Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number:	**734 / 2016**
Datum aangehoor / Date Heard:	**27 / 10 / 2016**
Datum gelewer/Date delivered:	**11 / 11 / 2016**

In the application of:

SCHAUMAN BUILDERS CC Applicant

and

THE MEC: DEPARTMENT OF ROADS AND PUBLIC WORKS, NORTHERN CAPE 1st Respondent

KOBUS DUVENHAGE BUILDERS (PTY) LTD 2nd Respondent

Coram: Olivier J and Erasmus AJ

JUDGMENT

Olivier J et Erasmus AJ

BACKGROUND

1. This review application by the applicant ("Schauman Builders") concerns the decision to award tender DRPW

029/2015 to the second respondent ("Duvenhage Builders") and the applicant seeks, *inter* alia, that the decision be reviewed and set aside.

2. During August 2015 the first respondent ("the Department") issued a tender notice and invited tenders under the project title "*Pre-qualification: Construction of the New Substance Abuse Rehabilitation Treatment Centre*", Tender DRPW 029/2015. In this notice the closing time for receipt of tenders was stated as 28 September 2015 and the validity period to be 90 days.

3. The tender progressed in two stages:

   3.1 In the pre-qualification stage, tenderers were required to submit technical and certain other information before the closing date 28 September 2015. Schauman Builders and Duvenhage Builders submitted the relevant documents set out in the tender notice under the heading "Responsiveness Criteria".

   3.2 These submissions were evaluated on 9 October 2015 during a meeting of the Departmental Technical Bid Evaluation Committee. After the evaluation of the submissions in the pre-qualifying stage, the qualifying tenderers, constituting 7 of the 11 initial tenderers, were invited to a compulsory meeting that was held on 10 November 2015. During this meeting tenderers were provided with the second envelope containing the pricing documents, also referred to as the bills of quantities, and it was resolved that these had to be submitted by 3 December 2015.

4. Both Schauman Builders and Duvenhage Builders timeously submitted their bills of quantities.

5. In a departmental report, dated 22 January 2016[1], the closing date of the tender is however stated as 4 December 2015 (which would be consistent with the deadline of 3 December 2015 determined at the meeting of 10 November 2015) and the validity period again as 90 days. It appears that 7 tenders had been received timeously. In paragraph 3 thereof it was recorded that a pre-qualification tender invitation had been done and that the tenderers' ability, staffing, qualifications, experience and financial position had been evaluated, that all tenderers had then been invited to submit tender prices based on the bills of quantities and that 7 tenderers had responded. The author set out an analysis of these tenders.

6. On 28 January 2016 the Department in writing requested both Schauman Builders and Duvenhage builders to

[1] Bundle 16: P 1530 - 1536

consent to the extension of the validity period for the evaluation of the tender documents.[2] In this document the existing validity expiry date was stated as 9 February 2016 and the requested extension date until when the tender would be valid, as 31 March 2016. Both parties consented to the extension, respectively on 28 January and 9 February 2016.

7. During the meeting of the Departmental Bid Evaluation Committee ('BEC'), held on 29 February 2016[3], Schauman Builders' bid was found to be non-responsive as its so-called CIDB status had expired on 28 February 2016. Schauman Builders applied for re-registration on 8 March 2016 and its active status was restored on 14 March 2016.

8. The tender was awarded to Duvenhage Builders on 2 March 2016 and the letter of appointment issued on 10 March 2016.[4]

The interim interdict

9. On 11 April 2016 Schauman Builders lodged an urgent application for an interdict, pending finalisation of these review proceedings, to stop and restrain

[2] Vol 1: P 37 - Annexure B4; P 102 – Annexure G
[3] Vol 1: P 49 – Annexure B9
[4] Bundle 16 p 1512

a. further implementation of the decision to award the tender and giving further effect to any service level agreement between the Department and Duvenhage Builders, and

b. performance of any construction related activity related to the decision to award the tender to Duvenhage Builders or the service level agreement.

10. Costs were sought against the Department, and against Duvenhage Builders only in the event of the latter opposing the application. Only the Department opposed that application.

11. On 29 April 2016 Lever AJ granted the interim relief and ordered that the costs be reserved for adjudication in the review application.

The review application

12. Schauman Builders lodged the urgent review application on 18 May 2016, seeking extensive relief. Adv Burger SC, on behalf of Schauman Builders, indicated in his heads of argument and also at the onset of argument before us, that the relief sought would however only be as set out in paragraphs 5, 6 and 7 of the Notice of Motion, to wit that

12.1 the tender process of the bid, as well as the awarding of the bid to Duvenhage Builders, be reviewed and set aside, alternatively be declared unlawful and set aside;

12.2 the Department be ordered to, in accordance with the provisions of section 8 of PAJA, re-advertise and call for bids for the tender; and

12.3 the Department be ordered to pay the costs of the application, alternatively, should Duvenhage Builders oppose the application, it be ordered to pay the costs of the application together with the Department, jointly and severally, the one paying the other to be absolved.

