**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: 1954/2017

In the matter between:

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| **JORIAN CONSTRUCTION CC** | Applicant |
| and | |
| **LETSEMENG LOCAL MUNICIPALITY** | First Respondent |
| **MAKOMOTO STONE (PTY) LTD** | Second Respondent |
| **ZALISILE MSEBENZI CIVILS** | Third Respondent |

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**CORAM:** RAMPAI, J *et* SNELLENBURG, AJ

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**HEARD ON:** 12 JUNE 2017

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**DELIVERED ON:** 24 AUGUST 2017

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**JUDGMENT BY:** SNELLENBURG, AJ

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[1] The applicant (Jorian Construction CC) seeks a threefold relief. In the first place, the applicant seeks to have the first respondent's decision in favour of the third respondent for upgrading of the water treatment works at Oppermansgronde reviewed. In the second place the applicant seeks to have the subsequent contract concluded between the first and the third respondent pursuant to the former's acceptance of the latter's tender bid set aside. In the third place the applicant seeks to have a judicial substitution order alternatively a remission of the matter to the first respondent with the directive that the tender bids be re-evaluated.

[2] The background against which the application stands to be evaluated can be summarised as follows:

2.1 The applicant, the third respondent and twelve other parties submitted bids in response to the invitation of the first respondent, Letsemeng Local Municipality, for the upgrading of the water treatment works at the Oppermansgronde. The water project was technically described as BID LETS/2016/WATER/03B: UPGRADING OF WATER TREATMENT WORKS AT OPPERMANSGRONDE. The tenders were invited on 15 January 2017 and the closing date for submission of bids was 2 February 2017. Tenderers also had to attend a compulsory tender briefing / site inspection which took place on 19 January 2017.

2.2 The project that forms the subject- matter of the tender forms part of the first respondent's plans to address water shortages in the Oppermansgronde and Koffiefontein communities. It therefore relates to the execution by the first respondent of its constitutional obligations to the affected communities. The project essentially comprises of the construction of a 5Ml additional raw water storage reservoir and connector pipework (the Works).

2.3 The first respondent appointed Messrs Mat Engineers & Project Managers to supply professional engineering services and to assist with the implementation of the Works.

2.4 During the beginning of April 2017 the applicant became aware that its bid had been unsuccessful and that the tender had been awarded to a rival bidder. It then caused a letter, dated 3 April 2017, to be addressed to the municipal manager of the first respondent. The aim of the letter was to record the applicant's dissatisfaction about the first respondent's failure to advise the applicant of the outcome of the bids evaluation; to let the first respondent know that, although the applicant had not been informed of the outcome of the bids evaluation, it had since become aware that the contract was awarded to Zalisile Service (sic) which was apparently supposed to refer to the third respondent, Zalisile Msebenzi Civils; to request an undertaking that the execution of the contract work be stayed pending the resolution of the dispute through the court processes; to demand in terms of section 5 Act No. 3 of 2000 that reasons be supplied for the decision not to award the tender to the applicant and to request to be furnished with copies of the following documents: the minutes of the meeting of the Bid Evaluation Committee, its evaluation report and its recommendations as well as the minutes of the Bid Adjudication Committee, its report and its recommendations.

2.5 The first respondent replied through its municipal manager on 5 April 2017. He supplied written reasons for the decision. I will deal with those reasons below. He also furnished the applicant with two documents, namely the consulting engineer's tender evaluation report which was issued on 13 February 2017 and the minutes of the Bid Evaluation Committee meeting held on 13 March 2017. The minutes of the meeting of the Bid Evaluation Committee for the evaluation of tender forms, the first document of the report and its recommendations to the Bid Adjudication Committee for appointment of a bidder to the project are contained in paragraph 4.5.The bidder recommended for appointment was Makomota Stone (the second respondent), according to the recommendation in the minutes of the Bid Evaluation Committee.

2.6 Notwithstanding its request, the applicant received no undertaking from the first respondent. As a result, the applicant then approached the court on urgent basis for an immediate interdictory relief, pending the finalisation of the review of the first respondent's decision, to prevent the implementation of the first respondent's decision whereby the tender contract was awarded to Makomota Stone (who was joined in the application as the second respondent) and to review the first respondent's decision to award the tender to the second respondent.

2.7 In its answering affidavit, the first respondent denied the applicant's allegation that the tender was awarded to the second respondent. Accordingly the first respondent asserted that the relief sought by the applicant was legally untenable. This led to the joinder of the third respondent and the filing of a supplementary affidavit by the applicant to amplify its case against the first and the third respondents. In its supplementary affidavit, the applicant abandoned any relief previously sought against the second respondent. That effectively signalled the end of the second respondent's participation in the proceedings.

