**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** |

Appeal No.: A73/2016

In the appeal between:-

**DOWN TOUCH INVESTMENTS** Applicant

and

**MATJHABENG LOCAL MUNICIPALITY** 1st Respondent

**REMBU CONSTRUCTION** 2nd Respondent

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**CORAM:** MOLEMELA, JP *et* JORDAAN, J

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**JUDGMENT BY:** MOLEMELA, JP

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**HEARD ON:** 17 OCTOBER 2016

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**DELIVERED ON:** 28 OCTOBER 2016

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**INTRODUCTION**

[1] This is an application for review brought by a construction company known as Down Touch Investments (the applicant) against Matjhabeng Local Municipality (first respondent) for the review of its decision to award a construction tender to the second respondent, Rembu Construction. This application is a sequel to two urgent applications brought by the applicant against the first respondent. In the first urgent application, the applicant sought and was granted an order compelling the first respondent to furnish reasons for its decision to award the tender to the second respondent and further ordering the first respondent to provide the applicant with certain documents relating to the tender. In the second urgent application, the

applicant successfully interdicted the first respondent from further implementing its decision to award the tender, with the result that the commencement of the project tendered for was halted. Only the first respondent is opposing the application for review.

**BACKGROUND FACTS**

[2] In September 2015 the first respondent issued a public invitation ("Invitation to Bid") inviting contractors to submit bids for the "**Upgrading of Dr Ngoma Road and Storm Water Management"** ("the Works") in Thabong, Welkom. In February 2016 the first respondent awarded the tender to the second respondent. Upon hearing of the awarding of the tender, the applicant approached this court for relief[1].

[3] The Invitation to Bid (ITB) set out the rules applicable to the tender. It, *inter alia,* specified that bid documents would be available from 14 October 2015. The closing date for the tender was 9 November 2015. The ITB further stipulated that the evaluating criteria applicable to the tender would be the 90/10 point-scoring method, with ninety points being allocated for the price and ten points for the Broad Based Black Economic Empowerment (BBBEE) status[2]. The ITB further stipulated that a compulsory briefing session would be held on 16 October 2015. The ITB also set out the minimum requirements applicable to the bid. It also provided that the Municipal Supply Chain Management Policy and the Preferential Procurement Policy Framework Act, 5 of 2000 (PPPFA) are applicable to the tender.

[4] It is common cause that the tender data stipulated three phases for the evaluation of submitted tenders. Phase 1, termed the "Administration Phase", entailed checking whether the tender documents had been initialised and signed at the appropriate places. It further necessitated checking whether supporting documents such as the tax clearance certificates, company registration certificates, CIDB grading, Joint Venture Agreements, Bills of

[1] See para [1] above
[2] This is informed by the Broad-Based Black Empowerment Act 53 of 2003. The empowerment points were calculated in accordance with each bidder's level of certification.

Quantities and declaration on past Supply Chain Management practices had been submitted. It also entailed ascertaining whether the tenderers had attended the compulsory site-briefing meeting[3]. Tenders that did not meet the requirements stipulated in Phase 1 were to be regarded as "non- responsive".

[5] Tenders that passed the responsiveness threshold progressed to Phase 2 of the tender process. The Phase 2 process entailed evaluating tenders for *functionality*. In the first respondent's Supply Chain Management policy attached to the tender documents, *functionality* is defined as "the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a bidder." As part of the functionality criteria, bidders were to be allocated points for (i) key staff and experience[4], (ii) plant and equipment[5], and bank rating[6]. The tender data stipulated that a tender would be disqualified "if it failed to meet the minimum threshold of 60% on functionality and a minimum of 20 points on relevant experience". Only once a tenderer had reached this threshold would Phase 3 become applicable. Phase 3 entailed allocating the final score using the 90/10 point system.

[6] It is common cause that the first respondent appointed a firm of engineers (Tsela Tshweu Consulting Engineers) as its principal agent for the evaluation of the tender and that Tsela Tshweu subsequently submitted an evaluation report to the first respondent's Bid Evaluation Committee[7].

