(vii) Should procuring entities have the right to condone non-compliance with bid requirements?

(viii) How should the law treat contracts that were erroneously awarded to non-responsive bidders?

(ix) To what extent should a non-responsive bidder be afforded procedural fairness before it is disqualified?

(x) To what extent should procuring entities be allowed to correct errors that have occurred during the course of a bidding process?

Part 1 of this chapter summarizes general principles that emerge from the research and Part 2 deals with the specific questions that have been explored. Appendix 5 identifies key areas for legislative reform.

8.2 NON-RESPONSIVENESS

The general rule in public procurement is that tenders that do not comply with procedural or substantive bid requirements are disqualified. The obligation to comply with procedural requirements (such as the requirement to submit by a particular date and time or to provide mandatory documentation) is no less significant than the obligation to comply with substantive requirements (such as the obligation to meet prequalification criteria).[1] This is because compliance usually comes at a price, and a bidder who does not meet compliance requirements may gain price or other advantages over bidders who have taken the time and effort to comply.[2] For example, if a bid document stipulates that bids are to be submitted in a particular language, bidders who decide not to comply with the requirement are likely to gain time and cost advantages over those who comply.[3] It might also be unfair to overlook instances of non-compliance, when the compliance requirements might have deterred other bidders from participation, even if no cost-related advantages are to be gained by the non-compliant bidder.[4] Compliance serves to promote important public-interest considerations, such as equal treatment and integrity in the bidding process.[5] It would therefore be erroneous to assume that non-compliance with procedural or formal bid requirements are less serious than non-compliance with substantive elements of a bid.

But the watchwords are *materiality* and *proportionality*. Not every breach of bid conditions is legally significant. Breaches of bid requirements, even mandatory ones, must be properly evaluated to determine their materiality. Furthermore, in certain circumstances the disqualification of a bidder on grounds of non-responsiveness might be disproportionate, taking into account factors such as the nature of the defect, the interests of all affected parties and the multidimensional nature of the public interest. Administrative rationality and the demands of

[1] Sue Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and the UK* 3 ed Vol 1 (2014) para 7-153. See Jonathan Davey & Amy Gatenby (eds) *The Government Procurement Review* 3 ed (2015) for a review of the eligibility criteria applicable in the procurement systems of 27 different countries.
[2] Arrowsmith (note 1 above) para 7-156.
[3] Ibid.
[4] Ibid 7-157.
[5] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) (hereafter *AllPay 1*) para 27.

proportionality require that the question of responsiveness be approached in a reflective and thoughtful manner, rather than in a mechanical and legalistic fashion.

How then should non-responsive bids be dealt with? Writing in the context of procurement regulation in the EU and the UK, Arrowsmith identifies four options.[6] The first is to accept the non-conforming bid. The general principle in EU law is that a bid response that does not comply with 'fundamental' requirements of a tender must be rejected,[7] but EU case law recognises that in certain instances a procuring entity may accept a non-conforming bid.[8] The second option is to allow for correction of the tender. In some instances, procuring entities are under a duty to allow for bid correction or clarification.[9] The third option is to reject non-conforming bids and the fourth option is to conduct a new tender process, either with the existing tenderers only or to follow an entirely new process.[10]

I am of the view that, with some modification, all four options are available within the South African procurement-law regime, or at least ought to be. As indicated above, non-compliance with a material bid requirement will invariably result in disqualification. Furthermore, if all bids are found to be non-responsive, the procuring entity would have to cancel the tender[11] and may either elect to follow an entirely new tender process or confine the tender to the bidders who participated in the cancelled event. In the latter instance, the procuring entity will require the prior approval of National Treasury to deviate from an open bidding process.[12] But in certain instances, non-compliance may be condoned[13] and the non-compliant bid may be accepted. The right to procedural fairness may also require that correction or clarification be allowed.

[6] Arrowsmith (note 1 above) paras 7-156 – 7-160.
[7] Ibid para 7-156, with reference to *Commission v Denmark* [1993] ECR 1-03353 (hereafter 'the *Storebaelt*' case).
[8] Ibid.
[9] Ibid para 7-158.
[10] Ibid paras 7-159 – 7-160.
[11] On the grounds that no acceptable bids were received, as contemplated in reg 13(1)(*c*) of the Preferential Procurement Regulations in GN 40553 *GG* 10684 of 20 January 2017.
[12] National Treasury Supply Chain Management Instruction 3 of 2016 -17 Preventing and Combatting of Abuse in the Supply Chain Management System para 8 last accessed from http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx on 5 November 2018.
[13] Either in the limited sense suggested in *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA) (hereafter *Moroka*) or in the broader sense indicated in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) (hereafter *Millennium Waste*).

8.3 COMPLIANCE MATTERS

As indicated, South African procurement law places a premium on compliance with bid requirements.[14] In the South African context, 'process does matter'.[15] Bid requirements are not mere administrative formalities that may be dispensed with at will, but are indispensable to ensuring impartiality and minimizing the risk of whimsical decision-making in the award of public contracts. There are two main reasons for the strong emphasis placed on compliance. First, compliance has intrinsic value owing to its importance in the achievement of fair and equal treatment of bidders.[16] A rules-based approach promotes equal treatment by limiting opportunities for subjectivity in decision-making.[17] But it must also be mentioned, in parenthesis, that the principle of equality does not require that all bidders be treated in an identical manner in all instances. Arrowsmith points out that equal treatment requires that *similar* situations not be treated differently and that *different* situations not be treated in the same way, unless such treatment is objectively justified.[18]

Secondly, strict enforcement of tender rules is seen as necessary to guard against the ever-present danger of corruption and other forms of malfeasance in tender processes.[19] Procedural defects, though not conclusive proof of the existence of corrupt practices, are often 'the very handmaidens of more serious forms of unlawfulness: mala fides, malfeasance, dishonesty and corruption'.[20] Furthermore, strict enforcement strengthens public confidence in public tendering[21] and serves an important educational purpose by impressing upon bidders the importance of taking bid requirements seriously.[22] For all these reasons, the award of a tender to a materially non-compliant bidder will invariably result in a reviewing court's finding of constitutional invalidity.

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[14] *AllPay 1* (note 5 above) para 27.
[15] *RodPaul Construction CC v Ethekwini Municipality* [2014] ZAKZDHC 18 (2 June 2014) (hereafter *RodPaul Construction*) para 32.
[16] *AllPay 1* (note 5 above) para 23; Omer Dekel 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237, 246.
[17] Arrowsmith (note 1 above) para 7-18.
[18] Ibid para 7-11, with reference to *Fabricom v Belgium* [2005] ECR I-01559 para 27.
[19] Ibid.
[20] Max du Plessis & Andreas Coutsoudis 'Considering Corruption Through the *AllPay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law' (2016) 133 *SALJ* 755, 763.*AllPay 1* (note 5 above) para 27; Max du Plessis and Andreas Coutsoudis 'Considering Corruption Through the *AllPay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law' 2016 *SALJ* 755, 763.
[21] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (hereafter *Steenkamp*) para 60; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 57; Dekel (note 16 above) 261.
[22] Dekel (note 16 above) 262.

The same conclusion is reached if non-compliance with tender requirements is viewed through the lens of the doctrine of jurisdictional facts. Bid formalities, such as responsiveness criteria, may be regarded as procedural jurisdictional facts. If the jurisdictional fact (the fulfillment of responsiveness requirements) is not met, the procuring entity lacks the authority to award the tender.[23] In such instances, the award of tender would be reviewable on the grounds that 'a mandatory and material procedure or condition prescribed by an empowering provision was not complied with' (s 6(2)(*b*) of the PAJA).

The research conducted highlights the central role that compliance plays in ensuring the integrity of tender processes. The research also reveals that a pedantic and overly formal style of judicial reasoning is simply incompatible with the approach adopted in *AllPay 1*.[24]

8.4 THE TWO-STAGE APPROACH

The two-stage approach to judicial review is key to understanding how courts must approach the problem of non-compliance with bid requirements.[25] The implications of non-compliance must be examined from two perspectives. During the merits stage of proceedings, the main question is whether a deviation from a bid requirement should be regarded as material. The central issue during the remedy stage is whether the judicial remedy selected is 'just and equitable'. If a deviation from responsiveness requirements is found to be material, a court has no discretion but to declare an award of tender to the non-responsive bidder constitutionally invalid. [26] Conversely, if a deviation from bid requirements does not satisfy the test of materiality, the second (remedy) stage of proceedings will not be reached.

Both stages of the review process are thus infused with an element of *flexibility*. Although a court 'must' declare any unconstitutional conduct invalid during the first stage, there is considerable flexibility in the test to be applied in reaching this conclusion. The test of materiality, predicated as it is on a purposive approach, avoids a knee-jerk response of regarding any deviation from mandatory requirements as fatal. Flexibility is also inherent in the selection of an appropriate remedy. The flexibility that the law demands is the veritable opposite of the formalism that has characterised much of our case law on bid responsiveness.

[23] *Ferndale Crossroads Share Block (Pty) Ltd v City of Johannesburg Metropolitan Municipality* 2011 (1) SA 24 (SCA) para 22.
[24] *AllPay 1* (note 5 above).
[25] Ibid paras 28 – 29.
[26] Max du Plessis, Glenn Penfold & Jason Brickhill *Constitutional Litigation* (2013) 108.

Quinot and Maree question the exercise of judicial discretion during the second (remedy) stage of proceedings.[27] The authors support the need for flexibility in dealing with the legal consequences of invalid conduct, but maintain that the better approach is to apply discretion at a stage preceding the remedy stage.[28] One of their suggestions is to develop a limitations clause analysis in the context of administrative-law review. The authors observe that s36 of the Constitution has played virtually no role in the review of administrative conduct, largely as a result of that section's requirement that a limitation of a fundamental right be in terms of a 'law of general application'.[29] But they maintain that administrative action taken 'in terms of' an empowering provision that qualifies as a 'law of general application' meets the threshold requirements of s 36.[30] By applying a limitation clause analysis, a court might well find that an infringement of s 33 passes the limitation test under s 36. The advantage of this approach is that it invites a transparent, structured, proportionality-based approach to the evaluation of the legal significance of non-compliance.[31]

I support the suggestion of developing a limitation analysis in the context of administrative-law review. However, I disagree with the authors to the extent that they suggest that discretionary powers should be limited to the stage preceding the remedy stage. It is my view that flexibility and discretion are necessary at *both* stages of the review process, as they perform different functions during each stage. During the merits stage, the flexibility inherent in the test for materiality is necessary to avoid an overly rigid application of rules. During the remedy stage the discretion inherent in the design of a 'just and equitable' remedy is necessary to ameliorate the rigour of declaring administrative conduct invalid.[32]

(a) Void and voidable

The *AllPay* rulings signify a departure from an earlier line of cases that established an inexorable link between a finding of invalidity in a tender process and an order that the award of tender be set aside.[33] In *Municipal Manager: Quakeni Local Municipality v FV General*

[27] Geo Quinot & P J H Maree 'The Puzzle of Pronouncing on the Validity of Administrative Law' (2015) 7 *CCR* 27.
[28] Ibid 41.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) (hereafter *Bengwenyama Minerals*) para 85.
[33] See *Provincial Government of the Eastern Cape v Contractprops 25 (Pty) Ltd* [2001] 4 All SA 273 (hereafter *Contractprops*); *Municipal Manager: Quakeni Local Authority v FV General Trading* 2010 (1) SA 198 (SCA) (hereafter *Quakeni*).

Trading [34] and *Provincial Government of the Eastern Cape v Contractprops 25 (Pty) Ltd*,[35] it was held that the consequences of invalidity could not vary from case to case, nor could invalidity depend on whether on whether harshness is discernible in a particular instance.[36] But clearly, cases such as *AllPay* and *Bengwenyama* establish the opposite ie that the consequences of a finding of constitutional invalidity *do* vary from case to case, depending on the manner in which the conflicting demands of legality, certainty, equity and administrative efficiency are mediated in any given instance.[37] The once-rigid *Schierhout* principle (that a thing done contrary to a direct prohibition is void and of no effect)[38] has been substantially modified,[39] and even constitutionally invalid contracts may in certain instances continue to have legally enforceable consequences. [40]

The notion that a constitutionally invalid administrative act might create legally enforceable consequences has correctly been described as one of the anomalies of modern administrative law.[41] It has opened up clear fissures between the majority and minority in a series of judgments handed down by the Constitutional Court.[42] It seems counter-intuitive and illogical to suggest that an invalid act is capable of producing legally effective consequences. The notion that courts enjoy discretion not to set aside invalid administrative has also attracted some academic criticism.[43] Indeed, there is no doctrinally neat explanation for the existence of the anomaly. But, ultimately, the rationale for its existence is to be found in the pragmatism of the law, rather than lofty legal doctrine.

There are interesting theoretical debates about whether an invalid administrative decision is 'void' or 'voidable'. But our law has chosen a pragmatic middle way[44] by treating

[34] *Quakeni* (note 33 above).
[35] *Contractprops* (note 33 above) para 9.
[36] *Quakeni* (note 33 above) para 15; *Contractprops* (note 33 above) para 9.
[37] *AllPay 1* (note 5 above) para 56; *Bengwenyama Minerals* (note 32 above) paras 81 – 85. See also *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) (hereafter *Oudekraal*) para 36;
[38] *Schierhout v Minister of Justice* 1926 AD 99, 109.
[39] *Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC) para 74.
[40] *AllPay 1* (note 5 above) para 56.
[41] *Bengwenyama Minerals* (note 32 above) para 85.
[42] See minority judgments of Jafta J in in *Cool Ideas CC v Hubbard* 2014 (4) SA 474 (CC) (hereafter *Cool Ideas*); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) (hereafter *Kirland*); *Merafong City Local Municipality v Anglogold Ashanti* Ltd 2017 (2) SA 211 (CC) (hereafter *Merafong*); and *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).
[43] Quinot & Maree (note 27 above).
[44] Daniel Freund & Alistair Price 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *SALJ* 184, 187.

an irregular act as 'theoretically void, yet functionally voidable'.[45] It regards the administrative act as valid until a court pronounces on its validity, 'but that does not mean that it is in fact valid'.[46] This legal fiction does not bestow legality on an illegal act, but recognises that the act exists in fact and is capable of producing legal consequences until it is set aside by a court of law.[47] Consequently, even when the right to administrative justice is being enforced, it may be that an invalid administrative act continues to have binding effect.[48]

A finding made by a reviewing court that a tender has been awarded to a non-responsive bidder erroneously or that a responsive bidder had been unfairly disqualified as non-responsive would invariably lead to a finding that the contract entered into is constitutionally invalid. But such finding need not invariably lead to the award of contract being set aside.

(b) The public interest

Quinot explains that the key distinction between public and private acquisition is that public acquisition is legitimate only if linked to a public purpose or function.[49] Procurement contracts are concluded on behalf of the public, and not the state.[50] An understanding of the multifaceted nature of the public interest in procurement matters is key to the determination of an appropriate remedy. The interests of an aggrieved bidder, though significant, are not the only factors to take into account in determining an appropriate remedy.[51] Public procurement strives to achieve numerous, and often conflicting, public-interest objectives. For this reason it would be futile to attempt a comprehensive definition of the public interest within the context of public procurement. But, in my view, these may broadly be divided into transactional objectives and process objectives. Transactional objectives determine *what* a procuring entity should strive to attain through a procurement event (these include economic efficiency, social transformation and security of supply), whereas process objectives determine *how* the procurement event is to

[45] Christopher Forsyth 'The Theory of the Second Actor Revisited' 2006 *Acta Juridica* 209, 210, as quoted in Freund & Price (note 44 above).
[46] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 546. See also *Merafong* (note 42 above) para 43.
[47] *Oudekraal* (note 37 above) para 26. See also *Kirland* (note 42 above) para 101; *Merafong* (note 42 above) para 36; *Tasima* (note 42 above) paras 145 – 150; Hoexter (note 46 above) 547.
[48] *Oudekraal* (note 37 above) para 26; Quinot & Maree (note 27 above) 40.
[49] Geo Quinot 'Public Procurement Law in Africa Within a Developmental Framework' in Sope Williams-Elegbe & Geo Quinot (eds) *Public Procurement Regulation for 21st Century Africa* (2018) 15, 18.
[50] *AllPay 1* (note 5 above) para 56.
[51] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) (hereafter *AllPay* 2) para 33; *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) paras 115 – 116.

be conducted (these include equal and fair treatment of all bidders, integrity, regulatory compliance, administrative efficiency and transparency). Ideally, every procurement event will achieve all these objectives. But practice suggests that procurement events often involve a trade-off between two or more objectives. Dekel correctly points out when the objective of ensuring integrity in procurement processes clashes with other objectives, the integrity objective must prevail.[52] Hence a process that yields economically or socially advantageous outcomes, but which is tainted by corruption, cannot stand.

