Reportable: YES [redacted]
Circulate to Judges: YES [redacted]
Circulate to Magistrates: [redacted] NO
Circulate to Regional Magistrates: [redacted] NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	1615/2019
Date Heard:	18 / 10 / 2019
Date delivered:	22 / 11 / 2019

In the matter between:

EXILACLOX (PTY) LTD Applicant

and

MEC, PROVINCIAL DEPARTMENT OF ROADS & PUBLIC WORKS, NORTHERN CAPE PROVINCE First Respondent
MEC, PROVINCIAL DEPARTMENT OF TREASURY, NORTHERN CAPE PROVINCE Second Respondent

Coram: Dauds, AJ

JUDGMENT

DAUDS, AJ

[1] This matter involves an application brought by the Applicant on 25 July 2019 wherein it sought an order in the following terms:

(a) That the application be heard as an urgent application in terms of the provisions of Rule 6(12) of the Uniform Rules of Court and that the necessary condonation be granted to the applicant in respect of

the non-compliance with the prescribed time limits, forms and service;

(b) *That the first respondent be ordered to immediately proceed with the implementation of the Tender that was awarded to the applicant in terms of the Court order dated 21 July 2017;*

(c) *That the first respondent be interdicted from re-advertising the Tender;*

(d) *That it is declared that the respondent has failed to comply with paragraph 4 of the Court order dated 21 July 2017 in that the respondent failed to negotiate with the applicant the requirements and finishes to which the building must comply with in strict compliance with the terms of reference and the building specifications;*

(e) *That the respondent be ordered to pay the costs of the application on an attorney and client scale*

A brief factual background

[2] The 2nd Respondent required office space. It was the 1st Respondent's function to fulfil the 2nd Respondent's needs. As a result, the 1st Respondent advertised a tender on 29 July 2016 for the provision of office accommodation for a period of 5 years and also provided details of the specifications in the tender documents. Interested parties were invited to submit bids. A number of parties submitted bids and one party, Alkara 79 CC was, upon evaluation of all the bids, awarded the tender. Dissatisfied with this decision, the Applicant took it on review. On 18 November 2016 the parties – the Applicant and the 1st Respondent – took an order by agreement. In terms of the order, the 1st Respondent was required to reverse its decision to award the tender to Alkara 79 CC and to re-evaluate all the bids, including the Applicant's bid.

[3] Upon a second evaluation of the bids, Alkara 79 CC was once again awarded the tender. The Applicant, together with another bidder by the name of Ocean Echo Properties 333 CC, took this decision on review.

After hearing argument on the matter, the review Court made an order on 21 July 2017:

(i) *setting aside the 1st Respondent's decision to award the tender to Alkara 79 CC;*

(ii) *declaring the Applicant the preferred bidder in respect of the tender advertised by the 1st Respondent on 29 July 2016;*

(iii) *compelling the 1st Respondent to negotiate with the Applicant, such negotiations to involve the requirements and finishes the office building sought by the 1st Respondent must comply with.*

[4] Litigation in respect of the tender continued after the review Court's decision of 21 July 2017. Alkara 79 CC, the bidder to whom the tender was awarded twice by the 1st Respondent, brought an application on 23 August 2017 for rescission of the review Court's order. The rescission application was heard on 12 December 2017 and on 29 August 2018 judgment was delivered dismissing the application. Alkara 79 CC then applied for leave to appeal. The application was dismissed. Alkara 79 then petitioned the Supreme Court of Appeal for leave to appeal. The petition was dismissed on 28 March 2019.

[5] On 10 April 2019 the 1st Respondent's attorneys wrote to the Applicant's attorneys inviting the Applicant to negotiations in compliance with the review Court's order of 21 July 2017. In accordance with the Court's order, the negotiations were to focus on the requirements and finishes, which the office building offered by the Applicant, had to comply with, such negotiations to be, as the order read, in strict compliance with the terms of reference of the tender documents and the building specifications. Negotiations between the parties deadlocked, and in a letter dated 02 July 2019 the 1st Respondent informed the Applicant that it was cancelling the tender which the 1st Respondent said it planned to then re-advertise. The letter went on to state that the Applicant would be afforded an equal opportunity to submit a bid once

the tender was re-advertised. The Applicant then brought this application.