2.8 Whilst the first respondent took issue with the procedure employed by the applicant for the third respondent's joinder, the third respondent, however, filed a notice to abide regarding the interdict proceedings. It also filed a notice to abide in the main review application. The first respondent contended that the applicant should have withdrawn its current application and issued a fresh application. In the light of the further conduct of the matter, the objection has fallen by the wayside.

2.9 The upshot was an order granted on 25 May 2017 to regulate the further conduct of the matter. It appears that the court indicated that the parties should agree to the time periods for the further conduct of the review on truncated basis. It is apposite to quote the court order that was subsequently made:

> "1. The First Respondent will file a supplementary opposing affidavit by Monday, 29 May 2017.
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> 2. The Applicant will reply to that affidavit, if necessary, by 2 June 2017.
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> 3. The Applicant will file heads of argument by 6 June 2017.
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> 4. The First Respondent will file heads of argument by 8 June 2017.
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> 5. The matter is enrolled for hearing on Monday, 12 June 2017"

2.10 The applicant joins issue with the extent of the first respondent's supplementary answering affidavit and complains that the first respondent's further supplementary affidavit canvassed matters which fall outside the ambit of merely answering to the allegations contained in paragraphs 8 and 12 of its supplementary affidavit. The court order is silent regarding a limitation of the ambit of the supplementary opposing affidavit, but the applicant and the third respondent both reference a direction by the court that the third respondent is required to respond to the allegations in paragraphs 8 and 12 of the applicant's supplementary affidavit.

2.11 By agreement, the matter would be adjudicated merely on the papers before court, which would obviously include the further affidavits and any annexures. The complete record of proceedings, including the tender documents, were thus by agreement between the parties not filed, contrary to the normal requirements of Rule 53.

[3] It is convenient to first dispose of the preliminary issue regarding the admissibility of the content of the supplementary answering affidavit. It will be recalled that the applicant contends that the first respondent was at liberty to deal specifically with the allegations contained in paragraphs 8 and 12 only of its supplementary affidavit and that the answering affidavit goes much further beyond those parameters.

[4] The relevant parts of paragraphs 8 and 12 of the applicant's supplementary affidavit read:

> "8. I was rather surprised by this revelation [that the contract was awarded to the third respondent], simply because Zalisile also could not have received the contract.
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> 12.1 Jorian must have outscored Zalisile as well. It submitted a bid of around R1 300 000.00 (one million three hundred thousand rand) cheaper than the Zalisile bid. Of course if the Jorian bid was properly adjudicated, it would have outscored Zalisile as well."

The applicant continues to criticise the evaluation procedure followed by the Bid Evaluation Committee and the Bid Adjudication Committee.

[5] In my view the answering affidavit in its entirety is admissible and should be taken into consideration. The gist of the allegations in paragraphs 8 and 12 was to the effect that the applicant should have been awarded the tender instead of the third respondent and that if the applicant's bid was properly adjudicated it would have outscored Zalisile. The first respondent was in my view fully entitled to present its case in the supplementary answering affidavit in the manner it did. It would be manifestly unfair to the first respondent to expect it to answer the allegations without affording it the opportunity to contextualise its case. I am in any event not convinced that the content of the answering affidavit can be said to fall outside the ambit of answering the allegations in paragraphs 8 and 12 of the supplementary affidavit.

[6] If there were any merits in the complaint it is in the interest of justice in this matter to have regard to the evidence in the supplementary answering affidavit. In the applicant's heads of argument the applicant *inter alia* seeks a directive as part of its alternative relief that the matter should be remitted to the first respondent for re-evaluation. If the process is vitiated because it is found not be fair and lawful and the 'remedy stage' becomes relevant, the "further considerations" dealt with by the first

respondent in its supplementary answering affidavit should also be considered before any order is made in that event.

[7] The dispute revolves around the question of fairness and lawfulness of the procurement process. It is by now well established that a tender process initiated by an organ of state is an administrative action as envisaged by the statute, PAJA[1], and that the participants (tenderers) are entitled to a lawful and procedurally fair process. It is equally well established that the executive in all spheres are constrained by the principle of legality, in other words they may not exercise any power or perform any function not authorised by empowering legislation.

[8] The applicant's evidence in its affidavits reveals that it assails the decision to award the tender to the third respondent, and not to it, on the following grounds:

8.1 The disqualification of the applicant's bid in want of supplying a municipal account or valid lease agreement constitutes a reviewable irregularity as the same was supplied;

8.2 The second reason advanced, namely that the applicant's bid "did not meet all the requirements of being awarded the tender from technical report, ext", is vague and seeks to justify the unlawful decision by *ex*

[1] Promotion of Administrative Justice Act, 3 of 2000, 'PAJA' as it is commonly referred to.