But conflicts between the other objectives cannot always be resolved in quite the same emphatic manner. A dilemma arises when the most economically advantageous bid is also a defective bid, such as where the best-priced bid is also a non-responsive bid.[53] How conflicts between competing objectives are resolved depends largely on the weight that a procurement system attaches to each objective.[54] A system that places greater weight on equal treatment will reject the non-responsive bid in favour of a more inefficient offer, even if it yields sub-optimal outcomes and a loss to the public purse.[55] On the other hand, a system that places the emphasis on economic efficiency, may choose the defective, but economically superior, bid at the expense of fair and equal treatment.[56]

According to Dekel, greater weight must be placed on the right to equal treatment.[57] This is because equal treatment has intrinsic value and must be pursued for its own sake, and not only in relation to how it serves to promote other objectives. [58] He calls for the application of a 'disqualification presumption', in terms of which procuring entities are required to reject a non-compliant bid in order to uphold the principle of fair and equal treatment of all bidders.[59] But the disqualification presumption may be rebutted when there are compelling reasons to do so.[60] In simple terms, when faced with a defective bid, a procuring entity must choose the approach that contributes more (or is least damaging) to the public interest. The more serious the violation of the equality principle and/or the smaller the economic harm resulting from a bid disqualification, the greater the need for strict compliance with bid criteria. Conversely, the greater the economic advantage to be derived from the defective bid and the slighter the

[52] Dekel (note 16 above) 242.
[53] Omer Dekel 'Improving Public Procurement Efficiency — Applying a Compliance Criterion' 2015 *Public Procurement Law Review* 3, 64.
[54] Arrowsmith (note 1 above) para 7-155.
[55] Dekel (note 53 above) 65.
[56] Dekel (note 16 above) 239.
[57] Ibid 246.
[58] Ibid.
[59] Ibid 259.
[60] Ibid 260.

violation of the equality principle, the stronger the justification will be for overlooking the defect.[61] Essentially, Dekel's disqualification presumption invokes proportionality as the guiding principle.

There are both similarities and differences between Dekel's theory and the approach of the Constitutional Court in *AllPay 1*. The Constitutional Court endorsed the notion that equal treatment has intrinsic value and that its observance promotes key public interest objectives. [62] But *AllPay's* two-stage approach is somewhat different to Dekel's presumption of disqualification. *AllPay* proceeds on the basis that if a material irregularity is detected, the tender *must* be declared constitutionally invalid.[63] A court has no choice in the matter. However, it is during the remedy stage of proceedings that courts engage in a balancing exercise to determine a just and equitable remedy. This may well involve a trade-off between the equality principle and the economic or social harm that could result from a bidder's disqualification. *AllPay* does not negate the need for a proportionality-driven assessment of competing interests but defers it to the remedy stage of proceedings.

There is one further area of difference between the two approaches. In my view, Dekel is more candid about the need to mediate the tension that exists between competing procurement objectives. *AllPay* on the other hand envisages a more harmonious relationship between the objectives of equal treatment and best procurement outcomes (economic efficiency). According to Froneman J, fair and equal treatment of bidders actually yields economically optimal outcomes.[64] If bidders are treated unequally, resulting in their unfair disqualification from the process, a proper price comparison will not be possible and the process will be rendered uncompetitive.[65] The Constitutional Court suggests that all three objectives identified by Dekel (integrity, equality and efficiency) can be achieved by following a compliance-driven approach.[66]

I support the view that compliance often yields optimal bid outcomes. But the oppositional nature of the relationship that exists between different procurement objectives cannot be denied. This is particularly true in the South African context where various procurement objectives often pull in different directions. Objectives such as social transformation exist in

[61] Ibid.
[62] *AllPay 1* (note 5 above) para 27.
[63] Ibid para 25.
[64] Ibid paras 24 and 60.
[65] *AllPay 2* (note 51 above) paras 1 and 37.
[66] *AllPay 1* (note 5 above) para 27.

an uneasy relationship with fair and equal treatment of bidders.[67] So, too, do the objectives of legality and economic efficiency. It is important to acknowledge the contradictions that exist between competing procurement objectives, so that they may be managed in a transparent and constitutionally-sustainable manner.

(c) A range of remedies

Finding a remedy that is ideally suited to address the multilateral nature of procurement disputes has been described as 'one of the most difficult decision[s] that a court must make in review applications'.[68] A parallel has been drawn with sentencing proceedings in criminal matters in which different sentencing options must be weighed against each other.[69] The choice of remedy must address the competing demands of legality, certainty and administrative efficiency. The corrective principle of constitutional and administrative law (the principle that seeks to pre-empt, correct or reverse the effects of invalid administrative processes) is key.[70] But the corrective principle is not one-dimensional and inflexible.[71] In *AllPay 2*, the Constitutional Court recognised that circumstances may arise in which it would be just and equitable to deviate from the corrective principle, but declined the invitation to issue a general statement on what those circumstances might entail.[72] Sometimes, the public interest is best served by a court *refusing* to set an award of tender aside.[73] Typically, this course of action will be justified to avoid administrative chaos that might result from striking down the award of tender or to avoid harm to innocent third parties.[74] For reasons of 'pragmatism and practicality', a court might refuse to strike down an award of tender if the contract has effectively run its course, leaving little or no chance of the court order having any practical effect.[75] A refusal to

[67] Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 255 – 256. See also Quinot (note 49 above) for a discussion regarding the different models for incorporating social transformation objectives into public procurement.
[68] *Passenger Rail Agency of South Africa v Swifambo Rail (Pty) Ltd* 2017 (6) SA 223 (GJ) (hereafter *PRASA*) para 88.
[69] Ibid.
[70] *Steenkamp* (note 21 above) para 29; *AllPay 2* (note 51 above) para 30; *PRASA* (note 68 above) para 83. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 96 – 97; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) para 17.
[71] *AllPay 2* (note 51 above) paras 33 and 34.
[72] Ibid para 34.
[73] H W R Wade & C F Forsyth *Administrative Law* 11 ed (2014) 597, as quoted in Freund & Price (note 44 above) 194.
[74] Ibid. See also *Bengwenyama Minerals* (note 32 above) para 84; *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9; Du Plessis *et al* (note 26 above) 115.
[75] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd and Others* [2005] 4 All SA 487 (SCA) (hereafter *JFE Sapela*) para 28; *Chief Executive Officer South African Social Security Agency v Cash Paymaster (Pty) Ltd* 2012 (1) SA 216 (SCA) para 29.

set a tender award aside when circumstances so dictate, does not defeat the corrective principle. Rather, the finding of constitutional invalidity, which must of necessity precede the remedy stage, must be seen as a denunciation of the breaches that have occurred in the administrative process.

Dekel suggests that the more serious the invasion of the right to equal treatment and the less the impact on economic efficiency, the stronger the case for setting aside the tender award.[76] Conversely, the greater the impact on economic or administrative efficiency and the more trivial the procedural defect, the stronger the case for not striking down the tender award.[77]

Chapter 3 outlined various factors that courts consider in arriving at an appropriate remedy in the context of public procurement disputes. These include the lapse of time and the extent to which the work has already been completed;[78] the extent to which an essential service may be disrupted by the setting aside of a tender award;[79] the inevitability of the outcome of re-evaluating the tenders;[80] the interests of vulnerable groups;[81] the degree of culpability on the part of the successful and unsuccessful bidders and that of the procuring entity involved;[82] the extent or materiality of the breach;[83] any adverse impact that the setting aside of the contract may have on the successful contractor;[84] the time and cost implications of running a new tender process;[85] the interests of efficient administration; and what message the court will be sending out when it grants a certain remedy.[86]

[76] See also Freund & Price (note 44 above) 207 – 207.
[77] *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) (hereafter *Moseme*) para 21.
[78] *JFE Sapela* (note 75 above) paras 20 and 23.
[79] *Millennium Waste* (note 13 above).
[80] *AllPay 1* (note 5 above) para 29.
[81] *AllPay 2* (note 51 above) paras 4 and 36.
[82] *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 14; *TEB Properties CC v MEC for Department of Health & Social Development, North West* [2012] 1 All SA 479 (SCA) para 32; *Actaris South Africa (Pty) Ltd v Sol Plaatjie Municipality* [2008] 4 All SA 168 (NC) paras 27 – 28; *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality* 2013 (5) SA 461 (KZD) para 22; *PRASA* (note 68 above) para 118.
[83] *Bengwenyama Minerals* (note 32 above) para 85.
[84] *Millennium Waste* (note 13 above) para 27.
[85] Ibid paras 6 – 7.
[86] Ibid. See also *Overstrand Municipality v Water and Sanitation Services of South Africa (Pty) Ltd* [2018] ZASCA 50 (29 March 2018) (hereafter *Overstrand*) para 51.

PART 2
SPECIFIC PRINCIPLES

8.5 MATERIALITY

As argued in Chapter 2, the question of materiality must be approached in two ways. First, with reference to the bid requirement itself, that is to say that the bid requirement must be material. Secondly, it must be determined whether the irregularity is material ie whether the deviation from a prescribed norm is sufficiently serious. It is contended that a material deviation from an immaterial bid requirement as well as an immaterial deviation from a material bid requirement ought not to attract a finding of bid invalidity.

(a) The materiality of the bid condition

The ground of review listed in s 6(2)(*b*) of the PAJA is triggered by non-compliance with an empowering provision that is both mandatory *and* material.[87] This is a clear indication that non-compliance with a mandatory provision is insufficient *per se* to establish a ground for review. Materiality in this sense requires that the bid condition in question serve an essential purpose of the tender, when read in the context of the bid document as a whole.[88] But a triviality, even one dressed up in peremptory language, remains a triviality. This was impliedly accepted by the SCA in *Moroka*, despite its austere approach to the question of condonation. In this instance it was held that a bid may still be regarded as 'acceptable' despite non-compliance with an immaterial requirement.[89] I return to this aspect of materiality below.

(b) The materiality of the deviation from a bid condition

The 'proper approach' to determining whether a deviation from a bid requirement is material is first to establish whether a deviation occurred and then to assess the materiality of the deviation in light of the purpose of the requirement.[90] By adopting this approach in *AllPay 1*, the Constitutional Court signalled that deviations from bid conditions do not all have the same

[87] *AllPay 1* (note 5 above) para 62.
[88] *Minister of Social Development v Phoenix Cash & Carry-Pmb* [2007] 3 All SA 115 (SCA) (hereafter *Phoenix Cash & Carry*) para 2. See also *Rainbow Civils CC v Minster of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) para 92; *ABET Inspection Engineering (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa* [2018] ZAWCHC 7 (1 February 2018) (hereafter *ABET*) para 24; *Maharaj v Rampersad* 1964 (4) SA 638 (A) (hereafter *Maharaj*) 644E-G.
[89] *Moroka* (note 13 above) paras 10 and 11. See also *Millennium Waste* (note 13 above) para 11.
[90] *AllPay 1* (note 5 above) paras 28 – 29.

implications. The remedy stage is reached only if the deviation is found to be material and the award of tender is declared constitutionally invalid.[91]

The process of determining whether a deviation from a prescribed condition occurred, and if so, the materiality of deviation, must begin with a proper interpretation of the bid requirement itself, read in context. After all, non-compliance with bid requirements 'bears no brand of invalidity upon its forehead'.[92] The rules of interpretation require that empowering provisions be read and understood in their contextual setting. This is necessary to determine whether a particular bid requirement is both mandatory and material, what its underlying purpose is and what the implications of non-compliance were intended to be.[93] The appearance of words such as 'shall' or 'must' in a legal text are by no means reliable indicators that the requirement itself is to be regarded as mandatory or that non-compliance with the provision automatically results in invalidity.[94] Furthermore, the bid requirement in question must be interpreted to determine whether it was sufficiently lucid.[95] Non-compliance with a bid requirement worded in vague or uncertain terms does not constitute a material irregularity.[96]

Once the bid requirement itself is properly interpreted and understood within its contextual setting, any deviation from the stated requirement must be evaluated in light of its purpose. The application of a purposive approach to textual analysis is considered trite law.[97] Our law does not require perfect compliance with any standard,[98] and a bidder who does not meet the letter of a specified requirement but nevertheless satisfies its underlying intent must be regarded as sufficiently compliant.

But *AllPay 1* should not be read to mean that purpose is the only (or even the most important) element to be considered when the materiality of a deviation is being determined.[99]

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[91] Ibid paras 28 – 29.
[92] To borrow from the *dictum* of Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) 769 – 760, as quoted in *Oudekraal* (note 37 above) para 27. See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) (hereafter *Aurecon*) para 43, confirmed on appeal in *City of Cape Town v Aurecon (Pty) Ltd* 2017 (6) BCLR 730 (CC); Lawrence Baxter *Administrative Law* (1984) 446.
[93] As indicated in Chapter 2, these aspects are not always self-evident.
[94] *Steenkamp* (note 39 above) paras 78, 99 and 182; *National Energy Regulator of South Africa v Borbet SA (Pty) Ltd* [2017] 3 All SA 559 (SCA) paras 104, 111; Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) 661E-J; *Nelson Mandela Bay Metropolitan Municipality v Erastyle (Pty) Ltd* [2018] ZAECPEHC 61 (6 November 2018) para 19; Hoexter (note 46 above) 48 – 50; 292 – 293.
[95] *AllPay 1* (note 5 above) para 92.
[96] Ibid.
[97] *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) (hereafter *ACDP*) para 25; *Maharaj* (note 88 above) 646C-E.
[98] See *Kirland* (note 42 above) footnote 54 in which Cameron J observed that '[t]here is no right to a perfect administration'.
[99] *AllPay 1* (note 5 above) para 28.

Other factors, such as causality and prejudice, are also relevant. The question may well be asked whether a procedural defect can be regarded as material in the absence of a causal relationship between the defective administrative act and an injured right.[100] Administrative efficiency, an important value governing public administration,[101] will undoubtedly be undermined if administrative action could be overturned for breaches that have no real impact on individual rights.[102]

8.6 PROPORTIONALITY

The principle of proportionality requires a reasonable relationship between a decision, its objectives and the circumstances of a given case.[103] It involves a context-driven, balancing exercise in which competing objectives are weighed against each other in a structured manner. Proportionality promotes good decision-making by requiring that administrators avoid decisions that would lead to disproportionate outcomes. Proportionality is commonly used as the basis of the limitation analysis in terms of s 36 of the Constitution. But there is no reason why it cannot serve also as the normative framework to determine the proportionality of administrative action.[104]

Proportionality is not specifically listed as a ground of review in s 6 of the PAJA, but it plays an important role in the evaluation of administrative action on grounds of reasonableness.[105] The core elements of balance, necessity and suitability provide an analytical tool to determine whether a decision to disqualify a bidder is unduly onerous or oppressive, or whether it involved an improper balancing of competing public-interest considerations. Writing in the context of EU and UK procurement law, Arrowsmith points out that the principle of proportionality has been applied by the European Court of Justice (ECJ) to limit bid exclusions based on a failure to meet prequalification criteria.[106] For example, the ECJ held that it is impermissible to exclude automatically from public tendering bidders who were

[100] Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475, 476.
[101] Section 195(1)(*b*) of the Constitution.
[102] Hoexter (note 46 above 385 – 387, 473; Grote (note 100 above) 476; *Aurecon* (note 92 above) para 23.
[103] *S v Makwanyane* 1995 (3) SA 391 (CC) para 102; *S v Bhulwana* 1996 (1) SA 388 (CC) para 18; Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 163-164; Yvonne Burns *Administrative Law* 4 ed (2013) 39.
[104] Quinot & Maree (note 27 above) 42.
[105] Burns (note 103 above) 37; Hoexter (note 46 above) 343 – 346 explains that rationality and proportionality form the twin pillars of review for reasonableness.
[106] Arrowsmith (note 1 above) para 7-24. See also *J B Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch) (hereafter *JB Leadbitter*) for an interesting example of how the principle of proportionality was applied to determine whether the disqualification of a bidder amounted to a disproportionate exercise of administrative power.

involved in preparatory work, as this goes beyond what is necessary to achieve the desired objective of ensuring equal treatment. [107]

In Chapter 4, I argued that had *Moroka* been decided on the basis of proportionality, the court might well have held that the decision to disqualify the bidder in the circumstances of that case did not meet the requirements of balance, necessity and suitability.