The Issue of Urgency

[6] When the matter was before the Court on 16 August 2019, the Court was not persuaded that the matter was so urgent that it had to be heard on that day. The Court struck it from the roll and ordered the issue of costs to stand over.

[7] The matter was then set down for hearing on 18 October 2019. According to Mr Cilliers, who appeared for the Applicant and was assisted by Mr Els, this was followed by a preferentially allocated hearing date. Mr Van Aswegen appeared for the 1st Respondent. The 2nd Respondent filed a Notice wherein it made it clear that it abides the Court's decision.

[8] The Applicant justified the urgency of the matter on the ground that, having been declared the preferred bidder by the review Court, it feared imminent harm as a result of the 1st Respondent's cancellation of the tender and its proposed re-advertisement. The Applicant contended that the only way it could protect its interests in the face of the 1st Respondent's notice that it planned to re-advertise the tender, was by way of an interdict.

[9] In defence of its interests, the Applicant wrote the following in paragraph 65 of its founding affidavit:

"*It is of this* [sic] *utmost importance that the first respondent does not proceed with the threatened publication of a new invitation to tender. If the respondent fails to provide an undertaking that it will not do so* *pending the final determination of this application, the applicant will launch a separate interlocutory application for interim relief*"

[10] The Applicant launched the present application on 25 July 2019. Upon receipt of the Applicant's papers, the 1st Respondent gave the undertaking sought by the Applicant. The undertaking was communicated to the Applicant's attorneys by the 1st Respondent's attorneys by way of a letter dated 29 July 2019. Paragraph 3 of the letter reads as follows:

"*With reference to the urgency of the matter we have noted that it hinges on the interdictory relief sought in respect of the re-advertisement of the tender. Our instructions are to provide your client with an undertaking (which is hereby done) that the tender will not be re-advertised pending finalisation of the current litigation*"

[11] One would have thought that, to all intents and purposes, the 1st Respondent's written undertaking disposed of the urgency of the matter, thus no longer rendering the matter urgent. Not so. The Applicant persisted with the issue of urgency. In an email communication dated 01 August 2019 in reply to the 1st Respondent's written undertaking of 29 July 2019, the Applicant appeared to accept that the undertaking not to re-advertise the tender pending finalisation of the matter no longer renders the application urgent. However, in what seemed to be an attempt to keep the issue of urgency alive, the Applicant's attorneys wrote in their email of 01 August 2019 that the date of occupation of the office building by the 2nd Respondent (the Provincial Department of Treasury) nevertheless rendered the matter urgent. The Applicant suggested that any delay in the occupation of the office building by the 2nd Respondent would prejudice the 2nd Respondent. Ordinarily, if what the Applicant sought was an interim interdict, it would have to show imminent and irreparable harm to itself (harm to its own interests) – and not harm to the interests of some other party such as the 2nd Respondent. The 2nd Respondent did not file

any papers in the matter. What the 2nd Respondent did file was a Notice stating that it will abide the Court's decision.

[12] There was a fair amount of correspondence between the parties prior to the Applicant launching its application on 25 July 2019. It is apparent from a letter dated 29 April 2019 written by the 1st Respondent's attorneys to the Applicant's attorneys that the 2nd Respondent (the Provincial Department of Treasury for whom the 1st Respondent was acquiring the office accommodation) considered the resolution of the parking issue to be of importance before taking occupation of the office building. In paragraph 8 of the letter, the 1st Respondent's attorneys wrote as follows:

"*8. In anticipation of the negotiations you are kindly requested to provide our office with:*

8.1 . . .