*post facto* seeking possible grounds to justify the decision to discard the applicant's bid. The reasons clearly stated that the applicant's bid did not pass through functionality stage of evaluation;

8.3 If the court finds that other reasons may be considered the risk assessment by the consulting engineers was flawed for the following reasons:

8.3.1 The consulting engineers found that the applicant's bid had a 27% variance from the estimate. The bidders were not informed to include a 10% contingency item in the bill of quantities. If the 10% contingency is not taken into consideration the applicant's bid would be within 10% to 20% of the estimate. The bid would not be high risk, but medium risk and could not be rejected because it was high risk;

8.3.2 A responsive and functional tender cannot be discarded as being too low without affording the tenderer at issue (*sic*) an opportunity of explaining its tender price. The applicant was never afforded an opportunity to explain its bid. Had the applicant been afforded an opportunity to explain its bid it could have laid to rest any fears regarding the prices it submitted;

8.3.3 The consulting engineers did not express an opinion on any specific item in the applicant's Bill of Quantities, but looked at the globular amount without reference to specific works at issue. This is irrational and arbitrary;

8.3.4 The use of a predetermined percentage is unlawful because it offends against the National Treasury's practice notice (which is dealt with below) which prohibit (sic) the disqualification of responsive tenders on this basis;

8.3.5 The CIDB Regulations require redetermination of the estimate after all the bids have been submitted to determine what the true 'market value' of the contract and estimate of the works are. The redetermination is also necessary to determine the range of all the tenderers' CIDB grading whereafter the average is determined which is considered with the consulting engineers estimate and the redetermination must be done;

8.4 The first respondent's Supply Chain Management Policy [SCPM] does not contain any structured manner in which the risk assessment must be done with reference to any specific criterion or criteria. The empowering provision or document does not authorise the risk assessment in a certain way;

8.5 The applicant must have outscored the third respondent if the bids were properly adjudicated;

8.6 The third respondent should not have advanced to the awarding of points stage. The Bid Adjudication Committee simply discarded the bid evaluation committee's findings without dealing with the third respondent's functionality;

8.7 There is no indication in the Bid Adjudication Committee's report that it investigated the functionality of the third respondent;

8.8 It is entirely unclear why the members of the bid adjudication committee took cognisance and finally came to a conclusion of the fact that the applicant substantially delayed completion of the previous project and that the delay was the applicant's fault. It is not uncommon for delays in projects and a final completion certificate was issued to the applicant and the contract was in fact extended and the additional work done;

8.9 The risk analysis does not form part of the objective criteria provided for in section 2 of the Preferential Procurement Policy Framework Act of any justifiable reason why the highest points scorer cannot receive the tender;

8.10 The first respondent performed 2 functionality exercises;

8.11 In the event that the court allows the evidence regarding the alleged expenditure already incurred in connection with the project, which the applicant claims falls outside the ambit of what the first respondent was allowed to answer to, then the first respondent failed to append the progress reports to substantiate its contentions; there is no reflected expenditure; there is no evidence regarding what the value of the works were when the court interdicted further construction and no explanation as to the exact nature of the work thus far performed.

Those then were grounds the applicant relied upon for the relief sought.

[9] The applicant abandoned its reliance on the objection based on the contention that the third respondent was irregularly advanced to the scoring stage. The concession was fairly made. The applicant also conceded during argument that its Bill of Quantities provided for a 10% contingency.

[10] The first respondent contends that it awarded the contract in full compliance with the required tender process legislation and objectively awarded the tender. It contended that there was no

substance in any of the grounds the applicant relied upon for the relief sought.

[11] The applicable test for the proper legal approach to determine the existence and legal effect of proven irregularities in a tender process was articulated in the leading judgment in the matter of **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others** 2014 (1) SA 604 (CC) [Allpay] by Froneman, J speaking on behalf of a unanimous court:

"[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA[2]. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

[29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.[3]

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[2] **The Promotion of Administrative Justice Act**, 3 of 2000.

[3] **Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others** 2008 (2) SA 481 (SCA) (Millennium Waste) at paras 28-32.

[30] 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.[4] That strict mechanical approach has been discarded.[5] 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".[6] This is not the same as asking whether compliance with the provisions will lead to a different result."

[12] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of the outcome under a State procurement process is necessarily *s* 217 of the Constitution[7]:

"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national

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[4] **Hoexter Administrative Law in South Africa 2 ed** (Juta and Co Ltd, Cape Town 2012) at 48-50 and 292-5.

[5] Compare **Maharaj and Others v Rampersad** 1964 (4) SA 466 (AD). See also **Weenen Transitional Local Council v Van Dyk** 2002 (4) SA 653 (SCA) at para 13.

[6] **African Christian Democratic Party v Electoral Commission** 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) (ACDP v Electoral Commission) at para 25.

[7] **Allpay**, supra para 32.

legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[13] The national legislation was enacted in the form of the **Preferential Procurement Policy Framework Act 5 of 2000** [**Procurement Act**]. It is beneficial to revisit *s* 2:

"(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed;

(b)(i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) the specific goals may include-

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance."