[7] It is undisputed that of the 43 bidders that submitted tenders, 23 were considered non-responsive and were not evaluated any further. It is also not disputed that as proof of past experience the applicant submitted a list of similar projects it had previously done but did not submit completion

[3] The site-briefing meeting was held on 16 October 2016 before the closing date of the tender
[4] The maximum score that could be allocated for key personnel and experience was 35 points
[5] The maximum score that could be awarded for key personnel and experience was 5 points
[6] The maximum score that could be allocated for bank rating was 10 points
[7] This is regulated by the Local Government: Municipal Finance Management Act, 56 of 2003, Municipal Supply Chain Management Regulations.

certificates in respect of these projects. The applicant's averment that it and the first respondent had previously entered into contracts involving projects similar to the one that was the subject of this tender and that seven of those projects had already been completed was not challenged. Similarly, the applicant's assertion that Tsela Tshweu allocated it the maximum points for functionality was not controverted.

[8] It is common cause that the applicant was eliminated during the second phase of the evaluation process. It is also undisputed that the sole reason advanced by the first respondent for not awarding the tender to the applicant was the fact that the applicant had not submitted completion certificates for purposes of proving its experience in respect of similar projects. The first respondent revealed that non-submission of completion certificates resulted in the applicant being allocated zero points for the key staff and experience component of the functionality criteria, which in turn led to the conclusion that the applicant did not achieve the minimum threshold of 60% on functionality, resulting in the applicant's disqualification from any further evaluation.

[9] The nub of the applicant's case is that the submission of completion certificates was not stipulated as one of the requirements for the tender and, as a result, its subsequent disqualification from the tender process on account of a requirement that was not disclosed to tenderers was unfair, irrational and unlawful. The applicant further asserts that the decision to award the tender to the second respondent violated its right to participate in a tender process that is transparent and fair and falls to be reviewed and set aside.

**ISSUE TO BE DECIDED**

[10] The crisp issue to be decided in the matter is whether the submission of completion certificates for the evaluation of a tenderer's experience was one of the requirements of the tender. If so, *caedit questio.* If not, then the next leg of the enquiry would be to consider whether the applicant's disqualification from further evaluation on the basis of non-submission of

these completion certificates constituted a reviewable irregularity that warrants the setting aside of the tender award.

## APPLICABLE LAW

[11] Section 217 of the Constitution[8] enjoins a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system. The legislative framework under that section provides the context within which judicial review of state procurement must be assessed.[9] Given the fact that a decision to award a tender constitutes administrative action, the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) apply, thus granting a cause of action for the judicial review of tender processes.[10]

[12] Section 6 of PAJA provides as follows:-

> "**Judicial review of administrative action**
> (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
> (2) A court or tribunal has the power to judicially review an administrative action if-
> *(a)* the administrator who took it-
> (i) was not authorised to do so by the empowering provision;
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
> (iii) was biased or reasonably suspected of bias;
> *(b)* a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
> *(c)* the action was procedurally unfair;
> *(d)* the action was materially influenced by an error of law;
> *(e)* the action was taken-
> (i) for a reason not authorised by the empowering provision;
> (ii) for an ulterior purpose or motive;
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
> (iv) because of the unauthorised or unwarranted dictates of another person or body;
> (v) in bad faith; or
> (vi) arbitrarily or capriciously;

[8] Section 217 of the Constitution Act 108 of 1996.
[9] AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) (Allpay 1 Judgment)
[10] 2014 (1) SA 604 (CC) at para [41].

*(f)* the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

*(aa)* the purpose for which it was taken;

*(bb)* the purpose of the empowering provision;

*(cc)* the information before the administrator; or

*(dd)* the reasons given for it by the administrator;

*(g)* the action concerned consists of a failure to take a decision;

*(h)* the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

*(i)* the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) *(g)*, he or she may in respect of a failure to take a decision, where-

*(a)* (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

*(b)* (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

**<u>APPLICATION OF THE LAW TO THE FACTS</u>**

[13] The first respondent contended that the case brought by the applicant is an appeal dressed up as judicial review as it is directed only at the correctness or otherwise of the first respondent's decision and not at the irregularities. This argument is negated by paragraph 10.2 of the first respondent's own heads of argument, where it is stated that "the applicant states that the point-scoring exercise is seriously tainted by irregularity". In

any case, the self-explanatory contents of the applicant's founding affidavit serve to refute this argument. The first respondent's reliance on the case of **Minister of Co-Operative Governance and Others v Wezizwe Feziwe Siqcau & Other**[11] is therefore clearly misplaced.