8.7 your client's proposal in respect of parking which remains an issue to the Treasury Department [2nd Respondent] *on whose behalf our client advertised the tender"*

[13] The significance of the parking issue was repeated in another letter dated 13 June 2019 written by the 1st Respondent's attorneys to the Applicant's attorneys. In paragraph 11 of the letter the 1st Respondent's attorneys wrote as follows:

"*Our instructions are to advise that, in the event that the issue of parking and occupation space can be resolved, full occupation must be given to the Treasury Department* [2nd Respondent] *on 1 December 2019 . . . "*

[14] It was common cause that while the Applicant was able to offer some of the parking onsite, i.e. within the office building offered by the Applicant, the Applicant could only offer the rest of the parking offsite,

i.e. in another building apparently approximately 500 metres from the office building. It is also common cause that the 1st Respondent insisted on all the parking being onsite, i.e. within in the same building, apparently because only this situation would meet or suit the 2nd Respondent's needs.

[15] It was evident that, until the issue of parking (and apparently also the one of occupation space) was resolved, the 2nd Respondent, for whom the 1st Respondent was acquiring the office accommodation, was not keen to take occupation of the office building. It seemingly was in no hurry to do so. And it so happened that up until the matter was argued before Court on 18 October 2019, resolution of the parking issue remained outstanding.

[16] It appears that what the Applicant sought to do was to inject some form of artificiality into the issue of urgency by seeking to invoke some harm or prejudice to be suffered not by the Applicant itself, but rather apparently by the 2nd Respondent. As at 29 April 2019 and 13 June 2019 the Applicant was aware of the fact that resolution of the parking issue was of importance to both the 1st Respondent and 2nd Respondent before the 2nd Respondent was willing to take occupation of the office building.

[17] The Court's decision on 16 August 2019 to strike the matter from the roll for lack of urgency was correct. The matter lacked urgency on that day mainly on two grounds:

17.1 the 1st Respondent had provided the written undertaking sought by the Applicant not to re-advertise the tender pending finalisation of the matter; and

17.2 to qualify for protection in the form of an interim interdict, the Applicant ordinarily must demonstrate harm to itself if the interdict were not granted – not harm to some other party (such as, for instance, the 2nd Respondent in this matter).

[18] The lack of urgency persisted throughout up until and including the day on which the matter was next heard, namely, on 18 October 2019. Ordinarily, costs follow the result. There is therefore no reason why the Applicant should not be held responsible for the 1st Respondent's costs attendant upon the striking of the matter from the roll on 16 August 2019.

Applicant's prayer that 1st Respondent be ordered to implement the Tender

[19] The second prayer in the Applicant's Notice of Motion reads as follows:

"*That the first respondent be ordered to immediately proceed with the implementation of the Tender that was awarded to the applicant in terms of the Court order dated 21 July 2017*"

[20] Upon a reading of the review Court's order of 21 July 2019, it is factually incorrect that the tender advertised by the 1st Respondent for the provision of office accommodation was awarded to the Applicant. Such language was simply not used by the Court in its order. The relevant part of the order (paragraph 3 thereof) reads as follows:

"*It is declared that Exilaclox (Pty) Ltd is the preferred bidder.*"

[21] The Applicant appears to rely on that part of the order declaring it the preferred bidder to contend that the tender was awarded to itself by the review Court, or to contend that the effect of the order was to award the tender to the Applicant.

[22] Mr Cilliers submitted that there was nothing magical about the Court's use of the phrase "preferred bidder", and that, having regard to the other terms of the review Court's order of 21 July 2017 and the full judgment as well as the facts of this matter, that part of the Court's order declaring the Applicant the preferred bidder should be read as awarding the tender to the Applicant, and all that was left to be done was for the 1st Respondent to implement the terms of the tender by ensuring that the necessary agreement between the parties giving effect to the Court's order was signed.

[23] It goes without saying that, on the face of it, there is a difference in meaning between the words "*the Applicant is declared the preferred bidder*" and "*the Applicant is awarded the tender*". I do not believe that being declared a preferred bidder could, without more, be translated as meaning that a tender has been awarded. Nor am I of the view that the review Court's order of 21 July 2017 could have been intended to be read, as it were, as an award of the tender to the Applicant.