[14] The provisions of *s* 2(1)(*f*) are clear and unambiguous. The contract must be awarded to the responsive tenderer who scores the highest points, unless objective criteria in addition to those

contemplated in *s* 2(1)(*d*) and (*e*) justify the award to another tenderer.

[15] An unsuccessful tenderer has the right to obtain the information which the tenderer reasonably requires in order to enable him to determine whether his right to lawful administrative action has been violated. Without reasons he might be without remedy. See **Transnet Ltd v Goodman Brothers (Pty) Ltd** 2001 (1) SA 853 (SCA). As consequence the organ of state must furnish the reasons for its decisions on request. See **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC) para 34.

[16] The organ of state is bound to the reasons supplied for the administrative decision. It may not supplement or change the reasons in its answering affidavit. In the matter of **Jicama 17 (Pty) Ltd v West Coast District Municipality** 2006 (1) SA 116 (C) para 11 *et seq* [Jicama] Cleaver, J eloquently explained why the decision maker is bound to the reasons supplied and will not be allowed to supplement the reasons in its answering affidavit ex post facto:

"[11] ... it is not open to the first respondent to raise the other defences raised for the first time in its answering papers. The applicant has come to court in order to deal with the reason which was conveyed to it as being the basis on which the decision to cancel the tender had been made. The reason why the first respondent should not now be allowed to supplement the basis on which its previous decision was taken is eloquently set out in a judgment of the Court of Appeal in R v Westminster City Council, Ex parte Ermakov[8] viz:

'(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in Ex p Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.

(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only

[8] [1996] 2 All ER 302 (CA) at 315h - 316d.

does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to application to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.'

[12] Another reason the first respondent should not be allowed to supplement the reasons for its decision by reasons which were clearly taken ex post facto is that if it was allowed to do so, it would in effect be converting the applicant's application for review, which is being brought on narrow grounds, into a full-scale review of its own decision. This would be palpably unfair and in any event would be defective for the tender documents of the other tenderers are not before the Court."

The dictum in **Jicama** was endorsed and applied by the Supreme Court of Appeal in the matter of **National Lotteries Board and Others v South African Education and Environment Project** 2012 (4) SA 504 (SCA) [National Lotteries]. Cachalia JA's remarks in paras 26 and 27, on behalf of the unanimous Court, are instructive:

"[26] The question here is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application.

[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified.[9] For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide."

[17] The reasons serve several purposes which include to inform the affected party of the reasons why it took the decision and also why the decision-maker thinks that the administrative act is justified.[10]

[18] It is convenient to identify the reasons initially advanced by the first respondent for its decision not to award the tender to the applicant.

[19] The first respondent's written reasons for the decision not to award the tender to the applicant, given on 5 April 2017, in relevant parts read:

"Your company did not meet all the requirements of being awarded the tender from the technical report, Bid evaluation and Bid adjudication reports and also

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[9] **Wade & Forsyth, Administrative Law** 10 ed at 441-2.

[10] **Commissioner, South African Police Service, and Others v Maimela and Another** 2003 (5) SA 480 (T).

didn't meet some requirements of the advert being municipal account or valid Lease agreement, as a result the company did not pass through functionality stage of evaluation.

The Municipality would also like to bring it to the attention of the company that low prices do not guarantee award of a tender as stipulated on an advert."

[20] In the answering affidavit the first respondent explains that the written reasons,

"must be understood to convey the message that the technical recommendations from Mat Engineers did not favour the appointment of the Applicant."

The deponent on behalf of the first respondent further explains that he regrets the wording confirming that the tender did not comply with some of the advertised criteria, as this seemed to have referred to responsiveness of the tender, which the applicant's tender was, but that it did not meet the functionality requirements of the first respondent.

[21] The reasons advanced by the municipal manager in the supplementary answering affidavit for the decision not to award the tender to the applicant can be summarised as follows:

21.1 Mat Engineers identified the applicant as "high risk" to complete the project;

21.2 Due to previous performance of the applicant for the first respondent on a project for the upgrading of streets in Bolokanong, Petrusburg, contract number BOV/LET/2013/01, which project was completed late, behind the stipulated project period, the BAC[11] decided not to recommend the applicant.

[22] The reasons advanced by the municipal manager in the answering affidavit for the recommendation of the third respondent are:

22.1 the third respondent had previous experience with work on similar projects; and-

22.2 the third respondent completed projects before in first respondent's jurisdiction within the scheduled time and according to the required specifications.

[23] In my view the first respondent is attempting to justify its decision *ex post facto* by supplementing the reasons initially given in its answering affidavit.

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[11] Bid Ajudication Committee.