8.7 CONDONATION

The question of condonation arises as the second step in a two-step exercise. During the first step it must be determined whether a bidder complied with bid requirements, either completely or substantively. A bidder that is found to be substantively compliant is sufficiently compliant, in which case the question of condonation need not arise.[108] The question of condonation only arises if the bidder is found to be non-compliant. During the second step, a procuring entity must determine whether it is legally competent to condone the non-compliance. Cases such as *Moroka* are open to criticism for the manner in which *both* legs of the inquiry were dealt with. During the first step, *Moroka* followed a mechanical rather than a purposive style of reasoning to determine that a material deviation had occurred. During the second step, it adopted a particularly narrow stance on the question of condonation. [109]

The principle of proportionality and the rule against fettering require us to re-evaluate the rigid approach adopted by the SCA to the question of condonation. In Chapter 4, I pointed out that the SCA has been anything but consistent in its approach to condonation. It has adopted different stances on the issue, ranging from acceptance[110] to rejection[111] and possibly something in between.[112] Our law remains unsettled on the issue of condonation and awaits a definitive ruling by the Constitutional Court on the matter.[113]

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[107] Arrowsmith (note 1 above) para 7-24, with reference to the *Fabricom* judgment (note 18 above).
[108] *ACDP* (note 97 above) para 34.
[109] The SCA has recently confirmed the *Moroka* line of reasoning in *WDR Earthmoving Enterprises v Joe Gcabi Municipality* [2018] ZASCA 72 (30 May 2018) (hereafter *WDR Earthmoving*).
[110] *Millennium Waste* (note 13 above).
[111] *Moroka* (note 13 above) and *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) (hereafter *Pepper Bay*).
[112] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) (hereafter *National Lotteries Board*); *Metro Projects CC and Another v Klerksdorp Municipality* [2004] 1 All SA 504 (SCA); *Overstrand* (para 86 above) para 50; *JFE Sapela* (note 75 above); *Phoenix Cash & Carry* (note 88 above).
[113] *Overstrand* (note 86 above) para 46.

(a) Condonation and corruption

Our courts have expressed some lingering affinity for *Moroka*-type reasoning.[114] The reason for this apparent affinity is not difficult to fathom. Public procurement in South Africa is notoriously prone to corrupt practices, and opportunities for illicit gain seem to lurk everywhere.[115] Though the offence of corruption is not easy to prove, non-compliance with bid requirements is often symptomatic of corrupt practices. [116] Courts tend to follow a strict approach, not because they regard strict compliance with procurement rules as a more worthwhile objective than economic efficiency, but because a strict approach facilitates the fight against corruption by widening the net in which corrupt officials may be caught.[117] It is thus believed that integrity in public procurement is best served by minimizing the discretion of public officials and enforcing strict adherence to tender rules. [118]

But some degree of discretion is unavoidable in a modern administrative state. The correct approach is to subject the exercise of discretionary power to clear controls and transparency requirements.[119] Thus, for example, the exercise of discretion to condone non-compliance could be made subject to the approval of an oversight body such as an accounting officer or accounting authority, a bid adjudication committee or even the National Treasury itself. Public bodies could also be required to submit regular reports to parliamentary oversight committees detailing the number of instances in which condonation was granted during a reporting period, including information pertaining to the nature of the non-compliance, the reasons for the condonation, the names of the entities in whose favour condonation was granted and whether the condonations were approved by a body with the delegated authority to do so.

I contend that the answer to corruption in public tenders does not necessarily lie in removing discretion from procurement officials. As matters currently stand, the regulatory framework does not allow for much discretion, but that has done little to dissuade public officials from engaging in corrupt practices. In fact, an inflexible application of procurement

[114] See for example *WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality* [2017] ZAECGHC 45 (17 March 2017) confirmed on appeal in *WDR Earthmoving* (note 109 above); *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform* [2016] 3 All SA 686 (WCC); *Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Reform* [2016] 3 All SA 686 (WCC); *African Paper Products* (note 78 above); *B Braun Medical (Pty) Ltd v The Director General: National Treasury* [2016] ZAGPPHC 1114 (3 November 2016).
[115] *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 42.
[116] *AllPay* 1 (note 5 above) para 27.
[117] Dekel (note 16 above) 264.
[118] *RodPaul Construction* (note 15 above) para 70.
[119] See for example reg 36(2) of the Municipal Supply Chain Management regulations, published under GN 868 in *GG* 27636 of 30 May 2005.

rules might facilitate corrupt practices by allowing corrupt officials to eliminate unwanted bidders for insignificant breaches.[120] The anti-corruption measures that are required in public procurement are well documented and need not be repeated here in great detail. In brief, these include the following: A demonstration of political will; professionalizing procurement; effective access to information regimes; control and auditing systems; the use of e-procurement; proactive civil society; and effective enforcement or sanctions mechanisms. The latter include capacitating anti-corruption bodies; thorough investigation and vigorous prosecution carried out by independent bodies; expeditious disciplinary proceedings; the removal from office of delinquent directors; civil recovery; debarment; the imposition of punitive costs orders on dishonest public officials; forfeiture of the proceeds of crime; mutual legal assistance and salutary sentences. [121]

(b) Immaterial, unreasonable or unconstitutional.

Moroka did not reject the *principle* of condonation, but rather rejected the idea that an organ of state has authority to condone non-compliance with bid criteria in the absence of an empowering provision authorizing it to do so. The only exception recognized by the court was if the bid requirement itself was 'immaterial, unreasonable, or unconstitutional'.[122] This exception necessarily implies that a procuring entity *is* empowered to condone non-compliance with an immaterial, unreasonable or unconstitutional bid condition. However, no guidance was given on how these terms must be understood. Consequently, it is unclear how administrators are to determine whether a particular bid requirement is immaterial or unreasonable, let alone unconstitutional.

In the absence of clear guidance, the following rule-of-thumb approach is suggested to determine whether a bid requirement is immaterial: A bid requirement should be regarded as immaterial if it was introduced mainly for the convenience of an organ of state or plays no role in the allocation of bid evaluation points. Examples of the former include the submission of a

[120] *Phoenix Cash & Carry* (note 88 above) para 2.
[121] See Organisation for Economic Co-Operation and Development *Principles for Integrity in Public Procurement* last accessed from http://www.oecd.org/gov/oecdprinciplesforenhancingintegrityinpublicprocurement.htm on 5 November 2018; OECD *Enhancing Integrity in Public Procurement: A Checklist* last accessed from http://www.oecd.org/gov/ethics/enhancingintegrityinpublicprocurementachecklist.htm on 8 September 2018; Sope Williams 'Public Procurement and Corruption: The South African Response' 2007 (124) *SALJ* 339; Sope Williams-Elegbe 'A Perspective on Corruption and Public Procurement in Africa' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 336, 348 – 369; Moustapha Diallo 'Corruption, Fraud and African Procurement' in Sope Williams-Elegbe & Geo Quinot (eds) *Public Procurement Regulation for 21st Century Africa* (2018) 99, 111 – 116. See also Chapters 2 – 6 of the United Nations Convention against Corruption.
[122] *Moroka* (note 13 above) para 10.

certain number of copies of a tender document, a requirement that a particular document be signed or that a bid be submitted in black as opposed to blue ink. Examples of the latter include the submission of identity or company registration documents or the submission of documents that are required for information purposes only, such as copies of company letterheads, banking account details etc. In such instances, condonation should result in a bidder being afforded an opportunity to correct the defect, such as the provision of an outstanding document, or a missing signature etc. [123] Non-compliance with immaterial requirements, must be regarded as 'correctable defects',[124] even if such requirements are worded in mandatory language. However, a refusal on the part of a bidder to correct a defect when required to do so, might lead to disqualification.[125]

Unreasonable bid conditions, on the other hand, include conditions that are written in a vague or ambiguous manner or which lack a rational basis for their inclusion in the RFP. Examples of the latter include requirements that are irrelevant to the tender or erroneously included in the bid document. However, bid requirements cannot be regarded as unreasonable simply because they impose onerous obligations on bidders or because they impose more onerous obligations on some categories of bidders as opposed to others. For example, an obligation to have a minimum annual turnover might impact negatively on small enterprises as opposed to established ones, or a requirement to produce three years' financial statements might exclude newly formed companies from participation, but that would not make the requirement unreasonable *per se.* Of course, a requirement that discriminates impermissibly between bidders would be unreasonable, not to mention unconstitutional.[126] Similarly, a bid requirement that is not authorized by legislation would breach the requirement of legality, and would therefore be unconstitutional.

(c) A proportionality-based approach

I support the argument in favour of a wider approach, one that recognises the right of public bodies to condone non-compliance when disqualification would amount to a disproportionate response. This general right to condonation may be exercised even in the absence of an express provision permitting condonation and even if the bid requirement in question is not

[123] See for example, art 43(1)(*b*) of the UNCITRAL Model Law on Public Procurement; article14.405 of the US Federal Acquisition Regulations, last accessed from https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf on 3 June 2018.
[124] To borrow a phrase from Dekel (note 26 above).
[125] Dekel (note 53) 64.
[126] Such actions would offend ss 8 and 33 of the Constitution.

'immaterial, unreasonable, or unconstitutional'.[127] Arrowsmith argues that the principle of proportionality not only establishes a right to condone non-compliance, but also creates a *duty* to allow for the correction of defects in particular instances.[128] According to Arrowsmith, correction must be allowed when an obvious error is made; when it can be established from the tender document what the bidder intended to say; when the error does not affect the merits of the bid, such as its price; where correction would not afford the bidder an unfair advantage or when the public entity is at fault in some way for the error.[129]

As highlighted in Part 1, the 'public interest' is a multi-dimensional concept.[130] Depending on the context, proportionality permits that certain factors considered to be in the public interest may be emphasized over other factors that are equally in the public interest. Proportionality often involves a choice between right and right, and not between right and wrong.[131]

The principles of necessity, balance and suitability provide useful guidelines to determine whether condonation would be required in the circumstances of any given case. The element of balance requires that a balance be achieved between the means applied and the ends sought to be achieved. The harm caused to the rights of a bidder or the broader public interest as a result of the bidder's disqualification ought not to be out of proportion to the benefits of the decision. The concept of necessity means that disqualification has to be the least harmful means available to protect the public interest. The concept of suitability requires that disqualification be appropriate in light of the facts and circumstances of the case. A proportionality-based approach encourages administrators to apply their minds to consider the possibilities of less drastic measures to achieve the desired objective.

(d) Correctable defects

In light of the *dicta* from the SCA that organs of state have no authority to condone non-compliance unless expressly authorized to do so by an empowering provision, [132] it would be prudent for public bodies to include a provision in their bid documents that expressly allows for some degree of discretion to condone non-compliance.[133] RFPs should draw a clear

[127] P Bolton 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PER/PELJ* 2340, 2342; Arrowsmith (note 1 above) para 7-157.
[128] Arrowsmith (note 1 above) para 7-158.
[129] Ibid.
[130] *AllPay 2* (note 51 above) para 33.
[131] Albie Sachs *We, the People: Insights of an Activist Judge* (2016) 165.
[132] *Pepper Bay* (note 111 above); *Moroka* (note 13 above); *W D R Engineering* (note 109 above).
[133] Bolton (note 127 above) 2343 – 2345.

distinction between documents that must be submitted by the closing date and time of a bid (such as pricing schedules and technical submissions) and the submission of other documents (mainly of an administrative nature) that will not result in automatic disqualification if not received by the closing date and time. In the latter instance, the procuring entity ought to have some discretion to afford a non-compliant bidder a further opportunity to provide the outstanding documents. Naturally, the exercise of the discretion ought to be rational and free of bias. Thus, if a procuring entity exercises its discretion to condone in respect of one bidder, it should do so in respect of all bidders who are similarly placed.

Dekel's list of 'correctable defects' is perhaps somewhat ambitious.[134] It will be recalled from the discussion in Chapter 4 that Dekel suggests that all defects that a procuring body regards as non-fatal ought to be listed upfront in an RFP, together with a penalty regime (a reduction in evaluation points) in relation to each defect.[135] For example, a missing signature or submission of an incomplete number of copies may be penalized with a deduction of 2 evaluation points, whereas a missing certificate or missing information pertaining to a company's organogram may be penalized with a deduction of 5 points, and so on. According to Dekel, this approach helps to promote economic efficiency by ensuring that meritorious but defective bids are not disqualified. It also helps to promote objectivity in decision-making, in that officials are given no discretion to deal with defective bids in a manner that is different to that set out in the RFP. This reduces the risk of discriminatory treatment.[136]

I criticized Dekel's list of 'correctable defects' as being too expansive and for having the potential for creating unfairness toward compliant bidders.[137] But the principle of listing 'correctable defects' upfront in an RFP is worth considering, provided that the list is confined to defects that do not affect the element of competition among bidders or the allocation of scores. Furthermore, the deduction of a predetermined number of evaluation points helps bidders to appreciate that although not every instance of non-compliance is regarded as fatal, non-compliance will always be penalized.

[134] Dekel (note 53 above) 66 – 68.
[135] Ibid 64.
[136] Ibid 71 – 72.
[137] See discussion in Chapter 4.

(e) *Legislative reform*

The much-anticipated Procurement Bill is the ideal opportunity for the legislature to establish a framework for the treatment of defective bids. The framework should include a test for materiality and set out the circumstances under which non-compliance with bid requirements may be condoned. Some recommendations in this regard are contained in Appendix 6.

8.8 WAIVER

The concepts of condonation and waiver are interrelated, but also different. Neither condonation nor waiver requires consensus between parties to be legally effective. But condonation involves an act of 'pardoning' or overlooking an act of non-compliance, whereas waiver involves a decision not to enforce a particular right, remedy, privilege, power, interest or benefit.[138]

At common law, a public body may waive compliance with statutory requirements that were enacted for the benefit of that body, provided that *no* public interest is negatively affected thereby.[139] In *Millennium Waste*, the SCA reformulated the common-law rule in somewhat wider terms to allow for condonation in instances where condonation is *not incompatible* with the public interest.[140] The *Millennium Waste* approach is that a public body should weigh up multiple (and sometimes conflicting) public-interest considerations to determine whether a waiver of requirements would be compatible with the public interest. On a proper reading of *Millennium Waste* it would appear that the judgment actually sought to *develop* the common law to allow organs of state to waive compliance or condone non-compliance with mandatory requirements in cases where such steps would promote the public interest.

Certain academic writers have expressed reservations about the right of a public body to waive compliance with prescribed requirements.[141] But our law is not inflexible on the issue of waiver. As indicated, the common-law position allows for waiver of legislative requirements enacted solely for the benefit of a public body. This is the case even if the provision in question is worded in peremptory terms.[142] Arrowsmith argues for a presumption that organs of state

[138] *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (A) (hereafter *Mothupi*) para 15.
[139] *SA Eagle Insurance Co Ltd v Bavuma* [1985] 2 All SA 190 (A) 192; *Montagu Springs (Pty) Ltd t/a Avalon Springs Hotel v Liquor Board, Western Cape* [1999] 2 All SA 549 (C) 555; *Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid* [1997] 2 All SA 321 (A) 326.
[140] *Millennium Waste* (note 13 above) para 17.
[141] See for example J R de Ville *Judicial Review of Administrative Action in South Africa* (2005) 98.
[142] *Bester v Sol Plaatje Municipality* [2004] 2 All SA 31 (NC) para 14.4.

have a right to waive non-compliance with bid formalities.[143] But this should not be taken to mean that public bodies are free to waive compliance criteria at will. Arrowsmith argues that the presumption should be rebutted when the waiver is likely to have an adverse impact on the procuring entity, where waiver will result in significant advantages for the non-compliant bidder over other bidders, where compliance requirements have deterred other bidders from participation or where significant risks of abuse exist. [144] Thus, for example, a requirement to submit a certain number of copies might ordinarily be capable of waiver, but not a requirement to meet deadlines for the submission of bids.[145] Furthermore, the principle of equal treatment requires that a requirement that is waived for one bidder be waived in respect of all other bidders.[146]

In Chapter 4, I recommended that the common-law rule regarding waiver be reformulated along the following lines: As a *general rule*, if a provision has been enacted for the protection of the public interest, waiver of such provision is not permitted. Strict compliance is required. Waiver may, however, be permitted when the public interest would best be served by waiving the requirement of strict compliance.

8.9 FETTERING

The treatment of defective bids must also be viewed in light of the rule against unlawful fettering of discretion. It is settled law that an organ of state cannot bind itself irrevocably (whether by contract or policy) to act in a certain manner in future.[147] Some allowance must be made for the exercise of discretion in light of the individual circumstances of each case and the broader public interest. It is therefore impermissible to apply the guidelines, policies or criteria in a rigid, thoughtless or inflexible manner.[148]

The receipt of late tenders is a case in point. Strict adherence to deadlines is universally regarded as necessary in order to promote public confidence in government tendering.[149] Yet,

[143] Arrowsmith (note 1 above) para 7-157.
[144] Ibid para 7-157.
[145] Ibid.
[146] Ibid.
[147] Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 86.
[148] *National Lotteries Board* (note 112 above).
[149] Article 30(1) of the UNCITRAL Model Law on Public Procurement; article14.405 of the US Federal Acquisition Regulations, last accessed from https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf on 3 June 2018. See also Bolton (note 147 above) 135, 148, 181; Dekel (note 26 above) 261.

exceptions to the rule have been recognized, particularly when there was fault on the part of the procuring entity.[150]

South African procurement law is prescriptive, but it does not promote a thoughtless application of tender rules. Once again, the watchword is proportionality. Reasonable administrative conduct requires that procuring entities be alert to instances where disqualification of a defective bid might amount to overreaching. Much depends on factors such as the nature of the defect, the reasons for the non-compliance, the purpose of the bid requirement, its importance in relation to key objectives of the tender, such as functionality and price, the nature of the public interests involved and the potential for prejudice to other bidders if the defect were to be condoned.