13. In his heads and at the hearing Mr Burger restricted his argument to a single ground of review, namely the alleged lapsing of the validity period. We therefore do not deem it necessary to deal with the factual allegations and submissions in respect of other issues like the disqualification of Schauman Builders when its bid was regarded as non-responsive due to the expiry of its CIDB certificate.

14. Initially both respondents opposed the review application. The Department, however, never filed an answering

affidavit and later withdrew its opposition and gave notice of its intention to abide by the decision of the court.

15. After the Department had filed the record of the tender proceedings, Schauman Builders elected not to supplement its founding papers as it, according to Mr Burger, did not deem it necessary to do so. It did file lengthy replying papers though, in response to Duvenhage Builders' answering affidavit.

The founding affidavit

16. Schauman Builders did not deal in founding with the two staged process that had been followed or the actual sequence of events. The impression created was that a single phase process had been followed and that the submission of the tender documents, as set out in the pre-qualification tender notice, with the closing date of 28 September 2015, constituted the complete tender submission process.

17. The deponent to the founding affidavit referred only to the closing date of 28 September 2015 and the validity period of 90 days, set out in the pre-qualification tender notice. The case made out in founding was simply that the validity period of 90 days would then have lapsed on 28 December

2015 and a tender could not be accepted after the lapse of the validity period.

18. The deponent admitted that he had on behalf of the Schauman Builders consented to an extension of the validity period from 9 February 2016 until 31 March 2016,[5] but averred that he had never consented to the extension of the validity period from 28 December 2015 until 9 February 2016. He maintained that the validity period had accordingly lapsed on 28 December 2015 and that the tender was therefore, notwithstanding the subsequent consent to extend it to 31 March 2016, unlawfully awarded to Duvenhage Builders.

19. The only reference in the founding affidavit to a further stage in the tender process was an averment to the effect that, once a bidder had passed the responsiveness threshold, the bids were to be further evaluated in accordance with the prescribed criteria for purposes of performing of the contract and the awarding of points to bidders. No reference was made to the further meeting held on 10 November 2015, nor to the fact that responsive bidders were invited to submit their bills of quantities by 3 December 2015. Schauman Builders elected to only deal with these issues in reply to Duvenhage Builders' answering affidavit.

[5] Vol 1: P 40 – Annexure B4

The opposing papers

20. The deponent for Duvenhage Builders explained that the tender process embarked upon by the Department had actually consisted of a two-stage procedure, recognised in the "*Standard for Uniformity in Construction Procurement*" as issued in terms of the Construction Industry Development Board Act, No. 30 of 2000 ('the CIBD Act'). This procedure entails

    20.1 a pre-qualification stage and then, after evaluation of the pre-qualification documents,

    20.2 an invitation to responsive tenderers to submit further information in respect of pricing and submission of their bills of quantities.

21. It was pointed out that the initial invitation to tender, as is evident from the tender notice, related to pre-qualifying documents and that the closing date for the submission of those documents was 28 September 2015, with a tender validity period of 90 days from that date.

22. The tender data document[6], which accompanied the tender notice inviting tenders, stipulated that the conditions of tender were the Standard Conditions of Tender as

[6] Bundle 3: P 212

contained in Annexure F of the CIDB Standard of Uniformity in Construction Procurement.[7]

23. The minutes of a meeting of the BEC, held on 9 October 2015[8], relate to the evaluation of the pre-qualification documents, submitted during the first stage of the tender process.

24. It was explained that, after evaluation of the pre-qualification documents, the responsive tenderers attended a final compulsory meeting on 10 November 2015 and that during that meeting they were invited to submit their bills of quantities by 3 December 2015. It was pointed out that the financial procurement documents, handed to the responsive tenderers on 10 November 2015, no longer referred to "pre-qualification" documents, but to "procurement documents".

25. On 2 December 2015 Duvenhage Builders sent an e-mail to the Department, applying for a postponement of one week of "the tender closing date from 3 December 2015 to 10 December 2015". This request was refused.

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[7] as per Government Notice No. 751 Published in Government Gazette No. 27831 of 22 July 2005, as amended

[8] Bundle 16: P 1548

26. It was averred that essential documents had been omitted from the record and that Schauman Builders' attorneys were informed accordingly, but that the said attorneys insisted that Duvenhage Builders file its answering papers.

27. Duvenhage Builders was not provided with the relevant notices and minutes pertaining to the events and meetings after 9 October 2015, up and until 3 December 2015, including the minutes of the meeting of 10 November 2015. After Schauman Builders had been informed accordingly, its attorney delivered a notice in terms of Rule 35(3) to the Department, but only requested delivery by the Department of the minutes of a meeting held on 12 November 2015 and invitations to tenderers to submit relevant cost schedules.