[14] The first respondent further argued that the applicant's reference to Rule 53 of the Uniform Rules in its urgent application and in its Notice of Motion relating to this review application confirms that this application is being brought in terms of the common law and not PAJA and consequently precludes the granting of PAJA remedies. This contention holds no water because the applicant's reference to the procedure laid out in Rule 53 cannot be equated to an irrevocable intention to bring the review in terms of the common law as opposed to PAJA. The applicant's reliance on PAJA is evident from several averments made in its founding affidavit. The following averment made by the applicant in its Founding Affidavit refutes the first respondent's argument:- "…Down Touch [the applicant] seeks the review and setting aside of an administrative action taken by the first respondent to award the bid … to the second respondent. This application is launched in terms of Section 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)." The first respondent's criticism of the applicant's application as being "generalised", "all over" and "overbroad" has no merit.

[15] With regards to the merits of the review application, it is necessary to consider whether the evidence on record establishes the factual existence of contraventions of PAJA, and whether there is justification for the setting aside of the award. Of great importance is whether there is any evidence showing that the submission of completion certificates was one of the requirements of the tender. The first respondent filed the record of decision (ROD) which included the ITB, Tender Data, the applicant and the second respondent's respective bids, the minutes of the Bid Evaluation Committee, the Bid Adjudication Committee as well as the notes made by the chairperson of the Bid Evaluation Committee. Incidentally, the minutes of the site-briefing

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[11] (40750/2014) [2015] SAGPPHC 764 (20 November 2015).

meeting were not part of this record. They were eventually obtained by the applicant from the engineers and were handed up during the proceedings.

[16] The first respondent's written requirements in respect of a tenderer's experience appear on page 182 and 199 of the ROD. Clause F.2.14 of the additions and variations of the Standard and Special Conditions of the Tender provides as follows:-

*"*[Tenderers] accept that the Employer [first respondent] shall in the evaluation of tender offers take due account of the tenderers' past performance in the execution of similar engineering works of comparable magnitude, and the degree to which he possesses the necessary technical, financial and other resources to enable him to complete the works successfully within the contract period. Satisfy the Employer and Engineer as to his ability to perform and complete the works timeously, safely and with satisfactory quality and furnish details in section 12.2 of contracts of a similar nature and magnitude which they have successfully executed in the past." No reference whatsoever is made to submission of completion certificates as a requirement.

[17] In clause F.2.23 of the same document, it is stated that a tenderer is required to submit all certificates / information as listed in the Schedule of Tender Compliance (Form F1). In Form F1, it is specified that the relevant form that serves as an aide to ensure a tenderer's compliance with the completion of the "returnable forms and schedules" is Form D5. The requirements in Form D5 are set out as follows:-

> "Form D5
>
> Note to tenderer:
>
> The tenderer shall provide details of previous experience required for this project.
>
> The experience of the Tenderer or joint venture partners in a consortium will be evaluated on the basis of experience in similar projects or similar areas and conditions in relation to the scope of work required for this project.
>
> Tenderers should briefly provide details of the 5 most relevant projects and status of project".

[18] Despite the fact that various clauses in the tender documents make reference to how a company's experience would be assessed, there is no reference to submission of completion certificates being one of the requirements. The respondent's counsel's concession that no such requirement was stipulated in any of the tender documents was thus correctly made.

[19] The first respondent maintains that a requirement pertaining to the submission of completion certificates was communicated to tenderers at the compulsory site-briefing meeting. The applicant denies such communication and asserts that in any event the issuing of such instruction at a site meeting would in any case have been unlawful since it was not specified in the Invitation to Tender.