8.10 ESTOPPEL

(a) Estoppel

This thesis calls into question the conventional view that the principle of estoppel can never be used to give legal effect to *ultra vires* acts.[151] I support the argument — one that finds growing support in academic and judicial circles — that a balance ought to be struck between the demands of legality on the one hand and the need to find an equitable outcome for innocent contractors on the other. The conventional approach to estoppel is epitomized in *RPM Bricks,* in which the SCA declared that it is 'settled law' that a state of affairs prohibited by law in the public interest cannot be continued by reliance on the doctrine of estoppel.[152] The thesis accepts that there are sound legal and public policy arguments for the proposition that government ought not to be bound by the *ultra vires* actions of its agents, but takes issue with the blanket manner in which the rule is applied. The fundamental difficulty with the conventional approach is that it has no 'flex in the joints', regardless of how strong the case for an equitable outcome might be.[153]

Two interrelated arguments are advanced. The first is that instances may arise when it is in the public interest to allow estoppel to operate in order to give effect to a formally defective

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[150] *Claude Neon Ltd v City Council of Germiston* 1995 (5) BCLR 554 (W) 562; *J B Leadbitter* (note 106 above) para 61; Arrowsmith (note 1 above) para 7 – 163.
[151] *Contractprops* (note 33 above) para 10; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) (hereafter *RPM Bricks*) para 16.
[152] *RPM Bricks* (note 151 above) 16.
[153] Kenneth D Dean 'Equitable Estoppel Against The Government – The Missouri Experience: Time To Rethink the Concept'(1992) 63 *St Louis University Law Journal* 107, 115 last accessed from *http://scholarship.law.missouri.edu/facpubs* on 24 September 2015. See also V M Movshovich *Ultra Vires Representations and Unlawful Decisions in English Administrative Law, in Comparative Perspective* (MLitt thesis, Oxford University, 2006) 22.

contract. This is the case when a public body is guilty of egregious misconduct, such as where it deliberately misleads a bidder into believing that an award of tender is valid despite irregularities in the process.[154] In such instances, the matter ought not to be dealt with on the basis of legality alone. Other competing values, such as proportionality, reasonableness, certainty, protection of reliance interests and preventing the abuse of power come into the equation. Secondly, the principle of estoppel requires reappraisal in light of our constitutional norms and values. [155] This argument was summarily rejected in *RPM Bricks*[156] but our law awaits a definitive ruling on this matter from the Constitutional Court.

The point of departure in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* [157] is that as a matter of constitutional principle, citizens are entitled to reasonable conduct on the part of public officials.[158] The determination of reasonableness necessarily involves a balancing exercise based on proportionality. Rather than placing the emphasis solely on the nature of the statutory obligation at play, a court should be able to balance *all* the competing interests at stake, including the degree of prejudice to the party raising the defence of estoppel.[159] The operation of estoppel would not render an *ultra vires* act *intra vires*, nor would it vest public bodies with powers that they do not possess.[160] Rather, estoppel operates to hold public officials to the consequences of their decisions.[161]

(b) Alternative pathways

The ruling of the Constitutional Court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd,* may have opened up alternative pathways for aggrieved contractors. In this instance, the Constitutional Court dealt with a contractor that had been harmed as a result of deliberate misrepresentations made by a public body. The court exercised its remedial powers to hold that the order of constitutional invalidity would not divest the contractor of rights that would have accrued to it under the contract.[162] The ruling in *Gijima* may well have diminished the need to develop the doctrine of estoppel.

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[154] See for example *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (hereafter *Gijima*).
[155] *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) (hereafter *Peter Klein*).
[156] *RPM Bricks* (note 151) above.
[157] *Peter Klein* (note 155 above).
[158] Ibid para 35.
[159] Ibid para 28.
[160] G M Ferreira 'Estoppel by Representation' in die Publiekreg' (1991) 54 *THRHR* 388, 398.
[161] Ibid.
[162] *Gijima* (note 154 above).

Other legal avenues were also explored in Chapter 4, such as the doctrine of substantive legitimate expectation and the somewhat enigmatic 'public law' principle that the Constitutional Court made reference to in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal.*[163] However, neither of these options was regarded as a feasible solution to the problem posed by *ultra vires* contracts.

Arrowsmith observes that the harsh effects of the *ultra vires* rule has a negative effect on the public interest by deterring the market from engaging in commercial transactions with public bodies and increasing the price of public contracts owing to the risk of contracts being declared *ultra vires*.[164] She highlights certain legislative interventions that were introduced in the UK in order to relax the effect of the *ultra vires* doctrine in the context of local government contracting.[165] The effect of the legislative changes was to confer a general power of competence on local authorities in England and Wales, thereby removing restrictions on the purposes for which a contract may be entered into.[166] Legislation has also been introduced which stipulate that non-compliance with procedural requirements for public contracting does not invalidate a contract.[167] Similar legislation may well be considered in South Africa.

8.11 PROCEDURAL FAIRNESS

Chapter 6 examined the extent to which the right to procedural fairness applies when decisions are made to disqualify bidders on grounds of non-responsiveness. Two main conclusions were reached. The first is that the right to procedural fairness does not apply uniformly throughout the procurement cycle. A bidder's rights and interests mutate during the various stages of the procurement cycle, which in turn affects the manner in which its right to procedural fairness must be observed. The manner in which the right to procedural fairness is applied in respect of a top-ranked bidder during the pre-award stage is different to how the right is applied to bidders during the pre-tender or evaluation stages of the process.

In essence, a public procurement event is a multi-staged process involving various considerations that impact the decision-making process differently during each stage. Decision-making is impacted by regulatory provisions applicable during each stage, the degree of discretion afforded to the decision-maker, the extent to which rights or legitimate

[163] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC).
[164] Arrowsmith (note 1 above) para 2-98 – 2-100.
[165] Ibid paras 2-93 and 2-100 – 2-102, with reference to, the UK Localism Act 2011.
[166] Ibid para 2-101. The effect of the Localism Act 2011 is that it confers on local authorities the power to enter into any contract that individuals may enter into.
[167] Ibid para 2-98.

expectations are affected and the degree of finality that attaches to decisions made during each stage.

The second conclusion to be drawn from the research relates to the implications of the finding in *AllPay 1* that an RFP should be regarded as constituting notice of the proposed administrative action, whilst the bidder's submissions constitute the representations received before a final decision is made.[168] The implications of this finding are twofold. First, the duty to observe procedural fairness must be observed when the procuring entity approaches the market by way of an invitation to bid. This places on obligation on procuring entities to ensure that bid documents are issued with sufficient clarity. Bid documents that are uncertain or opaque undermine the right to procedural fairness.

Secondly, *AllPay 1* holds important implications for how bidders are required to respond to invitations to bid. A logical consequence of the principle that a bidder's submissions constitute its representations is that bidders have a responsibility to make full use of the opportunity afforded them to respond to an RFP, in order for their representations to be properly considered. This means that all aspects of a bid, including responsiveness criteria, must be properly addressed. All bidders are afforded procedural fairness when they are invited on equal terms to respond to an RFP in the first instance. It is therefore incumbent on bidders to fully comply with the responsiveness criteria set out in the RFP or provide reasons for their failure to do so.

It is therefore my argument that, as a general rule, a bidder who fails to meet responsiveness criteria or who does not provide a full explanation upfront for its inability to meet such criteria, cannot bemoan a lack of procedural fairness when he or she is disqualified later. There is therefore no obligation on procuring entities to afford non-compliant entities further opportunities to explain their non-compliance before they are disqualified.

In limited instances, however, a non-compliant bidder may well be able to claim further procedural fairness protection. Typically, these might include instances where the organ of state ought to seek clarification regarding an aspect of the bidder's submission before a final decision is made to disqualify it. Procedural fairness should also be afforded to correct an innocent mistake of an immaterial nature. Of course, it is not possible (or desirable) to produce a closed list of instances that might trigger the need for further procedural fairness. But in the

[168] *AllPay 1* (note 5 above) paras 88 – 90.

main, a non-responsive bidder cannot demand further procedural fairness before being disqualified.

8.12 SELF-CORRECTION

Chapter 7 addressed the question whether procuring entities ought to be allowed to rectify their own errors.[169] I call for the recognition of limited forms of self-correction in public procurement where this would not give rise to material prejudice, deprive anyone of vested rights or undermine the legitimacy of the bidding process. I further argue that in defined instances self-correction would not be not incompatible with the rule against self-help established in *Kirland*,[170] or the requirements of certainty, finality and legality in administrative decision-making. Furthermore it would doubtless enhance administrative efficiency in public procurement.

The procurement process is prone to error. Of particular concern for purposes of this thesis is the situation that arises when a procuring entity mistakenly disqualifies a bid as non-responsive or awards a contract to a bidder who ought to have been disqualified as non-responsive. If the mistake is discovered after a final decision has been communicated which has vested rights in affected parties, the procuring entity will generally be regarded as *functus officio*. Such errors cannot be reversed without judicial intervention.

But other instances may arise where self-correction would be permissible. Existing common-law exceptions make allowance for self-correction under limited circumstances, albeit that some of these exceptions are expressed somewhat tenuously. The common law principle that preliminary decisions may be revoked, remains unaffected by *Kirland*. So too, the possible exception that decisions that do not affect the rights or interests of third parties may be revoked. It is my argument that a final, unfavourable but incorrect decision to disqualify a bidder as non-responsive would be revocable if no other party is affected by the decision.[171] Typically, this scenario might arise during an early stage of the process when bidders are filtered out based on non-compliance with responsiveness criteria. Thus, an erroneous decision to disqualify a bidder on grounds of non-responsiveness would be revocable if no rights were vested in third parties, in other words no contract was awarded. I would argue that the decision

[169] In Chapter 7, the terms 'revocation', 'rectification' are used interchangeably, albeit that there are shades of difference in the meaning of these terms.
[170] *Kirland* (note 42 above).
[171] See for example the approach adopted in *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) (hereafter *Aurecon*) paras 28 – 30.

is revocable even if the disqualified bidder was informed of its disqualification, provided that the decision was not communicated to the remaining bidders as well. If the remaining bidders were informed about the disqualification they might well have formed a legitimate expectation that the competitive pool of bidders would have been reduced as a result of the decision taken. In such instances, revocation is likely to frustrate their expectation.

Much depends on the stage of the bid evaluation process at which the decision was taken, and more importantly, the nature of the decision (whether preliminary, conditional or affecting rights). [172]

Ultimately, legislative intervention is required to prescribe the circumstances under which a public body may revoke its decisions. [173] It is my contention that Discussion Paper 112 issued by the South African Law Commission (SALC) establishes the basis for such intervention.

8.13 PREVENTION OF NON-RESPONSIVE BIDS

This thesis has placed much emphasis on the treatment of non-responsive bids. But equally, public bodies must take measures to make it less likely that non-responsive bids are submitted in the first instance.[174] This could be done by keeping mandatory bid requirements to a minimum and ensuring that that such requirements are only used to address key aspects of the tender, such as pricing and functionality. RFPs should also state explicitly that non-compliance with formal or administrative bid requirements, such as the submission of certain certificates, or copies, will not be regarded as fatal irregularities. RFPs must be written with the necessary level of clarity so as to enable bidders to understand what responsiveness requirements entail. There is also a need to avoid specifications that are unrealistic or unduly prescriptive. So-called 'pass-fail' technical criteria should be limited only to instances where 100% compliance with specified criteria is absolutely necessary.[175]

[172] De Ville (note 141 above) 77.
[173] Hoexter (note 46 above) 278.
[174] Arrowsmith (note 1 above) para 7-155; Bolton (note 127 above) 2344 – 2345.
[175] Arrowsmith (note 1 above) 7-155.

BIBLIOGRAPHY

1. BOOKS

Arrowsmith, Sue *Civil Liability and Public Authorities* Humberside: Earlsgate Press (1992).

Arrowsmith, Sue *The Law of Public and Utilities Procurement: Regulation in the EU and UK* Vol 1 3 ed London: Sweet & Maxwell (2014).

Arrowsmith, Sue & Anderson, Robert *The WTO on Government Procurement: Challenge and Reform* Cambridge, Cambridge University Press (2011).

Baxter, Lawrence *Administrative Law* Cape Town: Juta & Co, Ltd (1984).

Bolton, Phoebe *The Law of Government Procurement in South Africa* Durban: LexisNexis Butterworths (2007).

Botha, Christo *Statutory Interpretation: An Introduction for Students* 5 ed Cape Town: Juta & Co, Ltd (2012).

Boulle, Laurence; Harris, Bede & Hoexter, Cora *Constitutional and Administrative Law: Basic Principles* Cape Town: Juta & Co, Ltd (1989).

Burns, Yvonne *Administrative Law* Durban: LexisNexis (2013).

Corder, Hugh & McLennan, Fiona (eds) *Controlling Public Power: Administrative Justice through the Law* Cape Town: Department of Public Law University of Cape Town (1995).

Craig, Paul *Administrative Law* 7 ed London: Sweet & Maxwell (2012).

Currie, Iain & De Waal, Johan *The Bill of Rights Handbook* 6 ed Cape Town: Juta & Co, Ltd (2013).

Davey, Jonathan & Gatenby, Amy (eds) *The Government Procurement Review* 3 ed London: Law Business Research Ltd (2015).

Davis, Dennis & Geach, Walter *Companies and other Business Structures in South Africa* 3 ed Cape Town: Oxford University Press (2013).

Du Plessis, Max, Penfold, Glenn & Brickhill, Jason *Constitutional Litigation* Cape Town: Juta & Co, Ltd (2013).

De Ville, J R *Judicial Review of Administrative Action in South Africa* Durban: LexisNexis (2005).

De Vos, Pierre & Freedman, Warren *South African Constitutional Law in Context* Cape Town: Oxford University Press (2014).

Endicott, Timothy *Administrative Law* New York: Oxford University Press (2009).

Gellhorn, Walter; Byse, Clark; Strauss, Peter; Rakoff, Todd & Schotland, Roy *Administrative Law: Cases and Comments University Casebook Series* 8 ed New York: The Foundation Press, Inc (1987).

Halliday, Simon *Judicial Review and Compliance with Administrative Law* Portland: Hart Publishing (2004).

Hoexter, Cora *Administrative Law in South Africa* 2 ed Cape Town: Juta & Co, Ltd (2012).

Hutchinson, Dale & Pretorius, Chris-James (eds) *The Law of Contract in South Africa* 2 ed Cape Town: Oxford University Press Southern Africa (Pty) Ltd (2012).

Hugo, W M J & Badenhorst-Weiss, J A (ed) *Purchasing and Supply Management* 6 ed Pretoria: Van Schaik Publishers (2011).

Quinot, Geo *Administrative Law: Cases and Materials* Cape Town: Juta & Co, Ltd (2000).

Quinot, Geo *State Commercial Activity: A Legal Framework* Cape Town: Juta & Co, Ltd (2009).

Quinot, Geo (ed) *Administrative Justice in South Africa: An Introduction* Cape Town: Oxford University Press (2015).

Sachs, Albie *We, the People: Insights of an Activist Judge* Johannesburg: Wits University Press (2016).

Sonnekus, J C *The Law of Estoppel in South Africa* 3 ed Durban: LexisNexis (2012).

Wade, William & Forsyth, Christopher *Administrative Law* 11 ed London: Oxford University Press (2014).

Woolf, Harry; Jowell Jeffrey; Donnelly, Catherine & Hare, Ivan *De Smith's Judicial Review* 8 ed London: Thompson Reuters (Professional) UK Ltd, trading as Sweet & Maxwell (2018).

2. CHAPTERS IN EDITED VOLUMES

Boulle, Laurence 'ADR Applications in Administrative Law' in Corder, Hugh & McLennan, Fiona (eds) *Controlling Public Power: Administrative Justice through the Law* Cape Town: Department of Public Law University of Cape Town (1995) 160.

Davis, D M 'Administrative Justice in a Democratic South Africa' in Corder, Hugh & McLennan, Fiona (eds) *Controlling Public Power: Administrative Justice through the Law* Cape Town: Department of Public Law University of Cape Town (1995) 19.