[24] The first respondent furnished conflicting reasons for the decision but the decision taken could not be justified on the strength of the given reasons. Once the applicant's tender was found not to be responsive it was not eligible to advance to the next round. The administrator clearly relied on the non-responsiveness of the tender. If it were not so, the first respondent, as public administrative organ, would not have included such a consideration or finding among the reasons it furnished for its decision. This puts pay to the first respondent's attempt to explain how the reasons should be understood. The reasons make perfect sense insofar as the decision was based on the fact that the applicant's tender was found to be non-responsive. If the first respondent, in addition relied on objective grounds, the same would not only be in conflict with the non-responsiveness of the tender (because that would be the end of the matter as far as evaluation is concerned) but the first respondent would obviously have stated so clearly and lucidly in the given reasons. It did not.

[25] The point of departure is to establish, factually, whether an irregularity occurred in the process which amounts to a ground of review under PAJA. In doing so we are confined to review the procedure adopted by functionary in arriving at his decision. [12]

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[12] **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd** 2003 (6) SA 407 (SCA).

[26] It is common cause that the applicant's tender was responsive and should have advanced to the next round. It appears also from the record.

[27] In relying on this clearly erroneous ground a reviewable irregularity occurred in the process which is reviewable under PAJA.

[28] The review must therefore succeed on this score.

[29] The second stage of the enquiry relates to what would be a just and equitable remedy in declaring the administrative action constitutionally invalid. As the court explained in **Allpay**, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.[13]

[30] The applicant argues that the matter should not be remitted to the first respondent because, as it reckons, it is a foregone conclusion that the tender would, at any rate, ultimately be awarded to itself. On the contrary, the first respondent prays that the matter should be remitted to it for re-evaluation in the event that the review is successful. In its opinion, the outcome of the process of re-evaluation is not as simply predictable as the applicant makes it out to be. The first respondent seeks no relief for a substantial order by means of a counter application.

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[13] **Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others** 2008 (2) SA 481 (SCA) (Millennium Waste) at paras 28-32.

[31] It is necessary to determine whether the outcome of a re-evaluation of the tenders would indeed be as predictable as the applicant claims or what remedy will be just and equitable in the circumstances.

[32] The first respondent's reasons, as advanced in its answering affidavit, show that it relies on two main grounds for the contention that the applicant should not necessarily be successful. The grounds are that:

32.1 Mat Engineers identified the applicant as "high risk" to complete the project;

32.2 Due to previous performance of the applicant for the first respondent on a project for the upgrading of streets in Bolokanang, Petrusburg, contract number BOV/LET/2013/01, which project was completed late, after the expiry of the stipulated project period, the BAC decided not to recommend the applicant.

The applicant, on the other hand, argues that the first respondent is not entitled to take into account these considerations of their past dealings in the evaluation of the present tenders. The applicant, as stated, also seeks a directive in the event of the remittance of the matter to the first respondent for re-evaluation, namely that the first respondent is not entitled to apply a price deviation to conduct a risk analysis. It is therefore necessary to consider the grounds referenced in sub-paragraphs 32.1 and 32.2.

[33] An analysis of the answering affidavit shows that the following facts are not in dispute:

33.1 that the applicant tendered the lowest bid in the amount of R3 643 634.94 for completion of the project;

33.2 that Mofomo Construction had the second lowest (corrected) tender amount, namely R4 766 867.82;

33.3 that the third respondent's bid, in the corrected tender amount of R4 816 780.71, was the third lowest;

33.4 that the applicant scored 99 points which was the highest score of all the tender bids evaluated;

33.5 that both the third respondent and Mofomo Construction jointly scored the second highest number of tender evaluation points, to wit 71;

33.6 that the applicant's bid is responsive in that the required documents, including the municipal property rates and taxes account, were submitted and it was the lowest in scoring; and

33.7 that Mat Engineers determined a pre-tender estimate for the construction of the works in the amount of R5 020 721.31 including a 10% contingency and value-added tax at the applicable rate. This was used to apply the price risk analysis. I will deal with the issue below, but it will suffice to state that, in my view, the applicant cannot convincingly dispute the manner in which the first respondent conducted the price risk analysis.

34. The first respondent, however, also contends that the following further considerations are relevant:

34.1 that the tender was awarded to the third respondent on 31 March 2017; that the third respondent had already commenced with the works; that it had already mobilised machinery, tools and equipment; that it had already established itself on the site; that it had already cleared it to execute the contract; that it had already hired plant and that it had already appointed skilled as well as unskilled labour;

34.2 that the expenses already incurred amount to R1 400 000.00 and that the contract had created 14 local employment opportunities by the time the interdict was granted;

34.3 that the funds provided for projects, including this project, may be lost if the project is not completed within the financial year as the funds allocated are included in the budget for the specific financial year; and

34.4 that water is a basic human right and that dire situation of water supply to the Oppermansgronde and Koffiefontein communities is undeniable.

