



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 8221/16

In the matter between:

WESTWOOD INSURANCE BROKERS (PTY) LTD

APPLICANT

v

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

CHAIRPERSON: ETHEKWENI MUNICIPALITY

BID EVALUATION COMMITTEE

SECOND RESPONDENT

CHAIRPERSON: ETHEKWENI MUNICIPALITY

BID ADJUDICATION COMMITTEE

THIRD RESPONDENT

NC SOUTH WEST BROKERS CC

FOURTH RESPONDENT

WANDA FINANCIAL CONSULTANTS (PTY) LTD

FIFTH RESPONDENT

WATERSURE (PTY) LTD

SIXTH RESPONDENT

INDWE RISK SERVICES (PTY) LTD

SEVENTH RESPONDENT

MDUDUZI CHRISTOPHER NKOMO N.O.

EIGHTH RESPONDENT

and

KAMLESH RAJOO

FIRST INVITED PARTY

GREGORY STANDISH EVANS

SECOND INVITED PARTY

Date of Hearing : 6 July 2017

Date of Judgment : 31 July 2017

ORDER

The following order is granted:

The application for leave to appeal is granted to the full court of the KwaZulu-Natal, Division with costs being costs in the appeal.

JUDGMENT

D. Pillay J

The Crux

[1] Why did the Ethekewini Municipality, the first respondent, award a tender for the provision of insurance for water loss to a bidder who tendered professional indemnity insurance? This is the question I posed to counsel appearing for Ethekewini in the opposed application on 15 November 2016. The question resulted in Ethekewini conceding that the award should not have been made and tendering to pay the costs of Westwood Insurance Brokers (Pty) Ltd, the unsuccessful tenderer and applicant in the review. That question remains unanswered ever since I first raised it, despite the lapse of more than six months, the expansion of the court record in the application for leave to appeal to about 300 pages and, an invitation to all the officials involved in the process that resulted in the decision to make the award, to make representations to avoid a cost order against them personally.

[2] Not a single employee offered an explanation as to why indemnity insurance was accepted instead of water loss insurance. Worse still, not a single employee acknowledged that the award was irregular and that but for Westwood's urgent application, a socio-economic catastrophe was inevitable. No one has apologised or shown remorse. If the employees were unaware at the time they were processing the award, they could not have been in any doubt after Ethekewini's concession and the reasons for my judgment, that the award was unlawful. In the absence of any

explanation from the employees I concluded that there was none, at least none that was lawful, reasonable or justifiable.

[3] Furthermore, the failure to acknowledge the irregularity convinced me that those involved were also not willing to be held accountable for their irregular decisions. Ethekwini fortified this conviction not only by conceding the application, by failing to advance any reason for either making the unlawful award or by subsequently capitulating in the urgent application but also, vitally, by failing to take up the court's invitation to make representations regarding its proposed order for costs *de bonis propriis*. If the failure and persistent refusal by Ethekwini and its employees to account for their unlawful conduct was baffling then, now this application for leave to appeal against the judgment dated 5 April 2017 in terms of which the court granted a special order indemnifying Ethekwini against costs poses another question: Whose interests does Ethekwini represent in applying for leave to appeal against a judgment that is entirely in its favour and those of the people its officials are elected or appointed to represent?

[4] In preparing for the hearing of this application it became clear that there was no voice for the people of Ethekwini. To say that by applying for leave to appeal Ethekwini is seeking advice from the appellate courts on the propriety of the order avoids the question. It is also not correct. If it is advice that Ethekwini wants then it could simply choose to abide by the decision of the appeal court. Better still, it could defend the judgment favouring its own and the public interest. Instead, Ethekwini has positioned itself against the judgment. Hence the second unanswered question.

[5] Ethekwini's stance and the lack of representation of the people of the city prompted me to ask the Chairman of the Bar Council to assign counsel to represent notionally the people of the city. For this the court is indebted to the Bar and to Mr Broster SC who rose to the occasion with a *pro bono* brief on less than 48 hours notice.