Diallo, Moustapha 'Corruption, Fraud and African Procurement' in Williams-Elegbe, Sope & Quinot, Geo (eds) *Public Procurement Regulation for 21st Century Africa*: Cape Town: Juta & Co Ltd (2018) 99.

Govender, Karthy 'Administrative Appeals Tribunals' in Corder, Hugh & McLennan, Fiona (eds) *Controlling Public Power: Administrative Justice through the Law* Cape Town: Department of Public Law University of Cape Town (1995) 71.

Hoexter, Cora 'The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa' in Groves, Matthew & Weeks, Greg (eds) *Legitimate Expectations in the Common Law World* Oxford: Hart Publishing (2017) 165.

Hoexter, Cora 'The Rule of Law and the Principle of Legality in Administrative Law Today' in Carnelley, Marita & Hoctor, Shannon (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* Scottsville: University of Kwazulu-Natal Press (2011) 55.

Hoexter, Cora 'Just Administrative Action' in Currie, Iain & De Waal, Johan (eds) *The Bill of Rights Handbook* 6 ed Cape Town: Juta & Co, Ltd (2013) 643.

Kidd, Michael 'Reasonableness' in Quinot, Geo (ed) *Administrative Law in South Africa: An Introduction* Cape Town: Oxford University Press (2015) 184.

Mureinik, Ettienne 'Reconsidering Review: Participation and Accountability' in Corder, Hugh & McLennan, Fiona (eds) *Controlling Public Power: Administrative Justice through the Law* Cape Town: Department of Public Law University of Cape Town (1995) 28.

Penfold, Glenn & Reyburn, Pippa 'Public Procurement' in Woolman, Stuart et al (eds) *Constitutional Law of South Africa* 2 ed Cape Town: Juta & Co, Ltd (OS 12 – 03).

Plasket, Clive 'Playing Catch-Up: The South African Constitution, Administrative Law and Jurisdictional Facts' in Marita Carnelley, Marita & Hoctor, Shannon (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* University of KwaZulu-Natal Press (2011) 75.

Quinot, Geo 'Public Procurement Law in Africa Within a Developmental Framework' in Williams-Elegbe, Sope & Quinot, Geo (eds) *Public Procurement Regulation for 21st Century Africa* Cape Town: Juta & Co Ltd (2018) 15.

Quinot, Geo & Williams-Elegbe, Sope 'The New Challenges and Opportunities for Public Procurement Regulation in Africa' in Williams-Elegbe, Sope & Quinot, Geo (eds) *Public Procurement Regulation for 21st Century Africa* Cape Town: Juta & Co Ltd (2018) 1.

Quinot, Geo 'Lawfulness" in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015).

3. JOURNAL ARTICLES

Bolton, P 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PER/PELJ* 2340.

Cachalia, Raisa 'Clarifying the Exceptional Circumstances Test in *Trencon*: An Opportunity Missed' (2015) 7 *CCR* 6.

Cachalia, R 'Government Contracts in South Africa: Constructing the Framework' (2016) 27 *Stell LR* 88.

Campbell, John 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *SALJ* 315.

Cockrell, Alfred 'Can you Paradigm? – Another Perspective on the Public Law/Private Law Divide' 1993 *Acta Juridica* 227.

Couzans , M 'Procurement Adjudication and The Rights Of Children: Freedom Stationery (Pty) Ltd v MEC For Education, Eastern Cape 2011 JOL 26927 (E)' (2012) 15 *PER/PELJ* 392.

De Le Harpe 'Procurement under the UNCITRAL Model Law: A Southern African Perspective' (2015) 18 *PER/PELJ* 1572.

Dekel, Omer 'Improving Public Procurement Efficiency — Applying a Compliance Criterion' 2015 *Public Procurement Law Review* 3.

Dekel, Omer 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237.

De Ville, J R 'Proportionality as a Requirement of Legality in Administrative Law in terms of the New Constitution' (1994) 9 *SA Public Law* 360.

Du Plessis, Max & Coutsoudis, Andreas 'Considering Corruption through the *Allpay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law' (2016) 133 *SALJ* 755.

Fakude, Nokubonga 'Redundant or Relevant? The Law of Unjustified Enrichment' (2015) 36 *De Rebus* 69.

Ferreira, G M 'Estoppel by Representation' in die Publiekreg' (1991) 54 *THRHR* 398.

Finn, Meghan '*AllPay Remedy*: Dissecting the Constitutional Court's Approach to Organs of State' (2014) *CCR* 258.

Forsyth, Christopher 'The Theory of the Second Actor Revisited' 2006 *Acta Juridica* 209.

Freund, Freund and Price, Alistair 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *SALJ* 184.

Grote, Rainer 'Procedural Deficiencies in Administrative Law: A Comparative Analysis' (2002) 18 *SAJHR* 475.

Hoexter, Cora 'The Future of Judicial Review in South Africa' (2000) 117 *SALJ* 484.

Hoexter, Cora 'Contracts in Administrative Law: Life after Formalism?' (2004) 121 *SALJ* 595.

Hoexter, Cora 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 *SALJ* 207

Klaaren, Jonathan 'Teaching Procedural Jurisdictional Facts' (1998) 14 *SAJHR* 60.

Myburgh, Franziska 'On Constitutive Formalities, Estoppel and Breaking the Rule' (2016) 27 *Stell LR* 254

Plasket, C 'Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials' (2000) 117 *SALJ* 151.

Pretorius, C J 'Damages in Delict for Prospective Loss of Profit' 2006 *TSAR* 385.

Pretorius, Daniel 'The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law' (2005) 122 *SALJ* 835.

Pretorius, Daniel 'The *Functus Officio* Doctrine and Statutory Authorisation to Vary or Revoke Administrative Acts or Decisions' (2006) 68 *THRHR* 396.

Okpaluba, Chuks 'Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in the Tender Process' (2014) 26 *SA Merc LJ* 387.

Quinot, Geo 'The Developing Doctrine of Substantive Legitimate Expectations in South African Administrative Law' (2004) 19 *SA Public Law* 543

Quinot, Geo 'Worse Than Losing A Government Tender: Winning It' (2008) 19 *Stell LR* 101.

Quinot, Geo 'Administrative Law' 2010 *Annual Survey of South African Law* 41.

Quinot, Geo 'Enforcement of Procurement Law from a South African Perspective' 2011 (6) *Public Procurement Law Review* 193.

Quinot, G 'The Role of Quality in the Adjudication of Tenders' (2014) 17 *PER/PELJ* 1110.

Quinot, Geo & Maree, P J H 'The Puzzle of Pronouncing on the Validity of Administrative Law' (2015) 7 *CCR* 27.

Saunders, Cheryl 'Apples, Oranges and Comparative Administrative Law' 2006 *Acta Juridica* 423.

Volmink, Peter 'Legal Consequences of Non-Compliance with Bid Requirements' (2014) 1 *African Public Procurement Journal* 41.

Williams, R C 'The Concept of a "Decision" as the Threshold Requirement for Judicial Review in terms of the Promotion of Administrative Justice Act' (2011) 14 *PER* 230.

Williams, Sope 'Public Procurement and Corruption: The South African Response' (2007) 124 *SALJ* 339.

Wolf, Loammi 'In Search of a Definition for Administrative Action' (2017) 33 *SAJHR* 313.

4. UNPUBLISHED THESES, DISSERTATIONS AND CONFERENCE PAPERS

Hoexter, Cora *The Transformation of South African Administrative Law Since 1994, with Particular Reference to the Promotion of Administrative Act 3 of 2000* PhD Thesis, University of Witwatersrand (2009).

Movshovich, V M 'Ultra Vires Representations and Unlawful Decisions in English Administrative Law, in Comparative Perspective' MLitt thesis, Oxford University (2006).

Quinot, Geo 'Expectations of the New Procurement Bill' 7 – 9 Paper Presented at AdJASA's Launch of Special Interest Group on Public Procurement, Johannesburg (2018).

Wickens, D J 'The Meaning and Application of Cost-Effectiveness as a Constitutional Requirement for the South African Procurement System' LLD Thesis, North-West University (2017).

5. REPORTS AND DISCUSSION PAPERS

National Treasury *Public Sector Supply Chain Management Review* (2015).

National Treasury *State of Transparency in Public Procurement* (2018).

Public Protector Report *Investigation into Allegations of Maladministration Relating to Financial Mismanagement, Tender Irregularities and Appointment Irregularities*

Against the Passenger Rail Agency of South Africa (Prasa) (Report No: 3 of 2015/16).

Quinot, Geo *An Institutional Legal Structure for Regulating Public Procurement in South Africa. Research Report on the Feasibility of Specific Legislation for National Treasury's Newly Established Office of the Chief Procurement Officer* (March 2014).

South African Law Commission Discussion Paper 112 (Project 25), *Statutory Revision: Review of the Interpretation Act 33 of 1957* (September 2006).

6. NEWSPAPER AND ONLINE ARTICLES

Dean, Kenneth D '*Equitable Estoppel Against The Government – The Missouri Experience: Time to Rethink The Concept*'(1992) 63 *St Louis University Law Journal* last accessed from *http://scholarship.law.missouri.edu/facpubs* on 24 September 2015.

Eversheds 'Late Tenders: Acceptance of Late Tenders Found to be Lawful' last accessed from http://www.eversheds-sutherland.com/documents/global/ireland/acceptance-of-late-tender-documents.pdf on 17 April 2017.

Giacomuzzi, Jose 'Common Law Doctrine of Estoppel and Brazilian Constitutional Principle of Administrative Morality' last accessed from https://www2.gwu.edu/~ibi/minerva/spring2001/jose.giacomuzzi.pdf on 20 November 2017.

Mathews, Jud 'Proportionality Review in Administrative Law' last accessed from https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_mathews_proportionality.pdf on 22 April 2017.

Petrylaite, Renata 'Can The Doctrine of Equitable Estoppel be Applied Against a Government?' (2004) 1 *International Journal of Baltic La*w 111 last accessed from https://www.fcsl.edu/sites/fcsl.edu/files/ART%206.pdf on 18 November 2017.

Orr, Rovert & Briese, Robyn 'Don't Think Twice? Can Administrative Decision – Makers Change Their Mind'? *AIAL Forum* 35, 15 last accessed from http://www5.austlii.edu.au/au/journals/AIAdminLawF/2002/14.pdf on 1 April 2018.

TABLE OF CASES

A

ABET Inspection Engineering (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa and Another [2017] ZAWCHC 39 (8 March 2017)

ABET Inspection Engineering (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa and Another [2018] ZAWCHC 7 (1 February 2018)

Actaris South Africa (Pty) Ltd v Sol Plaatjie Municipality and Another [2008] 4 All SA 168 (NC)

Acting Chairperson: Judicial Services Commission and Others v Premier of the Western Cape Province 2011 (3) SA 538 (SCA)

African Christian Democratic Party v The Electoral Commission 2006 (3) SA 305 (CC)

Afriforum NPC and Others v Eskom Holdings SOC Ltd and Others [2017] ZAGPPHC 199 (24 May 2017)

Afriforum and Another v University of the Free State 2018 (2) SA 185 (CC)

Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform and Others [2016] 3 All SA 686 (WCC)

Air France-KLM SA v SAA Technical SOC Ltd and Others [2016] ZAGPPHC 877 (23 September 2016)

Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books 2016 (1) SA 473 (GJ)

Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others [2018] ZACC 33

Airports Company South Africa v Tswelokgotso Trading Enterprises CC 2019 (1) SA 204 (GJ)

Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC)

AllPay Consolidated investment Holdings and Others v Chief Executive Officer, South African Social Security Agency and Others [2012] ZAGPPHC 185 (28 August 2012).

AllPay Consolidated investment Holdings and Others v Chief Executive Officer, South African Social Security Agency and Others 2013 (4) SA 557 (SCA)

AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC)

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC)

Amandla GCF Construction CC and Another v Municipal Manager of Saldanha Bay Municipality and Others [2018] ZAWCHC 77 (22 June 2018) paras 40 – 44

Aquafund (Pty) Ltd v Premier of the Western Cape 1997 (7) BCLR 176 (SCA)

Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Others 2017 (6) BCLR 675 (CC)

Aris Enterprises (Finance) (Pty) Ltd v Protea Insurance Co Ltd 1981 (3) SA 274 (A)

Asatico Civil Construction (Pty) Ltd v Ekurhuleni Metropolitan Municipality [2016] ZAGPJHC 3 (21 January 2016)

Asla Construction (Pty) Ltd v The Head of the Department of Rural Development and Reform [2016] 3 All SA 686 (WCC)

Association of Test Publishers of South Africa v President of the Republic of South Africa and Others [2017] 8 BLLR 850 (GP)

Aurecon South Africa (Pty) Ltd v City of Cape Town 2016 (2) SA 199 (SCA)

Autozone Retail and Distribution (Pty) Ltd v National Commissioner of Police N.O and Others [2015] JOL 33089 (GJ)

Azcon Projects CC v National Minister, Department of Public Works, Mthatha [2011] JOL 27630 (ECM)

B

B Braun Medical (Pty) Ltd v The Director General: National Treasury [2016] ZAGPPHC 1114 (3 November 2016).

Baliso v Firstrand Bank Limited t/a Wesbank 2017 (1) SA 292 (CC).

Basadi JV v MEC for Education, Province of the Free State [2008] JOL 21070 (O)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (7) BCLR 687 (CC)

Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another 2002 (9) BCLR 891 (CC)

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC)

Bester v Sol Plaatje Municipality [2004] 2 All SA 31 (NC)

Beukes NO v Mdhlose; Mdhlalose v Mkhonza and Another 1990 (2) SA 768 (N)

Bhugwan v Johannesburg Stock Exchange Ltd 2010 (3) SA 335 (GSJ)

Black Sash Trust and Others v Minister of Social Development (Freedom Under Law NPC Intervening) and Others 2017 (3) SA 335 (CC)

Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) 2017 (9) BCLR 1089 (CC)

Blue Horison Investments 10 (Pty) Ltd and Another v Regional Land Claims Commissioner and Others [2012] ZALCC 18 (30 January 2012)

Borbet SA (Pty) Ltd v The National Energy Regulator of South Africa [2016] ZAGPPHC 702 (16 August 2016)

Bullock NO and Others v Provincial Government, North West Province and Another 2004 (5) SA 262 (SCA).

Buffalo City Municipality v Gauss and Another 2006 (10) BCLR 1172 (SCA)

C

Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010 (5) SA 457 (SCA)

Cape Book & College Supplies CC t/a University Bookshop v Northlink TVET College and Others [2015] ZAWCHC 191 (24 December 2015)

Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others 2001 (3) SA 1013 (SCA)

Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC)

Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Services 2001 (3) SA 210 (W)

Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality [2009] JOL 23397 (ECG)

Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape [1997] 4 All SA 363 (Ck)

CFIT (Pty) Ltd v Minister of Defence [2015] ZAGPPHC 2 (12 January 2015)

Chairman: Board on Tariffs and Trade and Others v Brenco Incorporated and Others 2001 (4) SA 511 (SCA)

Chairperson's Association v Minister of Arts and Culture and Others 2007 (5) SA 236 (SCA)

Chairperson of the National Council of Provinces v Malema 2016 (5) SA 335 (SCA)

Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others [2005] 4 All SA 487 (SCA)

Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others 2012 (2) SA 16 (SCA)

Chairman, State Tender Board v Supersonic Tours (Pty) Ltd 2008 (6) SA 220 (SCA)

Chief Executive Officer South African Social Security Agency v Cash Paymaster (Pty) Ltd 2012 (1) SA 216 (SCA)

Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng and Another 2003 (6) SA 308 (W)

City of Cape Town v Aurecon South Africa (Pty) Ltd [2014] ZAWCHC 51 (14 April 2014)

City of Cape Town v Aurecon (Pty) Ltd 2017 (4) SA 223 (CC)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)

City of Tshwane and Others v Nambiti Technologies (Pty) Ltd 2016 (2) SA 494 (SCA)

City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA)

Claude Neon Ltd v Germiston City Council and Another 1995 (5) BCLR 554 (W) 562

Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd 2013 (2) SA 133 (SCA)

Cool Ideas CC v Hubbard 2014 (4) SA 474 (CC)

Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others [2017] ZAGPPHC 741 (8 December 2017)

Corruption Watch NPC and Others v President of the Republic of South Africa and Others 2018 (10) BCLR 1179 (CC)

Country Cloud Trading CC v MEC, Department of Infrastructure Development 2014 (2) SA 214 (SCA)

Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng 2015 (1) SA 1 (CC)

Cross-Border road Transport Agency v Central African Road Services (Pty) Ltd 2015 (5) SA 370 (CC)

CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality [2012] 3 All SA 527 (WCC)

CTP Ltd and Others v Director General Department of Basic Education and Others [2018] ZASCA 156 (20 November 2018)

D

Darson Construction (Pty) Ltd v City of Cape Town [2007] 1 All SA 393 (C)

Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs 2000(1) SA 997 (C)

De Freitas v Somerset West Municipality 1997 (3) SA 1080 (C)

De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC)

Democratic Alliance v President of the Republic of South Africa [2017] ZAGPPHC 148 (9 May 2017)

Democratic Alliance v SABC; Democratic Alliance v Motsoeneng [2017] 1 All SA 530 (WCC)

Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC)

Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid [1997] 2 All SA 321 (A) 326

Digital Horizons (Pty) Ltd v South African Broadcasting Corporation and Another [2008] ZAGPHC 272 (8 September 2008)

Dilokong Chrome Mines (Edms) Bpk v Direkteur Generaal Departement van Handel en Nywerheid 1992 (4) SA 1 (A)

Dimension Data (Pty) Ltd v State Information Technology Agency (SOC) Ltd [2016] ZAGPPHC 351 (13 May 2016)

Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA)

Dr J S Moroka Municipality and Others v Betram (Pty) Ltd and Another [2014] 1 All SA 545 (SCA)

Du Bois v Stompdrift-Kamanassie Besproeiingsraad 2002 (5) SA 186 (C)

Dube and Others v Zikalala and Others [2017] ZAKZPHC 36 (12 September 2017)

Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A)

Dumani v Nair 2013 (2) SA 274 (SCA)

Durban City Council v Glenore Supermarket and Café 1981 (1) SA 470 (D)

E

e.tv (Pty) Ltd and Others v Minister of Communications and Others 2016 (6) SA 356 (SCA)

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 (C)

Earthlife Africa – Johannesburg an Others v Minister of Energy and Others [2017] ZAWCHC 50 (26 April 2017).

Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) SA 661 (W)

Economic Freedom Fighters v Speaker of the National Assembly 2016 (3) SA 580 (CC)

Ehrlich v Minister of Correctional Services 2009 (2) SA 373 (E)

Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2017 (6) SA BCLR 750 (CC)

Electronic Media Network Ltd and Others v e. TV (Pty) Ltd and Others [2017] ZACC 17 (8 June 2017)

Elite Bingo (UTH) Proprietary Limited v Zwane N.O and Others [2017] ZAECGHC 53 (11 May 2017)

Envitech Solutions (Pty) Ltd v Saldanha Bay Municipality and Another [2015]ZAWCHC 108 (13 August 2015)

Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA)

Eskom Holdings SOC Limited v Khum MK Investments & Bie Joint Venture (Pty) Ltd and Others [2015] ZAGPJHC 98 (4 June 2015)

F

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)

Ferndale Crossraods Share Block (Pty) Ltd and Others v City of Johannesburg Metropolitan Municipality and Others [2011] 2 All SA 15 (SCA)

Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC)

First Avenue Base Construction CC v Ukhahlamba District Municipality [2006] JOL 16724 (E)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Freedom Stationery and Another v MEC for Education, Eastern Cape and Others [2011] ZAECELLC 1 (16 March 2011)

G

Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA).

Gauteng MEC For Health v 3P Consulting (Pty) Ltd 2012 (2) SA 542 (SCA).

Genesis Medical Scheme v Registrar of Medical Schemes and Another 2017 (6) SA 1 (CC).

Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC).

Gidani (Pty) Ltd v Minister of Trade and Industry and Others [2015] ZAGPPHC 457 (4 July 2015).

Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd 2009 (1) SA 163 (SCA).

Green Mile Investments 340 CC v Khuthala Property Consortium (Pty) Ltd and Another; Khutala Property Consortium (Pty) Ltd v Mtubatuba Municipality and Others [2018] ZAKZPHC 16 (18 May 2018)

Grey's Marine (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA)

Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others [2002] 3 All SA 336 (T)

GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works [2007] JOL 20439 (D)

H

Harksen v President of the Republic of South Africa and Others 1998 (2) SA 1011 (C)

Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others [2017] ZASCA 30 (29 March 2017)

Hira v Booysen 1992 (4) SA 69 (A)

HNR Properties CC v Standard Bank of South Africa Ltd 2004 (4) SA 471 (SCA)

Hoisain v Town Clerk, Wynberg 1916 AD 236

Holobye Trading 2 CC v Head: Department of Roads and Transport, Gauteng and Others; Holobe Trading 2 CC and Another v Head: Gauteng Department of Roads and Transport and Others [2017] ZAGPJHC 268 (19 September 2017)

Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality [2017] ZASCA 77 (2 June 2017)

Hubbard v Cool Ideas 1186 CC 2013 (5) SA 112 (SCA)

I

Ikamva Architects CC v Coega Development Corporation and Another [2015] JOL 34289 (ECG).

Imvusa Trading 134 CC and Another v Dr. Ruth Mompati District Municipality and Others [2008] ZANWHC 46 (20 November 2008).

Industrial Development Corporation of South Africa Ltd v Trencon Construction (Pty) Ltd and Another [2014] 4 All SA 561 (SCA)

Inyameko Trading 189 CC and Another v Minister of Education and Others [2007] ZAWCHC 74 (10 December 2007)

Instimbi Industrial Manufacturing CC and Others v The Municipal Manager of the Nelson Mandela Metropolitan Municipality and Others [2015] ZAECPEHC 64 (13 November 2015)

J

J B Leadbitter & Co Ltd v Devon County Council [2009] EWHC 930 (Ch)

Jajbhay v Cassim 1939 AD 537

Jocastro (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Others [2018] ZAWCHC 44 (11 April 2018)

Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1998 (2) SA 308 (A) 321

Joint Anti-Fascist Refugee Committee v McGrath 341 US 123 (1951)

Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC)

K

Kawari Wholesalers (Pty) Ltd v MEC: Department of Health and Others [2008] ZANWHC 12 (6 March 2008)

Khani v Premier, Vrystaat, en Andere 1999 (2) SA 863 (O)

Kopel v Marshall 1981 (2) SA 521 (W)

Koyabe v Minister for Home Affairs 2010 (4) SA 327 (CC)

Kunwini Local Authority v Silver Lakes Home Owners Association and Another 2008 (6) SA 187 (SCA).

Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another [2015] 2 All SA 657 (SCA)

Kwafel CC v Kwa Dukuza Municipality [2017] ZAKZDHC 1 (5 January 2017)

KwaZulu-Natal Joint Liaison committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC)

L

Laser Transport Group (Pty) Ltd and Another v Minister, Department of International Relations and Cooperation and Others [2016] ZAGPPHC 1047 (15 December 2016)

LDM Consulting v South African National Roads Agency (Ltd) [2017] ZAKZPHC 8 (7 March 2017)

Leopogo Construction (Pty) Ltd v The Govan Mbeki Municipality [2015] 1 All SA 153 (SCA)

Logbro Properties CC v Bedderson N.O and Others [2003] 1 All SA 424 (SCA)

Londoloza Forestry Consortium (Pty) Ltd v South African Forestry Company Ltd 2008 JDR 0816 (T)

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC)

Loghdey and Others v City of Cape Town and Others; Advanced Parking Solutions CC and Another v City of Cape Town and Others 2010 (6) BCLR 591 (WCC)

M

Madibeng Local Authority v Public Investment Corporation [2018] ZASCA 93 (1 June 2018)

Mafongosi and Others v United Democratic Movement and Others 2002 (5) SA 567 (Tk)

Maharaj v Rampersad 1964 (4) SA 638 (A)

Manok Family Trust v Blue Horison Investment 10 (Pty) Ltd and Others 2014 (5) SA 503 (SCA)

Manong and Associates (Pty) Ltd v Minister of Public Works and Another [2010] 1 All SA 267 (SCA)

Masethla v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)

MEC for Education, Northern Cape and Another v Bateleur Books (Pty) Ltd and Others 2009 (4) SA 639 (SCA)

MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA)

MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works 2016 (3) SA 130 (SCA)

MEC for Public Works, Roads and Transport, Free State Provincial Government and Another v Phutanang Transport Services (Pty) Ltd [2006] ZASCA 77

MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA 219 (SCA)

MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA 481 (CC)

MEC: Police Roads and Transport, Free State Provincial Department v Ritcom (Pty) Ltd and Others [2015] ZAFSHC 241 (3 December 2015)

MEC for Public Works, Roads and Transport: Free State Provincial Government and Another v Phutanang Transport Service [2006] SCA 73 (RSA) (31 May 2006)

Medirite (Pty) Ltd v South African Pharmacy Council and Another [2015] ZASCA 27 (20 March 2015)

Merafong City Local Municipality v Anglogold Ashanti Ltd 2017 (2) SA 211 (CC)

Metro Projects CC and Another v Klerksdorp Municipality and Others [2004] 1 All SA 504 (SCA)

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province 2008 2 SA 481 (SCA)

Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George and Others [2005] JOL 13628 (C)

Minister of Defence and Military Veterans v Motau 2014 (5) SA 69 (CC)

Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith 2004 (1) SA 308 (SCA)

Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA)

Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen 9Pty) Ltd 2005 (6) SA 182 (SCA)

Minister of Justice and Constitutional Development v Chonco and Others 2010 (4) SA 82 (CC)

Minister of Justice and Constitutional Development and Another v The South African Restructuring and Insolvency Practitioners Association and Others 2017 (3) SA 95 (SCA)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (1) BCLR 1 (CC)

Minister of Home Affairs and Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA)

Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC)

Minister of Social Development and Others v Phoenix Cash and Carry–Pmb CC [2007] 2 All SA 115 (SCA)

Minister van Polisie v Gamble 1979 (4) SA 759 (A)

Minister of Transport NO v Prodiba (Pty) Ltd [2015] 2 All SA 387 (SCA)

Mobile Telephone Networks (Pty) Ltd v Transnet SOC Ltd and Another [2018] ZAGPJHC (18 June 2018)

Mogale City Municipality v Fidelity Security Services (Pty) Ltd and Others 2015 (5) SA 590 (SCA)

Mohammed v Minister of Home Affairs [2016] ZAWCHC 13 (12 February 2016)

Montagu Springs (Pty) Ltd t/a Avalon Springs Hotel v Liquor Board, Western Cape [1999] 2 All SA 549 (C) 555

Moola and Others v Kwa-Dukuza Municipality and Others [2017] ZAKZDHC 18 (21 April 2017)

Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA)

Mossel Bay Municipality v Ebrahim 1952 (1) SA 567 (C)

Municipal Manager: Quakeni Local Authority and Another v FV General Trading CC 2010 (1) SA 356 (SCA)

MTN (Pty) Ltd v Transnet SOC Ltd [2018] ZAGPHJHC (18 June 2018)

Mustapha v Receiver of Revenue, Lichtenburg 1958 (3) SA 343 (A)

N

National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A)

National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government and Another 1999 (1) SA 701 (FS)

National Director of Public Prosecutions v Mohamed NO 2003 (4) SA 1 (CC)

National Director of Public Prosecutions v Phillips 2002 (4) SA 60 (W)

National Energy Regulator of South Africa and Another v Borbet SA (Pty) Ltd and Others [2017] ZASCA 87 (6 June 2017)

National Lotteries Board v South African Education and Environment Project 2012 (4) SA 502 (SCA)

National Treasury and Another v Kubukeli 2016 (2) SA 507 (SCA)

Nelson Mandela Bay Metropolitan Municipality v Erastyle (Pty) Ltd and Others [2018] ZAECPEHC 61 (6 November 2018)

Neo Siyabonga Construction and Plant Hire CC and Another v Piet Bok Construction CC and Others [2015] ZAGPPHC 42 (6 February 2015)

Nextcom (Pty) Ltd v Funde NO and Others 2000 (4) SA 491 (T)

Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A)

Nkonkobe Municipality v Water Services South Africa (Pty) Ltd and Another [2001] ZAECHC 3 (14 December 2001)

Norgold Investments (Pty) Ltd v Minister of Minerals and Energy, Republic of South Africa and Others [2011] 3 All SA 610 (SCA)

Nortje en ‘n Ander v Minister van Korrektiewe Dienste en Andere 2001 (3) SA 472 (SCA)

O

Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA)

Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd [2018] ZASCA 50 (29 March 2018)

P

Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A)

Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others NAHCMD 268 (18 September 2017)

Paola v Jeeva NO and Others 2004 (1) SA 396 (SCA)

Passenger Rail Agency of South Africa v Swifambo Rail (Pty) Ltd 2017 (6) SA 223 (GJ)

Pepkor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA)

Pharmaceutical Manufacturers of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Pick n Pay Retailers (Pty) Ltd v The Gauteng Provincial Liquor Board [2016] ZAGPPHC 841 (16 February 2016)

Portmann v United States 674 F.2d 1155

Potchefstroom se Stadsraad v Kotze 1960 (3) SA 616 (A)

Pottie v Kotze 1954 (3) SA 719 (A)

Psychological Society of South Africa v Qwelane 2017 (8) BCLR 1039 (CC)

Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA)

Premier, Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal 1999 (2) SA 91 (CC)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)

Prince v Minister of Justice and Others; Rubin v National Director of Public Prosecution and Others; Acton v National Director of Public Prosecution and Others [2017] ZAWCHC 30 (31 March 2017).

Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd [2001] 4 All SA 273 (A)

Psychological Society of South Africa v Qwekane and Others 2017 (8) BCLR 1039 (CC)

Q

Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality and Others [2016] ZAFSHC 159 (8 September 2016)

Quakeni Local Authority v FV General Trading CC 2010 (1) SA 356 (SCA).

Queenstown Girls High School v MEC, Department of Education, Eastern Cape 2009 (5) SA 183 (Ck)

R

R v Ngwevela 1954 (1) SA 123 (A)

R (Abdi and Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363

R v North and East Devon Health Authority, ex parte Coughlan [2000] 3 All ER 850 (CA)

Raduvha v Minister of Safety and Security and Another 2016 (10) BCLR 1326 (CC)

Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others [2013] ZAWCHC 3 (6 February 2013)

Relmar Holdings (Pty) Ltd v The Minister of Agriculture, Forestry and Fisheries and Another [2015] ZAWCHC (30 July 2015)

Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 219 (SCA)

RHI Joint Venture v Minister of Roads and Public Works and Others [2003] JOL 10790 (Ck)

RMR Commodity Enterprise CC v Chairman, Bid Adjudication Committee [2009] 3 All SA 41 (SCA)

Road Accident Fund v Mothupi [2000] 3 All SA 181 (A)

Rodpaul Construction CC and Another v Ethekwini Municipality and Others [2014] ZAKZDHC 18 (2 June 2014)

Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport & Roads and Others; Raubex (Pty) Ltd v MEC for the Department of Transport & Roads and Others [2006] ZANWHC 54 (31 August 2006)

Roman v Williams NO 1998 (1) SA 270 (C)

Roodeport Settlement Committee v Retief 1951 (1) SA 73 (O)

S

S v Makwanyane 1995 (3) SA 391 (CC)

S v Bhulwana 1996 (1) SA 388 (CC)

S v Bhulwana; S v Gwadiso 1995 (12) BCLR 1579 (CC)

SA Eagle Insurance Co Ltd v Bavuma [1985] 2 All SA 190 (A)

SA Metal Machinery Co Ltd v Transnet Ltd [1998] JOL 3984 (W)

SAAB Grintek Defence (Pty) Ltd v South African Police Services and Others [2016] 3 All SA 669 (SCA)

Sakhiwo Health Solutions (Limpopo) (Pty) Ltd v MEC of Health, Limpopo Provincial Government [2014] ZASCA 206 (28 November 2014)

SANRAL v The Toll Collect Consortium and Another 2013 (6) SA 356 (SCA)

Sanyathi Civil Engineering & Construction (Pty) Ltd and Another v Ethekwini Municipality and Others; Group Five Construction (Pty) Ltd v eThekwini Municipality and Others 2012 (1) BCLR 45 (KZP)

Schierhout v Minister of Justice 1926 AD 99

Schoombee v MEC for Education, Mpumalanga 2002 (4) SA 877 (T) 885

Searle and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP).

Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality [2015] ZAFSHC 32 (10 March 2015)

Shalala v Klerksdorp Town Council 1969 (1) SA 582 (T)

Shidiack v Union Government 1912 AD 642

Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA)

Simunye Developers CC v Lovedale Public FET College and Another [2010] ZAECGHC 121 (9 December 2010)

Sizabonke Civils CC t/a Plascon Projects v O R Tambo District Municipality and Others [2010] JOL 26195 (ECM)

Sizabonke Civils CC v Zululand District Municipality and Others 2011 (4) SA 406 (KZP)

Solidarity and Others v South African Broadcasting Corporation 2016 (6) SA 73 (LC)

South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 31 (C)

South African Municipal Workers Union v Minister of Cooperative Governance and Traditional Affairs [2017] 5 BCLR 641 (CC)

South African National Roads Agency Ltd v City of Cape Town 2017 (1) SA 468 (SCA)

South African National Road Agency Ltd v The Toll Collect Consortium and Another 2013 (6) SA 356 (SCA)

South African Police Services v Solidarity obo Barnard 2014 (10) BCLR 1195 (CC)

South African Post Office v Chairperson, Western Cape Provincial Tender Board 2001 (2) SA 675 (C).

