

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

**REPORTABLE
Case No: 2806/2022**

In the matter between:

SPEC JOINT VENTURE

Applicant

and

**THE MINISTER: DEPARTMENT OF WATER
AND SANITATION**

First Respondent

**ZANA MANZI SERVICES (PTY) LTD
AND SANITATION**

Second Respondent

(Registration number: 2[...])

PHUNYA CONSULTING CC

Third Respondent

(Registration number: 2[...])

REASONS FOR JUDGMENT

BANDS AJ:

[1] The applicant applied for the review and setting aside of decisions by the first respondent to award tender BID DWS 05-0621 WTE for the mechanical and other related major plant and machinery installation, maintenance, repair, refurbishment

and upgrade for southern operations in the Eastern and Western Cape to the second and third respondents, respectively. The Eastern Cape portion of the tender was awarded to the second respondent on 21 June 2022, whilst the Western Cape portion was awarded to both the second and third respondents on 29 September 2022.

[2] It is common cause that the evaluation and award of the tender in question is administrative action and is reviewable under the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).

[3] On 2 February 2023, I granted an order reviewing and setting aside the impugned decisions and remitting the matter back to the first respondent to start the procurement process afresh.¹ What follows are my reasons for the order.

[4] The facts are largely common cause. The first respondent invited interested parties to tender for the appointment of contractors relating to a three-year term contract for the services referred to above.

[5] Pursuant to this invitation, and following mandatory briefing sessions, which were held on 13 and 15 July 2021,² 23 tenders were submitted, including tenders from the applicant and the second and third respondents respectively. The tender evaluation process comprised of seven phases, including: mandatory requirements; compulsory subcontracting; administrative compliance; local production and content; functionality compliance; workshop evaluation; and price and preference points claimed.

“1. The decision of the first respondent (“the first impugned decision”) to award the Eastern Cape portion of tender BID DWS 05-0621 WTE to the second respondent on 21 June 2022 is reviewed and set aside.

2. The decision of the first respondent (“the second impugned decision”) to award the Western Cape portion of tender BID DWS 05-0621 WTE to the second and third respondents on 29 September 2022 is reviewed and set aside.

3. The first and second impugned decisions are referred back to the first respondent to start the procurement of services for the mechanical and other related major plant and machinery installation, maintenance, repair, refurbishment and upgrade for southern operations (Eastern Cape and Western Cape) afresh.

4. The first respondent is ordered to pay the costs of the application.”

² Each bidder was required to attend one briefing session.

[6] It is common cause that the applicant's bid, being that of a joint venture between three separate entities, namely, (i) Surface Preparations Equipment and Coatings (Pty) Ltd, the lead partner; (ii) SPEC Hardware (Pty) Ltd; and (iii) SPEC Corrosion Protection (Pty) Ltd, had to be materially evaluated in the context of the applicant's lead entity's compliance with the mandatory tender requirements. In order to establish whether or not there had been compliance by the applicant, I am required to consider the schedule of returnable documents, which is central to the present dispute.

[7] The invitation to tender, in respect of phase 1, records as follows:

"PHASE 1: MANDATORY REQUIREMENTS

Failure to submit any of the documents listed below will render your bid non-responsive and will be disqualified."

[8] Of relevance is item 10 of the mandatory tender requirements, being "[a] copy of a valid UIF certificate of compliance or copy of a valid letter of good standing/tender letter (verification will be done with the Department of Labour)." Where I make reference to non-compliance with the mandatory tender requirements, such reference is made in the context of item 10.

[9] It is common cause that two of the entities comprising the joint venture, inclusive of the applicant's lead partner; and SPEC Hardware (Pty) Ltd, failed to submit valid UIF certificates of compliance. Instead, the applicant submitted alternative documentation in respect of the aforementioned entities in support of its contention that it was UIF compliant. I pause to mention that the documents submitted, inclusive of EPMSA statements, were not included in item 10 as acceptable alternatives to a valid UIF certificate of compliance. More particularly, the applicant's tender was accompanied by a cover letter, in which the applicant, in respect of its UIF compliance, commented as follows:

"6.1 The SPEC JV member SPEC Corrosion Protection (Pty) Ltd is in compliance with the UIF requirements and the Certificate of Compliance as

issued by the Department of Employment and Labour is attached to this Tender Bid.