The Background

[6] On 15 November 2016 the court granted an order in terms of which Ethekekwini consented to the setting aside of its decision and that of the arbitrator to award South West the tender. It also consented to paying the costs of Westwood's application including the costs of employing senior counsel. The court also granted orders, not by consent, substituting Westwood as the party to be awarded the tender. The court reserved making an order for the recovery of costs by Ethekekwini from its employees involved in awarding the irregular tender, pending responses to its invitation to any person having an interest in such an order to make written submissions to it by 22 November 2016. This was the court's first call for accountability.

[7] No submissions were received. Westwood had no further interest in the proceedings and withdrew. On 8 December 2016 the court made a second call.

[8] Acting *mero motu* the court gave specific instructions to Ethekekwini, its manager and municipal mayor regarding service of that judgment on all the persons 'who participated in support of awarding the tender to South West.' Such persons were invited to show cause on affidavit why they should not be ordered to indemnify Ethekekwini for all the costs that it had incurred in the litigation by paying costs *de bonis propriis*, jointly and severally, the one paying the others to be absolved. Such persons were also invited to indicate whether they wished to be heard in open court otherwise the matter would be disposed of in chambers on the documents delivered to the court by 20 February 2017. The court received affidavits from all but one employee who was involved in awarding the tender.

[9] On 5 April 2017 the court delivered its judgment on costs against which this application for leave to appeal lies. In terms of that order, 15 employees of Ethekekwini and the eighth respondent arbitrator were ordered to share equally 50 per cent of the costs Ethekekwini was ordered to pay to Westwood. The fourth respondent, NC South West Brokers CC, was ordered to pay the balance of the costs. The court also ordered the acting city manager or her replacement to serve a copy of the judgment on the mayor and all those who were ordered to pay the costs; she also had to report

to the court on affidavit about the steps taken to recover the costs by 30 July 2017 and monthly thereafter.

[10] Two employees namely Kamlesh Rajoo and Gregory Standish Evans who were members of the Bid Evaluation Committee (BEC) joined this application for leave to appeal as the first and second interested parties respectively.

The Grounds of Appeal

(a) Accountability

[11] The grounds of appeal, both substantive and procedural, are for alleged misdirection of law and facts. At the outset I indicated to counsel that I would be granting leave to appeal not least because of the novelty of the remedies ordered. However, prefacing every ground for leave to appeal is the unanswered questions posed above. Preliminarily a novel question for the court hearing the appeal is whether an organ of state and persons in the position of the employees who participate in delivering unlawful decisions should be allowed the right to appeal against cost and related orders when they refuse to account for the unlawfulness? Inevitably, recognising the entity's and the individual's right of access to a court must be balanced with the peoples' right to enforce the constitutional obligation of all persons, especially public entities and employees to function ethically, accountably and transparently.¹ The novelty of such a decision compels me to grant leave in this instance.

(b) The court erred or misdirected itself in assuming jurisdiction or the power to grant the orders mero motu and against non-parties.

[12] Counsel for Ethekwini helpfully tracked the evolution of precedents of cost orders against public officials. The courts resisted imposing cost orders against non-parties to the litigation. Initially they evolved slowly² but recently with alacrity. A small

¹ Section 195(1)(a), (f) and (g) of the Constitution of the Republic of South Africa, 1996.

² *Texas Co (SA) Ltd v Cape Town Municipality* 1926 (AD) 467 at 488.

breakthrough emerged first in *Mitchell v Mossel Bay Liquor Licensing Board*³ and later in *Coetzeestroom Estate and G.M. Co. v Registrar of Deeds*; public officials might be mulcted in costs if their actions are *mala fide* or grossly irregularly.⁴ Otherwise public officials could not be held personally liable for costs.