South African Post Office v De Lacey 2009 (5) SA 255 (SCA)

South African Reserve Bank v Public Protector and Others [2017] ZAGPPHC 443 (15 August 2017)

South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)

South African Social Security Agency and Another v Minister of Social Development and Others [2018] ZACC 26 (30 August 2018)

Standard Bank v Estate Van Rhyn 1925 AD 266

State Information Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA)

State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd [2017] ZACC 40

Steenkamp v Edcon Ltd 2016 (3) SA 251 (CC)

Steenkamp NO v The Provincial Tender Board of the Eastern Cape Province 2006 (3) SA 151 (SCA)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)

Steigelmeyer Africa (Pty) Ltd v National Treasury and Others [2015] 2 All SA 110 (WCC)

Strata International (Pty) Ltd v Ekurhuleni Metropolitan Municipality [2015] ZASCA 47 (26 March 2015)

Strydom v Land-en Landbou Bank van Suid Afrika 1972 (1) SA 801 (AD)

Superintendent-General: North West Department of Education and Another v African Paper Products (Pty) Ltd and Others [2014] ZANWHC 29 (24 October 2014)

Swart v Starbuck and Others 2017 (5) SA 370 (CC)

Superintendent-General: North West Department of Education and Another v African Paper Products (Pty) Ltd and Others [2014] ZANWHC 29 (24 October 2014)

Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa [2018] ZASCA 167 (30 November 2018)

Syntell (Pty) Ltd v City of Cape Town [2008] ZAWCHC 120 (13 March 2008)

T

Tasima (Pty) Ltd v Department of Transport [2016] 1 All SA 465 (SCA)

TEB Properties CC v MEC for Department of Health & Social Development, North West [2012] 1 All SA 479 (SCA)

Tecmed (Pty) Ltd v Eastern Cape Provincial Tender Board and Others 2001 (3) SA 735 (SCA).

Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others 2008 (1) SA 438 (SCA)

Thabo Mogudi Security Services CC v Randfontein Local Municipality and Another [2010] 4 All SA 314 (GSJ)

Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA)

Transnet v Vusa-Isizwe Security Services (Pty) Ltd [2011] ZAGPJHC 81 (11 February 2011)

Transcreations KZN CC v City of Cape Town [2015] ZAWCHC 32 (23 March 2015)

Trencon Construction (Pty) Ltd v Industrial Development Corporation and Another [2013] ZAGPPHC 147 (3 June 2013)

Trencon Construction (Pty) Ltd v Industrial Development Corporation and Another 2015 (5) SA 245 (CC)

Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A)

Trustees of the Simcha Trust v De Jong and Others 2015 (4) SA 229 (SCA)

Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality 2007 (6) SA 511 (SCA).

U

Umso Construction (Pty) Ltd v MEC of the Government of the Province of the Eastern Cape Responsible for Roads and Transport [2016] ZASCA 61 (14 April 2016)

United Democratic Movement v Speaker of the National Assembly and Others 2017 (5) SA 300 (CC)

United Teachers Association of South Africa and Another v Minister of Education and Culture, House of Representatives and Another; Isaacs and Others v Minister of Education and Culture, House of Representatives and Another 1993 (2) SA 828

Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere [1997] 2 All SA 548 (A)

Umgungundlovu District Municipality v Amaraka investments 37 (Pty) Ltd and Others [2018] ZAKZPHC 10 (11 April 2018)

Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA)

V

V&A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others [2006] 3 All SA 523 (SCA).

Van Schalkwyk v Mkiva NO [2007] ZAFSHC 69

Van Wyk NO and Another v Van der Merwe 1957 (1) SA 181 (A).

VDZ Construction (Pty) Ltd v Makana Municipality and Others [2011] ZAECGHC 64 (3 November 2011).

VE Reticulation (Pty) Ltd v Mossel Bay Municipality [2013] 2 All SA 489 (WCC)

Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC)

Viva Engineering Project CC v Minister of Water Affairs and Others [2015] ZAGPPHC 254 (17 March 2015)

W

Waenhuiskrans Arniston Ratepayers Association and Another v Verreweide Eiendomsontwikkeling (Edms) Bpk and Others 2011 (3) SA 434 (WCC)

Walele v City of Cape Town and Others 2008 (6) SA 129 (CC)

WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality [2017] ZAECGHC 45 (17 March 2017)

WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others [2018] ZASCA 72 (30 May 2018)

Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA)

Welgemoed v The Master 1976 (1) SA 513 (T)

Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (SOC) Ltd and Another 2016 (3) SA 1 (SCA)

Westwood Insurance Brokers (Pty) Ltd v Ethewini Municipality [2016] ZAKZDHC 46 (8 December 2016)

Westwood Insurance Brokers (Pty) Ltd v Ethewini Municipality [2017] ZAKZDHC 15 (5 April 2017)

WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality [2017] ZAECGHC 45 (13 March 2017)

WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another 2013 (5) SA 461 (KZD)

Worley Parsons RSA (Pty) Ltd v Ekurhuleni Metropolitan Municipality [2017] ZAGPPHC 42 (14 February 2017)

Z

Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)

APPENDIX 1

DEFECTIVE BIDS: A CRITIQUE OF THE UNCITRAL MODEL LAW

1. Introduction

The UNCITRAL Model Law on Public Procurement ('the Model Law') aims to harmonize procurement law across national boundaries and serves as an international benchmark for states that wish to modernize their procurement laws.[1] It is regarded as a leading legal text in procurement law circles and serves as the basis for procurement legislation in some thirty countries. My analysis of the Model Law's treatment of defective bids, will focus on two main issues: first, the nature of the discretion afforded to public entities to condone non-compliance with bid requirements ('the discretion issue') and secondly, how the materiality of the non-compliance is determined ('the materiality issue').

2. Discretion

The Model Law does not adopt a uniform approach to the treatment of defective bids. For instance, the nature of the discretion afforded to procuring entities to deal with non-responsive bids differs considerably from the discretion to deal with inaccurate or incorrect information received from bidders. A different level of discretion also pertains to the correction of arithmetical errors. Each of these instances of non-compliance will be examined in turn.

2.1 *Bid Responsiveness*

Article 43(1)(*a*) and (*b*) of the Model Law reads as follows:

> *(a)* Subject to subparagraph (*b*) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law;
>
> *(b)* The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics,

[1] The Guide to Enactment of the UNCITRAL Model Law on Procurement ('the UNCITRAL Guide') 2, last accessed from http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html on 3 February 2017. For further discussion on the UNCITRAL Model Law see Phoebe Bolton *The Law of Government Procurement in South Africa* 2316 – 2319; S De Le Harpe 'Procurement under the UNCITRAL Model Law: A Southern African Perspective' (2015) 18 *PER/PELJ* 1572.

> terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations shall be quantified to the extent possible, and appropriately taken account of in the evaluation of tenders.

The Model Law's approach to bid responsiveness encourages flexibility in the treatment of procedural slips, errors and ambiguities that occur during a procurement process.[2] This is clear from the following features of the Model Law: First, although the Model Law requires bidders to comply with bid requirements in order to be considered responsive,[3] the treatment of responsiveness is not based on an 'all-or-nothing' approach. The Model Law makes allowance for a bidding entity to be considered responsive even if it does not comply perfectly with all bid requirements. Secondly, the question of responsiveness is assessed against the standard of materiality. A bid that is not fully compliant may still be regarded as a responsive bid, provided that it does not materially depart from the terms and conditions of the bid document.[4] Thirdly, the Model Law makes allowance for the correction of non-material errors, oversights and deviations. Non-material slips (sometimes referred to as 'unintentional errors of form'[5]) are those that do not touch on the substance of the tender.[6] Fourthly, although the term 'condonation' does not appear in the text, the power to condone non-material errors is implied. The power to condone is a corollary of the power to allow correction.

The discretion to overlook minor deviations is intended to maximize participation and competition in bidding processes and to ensure that bidders are not eliminated for insignificant errors.[7] The UNCITRAL Guide explains that in the absence of this flexible approach 'the procuring entity may face undesirable consequences, such as the rejection of the best tender from the best qualified supplier or contractor for what the WTO GPA calls "unintentional errors of form"'.[8]

However, it is clear from article 43(1) that procuring entities do not have unfettered discretion to overlook non-responsiveness in all instances. The discretion to treat non-

[2] The UNCITRAL Guide (note 1 above) states that the rules regarding bid responsiveness do not cover 'purely arithmetical errors'. Such errors are specifically dealt with in terms of Article 16 read with Article 43(2)(*b*).
[3] Article 43(1)(*a*).
[4] Article 43(1)(*b*).
[5] Article XV.3 of the World Trade Organization's Revised Agreement on Government Procurement (WTO GPA) last accessed from https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm on 6 February 2017.
[6] Article 43(1)(*b*).
[7] Ibid.
[8] The UNCITRAL Guide (note 1 above) 156. http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html (accessed 3 February 2017).

compliant bids as responsive may only be exercised in two instances: (a) the deviation from the bid requirements should be relatively minor and (b) the errors or oversights should be capable of correction without affecting the substance of the tender. The exercise of the discretion is circumscribed by the terms of the article.

2.2 *Inaccurate or incomplete information*

The receipt of 'inaccurate or incomplete information' from bidders is treated rather differently. Article 9.8 (*a*) - (*c*) of the Model Law reads as follows:

> (a) The procuring entity *shall* disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false or constituted a misrepresentation;
> (b) A procuring entity *may* disqualify a supplier or contractor if it finds at any time that the information submitted concerning qualifications of the supplier or contractor was materially inaccurate or materially incomplete;
> (c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity *may not* disqualify a supplier or contractor on the ground that information submitted concerning qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon a request by the procuring entity. (Own emphasis)

The article prescribes that procuring entities 'shall' disqualify suppliers who submit false information regarding their qualifications. There is nothing contentious or unusual about this provision. But the article also prescribes that procuring entities 'may' disqualify suppliers who have submitted materially inaccurate or materially incomplete information[9] and that suppliers whose information was inaccurate or incomplete in a non-material respect, 'may not' be disqualified.[10] Notably, procuring entities are not empowered under this article to request bidders to *correct* materially inaccurate or incomplete information. The rules governing the correction of bids are contained in article 43(1) dealing with bid responsiveness.

From the use of the word 'may' in article 9.8(*b*) it is evident that procuring entities are vested with a discretion to disqualify or *not to disqualify* bidders who have submitted materially

[9] Article 9.8 (*b*).
[10] Article 9.8(*c*).

inaccurate or materially incomplete information.[11] But this is anomalous. Why should public bodies have *any* discretion regarding the disqualification of bidders who have provided materially inaccurate information regarding their professional, technical or other qualifications? Surely, a bidder who has provided materially deficient information cannot be evaluated under any circumstances. The UNCITRAL Guide[12] does not explain this anomaly but states that article 9.8(*b*) 'permits' procuring entities to disqualify bidders who have provided materially inaccurate information. The point however, is that by virtue of the discretion vested in procuring entities, they are also permitted *not to disqualify* such non-compliant bidders if they so choose.

The UNCITRAL Guide further explains that the material inaccuracies or incompleteness contemplated in article 9.8 refers to 'inaccuracies or omissions that affect the integrity of the competition or procurement process generally'[13] and that the purpose behind article 9.8 (*a*) to (*c*) is to 'safeguard both the interests of suppliers and contractors in receiving fair, equal and equitable treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors'.[14] But this explanation only deepens the mystery, for it is doubtful that compliant bidders who have provided complete information could receive equal treatment if non-compliant bidders who have submitted materially deficient information were also allowed to participate in the same bidding process.

Furthermore, article 9.8 (*b*) is difficult to reconcile with other provisions of the Model Law. For example, article 43(2)(*a*) provides that the procuring entity 'shall' reject a tender if the bidder is not qualified. Although this ground for disqualification must be implemented 'in the light of' the provisions of article 9,[15] it is difficult to reconcile the rule that procuring entities 'shall' reject a tender if the supplier is not qualified[16] with the clear wording of article 9.8 (*b*) that indicates that they have a discretion not to do so.

Article 9.8(*b*) is also difficult to reconcile with the process of bid clarification outlined in article 16. Article 16 provides that a procuring entity may at any stage request a supplier to provide clarification of its qualification information to assist in the evaluation process. However, 'no substantive change to qualification information, including changes aimed at

[11] Article 9.8 (*b*).
[12] Note 1 above.
[13] UNCITRAL Guide (note 1 above) 82.
[14] Ibid.
[15] UNCITRAL Guide (note 1 above) 157.
[16] Article 43(2)(*a*).

making an unqualified supplier or contractor qualified or an unresponsive submission responsive, shall be sought, offered or permitted'.[17] Furthermore, during the clarification process, 'no negotiations shall take place between the procuring entity and a supplier with respect to qualification information'.[18] Clearly, the intention behind the provision is that the process of bid clarification cannot be used to allow a bidder to provide outstanding qualification information. Yet, by virtue of article 9.8(*b*) procuring entities have a discretion not to disqualify such bidder but instead to keep the bidder in the process.

2.3 *Arithmetical errors*

In terms of article 16, the procuring entity is required, upon notice to the bidder, to correct any arithmetical errors discovered during the evaluation process.[19] The Model Law further prescribes that the procuring entity *must* reject the bid if the bidder does not accept the correction of the arithmetical error[20] — no discretion is afforded to officials in this regard. The UNCITRAL Guide explains that that 'no further discussion between the procuring entity and supplier or contractor on the corrected arithmetical error should be permitted: the supplier or contractor concerned can either accept the correction made or its tender will be rejected'.[21]

This approach cannot be faulted in instances where the arithmetical error is self-evident and the bidder is unable to provide a legitimate reason for refusing the correction. But other instances may arise where the arithmetical 'error' is far from self-evident, for example, in cases involving complex price calculations. In such instances, procuring entities would be well-advised *not* to reject a bid for what they may regard as 'arithmetical errors', particularly if the alleged error is disputed by the bidder for plausible reasons. In other words, the Model Law should not permit public officials to reject a bid based on the unwillingness of the bidder to accept the correction of an arithmetical error, if either the 'error' or the 'correction' proposed by the procuring entity is validly disputed.

In South African administrative law, an inflexible approach to disqualification would in all likelihood be challengeable on the grounds of reasonableness, rationality, procedural fairness, error of law and the unlawful 'fettering' of administrative discretion. It is recommended that in instances involving complex pricing formulae, the procuring entity must

[17] Article 16.3.
[18] Article 16.4.
[19] Article 16.2. There are a few exceptions to this rule discussed in the UNCITRAL Guide (note 1 above) 97.
[20] Article 43.2 (*b*).
[21] UNCITRAL Guide (note 1 above) 157.

follow the process of bid clarification outlined in Article 16.1 of the Model law *prior* to rejecting the bid.

3. Materiality

As indicated above, article 43(1) of the Model Law states that a non-compliant bid may be considered to be responsive 'even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender.' [22] Article 43(1) calls for an inquiry into the degree of the deviation —whether it may be considered 'major' or 'minor'.

However, the determination of what constitutes a 'minor' or 'major' deviation is hardly an exact science. In many instances, it is far from self-evident whether a particular deviation constitutes a 'material departure' from the terms or conditions of the bid or whether correction of the deviation would not be prejudicial to other bidders. For example, a failure to sign a bid document, to provide the requisite number of copies or to provide the necessary licenses and permits may be regarded as immaterial by some procuring entities but material by others. The process lends itself to manipulation, subjectivity, and favouritism. The Model Law fails to provide adequate guidance on how the concept of materiality should be understood.

Furthermore, compliant bidders may argue that it would *always* be prejudicial to their interests if *any* corrections were to be allowed. This is admittedly an extreme position to hold, but compliant bidders may point out that had the procuring entity disqualified non-compliant bidders at the outset, the competitive pool would have been considerably smaller, thereby increasing their prospects of success. They may also question the value of compliance as a key principle of public procurement, if it is ultimately left to a functionary to decide which instances of non-compliance are considered 'material' resulting in disqualification and which are 'minor' resulting in a non-compliant bidder being retained in the process. Furthermore, they may rely on a legitimate expectation that the procuring entity would apply its rules in a uniform and even-handed manner.[23]

The purposive approach adopted in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of the South African Social Security Agency*, provides a useful

[22] The UNCITRAL Guide (note 1 above) 156.
[23] Bolton (note 1 above) 2314

analytical tool to determine materiality. [24] In this instance, the Constitutional Court determined that a deviation from a prescribed requirement will be regarded as immaterial if the underlying purpose of the bid requirement is satisfied, despite the imperfect compliance. The purposive approach signifies a break with the formalistic, mechanical and rule-bound approach to bid irregularities that has dominated much of our case law in the past. The *AllPay* ruling established an important equilibrium in South African procurement law by emphasizing the importance of compliance in public procurement whilst at the same time recognizing that not every misstep in a procurement process should be regarded as fatal.