[24] Mr Cilliers further contended that the issues in respect of which the parties could negotiate were very limited. As he put it, they were "*numerus clausus*". According to him, most of the issues involving the tender were fixed — they had been settled and were not open to negotiation. Mr Cilliers submitted that the only things the parties could negotiate were, for instance, the colour of the paint to be used on the walls, the carpets to be laid and such other relatively insignificant

issues. Mr Cilliers referred the Court to a part of the tender document titled "*TERMS OF REFERENCE AND BUILDING SPECIFICATION REQUIREMENTS FOR LEASE OF OFFICE ACCOMMODATION ON BEHALF OF THE DEPARTMENT OF PROVINCIAL TREASURY AT FRANCES BAARD DISTRICT, KIMBERLEY*". Mr Cilliers drew the Court's attention to the items listed on page 381 of this document. Those were the items that, so Mr Cilliers contended, could not be negotiated as they were already fixed — settled between the parties. There were 19 items which, according to Mr Cilliers, were non-negotiable from the Applicant's perspective. They included the waiting area of the office building, the conference room, the registry, the strong room, the boardroom, the reception area, the security/control room, the cleaners' rest room, the disabled toilet facility, the warehouse, the training facility, the sick bay, archive registry, registry, the kitchen, the covered parking, the secured parking, the visitors' parking and the full toilet facilities.

[25] The list of 19 items mentioned above is preceded by a heading which reads as follows:

> "*SPECIFICATION FOR ADDITIONAL REQUIREMENTS AND FINISHES TO WHICH THE BUILDING MUST COMPLY:*
>
> *NB: The additional required items are subjected to negotiation prior the awards* [sic]*, preferred bidder will be required to submit detailed implementation plan with regard to additional items*"

[26] The next heading — the one immediately following the above — reads as follows:

> "*COMPLIANCE REQUIREMENTS*
>
> *NB: The compliance required items are subjected to negotiation prior the awards* [sic]*, preferred bidder will be required to submit detailed implementation plan with regard to compliance items*"

[27] The above heading is then followed by what appears to constitute a list of the "compliance items". They include the carpets or tiles for flooring, the security doors to be fitted on all external doors as well as the store room, the burglar bars to be fitted on all windows, the demarcation of the waiting room, the air-conditioning in all offices and the storeroom, the blinds on all windows, the double power skirting in all offices, the accessibility of the office building to people with disabilities, the emergency escapes which includes fire-fighting equipment and signage, compliance with building regulations. Compliance with the specifications required by the Provincial Treasury (2nd Respondent) for whom the office accommodation was sought is also expressly mentioned.

[28] The tender documents thus made it clear that all those items that Mr Cilliers contended were relatively insignificant and not subject to negotiation actually had to be negotiated and resolved between the 1st Respondent and a bidder before the tender could be awarded. The language of the tender documents is clear. It was very clear that the parties were in disagreement in respect of at least on 2 items – the parking and the office accommodation space.

[29] It was common cause that the parking issue remained a bone of contention between the parties. It was apparent that the 1st Respondent required a total of 199 parking bays or areas. While the Applicant offered some of the parking within the same office building, the Applicant was only able to make the rest of the parking available offsite, i.e. in another building approximately 500 metres away. The 1st Respondent insisted that, in accordance with the 2nd Respondent's needs, all the parking should be made available within the same office building. Mr Cilliers submitted that the fact that the rest of the parking was made available offsite was of no moment. Mr Van Aswegen who appeared for the 1st Respondent maintained that the parking issue was

of importance to the 1st Respondent. He sought to demonstrate the actual distance between the offsite parking and the office building offered by the Applicant by referring the Court to an aerial picture showing the location of the office building and the location of the offsite parking. The aerial picture formed part of the bundle of documents. It was common cause that the offsite parking was located approximately 500 metres from the office building.