[13] The jurisprudence shifted in *Deneysville Estates Ltd v Surveyor-General*,⁵ which held that the courts have the discretion to award costs against public officials if the circumstances justify doing so. *Omnia Fertilizer Ltd v Competition Commission*; *In re Competition Commission v Sasol Chemical Industries (Pty) Ltd & others* confirmed the rule in *Coetzeestroom* but cautioned against cost orders against public officials who carried out their duties mistakenly but in good faith and against the rule becoming so rigid as to fetter judicial discretion.⁶

[14] In *Mlatsheni v Road Accident Fund*⁷ the Eastern Cape court raised the behavioural bar for public employees thus:

‘Organs of State are not free to litigate as they please. The Constitution has subordinated them to what Cameron J, in *Van Niekerk v Pretoria City Council*, called ‘a new regimen of openness and fair dealing with the public’. The very purpose of their existence is to further the public interest, and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust.

It is expected of organs of State that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly.’⁸

(Footnotes omitted)

[15] Responding to abuse of a position of power by an employee of the Road Accident Fund the court warned that:

³ *Mitchell v Mossel Bay Liquor Licensing Board* 1954 (1) SA 398 (C) at 414-418.

⁴ *Coetzeestroom Estate and G.M. Co v Registrar of Deeds* 1902 TS 216 at 223-224.

⁵ *Deneysville Estate Ltd v Surveyor-General* 1951 (2) SA 68 (C).

⁶ *Omnia Fertilizer Ltd v Competition Commission*; *In re Competition Commission v Sasol Chemical Industries (Pty) Ltd & others* [2008] JOL 22197 (CT) paras 11-13.

⁷ *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E).

⁸ *Mlatsheni* paras 16-17.

‘. . .if this type of conduct continues, the time may have well arrived for orders of costs *de bonis propriis* to be awarded against employees. . . .’⁹

[16] Then it was time for the Supreme Court of Appeal to echo the warning in *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng*.¹⁰ Critical of the MEC in that case for being indignant, playing the victim and attempting ‘to turn turpitude into rectitude’¹¹ the court warned:

‘It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers.’¹²

*Mogale City v Fidelity Security Services (Pty) Ltd & others*¹³ reiterated the Supreme Court of Appeal’s earlier warning.

[17] Eventually the Constitutional Court was seized with the question in *MEC for Health, Gauteng v Lushaba*.¹⁴ The Constitutional Court broke through the resistance against orders *de bonis propriis* to affirm as a principle that cost orders against public officials are permissible provided they have adequate notice to make representations. It set aside the order of the High Court that imposed a cost order against public officials personally not because cost orders *de bonis propriis* against public officials were impermissible but because of the strange procedure the trial court had adopted. I will deal with the issue of representations under the non-joinder ground below.¹⁵

[18] Finally *Black Sash Trust v Minister of Social Development & others (Freedom Under Law intervening)*¹⁶ (SASSA) put to rest the debate about whether in principle, public officials can be held personally liable for costs. In *Democratic Alliance v South*

⁹ *Mlatsheni* para 18.

¹⁰ *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA).

¹¹ *Gauteng Gambling Board* para 54.

¹² *Gauteng Gambling Board* para 54.

¹³ *Mogale City v Fidelity Security Services (Pty) Ltd & others* 2015 (5) SA 590 (SCA)

¹⁴ *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC).

¹⁵ *Lushaba* paras 6, 11, 19-22.

¹⁶ *Black Sash Trust v Minister of Social Development & others (Freedom Under Law intervening)* 2017 (3) SA 335 (CC).