6.2 The SPEC JV member SPEC Hardware (Pty) Ltd is in compliance with the UIF requirements, but at time of this letter it is recorded on the DoEL website that the contributions for June 2021 is (sic) outstanding. However, proof of that payment (statement of account) is attached to the tender Bid document. In view of this it is the correct contention that SPEC Hardware (Pty) Ltd is in compliance with UIF requirements.

6.3 The SPEC JV member Surface Preparations Equipment and Coatings (Pty) Ltd is in compliance with the UIF requirements, but at time of this letter it is recorded on the DoEL website that contribution (sic) and declaration is (sic) outstanding. However, proof of that payment (statement of account) as well as proof of submission of declaration is attached to the tender Bid document. In view of this it is the correct contention that Surface Preparations Equipment and Coatings (Pty) Ltd is in compliance with UIF requirements."

[10] It is not in dispute that the documents submitted by the applicant do not comply with the mandatory tender requirements.

[11] Apparent from the minutes of the Bid Evaluation Committee ("*the BEC*") is that despite non-compliance with the mandatory tender requirements by several of the other bidders, inclusive of the second respondent and Bicacon (Pty) Ltd (to whom I shall return later), such bids were not declared non-responsive by the first respondent, nor were they disqualified. Instead, the BEC suggested that the documents submitted by the respective bidders be forwarded to the Department of Labour for verification. The following entries, with reference to "*Phase 1: Mandatory requirements*", in the minutes under discussion bear repetition:

SUMMARY	RESOLUTION/ ACTION
<i>All twenty-three (23) bids were evaluated on</i>	<i>Seven (7) bids complied</i>

phase 1 (mandatory requirements). Failure to submit documents listed under mandatory requirements will render your bid non-responsive and will be disqualified.

The following bidders did not comply with Mandatory Requirements

- ***Bidder 5: Zana Manzi Services (Pty) Ltd*** – bidder submitted SARS notice of registration instead of UIF certificate or tender letter. Bid Evaluation Committee (BEC) suggested that the documents submitted should be forwarded to (DoL) for verification. DoL confirmed that the companies' (sic) declaration and contributions were up to date at the closing of the bid, but the UFC certificates were not issued. Bidder was therefore considered for further evaluation.

...

- ***Bidder 8: Bicacon (Pty) Ltd*** - bidder submitted application for registration instead of UIF certificate or tender letter. Bid Evaluation Committee (BEC) suggested that the documents submitted should be forwarded to (DoL) for verification. DoL confirmed that the companies' declaration and contributions were up to date at the closing of the bid, but the UIF certificates were not issued. Bid was therefore considered for further evaluation.

...

with the mandatory requirements and were considered for further evaluation into Phase 2 (compulsory sub-contracting (Regulation 9) criteria.

• Bidder 20 – SPEC JV (Pty) Ltd – one of the joint venture company (SPEC) UIF was non-compliant. ... See score sheets attached for ease of reference. Below is a list of nine (9)³ bids who were considered for further evaluation: • Bidder 2: Isiphethu Water Services (Pty) Ltd • Bidder 4: Tushcor Holdings (Pty) Ltd • Bidder 5: Zana Manzi Services (Pty) Ltd • Bidder 8: Bicacon (Pty) Ltd • Bidder 9: Phunya Consulting CC • Bidder 15: CMS Water Engineering CC • Bidder 19: Kelotlhoko JV Xintsabyana ...	
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[12] The main thrust of the applicant's case is two-fold. Firstly, that the first respondent relaxed the mandatory tender requirements for certain bidders but not for others, including the applicant; and secondly, that the first respondent had sufficient information to verify the applicant's UIF status and compliance with the Department of Labour, which it failed to do.