[20] The first respondent's municipal manager stated in his answering affidavit that one of the members of the Bid Evaluation Committee who attended the site briefing meeting, namely Mr Springkaan, would confirm that *all* bidders "were advised of the completion certificates at the briefing session". However, Mr Springkaan, a member of the Bid Evaluation Committee who professed to have been present at that meeting, did not make this specific assertion in his confirmatory affidavit. He merely stated that "the applicant failed to attach the completion certificates even though they were informed of their importance at the briefing meeting." There are thus two different versions from the first respondent on this critical aspect. What was allegedly conveyed to the tenderers at that meeting is unclear. Significantly, the minutes of the site-briefing do not make any reference whatsoever to the submission of completion certificates being a requirement for the evaluation of a company's experience. On the contrary, these minutes refer back to the qualitative and qualitative criteria referred to in forms A-E, of which Form 1 and D[12] seem to be the most relevant. Under these circumstances, the first respondent's submission that Mr Springkaan's allegation suffices as proof of this requirement despite not being reflected in the minutes of the site briefing meeting simply does not hold water. The first respondent's bare averment

[12] See para [17]

that seven of the nine contractors whose contracts were found responsive submitted completion certificates is neither here nor there, in my view, especially because the ROD shows that the applicant was not the only company that was allocated zero points for non-submission of completion certificates.

[21] In my view, the facts set out above constitute evidence which, when considered in its totality, does not support a conclusion that the submission of tenderers' completion certificates was conveyed as one of the tender requirements to the tenderers. Under such circumstances, disqualifying the applicant from further evaluation based on an alleged non-compliance with a non-existent requirement constituted an irregularity.

[22] It is undisputed that the applicant submitted a list detailing its completed projects and attaching CV's of its key personnel. It is also not contested that the first respondent was the client in at least seven of those projects. The first respondent, as the client and signatory to those completion certificates, would therefore have known the details pertaining to the magnitude of the projects and how the applicant conducted itself in the execution thereof. Notably, some of these completed projects were of a far bigger magnitude than that of the project tendered for. The first respondent would have had first-hand knowledge of the applicant's technical ability and resources to successfully finalise the Works within the contract period. The decision to disqualify the applicant despite being in possession of this critical information was therefore irrational.

[23] In an attempt to underplay these non-compliances, the first respondent submits that the applicant is making an error by considering procedural requirements on their own merits instead of doing so "through the lens of the outcome". Although the respondent's heads of argument correctly quote from various passages in the **AllPay 1 judgment,**[13] it seems to me that the first respondent's argument is based on *dicta* of the SCA judgment which the **AllPay 1 judgment** overturned. In that judgment, the Constitutional Court

[13] See fn 5.

rejected the approach followed by the SCA towards the reviewing of the tender. The SCA had stated that public interest dictated that a procurement process should not be invalidated for minor, inconsequential flaws and declined to interfere with the awarding of the tender on the basis that even if the proven irregularities indeed existed, they had to be considered through the lens of the inevitability of the particular outcome that the tender was intended to achieve.

[24] The Constitutional Court held that the suggestion that "inconsequential irregularities" in a tender process were irrelevant when reviewing the tender amounted to a conflation of the test for irregularities and their import. It held that an assessment of the procurement process must be independent of the outcome. The **AllPay 1 judgment** recognises the important role that compliance with specified procedural requirements plays in levelling the playing fields by ensuring equal and fair treatment of all bidders and simultaneously acknowledges that the purpose of a fair process is to ensure the best outcome of the tender process:- The following extract from that judgment is apposite: "Deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a)it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."[14]

[25] That court went on to hold that the proper approach is to establish factually whether an irregularity occurred and if so, the irregularity must be evaluated to determine whether it amounts to a ground of review under PAJA. Where appropriate, the materiality of any deviance from legal requirements must be linked to the purpose of the provision before concluding that a review ground under PAJA has been established. Relying on that finding, the first respondent contends that the court ought not to tamper with the first respondent's decision to award the tender to the second respondent because

[14] Id at para [27].

the purpose of the tender was achieved. It submits that this court must weigh the disruptive effect of the granting of the review application as against “the legitimate compelling and rational goal the upgrading of Dr Ngoma Road and Storm Water Management seeks to achieve.” The first respondent urged the court to strike a balance between the applicant’s limited commercial interests as against the first respondent’s societal interests.