African Broadcasting Corporation Soc Ltd (“SABC”) & others; Democratic Alliance v Motsoeneng & others the Western Cape Court extended the principle of imposing costs *de bonis propriis* to directors as persons performing functions in a fiduciary capacity on behalf of the public.¹⁷

[19] Over almost a century, this evolution of jurisprudence that now holds those exercising public power to account through orders for costs *de bonis propriis* has come to reflect societal changes. As public officials become more brazen, the courts are emboldened commensurately to respond naturally, intuitively and pragmatically to do justice. Quite simply, if society was not afflicted so detrimentally by those exercising public power, there would never be a need for the courts to order costs *de bonis propriis* against them. To challenge the court’s powers and jurisdiction in these circumstances is to misdiagnose the problem. A misdiagnosis leading inevitably to the wrong prescription will not cure the affliction. A prescription to prevent courts from ordering costs *de bonis propriis* against public officials, irrespective of whether they are parties to the litigation or not, would serve no purpose but to blind the court to its constitutionally entrenched oversight function. That would be untenable.

[20] Sight should not be lost of the origins of the court’s power and jurisdiction to award costs if it is just and equitable to do so in constitutional matters.¹⁸ It originates in s 172(1)(b) of the Constitution. Procurement is a constitutional matter. So is the right to just administrative action¹⁹ and the values and principles governing public administration.²⁰ My judgment of 8 December 2016 identifies the source of the court’s power and jurisdiction and provides appellate authority for its orders.²¹

[21] The primary difference in this case relative to the precedents above is that the court was limited to hearing only one side once Westwood withdrew from the proceedings. Acting *mero motu* in the circumstances was entirely unavoidable. Not to act meant that the public would be saddled unjustifiably with the costs. None of

¹⁷ *Democratic Alliance v South African Broadcasting Corporation Soc Ltd (“SABC”) & others; Democratic Alliance v Motsoeneng & others* [2017] 1 All SA 530 (WCC) para 222.

¹⁸ Section 172 of the Constitution.

¹⁹ Section 33 of the Constitution.

²⁰ Section 195 of the Constitution.

²¹ Paras 61-69 of judgment dated 8 December 2016.

the applicants in this application addressed the court on why the public or anyone else should have to foot the bill for illegalities perpetrated by them as would be the case if they did not indemnify Ethekeini.

[22] The authorities cited in support of the submission that it is not for a court to raise issues not traversed in the pleadings, even when a constitutional complaint arises, are distinguishable on the facts and the law in this case and therefore irrelevant.²² Moreover, the law reports evidence many instances in which appellate courts decide cases on points not pleaded or even when counsel expressly disavows a submission that becomes the headstone of a judgment.²³ Perfect congruence between the reasons for decisions as an adjudicator's response to the 'proofs and arguments' adduced through the participation of the litigants,²⁴ is an ideal we strive for but one that proves to be increasingly illusive as the complexity of issues and the diversity of morality escalate,²⁵ and participation and dialogue in the search for common aims and reciprocity de-escalate.

[23] Ethekeini and all the affected employees had two opportunities to make representations before the court granted the cost orders. Challenges to the court's jurisdiction or its power to grant the orders *mero motu* should have been raised then. That is the kind of engagement that is expected of a municipality and other participants in a constitutional democracy.²⁶ The court should not be misunderstood as saying that Ethekeini has no right of access to a court by applying for leave to appeal; on the contrary, such access as it seeks should be encouraged if it is exercised consistently with the values and practices of a participatory democracy. Dialogue about the court's powers and jurisdiction should have commenced earlier when the court invited representations rather than later in the grounds of appeal. It could have changed the course of events.

²² *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA) para 14; *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 39.

²³ See *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal & others* 2013 (4) SA 262 (CC) ('KZN Joint Liaison Committee').

²⁴ L L Fuller & K I Winston 'The Forms and Limits of Adjudication' (1978) 82 *Harv. L. Rev* 353 at 388.

²⁵ M C Dorf 'Legal indeterminacy and institutional design' (2003) 78 *N.Y.U. L. Rev* 875 at 877.

²⁶ C Bateup 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 *Brook. L. Rev.* Available at: <http://brooklynworks.brooklaw.edu/blr/vol71/iss3/1> (accessed 10/12/15).