³ Despite reference being made to 9 bids having been considered for further evaluation, it appears *ex facie* the minutes that only 7 progressed to phase 2.

[13] On the other hand, the first respondent, notwithstanding the department's own apparent deviation from the mandatory requirements, and without addressing this disparity on the papers before court, takes the position that the applicant was not considered for further participation in the bidding process by reason of the applicant's non-compliance with the mandatory requirements, and more particularly, its lead partner's failure to submit a valid UIF certificate of compliance.

[14] The applicant's submission that it was undisputed on the papers that the Department of Labour had ceased to issue UIF compliance certificates for some time before the date of issue of the tender; alternatively, that such certificates were only issued intermittently, is not only incorrect, but it is not born out by the papers before court. This aspect was pertinently dealt with by the first respondent with reference to circulars issued by the Department of Labour during or about March and April 2022, some seven to eight months after the submission of the applicant's bid on 12 August 2021. This too is evidenced by the certificate of compliance issued to the second respondent by the Department of Labour on 29 July 2021. Significantly, nowhere in the applicant's explanatory letter, under cover of which its bid was submitted, and to which I have already referred, does the applicant contend that it was unable to obtain the required certificates of compliance.

[15] Further and in any event, leaving aside the dispute between the parties as to the availability of certificates of compliance, the applicant does not contend that it was unable to obtain a valid letter of good standing/tender letter, this being the alternative acceptable documentation falling within the ambit of item 10.

[16] In argument, Mr Beyleveld SC correctly conceded that on the facts of the present matter, and in the event of a finding that the first respondent had no authority to condone non-compliance with its own mandatory requirements, the proper order in the circumstances was to review and set aside the impugned decisions and to refer the matter back to the first respondent to start the procurement process afresh. Whilst Mr Buchannan SC was, in principle, in agreement with the said proposition, he contended that on the facts of the present matter, (i) the materiality of compliance with the mandatory requirement depends on the extent to which the purpose of the requirement is attained; (ii) the purpose of the requirement to supply a UIF

compliance certificate is to ensure that a prospective tenderer is registered for UIF and that its UIF contributions are up to date; and (iii) the decision of the first respondent to qualify/limit this condition by enforcing the rigid requirement that a tenderer can only prove its compliance in the manner sought, without allowing any other valid proof of such compliance, is irrational in light of the purpose of the requirement.

[17] Section 217(1) of the Constitution⁴ requires that public procurement must occur in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. Such requirements are qualified to the extent that organs of state or institutions referred to in section 217(1) are permitted to implement a preferential procurement policy as provided for in section 217(2) of the Constitution. In turn, section 217(3) of the Constitution makes provision for the enactment of legislation to provide a framework within which such policy is to be implemented. To give effect to section 217(3) of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (*“the PPPFA”*) was enacted.

[18] In addition to providing for the application of a preferential point system in the evaluation of bids, the PPPFA makes it clear that for a tenderer to be eligible for consideration, ie for the allocation of points, the tender must be what the PPPFA defines as an acceptable tender, this being one which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. In accordance with the doctrine of legality, the legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law.⁵ The acceptability of the tender is accordingly a threshold requirement and the acceptance by an organ of state of a tender which fails to meet this threshold is an invalid act which falls to be set aside.⁶

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at paras 17 and 50.

⁶ *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at 644B-E.

[19] In *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* (supra) Scott JA, with reference to the definition of an acceptable tender, stated as follows at paragraph [14]:

“The definition of ‘acceptable tender’ in the Preferential Act must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is ‘fair, equitable, transparent, competitive and effective’. In other words, whether ‘the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents’ must be judged against these values...”

[20] In considering the aforesaid passage, Jafta JA in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*⁷ commented, obiter, that in such context, the definition of tender cannot be given its wide literal meaning and accordingly, it cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional.