[26] This court is alive to the fact that the need for the upgrading of roads is indeed a crucial service that needs to be delivered to communities. This, however, is not to say that such projects must be undertaken at all costs, to the extent of dispensing with the checks and balances that procurement processes have put in place with a view to enhancing the likelihood of efficiency and optimality in the outcome of the tender process. A consideration of the ITB and the Tender Data makes it clear that the overarching objective is to ensure that the tender is awarded to a company that not only has technical capacity and resources for the completion of the Works within the contract period but one that can do so cost effectively. It is common cause that the difference between applicants bid and the second respondent’s one is R847 667.76. Under such circumstances, it cannot be said that the purpose of the stipulated tender requirements was substantively achieved. I can do no better than to simply re-iterate what was stated in the **AllPay 1 judgment**: “Once a ground of review under PAJA has been established, there is no room for shying away from it”.

[27] I am therefore satisfied that the applicant has, in its review application adduced evidence that has conclusively shown that the first respondent’s decision to award the tender to the second respondent was unfair, irrational and unlawful. The applicant has established a ground of review as contemplated in section 6 of PAJA. Since the purpose of the tender requirements has not been achieved, the award of the tender to the second respondent must be set aside.

**REMEDY**

[28] Section 8(1)[15] of PAJA provides a wide range of "just and equitable" remedies following upon a declaration of unlawful administrative action in proceedings for judicial review in terms of PAJA. In exceptional circumstances, section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order. The **Allpay 1 judgment**[16] lays down that the remedy stage is where proper consideration must be given to the public interest in the consequences of setting the procurement process aside.

[29] In the case of **Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another**[17], the Constitutional Court acknowledged that substitution remains an extraordinary remedy. It sounded a warning that "a case implicating an order of substitution… requires courts to be mindful of the need for judicial deference and their obligations under the constitution." The court stated that in conducting an exceptional circumstances enquiry courts must recognise that there are certain factors that hold greater weight. Although the court alluded to several factors, it emphasized the importance of two, namely (i) whether a court is in as good a position as the administrator to make the decision; and (ii) whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. The court emphasised that the

[15] (1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-
*(a)* directing the administrator-
(i) to give reasons; or
(ii) to act in the manner the court or tribunal requires;
*(b)* prohibiting the administrator from acting in a particular manner;
*(c)* setting aside the administrative action and-
(i) remitting the matter for reconsideration by the administrator, with or without directions; or
(ii) in exceptional cases-
*(aa)* substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
*(bb)* directing the administrator or any other party to the proceedings to pay compensation;
*(d)* declaring the rights of the parties in respect of any matter to which the administrative action relates;
*(e)* granting a temporary interdict or other temporary relief; or
*(f)* as to costs.

[16] at para 22

[17] 2015 (5) SA 245 (CC).

exceptional circumstances enquiry “requires an examination of each matter on a case by case basis that accounts for all relevant facts and circumstances.”

[30] The applicant avers that the remedy that this court ought to grant is one substituting the first respondent’s decision by awarding the tender to it (applicant). The applicant avers that had it not been disqualified from evaluation, it would have obtained the highest score for the tender and the tender would therefore have been allocated to it. It avers that it would, on the basis of having tendered for the lowest price, have been allocated 90 points for price and 9 points for BBBEE status which means that it would have scored 99 points. It argues that the closest the second respondent comes would have been 95 points. The first respondent submits that the applicant has not made out an adequate case for the granting of a substitution order.

[31] It needs to be pointed out that the applicant has not substantiated how the final point allocation would have been done, and how it came to the total of 99 points for itself and 95 points for the second respondent. The additions and variations of the Standard Conditions of Tender stipulate that Method 4 shall be applicable to this tender. This method specifies a certain formula which takes the comparative offer into account. The comparative offer is defined in the tender documents as “the tenderer’s financial offer after all tendered parameters that will affect the value of the financial offer have been taken into consideration in order to enable comparisons to be made between offers on a comparative basis”. None of the parties has made averments as to what these parameters are and this court cannot make conclusions based on assumptions. Without pertinent information pertaining to these parameters, this court is not in as good a position as the first respondent to make the decision. Under such circumstances, the applicant’s assertion that the determination of the final score is a simple calculation of points that this court can do is without foundation.

[32] In the absence of pertinent information that covers all the relevant parts of the applicable formulae and equations, a remedy of substitution becomes impractical even when certain circumstances may be calling for this

extraordinary remedy. It follows that the correct remedy would be to remit the matter back to the first respondent's Bid Evaluation Committee for reconsideration notwithstanding the misgivings that are alluded to below pertaining to the Bid Evaluation Committee.