[24] In the circumstances the court had the jurisdiction and the power, supported by precedent, to impose orders for costs *de bonis propriis* and related orders regarding the recovery of costs against public officials and employees. No appeal lies against that part of my judgment. What is novel and therefore appealable, is whether the court could do so *mero motu* and against non-parties to the litigation.

(c) The court impermissibly and improperly trenched upon the separation of powers between it and EtheKwini.

[25] As stated above, s 172(1)(b) of the Constitution bestows upon the courts the power and jurisdiction to make any order that is just and equitable. Furthermore, determining costs is a matter entirely within the discretion of the court. Saddling the public with the costs would have been unjust and inequitable. If EtheKwini or any interested person had represented that the public would not be footing the bill that would have been the end of the court's hold on the matter. None did. Thus, if those who processed the award were not held liable for the costs then it would have fallen on the public purse to foot the bill.

[26] Additionally, if EtheKwini had made representations to assure the court that it would act in terms of s 176 of the Local Government: Municipal Finance Management Act 56 of 2003 and the Code of Conduct for Municipal Staff Members read with Schedule 2 of the Local Government: Municipal Systems Act 32 of 2000 to hold the responsible employees accountable for the irregularity, the court would have exercised its discretion differently. If there was any reliable information in the public domain to show that historically EtheKwini had acted against those who flouted procurement rules, the court would also have exercised its discretion differently. Instead, the 2015-16 report of the Auditor General reveals the following:

‘eTheKwini Metro regressed from a clean audit to an unqualified audit opinion with findings on compliance. The metro’s routine monitoring controls over procurement processes were not sufficient to prevent repeat instances of irregular expenditure.’²⁷

²⁷ General report on the local government audit outcomes for 2015-16 at 154.

And

‘Five municipalities (uThukela District, uMkhanyakude District, uMzinyathi District, eThekweni Metro and Msunduzi) contributed R1,24 billion (51%) to the total irregular expenditure. The main cause of this irregular expenditure was deviations that were either not approved or not justifiable.’²⁸

And

‘Hence, the central theme of this report is accountability.

The key drivers of internal control, being leadership, financial and performance management as well as governance, had shown minimal improvement since the previous year. This slow response by the leadership to our consistent messages over the years to improve internal controls and address risks, was the main root cause of poor audit outcomes. Continued vacancies and instability in key positions as well as inadequate consequences for poor performance and transgressions further contributed to these outcomes.’²⁹

[27] This information and Ethekeeni’s stance in this application fortify my view that the order was justified. Notwithstanding my order, if Ethekeeni was minded to investigate how the irregularity arose, who was responsible for it, and to distinguish between degrees of culpability amongst those who participated in the processes, it could have applied to vary the order. Such an application for variation would have been entirely consistent with the approach to dialogical constitutionalism, a pragmatic way in which the courts, litigants and organs of State engage meaningfully in the on-going search to improve the quality of justice for all.³⁰

(d) The court erred or misdirected itself by failing to join the employees before ordering them to pay costs.

²⁸ General report on the local government audit outcomes for 2015-16 at 155.

²⁹ General report on the local government audit outcomes for 2015-16 at 10.

³⁰ JC Froneman ‘Legal Reasoning and Legal Culture: Our “Vision” Of Law’ (2005) 1 *Stell LR* at 19.

[28] The right to a fair hearing is well entrenched in our jurisprudence.³¹ In *Black Sash Trust v Minister of Social Development & others (Freedom Under Law intervening)* (SASSA) the court found that further scrutiny was necessary:

‘. . .but that can only be done after the potentially affected parties are joined to the proceedings in their personal capacities and given an opportunity to explain their conduct in relation to each of these issues.’³²

[29] However, the following extract from *Lushaba* guided my decision to request representations:

‘Another principle breached is that, without notice and opportunity to make representations, the High Court punished the three officials. It is a fundamental principle of our law that no one should be condemned without a hearing. This is part of the rule of law which is foundational to our constitutional order.’³³ (my emphasis)

[30] Subsequent to *Lushaba* and the judgment at issue, the Constitutional Court found in SASSA that there were reasonable grounds for investigating whether its remedial order was disregarded and, if so, whether this was wilful. That the Minister and SASSA were liable in their official capacity for the costs was clear; what was not was the possibility that individuals may have played a material role. To provide for a further opportunity for explanation the court ordered the Minister to show cause on affidavit why she should not be joined in her personal capacity and pay costs of the application from her own pocket.