This approach also accords with the principle of proportionality, which requires that procuring entities not exceed the limits of what may be considered to be appropriate.[25] Where several appropriate measures are available, the least onerous measure must be chosen. The sanction of disqualification should therefore not be disproportionate to the nature of the error committed or the object sought to be achieved.[26]

3. Conclusion

The problems inherent in the treatment of defective bids are universal. The challenge is to find an appropriate balance between a uniform and consistent application of the rules on the one hand and a refusal to disqualify bidders for relatively insignificant deviations, on the other. The regulatory framework should provide the guiding principles for how this balancing exercise could best be achieved. However, procuring entities should not be given any discretion to consider bids that contain materially inaccurate or incomplete information. It is suggested that the wording of article 9.8(*b*) be re-appraised.

The 'purposive' approach of South African law and the proportionality-based approach of English law provide useful analytical tools. They focus attention not merely on whether the deviation from stated criteria was 'major' or 'minor', but whether the underlying purpose of the relevant requirement was met and whether disqualification would amount to a reasonable response under the circumstances. These approaches enhance the quality of reasoning that administrators are required to engage in before disqualifying bidders. The purpose of

[24] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC).
[25] *Tideland Signal Ltd. V Commission of the European Communities* Court of First Instance (First Chamber) para 39.
[26] *RJ B Leadbitter & CO Ltd v Devon County Council* [2009] EWHC 930 (Ch); *RodPaul Construction CC v Ethekwini Municipality* [2014] ZAKZDHC 18 (2 June 2014) paras 26 and 27.

administrative law is not only to allow for judicial review of invalid administrative decisions, but also to enhance the quality and efficiency of decision-making at the administrative level.

APPENDIX 2

SOUTH AFRICAN LAW REFORM COMMISSION'S PROPOSED CLAUSE ON REVOCATION

50. (1) If legislation confers a power or imposes a duty, that legislation must be read as implying that any decision taken in the exercise of the power or the performance of the duty may, subject to subsections (2) and (3), be reconsidered and either be confirmed, altered or repealed –

(a) by the person on whom the power is conferred or the duty is imposed; or

(b) either by that person or the person who took who took the decision, if the decision was taken by another person in terms of a power or duty delegated to that other person.

(2) A decision may be altered or repealed in terms of subsection (1) with effect from a date determined by the person altering or repealing the decision, which may be a date before, on or after the decision to alter or repeal was taken.

(3) If the person to whom a decision relates has been notified, the decision may not be altered or repealed if the alteration or repeal will detract from any rights that have accrued or any legitimate expectations that have arisen as a result of the decision, but this subsection does not apply if –

(a) the affected person agrees in writing to the alteration or repeal of the decision;

(b) the decision was procured by fraudulent, dishonest or any other illegal means; or

(c) the decision is for other reason invalid.

(4) the following decisions may not be altered or repealed in terms of this section:

(a) a decision which is the subject of –

(i) internal or administrative appeal proceedings;

(ii) alternative dispute resolution proceedings; or

(iii) judicial proceedings; or

(b) a decision taken to decide an internal or administrative appeal.

APPENDIX 3

PRETORIUS' PROPOSED CLAUSE ON REVOCATION

10. **Construction of provisions as to exercise of statutory powers and performance of statutory duties.** –

(1) When an enactment confers a power or imposes a duty upon an organ of state, or otherwise authorizes or requires an organ of state to perform a function, and that organ of state organ of state makes a decision or performs an act in the exercise of such power or in the discharge of such duty or function, then –

(a) unless the relevant enactment provides otherwise, that decision or act shall become final as soon as the organ of state concerned has pronounced that decision or has announced the performance of that act, as the case may be;

(b) that decision or act shall not be susceptible of revocation, rescission, variation or amendment by that organ of state except:

(i) by means of rectification of manifest clerical errors appearing on the face of the instrument recording that act or decision;

(ii) to the extent and in the circumstances permitted by the common law or by the enactment under which that decision was made or that act was performed;

(iii) with prior written and informed consent of all persons affected by or having an interest in that act or decision;

(iv) where that act or decision was procured by fraudulent or dishonest means, provided that the organ of state shall afford all persons affected by or having an interest in that act or decision a fair hearing before revoking, rescinding, varying or amending it on account of suspected fraud or dishonesty; or

(v) where that decision or act in invalid due to lack of jurisdiction on the part of the organ of state to make that decision or to perform that act, or due to a failure of natural justice, or due to lack of authority on the part of an attorney who purported to represent a party to the proceedings which gave rise to that act or decision, and then only on written application by an interested party and after all persons affected by or having an interest in that act or decision will have been afforded a fair hearing;

(c) subject to paragraphs (a) and (b), that organ of state shall be entitled to make further decisions or to perform further acts from time to time in the exercise of such power or in the discharge of such duty or function.

APPENDIX 4

PROPOSED CLAUSE ON REVOCATION

50. (1) If legislation confers a power or imposes a duty upon an organ of state, or otherwise authorizes or requires an organ of state to perform a function, that legislation must be read as implying that any decision taken or act performed in the exercise of the power or the performance of the duty may, subject to subsections (2) and (3), be reconsidered and either be confirmed, altered or revoked –

(a) by the person on whom the power is conferred or the duty is imposed; or

(b) either by that person or the person who took who took the decision, if the decision was taken by another person in terms of a power or duty delegated to that other person.

(2) A decision may be altered or revoked in terms of subsection (1) with effect from a date determined by the person altering or repealing the decision, which may be a date before, on or after the decision to alter or repeal was taken.

(3) If the organ of state concerned has pronounced that decision or has announced the performance of that act, as the case may be, the decision or act may not be altered or revoked without an order of a competent court, if the alteration or revocation will detract from any rights that have accrued or any legitimate expectations that have arisen as a result of the decision.

(4) For purposes of subsection (3), unless the contrary is established, it will be presumed that unless a decision has been pronounced or the performance of an act has been announced, such decision or act as the case may be, does not detract from the rights or legitimate expectations of any person.

(5) Subsection (3) does not apply if –

(a) the alteration or revocation is intended to rectify manifest clerical errors appearing on the face of the instrument recording that act or decision;

(b) the affected person agrees in writing to the alteration or revocation of the decision;

(c) the decision was tainted by:

  (i) fraud, corruption or other acts of dishonesty;

  (ii) any other material irregularity that occurred during the administrative process; or

(d) the alteration or revocation does not detract from the rights or legitimate expectations of any person.

(6) The following decisions may not be altered or repealed in terms of this section:

(a) a decision which is the subject of –

  (i) internal or administrative appeal proceedings;

  (ii) alternative dispute resolution proceedings; or

(iii) judicial proceedings; or

(b) a decision taken to decide an internal or administrative appeal.

APPENDIX 5

RECOMMENDATIONS FOR LEGISLATIVE REFORM

The much-anticipated Procurement Bill provides an ideal opportunity for the legislature to address many of the problems identified in this thesis.[1] The Bill could clarify the circumstances under which a public body is able to exercise its powers of condonation, correction or waiver; deal with the problem of *ultra vires* contracts and allow for limited powers of self-correction. The Bill could also remedy the fragmented manner in which the legislative framework currently deals with non-responsive bids. The challenge is to find an appropriate balance between compliance and a uniform, consistent application of tender rules on the one hand and a refusal to disqualify bidders for relatively insignificant deviations, on the other. At least three areas of reform must be addressed: The need for a coherent legislative framework governing bid responsiveness, the issue of materiality and the degree of discretion afforded to public authorities to deal with non-responsive bids.

(a) Coherence

In South Africa there is no single piece of legislation that governs the treatment of non-responsive bids. The main legislative provision is to be found in s 1 of the PPPFA, which defines an 'acceptable tender' as one which 'in all respects complies with the specifications and conditions of tender as set out in the tender document'. But there are at least three problems with the definition. First, it is unclear *ex facie* the provision what the consequences of non-compliance are intended to be. Secondly, it draws no distinction between material and immaterial instances of non-compliance. The definition seemingly demands unfaltering compliance — a bid must comply *in all respect*s. Thirdly, it makes no allowance for condonation or correction of immaterial deviations.[2] These legislative gaps have been filled through a process of legislative interpretation. The courts have interpreted the provision to mean that a bid that is not 'acceptable' must be rejected.[3] But the courts have ameliorated the

[1] See Geo Quinot 'Expectations of the New Procurement Bill' 7 – 9, an unpublished paper presented at AdJASA's Launch of Special Interest Group on Public Procurement, Johannesburg (2018) for a discussion of the changes that the Bill is expected to make to the procurement regime. See also Geo Quinot & Sope Willaims-Elegbe 'The New Challenges and Opportunities for Public Procurement Regulation in Africa' in Sope Williams-Elegbe & Geo Quinot (eds) *Public Procurement Regulation for 21st Century Africa* (2018) 1 for a discussion of key areas of reform for public procurement throughout Africa.

[2] P Bolton 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PER/PELJ* 2315, 2344 – 2345

[3] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] 4 All SA 487 (SCA) (hereafter *Sapela*) para 11.

effects of a literal approach by reading in the requirements of materiality and reasonableness.[4] The courts initially allowed for condonation on broad public-interest grounds[5] and then on a much more restricted basis, by limiting the right to condone to instances where the bid condition in question was immaterial, unreasonable or unconstitutional.[6]

Apart from the PPPFA, various sector-specific pieces of legislation also address the issue of responsiveness. For example, in the context of construction procurement, procuring entities are expressly prohibited from accepting non-responsive bids.[7] But the principle of materiality is key to the manner in which non-responsiveness is understood within the context of construction procurement.[8] A responsive bid is defined as one that 'complies with all the terms and specifications of the tender document without material deviation or qualification'.[9] There is thus an implied power to condone immaterial deviations from stated conditions.

The municipal procurement regime, on the other hand, is overly prescriptive regarding the formalities that must be complied with in order for a bidder to be regarded as responsive. A municipality 'may not consider' a bid unless the bidder has complied with various administrative requirements such as providing the bidder's full name, identification number or company registration number, tax reference number and VAT registration number, etc.[10] On a literal application, a bid may be rejected for relatively insignificant deviations, such as providing an abbreviated name and not the full name of the bidder,[11] or minor slips in providing the correct identification number or company registration number.

Various regulatory prescripts provide for a power of condonation of sorts, but typically, this power of condonation finds application only when a *public body* seeks condonation for deviating from one or other legislative prescript. It is doubtful whether such provisions can be

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[4] *Millennium Waste Management v Chairperson, Tender Board, Limpopo Province* 2008 (2) SA 481 (SCA) (hereafter *Millennium Waste*) para 19; *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA) (hereafter *Moroka*); paras 12 – 13.
[5] *Millennium Waste* (note 4 above) para 19.
[6] *Moroka* (note 4 above) paras 12 – 13.
[7] Paragraph F.3.8 of Annexure F (Standard Conditions of Tender) of the Standards for Uniformity issued in terms of ss 4(*f*) and 5(4)(*b*) of the CIDB Act 38 of 2000, read with reg 24 of the CIDB regulations, 2004 (as amended).
[8] Ibid
[9] Ibid.
[10] Regulation 13 of the Municipal Supply Chain Management regulations, published under GN 868 in *GG* 27636 of 30 May2005.
[11] See *National Lotteries Board v South African Education Project* 2012 (4) SA 504 (SCA) for an example of where an applicant was disqualified for failing to provide its full names. This occurred in the context of applications for financial assistance to the National Lotteries Board, and not in the context of municipal procurement.

invoked to confer power on a public body to condone non-compliance by bidders with the terms of a tender document. MFMA reg 36(1)(*b*) provides that an SCM policy may allow the accounting officer to 'to ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature'. The provision does not define what 'minor breaches of a technical nature' entail. As indicated, it relates only to breaches of procurement rules 'by an official or committee acting in terms of delegated powers or duties' and not to breaches committed by bidders.

Section 79 of the PFMA permits National Treasury, on good cause shown, to approve a departure from a treasury regulation or instructions or any condition imposed in terms of the Act. Notionally, this might include approving a departure from responsiveness criteria prescribed by a treasury regulation or instruction, such as the prescripts of reg 13 of the MFMA regulations referred to above. However, it is unclear whether such approval must be sought and obtained upfront (ie whether procuring entity must seek approval for the departure before issuing an RFP) or whether it can also be invoked afterwards. Furthermore, it is unclear whether National Treasury is empowered only to approve a departure by a public body from the said prescripts, or whether it also has powers to approve departures by bidders from legislatively prescribed responsiveness criteria.

The 'Irregular Expenditure Framework' issued by the Office of the Accountant General makes provision for an accounting officer or accounting authority to request the 'relevant authority' to condone irregular expenditure, that is, expenditure incurred in contravention of legislative prescripts or internal policies.[12] Thus, expenditure incurred in respect of a contract awarded to a bidder who ought to have been disqualified as non-responsive would be regarded as irregular. Significantly, the power of condonation in the Framework applies only in respect of the irregular expenditure incurred. There is no authority granted to grant condonation of the actual instance of non-compliance.

The picture that emerges is one of incoherence, fragmentation and confusion. The Bill must correct this by providing a cohesive approach to the treatment of non-responsive bids,

[12] See 'Irregular Expenditure Framework' (the Framework') annexed to National Treasury Instruction 1 of 2018/19 para 5, last accessed from http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/TreasuryInstructionof202018-2019IrregularExpenditureFramework.pd on 10 November 2018. The Framework takes effect on 1 December 2018.

applicable to all types of procurement. It must contain a clear definition of materiality and make express allowance for the condonation of breaches that are immaterial.

(b) Materiality

The Procurement Bill must vindicate the principle of equal treatment by emphasizing the importance of adherence to tender rules. But the Bill must also vindicate the principles of materiality and purposiveness by making a distinction between material and immaterial breaches. Invalidity should attach only to breaches that may be regarded as material. What constitutes a material or immaterial deviation cannot be defined with precision, but a non-exhaustive list of guiding principles could be provided. Broadly speaking, a non-compliant bid may be regarded as substantively responsive (and therefore acceptable) if:

(i) Despite the non-compliance, the underlying purpose of the term, condition or specification is achieved;

(ii) It may be corrected without affording a non-responsive bidder an unfair advantage over other bidders. A non-responsive bidder may gain an unfair advantage if correction would affect substantive aspects of the bid, such as price and functionality.[13] However, *bona fide* arithmetical errors may be corrected;

(iii) It does not materially alter the risks or responsibilities of either the procuring entity or the bidder under the proposed contract;

(iv) It contains minor deviations from bid requirements that do not materially alter or depart from bid terms, conditions or specifications.[14]

The procuring entity may either afford the non-compliant bidder an opportunity to correct any defects in the bid or it may waive compliance with the bid requirement, taking into account various public interest objectives.

(c) The discretion to condone

In Appendix 1, I provided a critique of the approach followed by the UNCITRAL Model Law on Public Procurement ('the Model Law') to the treatment of non-compliant bids. My concern is that in some instances the Model Law affords procuring entities too much discretion and in other instances too little. Under the Model Law, the degree of discretion afforded procuring entities depends on the type of non-compliance it is required to deal with. Thus the nature of

[13] Ibid.
[14] Article 43(1)(*b*) of the Model Law. Join up numbering

the discretion to deal with non-responsive bids differs from the way in which procuring entities have to deal with the receipt of inaccurate or incorrect information or the correction of arithmetical errors. In Appendix 1, I expressed the view that the approach adopted by the Model Law is both unnecessary and confusing.

The exercise of the discretion to condone non-compliance must be carefully circumscribed. The Procurement Bill ought to vest procuring authorities with discretion to condone non-compliance whilst simultaneously placing limits on the exercise of the discretion. The exercise of the discretion to condone non-compliance must be limited to immaterial instances of non-compliance. Unlike the Model Law, the Bill should not afford procuring entities any discretion regarding the disqualification of bidders who have submitted 'materially inaccurate or materially incomplete information'.[15] The position adopted by the Model Law is anomalous, for the principle of fair and equal treatment of bidders would be undermined if procuring entities were afforded a discretion not to disqualify a materially non-compliant bidder.

[15] See article 9.8 (*b*) of the Model Law.