[33] The minutes of the Bid Evaluation Committee filed in both the urgent application and the review application are incomplete as paragraphs 7.1 - 7.3 have not been included in the ROD. It is quite evident from the sketchy report of the chairperson of that committee that the Bid Evaluation Committee was not *au fait* with the basics of point-scoring even where a formula had been prescribed. Although one of the members of this committee (Mr Springkaan) deposed to an affidavit, there is a paucity of information pertaining to how the committee evaluated each bidder's ability to execute the contract, which is one of the tasks a Bid Evaluation Committee is enjoined to do. As stated before, the first respondent appointed experts in the construction industry, namely Tsela Tshweu Consulting Engineers, as its agent in order to assist the Bid Evaluation Committee with the evaluation of the tenders. It can be accepted that the first respondent made this appointment advisedly even though it is undisputed that the agent's recommendations are not binding. I doubt that Tsela Tshweu Consulting Engineers agreed to do this service for the first respondent free of charge. It is undisputed that Tsela Tshweu Consulting Engineers submitted a report regarding the evaluation process. The fact that the Bid Evaluation Committee decided to proverbially throw the baby out with the bath water by hastily jettisoning the entire technical report for the bareboned reasons it has advanced is extremely disconcerting and sacrifices the constitutionally enshrined right to fair, equitable, transparent, competitive and cost-effective procurement processes at the altar of expedience. Such conduct is no doubt responsible for the flood of tender-related review applications that are becoming a common feature at our courts, which invariably delays the commencement or finalisation of projects that serve to advance service delivery.

[34] The Bid Evaluation Committee ought to have properly engaged Tsela Tshweu on how the final evaluation and scoring was supposed to be done.

This is clearly an area that needs expertise which they are demonstrably lacking. The importance of an engagement with the appointed agent is that it will enable the Bid Evaluation Committee to make an informed recommendation to the Bid Adjudication Committee and the Bid Adjudication Committee will in turn be able to properly consider the Bid Evaluation Committee's recommendation. Under the circumstances, it follows that the correct remedy would be to remit the matter back to the first respondent's Bid Evaluation Committee with directions enjoining that Committee to seek the agent's input pertaining to the correct application of the 90/10 evaluation criteria applicable to this tender.

[35] With regards to costs, there is no basis for departing from the general rule that costs should follow the result.

[36] **ORDER**

1. The first respondent's decision to award **Bid 22/2015: Upgrading of Dr Ngoma Road and Storm Water Management** to the second respondent (Rembu Construction) is reviewed and set aside.
2. The matter is remitted to the first respondent's Bid Evaluation Committee for reconsideration.
3. It is directed that in considering all the tenders that were submitted, the first respondent's Bid Evaluation Committee shall take due cognizance of this court's finding that (i) there was no specific requirement obliging tenderers to submit completion certificates as the only acceptable proof of company experience; (ii) there was no lawful basis for disqualifying the applicant in respect of the functionality criteria.
4. In light of the order in clause 3 above, the Bid Evaluation Committee is directed (i) not to disqualify any tenderer from further evaluation purely because of non-submission of completion certificates; (ii) to consider the applicant's technical capability (company experience) by having regard to its list of similar projects attached to its tender documents.

5. It is further directed that the Bid Evaluation Committee shall seek the input of the first respondent's appointed agent, namely Tsela Tshweu Consulting Engineers on the implementation of the specified method for allocation of points for price before making any recommendation to the Bid Adjudication Committee.
6. The first respondent is ordered to pay the costs of this application and the costs of the urgent application that were reserved in terms of an order granted by this court on 24 March 2016.

**M. B. MOLEMELA, JP**

I concur.

**A. F. JORDAAN, J**

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| On behalf of applicant: | Adv. S. Grobler<br>Instructed by:<br>Peyer Attorneys<br>BLOEMFONTEIN |
| On behalf of first respondent: | Adv. S. M. Lebala SC<br>with Adv. N KHooe<br>Instructed by:<br>Moroka Attorneys<br>BLOEMFONTEIN |

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