[31] The effect of the order in this case is no different from that in SASSA granted in similar circumstances. The Constitutional Court did not stipulate joinder as the exclusive means of providing an opportunity to be heard. To insist that this court should have formally granted a rule *nisi* joining the interested parties would be to prefer form to substance. In no way did this court’s call for representations deny the

³¹ *De Beer NO v North-Central Local Council and South-Central Local Council & others (Umhlatuzana Civic Association intervening)* 2002 (1) SA 429 (CC) para 11; *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd & others* 2015 (2) SA 539 (CC) paras 24-26. Both judgments are cited in SASSA.

³² SASSA para 75. .

³³ *Lushaba* para 18.

interested parties all the rights available to persons formally joined.

[32] In this case as in *SASSA*, the prospect of recovering costs *de bonis propriis* emerged only after Ethekwini conceded defeat without accounting for the unlawfulness. The call for representations was an open one with the court having no evidence whatsoever of the reasons for Ethekwini making an irregular award and subsequently conceding that it was unlawful. The representations could have ranged from anything between identifying a person who intimidated officials into making an irregular award to employees being genuinely mistaken or unaware of the difference between professional indemnity insurance and water loss insurance. Consequently the call for representations was intended to seek guidance on how the court should take the matter further.

[33] The submission that the court should have formally joined interested parties to the proceedings would have been a good one if there were factual disputes about the unlawfulness. As in *SASSA*, the substantive merits had already been determined. That Ethekwini accepted an offer of indemnity insurance instead of insurance for water loss was a fact never in dispute. That the irregularity was substantive and self-evident was also not in dispute. Neither was the fact there has been no explanation because there can be none, at least not one that is rational. Therefore the award of the tender in this instance was distinguishable from others in which disputes of fact and the possibility of rational explanations arose. Disputes of fact require processes in which they can be resolved by allowing every interested person an opportunity to produce evidence and to be heard. An adversarial approach would have been adopted if disputes of fact had emerged from the representations, e.g. about who caused the illegality. That approach was not required in this instance either on the substantive merits or on the proposed order for costs *de bonis propriis*.

[34] Hence guided by *Lushaba*, the process the court adopted was appropriately attenuated to receiving representations from interested parties before imposing the cost orders against them.³⁴

[35] The invitation to make submissions in writing, and if so desired, in open court, was wide enough for any interested person to seek legal counsel, to ask for a postponement, to ask to be joined formally or ask for any other procedural (re)arrangements. No one asked for any of these options, not even to be heard in open court. However, another court might find that more should have been done to ensure that interested persons had a better opportunity to be heard.

(e) The court erred or misdirected itself by failing to establish bad faith or dishonesty on the part of the employees before ordering them to pay costs.

[36] All interested parties had two opportunities to state why they processed the award in the way they did. None disclosed whether he or she acted in good or bad faith, dishonestly, negligently, mistakenly or out of genuine ignorance. Hence the court had no option but to found its decision to award costs *de bonis propriis* on the refusal to account for an irrational decision. A refusal to account is unconstitutional. The onus rests on those refusing to account to show why they should not be mulcted with costs or penalised in some other way. Another court may come to a different conclusion about the duty to account.

(f) The court failed to consider that its order would terrorise and paralyse employees into not doing their jobs out of fear that every little error would be met with extreme sanction.