[21] In this context, and with reference to the above, the Supreme Court of Appeal, in *Dr JS Moroka Municipality and Others v Betram (Pty) Limited and Another*, stated that:⁸

“Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an ‘acceptable tender’ under the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.”

[22] The requirement that tenders should only be awarded to bidders who are UIF compliant is not in issue. Instead, the applicant contends that the decision of the first respondent to qualify or limit such condition by enforcing the rigid requirement that a tenderer can only prove its compliance by way of a UIF certificate,⁹ without allowing

⁷ 2008 (2) SA 481 (SCA) at para 19.

⁸ (937/2012) [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) (29 November 2013).

⁹ Which in any event is not the case if regard is had to the wording of item 10.

any other valid proof of its compliance, is irrational in light of the purpose of the empowering provision, such purpose being, as stated, to ensure that a prospective tenderer is registered for UIF and that its UIF contributions are up to date.

[23] In short, the applicant's contention is that the first respondent could and should have condoned the applicant's non-compliance with the mandatory tender requirements.

[24] The court in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith*¹⁰ in dealing with the question as to whether an administrative authority has the power to condone a failure to comply with a peremptory requirement, stated that:

"As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so."

[25] This has been reaffirmed by the Supreme Court of Appeal on more than one occasion.¹¹

[26] The first respondent's ability to condone a failure to comply with a peremptory tender requirement, in the present instance, is dependent upon a proper construction of the documents forming part of the tender invitation. Having had regard to the tender invitation under discussion, I am satisfied that it in no manner, either expressly or impliedly, affords the first respondent a discretion to condone a bidder's failure to comply with the prescribed minimum prerequisites set out in items 1 to 10 of the mandatory requirements.

[27] I am aware of the comments in *Millennium Waste Management* that our law permits condonation of non-compliance with peremptory requirements where the granting thereof is not incompatible with public interest and if it is granted by the body

¹⁰ 2004 (1) SA 308 (SCA) at para 31.

¹¹ *Dr JS Moroka Municipality and Others v Betram (Pty) Limited and Another* (supra) at para 12. See also: *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (392/2017) [2018] ZASCA 72 (30 May 2018) at para 30.

for whose benefit the provision was enacted. The aforesaid dictum was later disapproved of by the court in *Moroka Municipality*¹² on the basis that such proposition is inconsistent with the decision of the court in *Pepper Bay*, a decision which is regularly followed and cited with approval, and that it also offends the principle of legality as emphasised by the court in *Sapela Electronics*, to which I have referred. The Supreme Court of Appeal in *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd*,¹³ in considering the aforesaid apparent differences and having held that it was not necessary on the facts confronted with to resolve such differences, stated as follows:

“I am alert to the debate concerning the possible sufficiency of substantial or adequate compliance with what, in conventional terms, is described as mandatory requirements. One should also guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. In the present case the non-compliance is not of a trivial or minor nature. The tender by Veolia was not an ‘acceptable’ one in terms of the Procurement Act, in that it did not ‘in all respects’ comply with the specifications and conditions set out in the RFP. Thus, the challenge in terms of s 6(2)(b) of PAJA, namely that a ‘mandatory and material procedure or condition prescribed by an empowering provision, was not complied with’. In my view, for all the reasons set out above, WSSA has made out a case for setting aside the decision by the Municipality to award the tender to Veolia and the consequent contract.”

[28] I align myself with the decisions of *Moroka Municipality*, *Pepper Bay*, and *Sapela Electronics*.¹⁴ I am, in any event, of the view that the mandatory requirement set out in item 10 of the tender invitation is neither trivial nor is it of a minor nature. Similarly, it is not immaterial, unreasonable or unconstitutional.

¹² At paragraph 18.

¹³ [2018] 2 All SA 644 (SCA) at para 50.

¹⁴ And to which I am bound.

