

Can Court Review Private Procurement Decisions?

Insights from *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme and Others 2026 (4) BCLR 291 (CC)*

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INTRODUCTION

On 11 February 2026, the Constitutional Court handed down a judgment addressing whether procurement decisions made by private entities can be reviewed under public law frameworks such as the Promotion of Administrative Justice Act (PAJA), the principle of legality, or the common law. The case arose from Famous Idea Trading 4 (Pty) Ltd, trading as Dely Road Courier Pharmacy, which unsuccessfully tendered for courier pharmacy services for the Government

Employees Medical Scheme (GEMS). The tender was awarded instead to a joint venture between Marara Pharmacy and Pharmacy Direct, as well as Medipost Pharmacy.

BACKGROUND

During 2022, GEMS issued an invitation to submit tenders for the appointment of a service provider who would render courier pharmacy services. Famous Idea was among the entities that submitted a tender in response to this invitation. Marara and Pharmacy Direct formed a joint venture (JV) and submitted a joint tender, while Famous Idea and Medipost submitted their respective tenders independently. The JV and Medipost were ultimately appointed by GEMS and Famous Idea's tender was rejected. Aggrieved by the outcome, Famous Idea decided to litigate.

Famous Idea launched a review application, in which it sought to challenge GEMS' decisions to reject its bid and to award the tender to the JV and Medipost. The legal question was whether a procurement decision of a private entity/body could be reviewed under PAJA, alternatively, under the principle of legality or the common law.

HIGH COURT

Famous Idea sought to review GEMS' decision and compel GEMS to produce the Rule 53 record. GEMS argued its decision was a private, commercial choice and not something the courts could review. The High Court agreed with GEMS, saying the decision was not "administrative action" but merely a commercial decision. The court highlighted that it would be dangerous to set a precedent that allows for the decisions of private parties to appoint service providers to be reviewed, especially if the ambit of common law review is broadened and dismissed Famous Idea's case. Famous Idea tried to appeal but was refused by both the High Court and the Supreme Court of Appeal. It then approached the Constitutional Court.

CONSTITUTIONAL COURT

Before considering the merits of the review, the Constitutional Court confirmed that a respondent may raise a Rule 6(5)(d)(iii) point of law challenging the court's review jurisdiction before producing the Rule 53 record. The Court held that where an applicant fails to establish that a decision is reviewable, the respondent is not obliged to produce the Rule 53 record before the jurisdictional challenge is determined.

The Court held that GEMS is not an organ of state. Relying on the Supreme Court of Appeal's reasoning in *GEMS v Public Protector*,¹ it found that the operations of a medical scheme do not involve the exercise of public power or the performance of a public function. Consequently, GEMS' decision did not amount to administrative action. The Court therefore held that neither PAJA nor the principle of legality applied, and the High Court lacked review jurisdiction on those grounds.

CAN PRIVATE DECISIONS BE REVIEWED UNDER THE COMMON LAW?

Famous Idea also argued that even if GEMS is a private body, the court should still be able to review its decision under "common law" (general legal principles) to ensure that it was not arbitrary or dishonest.

Although courts are generally reluctant to interfere in the affairs of private entities, the Constitutional Court explained that intervention may be justified where a private contract confers decision-making or adjudicative powers that carry implied duties of fairness. However, Famous Idea failed to plead that the tender conditions created a contractual relationship giving rise to such duties. As a result, the Court held that no basis had been established for a common-law (private law) review.

In this case, the Court found that Famous Idea failed to prove that a special contract existed between them and GEMS that required this level of fairness. Simply applying for a tender does not automatically give a company the right to a court review if they lose.

CONCLUSION

The Constitutional Court ultimately dismissed the appeal by Famous Idea. The judgment confirms that private entities, including medical schemes, have the freedom to make their own commercial choices when hiring service providers. Unless a company can prove that the decision-maker was exercising government-like power or had a specific contractual duty to be fair in a legal sense, a court will generally not interfere with a private entity's commercial procurement decisions.

¹ *Government Employees Medical Scheme v Public Protector of the Republic of South Africa* [2020] ZASCA 111.



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