[37] No one took the court into its confidence to disclose what the ‘little error’ was in this case. It is this refusal to disclose that attracts the punitive cost orders. That

³⁴ *Administrator, Transvaal, & others v Zenzile & others* 1991 (1) 21 (A); *Administrator, Natal, & another v Sibiyi & another* 1992 (4) SA 532 (A).

punishment must fit the offence is an essential tenet of our common law now well entrenched in our constitutional and labour law jurisprudence. If an error is indeed little, the sanction will be commensurately slight. However, when the error is a failure to account in the face of a constitutional obligation to do so and when the consequences for the people of the city are so dire, the error is not little, the sanction of one-fifteenth of 50 per cent of the costs hardly extreme.

[38] The committee system of procurement leaves little scope for errors. A decision is not that of an individual even though an individual eventually signs off the award. It is three layers of committees that contribute in various ways to the decision. Therefore the system is designed precisely to entrench and inculcate a bureaucratic, and for the most part, a tick box approach to procurement. Honest employees attentive to their responsibilities need suffer no paralysis. In the unusual instance of a genuine error occurring employees could escape liability and punishment but only if they account fully for how the error occurred. Without accountability, transparency and remorse no reprieve is permissible is a basic tenet of our natural law.

[39] At the primary level bids that meet the threshold requirements are accepted and those that do not are rejected. The bid in this case should not have been allowed to pass that threshold. At the secondary BEC level higher degrees of skill and expertise operate. It was at this level that the two interested parties in this application functioned. Ms Rajoo is an attorney. She was engaged for her expertise as such in the BEC. Nowhere in her lengthy representations does she ever say that she alerted her colleagues on the BEC to the obvious non-compliance of the bid with the tender requirements, i.e. that it should not have passed the threshold test because the insurance tendered was not for water loss. Irrespective of which meetings she did or did not attend, whenever the tender served before her for her input she failed to draw this to the attention of her colleagues. If the significance of water and indemnity insurance escaped her when she was serving on the BEC – which she does not say and which would be surprising for an attorney involved in an R80 million tender to say – then she could not have been in any doubt about the difference after receiving both judgments. Still she did not acknowledge the difference and disclose what she did about it. These omissions from her

representation compelled the award of costs against her. As an attorney she could not reasonably have misunderstood the purpose of inviting her representations.

[40] Likewise, Mr Evans is an engineer. As a professional he had to know the difference between indemnity insurance and water loss insurance. He too does not say whether he was alive to this difference at the time. He cannot hide behind his mandate, which was to look to the engineering aspects of tenders. Even if engineering criteria were not at issue in the water and sanitation project, his participation was as a collective in the BEC. A decision of the BEC is a decision of each of its members, unless a member dissents. Mr Evans does not say that he dissented. Furthermore, as an engineer and a professional he had to know the difference between professional indemnity and water loss insurance if he was attentive to the task. There is nothing technical or legal in the distinction that even a layperson functionally literate in English cannot fathom. Another court may find differently on the liability of the employees.

Order

[41] The application for leave to appeal is granted to the full court of the KwaZulu-Natal, Division with costs being costs in the appeal.

D. Pillay J

APPEARANCES

Counsel for the First Respondent (in leave to appeal)	:	V. I Gajoo SC
Instructed by	:	S.D Moloi & Associates Tel: (031) 563 3112 Ref: SDM/XSN/0420-16
Counsel for Kamlesh Rajoo (First invited party)	:	M. Du Plessis
Instructed by	:	Cox Yeats Tel: (031) 536 8500 Ref: DVLcek@coxyeats.co.za
Counsel for Gregory Standish Evans (Second invited party)	:	J. P Broster
Instructed by	:	Larson Falconer Hassen Parsee Inc Tel: (031) 534 1600 Ref: 21/W260/001
Acting as <i>amicus curiae</i>	:	L.B Broster SC
Date of Hearing	:	6 July 2017
Date of Judgment	:	31 July 2017