[29] The dictum in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*¹⁵ that in determining whether a ground of review exists under PAJA, the materiality of any deviance from legal requirements is dependent on the extent to which the purpose of the requirements is attained, is distinguishable on the facts of this case.¹⁶

[30] The applicant placed reliance on the comments of the Constitutional Court in *Allpay* to advance its argument that the first respondent was permitted to condone a bidder's non-compliance with the mandatory tender requirements. The Constitutional Court, at paragraph [30], in dealing with the distinction between mandatory or peremptory provisions on the one hand and directory provisions on the other, stated as follows:

“Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in ACDP v Electoral Commission as being “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose.”

[31] An examination and consideration of the context in which the above comments were made is necessary. Such comments were made in the context of the interpretation of documents, and more particularly, the interpretation of clauses which are framed in peremptory terms; and the trend to move away from the strict legalistic to the substantive. In this regard, the Constitutional Court, *inter alia*, made

¹⁵ ZACC 42; 2014 (1) SA 604 (CC) at para 22.

¹⁶ In this regard, see also: *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (392/2017) [2018] ZASCA 72 (30 May 2018) at para 40.

reference to paragraph [13] of *Weenen Transitional Local Council v Van Dyk*,¹⁷ which reads as follows:

“It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the Ordinance is to follow a common sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434 A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138 D - E, seems to be the correct one and does away with debates of secondary importance only.”

[32] Whilst the comments in *Allpay* are apposite to the interpretation and assessment of the general provisions contained in tender invitations such comments are not authority for the proposition that an administrative authority has the power to condone a failure to comply with a mandatory (peremptory) requirement, which is included as a prerequisite for a valid tender, in the absence of a discretion to do so. In *Allpay*, the administrative authority had reserved the right to disqualify any bidder who failed to submit mandatory documentation and accordingly it retained a

¹⁷ [2002] 2 All SA 482 (A) (14 March 2002).

discretion to condone such failure. As already stated, the first respondent herein retained no such discretion.

[33] Similarly, the applicant's reliance on *Millennium Waste Management* and the unreported decision of *Amakahaya Construction CC v Eastern Cape Department of Human Settlements and the Member of the Executive Council of the Eastern Cape Department of Human Settlements*¹⁸ is misplaced. In neither of the aforesaid matters was the court confronted with a failure of a bidder to comply with peremptory tender requirements, which were required to be met in order to meet the threshold of an acceptable tender, and in respect of which the administrative authority in question retained no discretion to condone.

[34] Having come to this conclusion, the tender submitted by the applicant was not an acceptable tender as envisaged by the PPPFA and accordingly, it did not pass the threshold requirement to which I have referred. By necessary implication, the same holds true for the remainder of the bidders who failed to comply with the mandatory tender requirements and in whose cases such requirements were erroneously relaxed by the first respondent. I am accordingly satisfied that the first respondent failed to comply with a mandatory condition prescribed by an empowering provision as envisaged in section 6(2)(b) of PAJA.

[35] In light of the conclusion to which I have arrived, I was required by section 172(1)(a) of the Constitution to declare the decisions under consideration unlawful on this basis alone.¹⁹ Accordingly, it is not necessary to deal with the dispute regarding the validity of the first respondent's award of the Western Cape portion of the tender to the second and third respondents outside the tender validity period, which portion had previously been conditionally awarded to Bicacon (Pty) Ltd within such period.

[36] In respect of the issue of costs, I am satisfied that the applicant was substantially successful herein and accordingly, it was appropriate that the costs should follow the cause. Given the crisp issue which fell to be determined, which

¹⁸ (Eastern Cape Division, Grahamstown) Case No. 3782/2021.

¹⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* ZACC 42; 2014 (1) SA 604 (CC) at para 25.

was uncomplicated in nature, I do not agree that the costs of two counsel was justified in this case.

[37] Having already granted the order herein, I need not make any further order.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Heard: 2 December 2022

Judgment granted: 2 February 2023

Reasons: 17 February 2023

For the applicant: Mr Buchanan SC; Mr Ronaasen SC; and Ms Ellis
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