[35] The first respondent intends to evaluate the tenders in the event that the matter is remitted by:

35. applying a risk analysis using a predetermined price deviation percentage;

35.2 having regard to the applicant's past performance in respect of previous contracts which it had awarded to the applicant and any one of the above mentioned grounds which will result in the bid, and thus the contract, not being awarded to the applicant who has scored the highest points. The real issue is whether the first respondent will act in a procedurally fair manner if it does so. If it may not rely on those considerations the outcome is indeed predictable, ergo the bid must be awarded to the applicant.

[36] A further consideration arises if the first respondent may apply the above mentioned criteria when evaluating the tenders. If the first respondent is justified to have regard to either of the aforementioned considerations the question arises whether the first respondent must afford the applicant (it should rather be all tenderers if the process is to be transparent and fair) an opportunity to explain its tender price and to address the concerns regarding the past performance.

[37] As stated above, the applicant contended in its founding papers that the first respondent's calculation was also mathematically incorrect as the bidders were not informed or required to make provision for a 10% contingency. The applicant conceded that its bill of quantities indeed provided for a 10% contingency. This disposes of the argument that the bidders were not required or notified to include a 10% contingency in their bids.

[38] As stated above, the contract must be awarded to the tenderer who scores the highest points (in *casu* the applicant), unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.

[39] The first respondent relies on the application of objective criteria in addition to those contemplated in subsections 2(*1*)(*e*) and (*f*) of the Procurement Act.

[40] As stated, the applicant argues that it is a foregone conclusion that the bid would be awarded to it and consequently that the contract be awarded to it because its bid must receive the highest score for the lowest price. The applicant, in the alternative, contends that the court must issue a directive to preclude the first respondent from applying the disqualification percentage if it should be directed by this court to re-evaluate the tender bids.

[41] Reliance by the first respondent on the applicant's past performance can be disposed of first without much ado, in my view. According to the first respondent's SCMP bidders are required to supply particulars of any contracts awarded to them during the past five years, including particulars of any material non-compliance or dispute concerning the execution of such contract as part of the functionality assessment. Due to the manner in which the proceedings were conducted, the court is not privy to the applicant's tender document. Suffice it to say that the first respondent did not complain of any false information in the applicant's tender.

[42] As far as objective criteria is concerned the first two requirements to qualify as objective criteria, namely (i) being objective in the

sense that it can be ascertained objectively and (ii) its existence or worth does not depend on someone's subjective opinion, cannot on the facts of this matter be satisfied.[14] The criteria would obviously bear on the third requirement, namely some degree of rationality and relevance to the tender or project, but that does not suffice on its own.

[43] The applicant has not been registered by the first respondent as a defaulter. The applicant also states that the contract in question was extended and scope of work expanded after the initial scope of work was completed which is at odds with the allegation that its past performance was not satisfactory.

[44] In my view, on the facts of this matter, the applicant's past performance cannot be found to be a justifiable ground not to award the bid and contract to it as other objective criteria.

[45] Regarding the application of the price risk analysis, the first respondent explained that this is done based on variance of the tender offer from the engineer's estimate. A tender amount 20% below or above the engineer's estimate is considered to be high risk. Tender amounts between 10% to 20% below or above the engineer's estimate is considered to be medium risk and tender amounts less than 10% below or above the engineer's estimate is

[14] **Pelatona Projects (Pty) Ltd v Phokwane Municipality and 14 Others** unreported NCD judgment under case 691/04, para [31]; **Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality and Another 2016** (ZAFSHC) 159 (A48/2016).

considered to be low risk. The price variation was determined in collaboration with the first respondent. A price risk assessment is a common practice in evaluation of tender offers to protect state organs from under-bidding of costs by tenderers simply to make their bids appear more attractive and to complete the works with the ulterior motive of increasing the costs later on through additional claims. The risk analysis is applied in the same manner across the board to all responsive tenders.

[46] Firstly the applicant argues that the National Treasury Practice Note SCM 2 of 2006 prohibits the use of cost estimates as bench mark in its supply chain management to disregard tenders due to predetermined percentage variation from price estimates of the costs of projects because it is not justifiable. Secondly it argues that it is settled law that a tender cannot be assessed for functionality on undisclosed or subjective criteria. Reliance for the contention is placed on **Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd** 2016 (3) SA 1 (SCA). Thirdly the applicant argues that the first respondent did not include price viability as a functionality criterion. As result the first respondent was precluded from applying its rule to disqualify the applicant

[47] The National Treasury Practice Note SCM 2 of 2006 provides as follows:

"1.2.1 It has also come to the fore that departments/institutions are incorrectly evaluating bids by using estimates as a benchmark to regard bids as unacceptable or non-responsive.