[30] The parties could not agree on the parking issue. While the 1st Respondent insisted that its tender specifications for the office accommodation require that all the parking should be in the same building, the Applicant took the view, firstly, that its bid complied with all the specifications of the tender. Mr Cilliers submitted that the parking issue did not constitute a matter so material or substantive for the 1st Respondent not to, as it were, implement the tender in the Applicant's favour, especially in view of the review Court's order which declared the Applicant the preferred bidder. He further contended that, in any event, it was simply not possible to have all the parking in the same building. That the resolution of the parking issue was a serious matter for the 1st Respondent is apparent from the letters dated 29 April 2019 and 13 June 2019 sent to the Applicant's attorneys by the 1st Respondent's attorneys. In the letter of 29 April 2019, the 1st Respondent requested the Applicant, in anticipation of the negotiations as directed by the Court order of 21 July 2017, for proposals in respect of parking which the 1st Respondent's attorneys wrote remained an issue. In paragraphs 4, 5 and 6 of a further letter dated 13 June 2019 the 1st Respondent's attorneys wrote as follows:

"*4. There appears to be three obstacles that our respective clients need to overcome to enable the Department to enter into a lease agreement with your client.*

Parking

5. *We had the opportunity to familiarize ourselves with the current parking offered and attach hereto a Google Map printout of the area. Although it might be so that the parking is not '1 kilometre away from the Flaxley House* [the location of the office building]', *it most definitely is also not 'literally across the street' as alluded to by Ms Campodonico during our discussions.*

6. *The unfortunate fact of the matter is that the current situation is wholly unsuitable to our client's needs and unless this issue can be resolved, this issue appears to be unsurpassable*"

[31] The letter of 13 June 2019 proceeds as follows:

"***Occupation Space***

7. *Whilst your client offers a total rentable area of 10,477m^2, the Department only required a total rentable area of 7,930m^2.*

8. *This amounts to a monthly payment of R4,006,940.40 (in respect of the first year) towards wasted space which will result in wasteful and fruitless expenses to the Department. Kindly provide us with your client's comments and proposed way forward on this issue"*

[32] Mr Cilliers submitted that while the 1st Respondent's office space requirements (for use by the 2nd Respondent) was indeed 7,930m^2 and the Applicant did in fact offer 10,477m^2 of office space, there would be no additional charge in respect of the excess space. Mr Van Aswegen who appeared for the 1st Respondent contended that the matter was not quite as settled as Mr Cilliers made it out to be and that it remained an issue, at least as far as the 1st Respondent was concerned.

[33] In view of all the outstanding issues, the question is whether, having regard to the review Court's order declaring it the preferred bidder, the Applicant's contention or conclusion that the review Court's order should be read as having awarded it the tender was reasonable or sustainable? Having regard to the language of the order as well as the disagreements between the parties, I do not believe so. The parking

issue appeared to have been a fundamental bone of contention for the 1st Respondent. In these circumstances, it would be difficult to draw the reasonable conclusion that the 1st Respondent had any intention to contract with the Applicant. In other words, it lacked the "*animus contrahendi*."

[34] Ordinarily, preferred bidder status in procurement matters precedes the actual award of a tender. At preferred bidder stage, no final award of the tender is usually made. A preferred bidder is the party with whom a contract may eventually be entered into as part of the finalisation of the award of a tender. This is the position the Applicant in this matter found itself in as a preferred bidder. It did not have the contract in hand yet, although it might still.

[35] An award of the tender was never made to the Applicant – not by the 1st Respondent, nor the review Court's order of 21 July 2017. It is accordingly not competent for this Court to make the order sought by the Applicant in paragraph 2 of its Notice of Motion wherein it prays for an order:

> "*That the 1st Respondent immediately proceed with the implementation of the tender that was awarded to the Applicant in terms of the Court order dated 21 July 2019*"

[36] Mr Cilliers relied on, among others, *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) for support of his contention that, having regard to the circumstances of the matter as well as the review Court's order, the tender advertised by the 1st Respondent had been awarded to the Applicant. However, the facts of the Jicama case are distinguishable from those of the present matter. In the Jicama case, the Applicant was informed in writing on 12 July 2004 by the West Coast District Municipality that the Applicant's bid for the tender had

been successful. The Applicant then sent a letter to the municipality in which it intimated its acceptance of the municipality's tender. In other words, an offer was made by the municipality and it was accepted by the Applicant. The necessary elements of "*animus contrahendi*" (intention to contract) were present. However, in a letter dated 25 October 2004 the municipality informed the Applicant that it had decided to re-advertise the tender, thereby cancelling the tender after acceptance thereof by the Applicant. It was for all the above reasons that the Court in that matter was disposed to finding in favour of the Applicant by setting aside the municipality's decision to cancel the tender.