1.2.2 The PPPFA prescribes that the lowest acceptable bid must receive 80 or 90 points for price. A bid is regarded as acceptable if:

(a) it complies in all respect with the specification and conditions of the bid;

(b) the bidder completed and signed all the prescribed bid forms to enable the principle (sic) to evaluate the submitted bid;

(c) the bidder submitted the required tax clearance certificate and other clearance/registration forms as prescribed by various acts and/or in the bid documentation; and

(d) the bidder has the necessary capacity and ability to execute the contract.

1.2.3 Bids should only be evaluated in accordance with the evaluation criteria stipulated in the bid documentation. When any bid is passed over and regarded as non-responsive, the reasons for passing over such bid must be defendable in a court of law. Examples in this regard may include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and/or capability and being listed on the Register for Tender Defaulters.

1.2.4 Deviation by more than a predetermined percentage from the cost estimates of the project/commodity cannot be regarded as a justifiable reason for the rejection of a bid and has, therefore not been approved by the National Treasury as an evaluation norm or criteria."

[48] *In casu* the first respondent's **Supply Chain Management Policy [SCMP]** stipulates that the first respondent must take into account any Treasury guidelines on bid documentation.[15]

[49] In my view reliance on the National Treasury practice note is misplaced. The practice note does not state that a percentage deviation from predetermined costs estimates may not be used by an organ of state, in a price risk assessment or analysis. The note simply states that a tender may not be rejected outright or found to be non-responsive because it deviates more than a predetermined percentage from the cost estimates of the project or commodities. The first respondent's affidavit shows clearly that the tender will not be found to be non-responsive or rejected outright because the tender amount deviates more than a predetermined percentage from the cost estimate of the project. In my view this blanket prohibition does not apply to the facts at hand. Price deviation to analyse risk, as proposed by the first respondent in this matter, has been countenanced by courts in this and other Divisions. Obviously each case is determined on its own facts, but this puts pay to the interpretation proffered by the applicant.

[50] Ultimately the matter boils down to this: if the first respondent is justified to use the price risk analysis and to rescore and re-rank the tenders, then the outcome advocated by the applicant is not a pre-cast fact.

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[15] Clause 21(a)(ii) of the SCMP.

[51] The applicant contends that this matter must be distinguished on the facts from the judgment in the matter of **Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality and Another** 2016 (ZAFSHC) 159 (A48/2016), a judgment on review in this Division where the court held that the disqualification of Q Civils (Pty) Ltd because their price was below 15% deviation from the engineer's price and average price submitted - the application of a so-called price envelope - was justifiable.

[52] So-called price envelopes are widely used by organs of state to analyse risk as appears from the various unreported judgments referred to in the **Q Civils** judgment *supra*.

[53] The applicant argues that the Q Civils judgment (*infra*) is distinguishable from the facts in this matter because the tenderers had knowledge of the fact that the price deviation criteria would be used and the organ of state's SCMP provided for it.

[54] In **Q Civils** *supra*, Daffue, J, with whom Jordaan, J concurred held after consideration of the leading judgments that objective criteria need not necessarily be disclosed in tender documents and tenderers need not be made aware of the intention to apply objective criteria. This appears to me to be the broad consensus in the judgments dealing with the matter, some of which are referred

to in the **Q Civils** judgment. As stated, the applicant argued that the judgment was distinguishable because in that matter all the tenderers were aware from the outset that a price deviation would be applied and the price deviation was authorised in the organ of state's SCMP.

[55] It is correct that Daffue, J distinguished the facts of that matter from the **Westinghouse** judgment on the basis that "all bidders knew from the outset that a too low or too high bid, or put otherwise, a bid substantially below or higher than that of other bidders, will be disqualified". But of equal force is his finding in para 53 of the judgment later that "I also find, in line with para [22] of that judgment it was not required to disclose the 15% deviation in the invitation to bid, even on the basis that Q Civils or any of the other bidders were unaware of this criterium." I agree.

[56] As was the case in the **Q Civils** judgment *supra*, in this matter the tender document also provided that the lowest tender (amount) does not guarantee that the tender will be awarded. The Standard Conditions of Tender also in T1.3 provides that the tenderer with the highest number of points may not necessarily be recommended, as was indeed the case.

[57] In my view the deviation figure of 20% as determined and accepted by the first respondent in conjunction with the appointed consultant is an objective yardstick or criterion. The evaluation of the bids and the application of a deviation criterion to determine

risk will not result in a process which is not "undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude." See: **South African National Roads Agency Ltd v Toll Collect Consortium** 2013 (6) SA 356 (SCA) at para [20]. The price deviation is an objective factor that qualifies as an objective criterion for purposes of s 2(*1*)(*f*) of Procurement Act.

[58] The 20% deviation figure if applied will be unbiased, objective and not arbitrary. No evidence showing the contrary has been put up by the applicant. The applicant in *casu* argued that the precast deviation is arbitrary. I do not agree and there is in fact no evidence to support such an allegation. I also do not agree that the deviation criteria is dependent on the subjective opinion of somebody.

[59] The first respondent applied the deviation in an objective manner to all responsive tenders to analyse the risk. If it does so there can be no complaint of it being dependent on someone's subjective opinion.

[60] I therefore find that the first respondent would be justified to apply the 20% deviation to analyse risk as objective criteria. It satisfies all three the requirements of objective criteria, namely (i) being objective in the sense that it can be ascertained objectively; (ii) its existence or worth does not depend on someone's subjective opinion and (iii) it bears some degree of rationality and relevance

to the tender or project. It would be justified not to recommend the tenderer with the highest points based on the outcome of the application of the objective criteria.

[61] It needs to be mentioned that this matter resorts under the Preferential Procurement Regulations, 2011. Those regulations find application to any tenders which were invited before 1 April 2017. As from 1 April 2017 all tenders will be subject to the Preferential Procurement Regulations, 2017 which determine in section 11(2) that an organ of state will henceforth need to stipulate any objective criteria it intends to apply in the tender document.

[62] I would, therefore, decline to issue the directive prayed for by the applicant.

[63] The applicant argued that the first respondent was compelled to afford it an opportunity to explain its prices for specific items in the event that it may apply a price deviation to analyse risk. In my view the first respondent is not obliged to afford the tenderers an opportunity to explain the pricing. This does not mean that it may not do so. The first respondent should exercise a discretion when re-evaluating the tenders. If it does follow this route it must treat all the tenderers equally and fairly. I am not prepared to make a finding that the first respondent is compelled in the circumstances

to afford bidders an opportunity to explain their pricing. See also **Q Civils** supra.

[64] Lastly, on the first respondent's version the funds may no longer be available if the contract was not finalised in the current financial year. Suffice it to say, that was no longer possible already when the matter was argued. The allegation regarding the availability of the funds is however merely that, an allegation. No evidence to substantiate the allegation was proffered. In the absence of evidence to substantiate the allegation it does not pass muster. The fact of the matter is simply that the first respondent did not substantiate the allegation and in consequence it carries no evidentiary weight. This issue can, therefore, not be determinative.

[65] The applicant sought relief in prayer 5 to the effect that the court must order the re-evaluation and award of the contract "in accordance with a lawful process". This was meant to relate to the application of the deviation criteria. I have already held that the application of the deviation criteria will not be unlawful. The first respondent must evaluate and award the contract in terms of a fair and lawful administrative process. It is constitutionally obliged to do so. The first respondent did not object to the relief in the event that the application is not being dismissed outright and did not seek any relief other than the dismissal of the application. Had it sought specific relief it may have had an effect on the order, but it did not. Instead it argued that the matter should rather be remitted.

[66] The application succeeds to the extent that the award of the tender should be reviewed and set aside. The matter should be remitted in the circumstances for re-evaluation.

[67] The applicant did not seek any costs pertaining to part B of its notice of motion, namely these review proceedings. The first respondent argued that the application be dismissed with costs or remitted. Although the applicant did not claim costs in the notice of motion, it is nonetheless entitled to an appropriate cost order in the light of the opposition by the respondent. See **Naidoo and Another v Matlala NO and Others** 2012 (1) SA 143 (GNP) at 157 and **Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others** 1999 (2) SA 599 (T) at 633.

[68] Accordingly, **IT IS ORDERED THAT**:

[68.1] The first respondent's decision to exclude the applicant's bid from further and proper evaluation in the assessment process of awarding Bid LETS/2016/WATER/03B: UPGRADING OF WATER TREATMENT WORKS AT OPPERMANSGRONDE, was irregular and it is consequently reviewed and set aside;

[68.2] The first respondent's decision to ultimately award Bid LETS/2016/WATER/03B: UPGRADING OF WATER

TREATMENT WORKS AT OPPERMANSGRONDE to the third respondent, ZALISILE MSEBENZI CIVILS, is reviewed and set aside;

[68.3] Any Service Level Agreement concluded between the first respondent and the third respondent relative to the assailed decision is struck down in accordance with section 8 of the Promotion of Administrative Justice Act, 3 of 2000;

[68.4] The matter is remitted to the first respondent for reconsideration in terms of s 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000.

[68.5] The first respondent is directed to pay the costs of the application.

N. SNELLENBURG, AJ

I concur,

M.H. RAMPAI, J

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| On behalf of the applicant: | Adv S Grobler<br>Instructed by:<br>Gous & Vertue Attorneys<br>BLOEMFONTEIN |
| On behalf of the respondent: | Adv W J Groenewald<br>Instructed by:<br>Machacka Attorneys<br>BLOEMFONTEIN |