[37] In the present case the Applicant was never informed by the 1st Respondent that its bid was successful, nor had the review Court made such an order.

[38] Mr Cilliers also relied on *CGWE Altsthom Equipments v GKN Sankey (Pty) Ltd* 1987 (1) SA (A) 81 to drive home the point that the Applicant had been awarded, or effectively awarded, the tender and, as such, a binding contract came into being between itself and the 1st Respondent, the terms of which the 1st Respondent was required to implement.

[39] The facts of the CGWE Altsthom case are similarly distinguishable from those of the present matter. In that case, the Court of first instance and the Court of Appeal found, as was contended by GKN Sankey, that its bid for the manufacture and supply of steel cable trays to be used as a support system in the installation of 20,000 electrical cables, was accepted by CGWE Altsthom, thus bringing a binding contract into being between the parties. In this regard, both the Court of first instance and the Court of Appeal relied on a letter written by CGWE Altsthom wherein

it communicated its acceptance of GKN Sankey's bid, as well as the parties' conduct and interactions subsequent to the letter which left no doubt about the acceptance of the bid. And, quoting the remarks of Watermeyer ACJ in *Reid Bros (South Africa) Ltd v Fischer Bearings Co. Ltd* 1943 AD 232 at 241, namely, "*. . . a binding contract is as a rule constituted by the acceptance of an offer*", the Appellate Division (as it then was) in the CGWE Altsthom case found that GKN Sankey's bid constituted an offer made *animus contrahendi* (with the intention to contract).

[40] In the present matter the 1st Respondent never provided the Applicant with any form of communication, written or otherwise, that its bid had been accepted and the tender accordingly awarded to the Applicant. In fact, it is common cause that the 1st Respondent had twice decided to award the tender to another bidder, namely, Alkara 79 CC, a decision which the Applicant had taken on review twice. The review Court had also never actually made the decision to award the tender to the Applicant. What the Court did do was to declare the Applicant the preferred bidder. And while Mr Cilliers strenuously contended that the review Court's declarator effectively amounted to a decision to award the tender to the Applicant, this Court does not agree with the contention.

Interpretation of the Review Court's order

[41] As correctly pointed out by Mr Cilliers in his heads, in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) the Court said the following at 304D-F:

> "*The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules*"

[42] The Court went on to say that:

> "*Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it*"

[43] It is apparent that when pronouncing judgment in the review case, Her Ladyship, Ms Justice Mamosebo and His Lordship, Mr Acting Justice Lever sitting as the review Court, were alive to the distinction in meaning between a decision to award a party a tender and a decision to declare a party a preferred bidder. A copy of the review Court's judgment and order formed part of the record of the proceedings. For instance, in paragraph 9 of the judgment, the Court wrote as follows:

> "*It is common cause that the Bid was awarded to Alkara 79 CC*"

[44] In paragraph 10 of the judgment, the Court wrote further:

> "*. . . Alkara was again found to be the most successful bidder and was awarded the tender*"

[45] And in paragraph 35 of the judgment, the Court wrote:

> "*. . . the decision to award the bid to Alkara stands to be reviewed and set aside*"

[46] It is clear that the Court understood that Alkara 79 CC was actually previously awarded the tender, and not merely declared a preferred bidder, as the Applicant was by the review Court's order.

[47] The review Court's language in its judgment and the order is clear and unambiguous. Nowhere in either the judgment or the order can the

Court's language be read as meaning that the Court had made a decision to award the tender to the Applicant, or that the effect of the order is that the tender was awarded to the Applicant. Such an interpretation of the order does not accord with the Court's clear language or intention.

Applicant's prayer that the 1st Respondent be interdicted from re-advertising the tender

[48] This issue has extensively been addressed under the issue of urgency. The 1st Respondent did, through its attorneys, give the written undertaking sought by the Applicant not to re-advertise the tender pending finalisation of the matter. The Applicant nevertheless persisted with the application on an urgent basis and with this prayer.

Applicant's prayer for a declarator that 1st Respondent had failed to negotiate in compliance with the review Court's order

[49] It is common cause that another bidder, Ocean Echo Properties 333 CC, brought an application to have the review Court's order of 21 July 2017 rescinded. The application was dismissed. Ocean Echo Properties then applied for leave to appeal. The application was denied. Ocean Echo Properties then petitioned the Supreme Court of Appeal for leave to appeal. This petition was denied on 28 March 2019. It was only after this date that any negotiations between the 1st Respondent and the Applicant in compliance with the review Court's order could commence.

[50] It is also common cause that the 1st Respondent's attorneys sent the Applicant's attorneys a letter dated 10 April 2019 wherein the Applicant

was invited to negotiations with the 1st Respondent in compliance with the review Court's order. The 1st Respondent's attorneys proposed two dates to meet and asked the Applicant to confirm its availability. The parties met on 17 April 2019. Correspondence between the parties followed after this first meeting. The first letter after the meeting was dated 23 April 2019, written by the Applicant's attorneys to the 1st Respondent's attorneys. The 1st Respondent's attorneys replied by way of a letter dated 29 April 2019. In paragraph 8.7 of that letter the 1st Respondent's attorneys wrote that the parking as required in accordance with the tender documents remained an issue for their client (i.e. 1st Respondent) and the Applicant was invited to make proposals in this regard. The Applicant quoted the letter of 29 April 2019 in full in paragraph 36 of its founding affidavit.

[51] Further letters followed between the parties during May 2019 – on 09 May 2019 and 22 May 2019. The parties met again on 23 May 2019. More letters were exchanged between the parties after the second meeting. These letters are dated 23 May 2019 (sent right after the meeting), 04 June 2019, 13 June 2019 and 25 June 2019. In their letter of 13 June 2019 the 1st Respondent's attorneys repeated the issue involving parking (and other issues such as the occupation space and occupation date). On the issue of parking, the 1st Respondent's attorneys wrote that their client was not happy with the offsite parking offered by the Applicant. The attorneys wrote that the parking situation was wholly unsustainable to their client's needs and unless the issue was resolved, it remained a stumbling block.

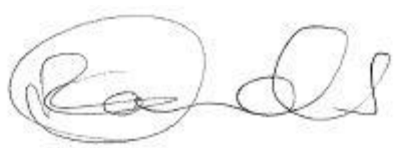
[52] On 16 July 2019 the 1st Respondent's attorneys wrote the Applicant's attorneys a letter wherein they referred to the negotiations between the parties and the issues that remained outstanding, namely, that the 2nd Respondent (Provincial Department of Treasury) required all of its

parking to be onsite (i.e. within the same building) and that the resolution proposed by the Applicant in this regard (the offer of onsite and offsite parking) was not acceptable to the 2nd Respondent. The Applicant was then informed in the letter that the 1st Respondent was cancelling the tender with immediate effect. The letter went on to say that the tender would be re-advertised and that the Applicant was afforded an equal opportunity to submit a bid in respect of the re-advertised tender.

[53] It is apparent from the above facts that it cannot be said that the 1st Respondent failed to negotiate with the Applicant in compliance with the review Court's order of 21 July 2017. The factual position is that the parties did negotiate, but negotiations broke down.

In the circumstances, the following order is made:

THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING THE COSTS OF 16 AUGUST 2019.



CI DAUDS

ACTING JUDGE

Obo Applicant:	Adv. P.G. Cilliers SC; asstd by Adv. APJ Els (oio Waldick Jansen van Rensburg Attorneys, Centurion c/o Duncan & Rothman, Kimberley)