28. The Department responded to the notice by stating "The minutes of the 12/11/2015 are unavailable, there was no meeting held on this day, no discussion of the bid, the No. 29/2015 was still active until the 28/12/2016." It further stated "The notices, letters inviting the 7 companies are attached to the record filed in Court, under a bundle NCT 52 (LIST OF TENDERERS RECEIVED)." The last mentioned bundle does not form part of the record and/or the bundles filed by Schauman Builders, and according to its attorney could not be found.

29. It was submitted on behalf of Duvenhage Builders that, in the absence of these documents and minutes, and the complete record of what had transpired in the relevant period, a case for review of any of the decisions of the Department had not been made out.

The replying papers

30. In reply it was admitted that the tender process had consisted of two parts; the first part being the pre-qualification phase and the second part being the pricing phase. It was submitted though that the second phase formed part of the same tender with the same validity period of 90 days, from 28 September 2015. It was pointed out that a two-envelope procedure was followed and that tenderers were **not** required "*to submit a fully Priced Bill/Lump Sum tender document, with the tender closing.*"

31. Schauman Builders also admitted that the bills of quantities had to be submitted by 3 December 2015. It was submitted that this date was within three weeks of the last day of the initial and only period of validity, to wit 28 December 2015. The date of the final compulsory meeting was admitted to have been 10 November 2015, and also that the bills of quantities were handed to the qualifying bidders at that meeting.

32. It was conceded that certain documents had been omitted from the record and that, according to the minutes of a meeting of the Bid Adjudication Committee ('BAC'), held on 2 March 2016, the minutes of a meeting of 12 November 2015 had been approved at that meeting, suggesting that a meeting had taken place on that day. Schauman Builders contended though that the documents not included in the bundle were either irrelevant or could not be traced.

33. Although Schauman Builders admitted that a two stage process had been followed, it averred in reply that Duvenhage Builders' "*attempts to create a two stage process for purposes of the tender is to get past the validity that expired on 28 December 2015".* It was submitted again that it remained one tender process, not a further tender, and that it still had to be finalised within the validity period of 90 days.

34. With reference to the report dated 22 January 2016[9], it was submitted that committees are not responsible for the bidding process and that this was the responsibility of the Supply Chain Management department. Although the report specifically referred to a closing date of 4 December 2015 and a validity period of 90 days (supposedly from 4 December 2015), it was maintained that the reliance of

[9] Bundle 16: P 1529 - 1530

Duvenhage Builders on two separate stages, with a new or extended closing date of 3 or 4 December 2015 as part of the second stage, was misplaced and not supported by the contents of the tender evaluation report of 22 January 2016.

35. It was denied that the BEC had sat on 9 October 2015 and it was stated that it had in fact been the Technical Bid Evaluation Committee which had sat for the "*first gate*" that the 11 tenderers had to pass through, probably referring to the pre-qualification stage, in response to the Tender Notice with the closing date of 28 September 2015.

36. It was alleged that the deponent, Mr Jampies, had attended the meeting held on 10 November 2015 when the bills of quantities were handed to tenderers. He had requested an extension for the filing of this until 10 December 2015, but such request was turned down because of the reason that this "*was the second envelope and the first envelope completed*."[10] It was further alleged in this regard that the Department had at the meeting adopted the attitude that the awarding of the contract had to be finalised before the December 2015 holiday and the successful contractor had to start with construction in January 2016, after the builders' vacation.

[10] Vol 2: P 115 Para 16.3

37. It was submitted on behalf of Schauman Builders that the tender had not been finalised by 28 December 2015, the last day of the validity period of 90 days, which according to Mr Jampies had to be calculated from 28 September 2015. It was further submitted that the request for an extension of the validity period had been made and acceded to after the validity period had already lapsed, and that the representative of Schauman Builders had never agreed to a revival of the validity period.

The issues

38. As already mentioned, the only remaining challenge to the decision of the Department is on the basis that the decision to award the tender to Duvenhage Builders was taken after the validity period of the tender had expired on 28 December 2015.

39. The issues before us are the following:

39.1 Whether the date determined for the submission of the bills of quantities, to wit 3 December 2013 or the first day after that deadline, had constituted a new closing date and/or whether the initial closing date of 28 September 2015 had been extended to 3 or 4 December 2015;

39.2 If so, what the effect thereof would have been on the validity date;

39.3 Whether the award of the tender contract to Duvenhage Builders should be set aside and the tender re-advertised.

The legal position

40. An organ of state must procure goods and services in accordance with a framework and system which is fair, equitable, transparent, competitive and cost effective.[11] A contract may only be awarded on an acceptable tender, i.e. a tender that complies with the specifications and conditions set out in the tender document.[12]

41. It is trite that a court has the power to judicially review an administrative action if it falls within the categories stipulated under section 6(2) of PAJA and that the awarding of a contract in a tender process indeed constitutes administrative action. This court should in such a review not however concern itself with the merits of the

[11] Section 172 of the Constitution of the Republic of South Africa; Preferential Procurement Policy Framework Act, No. 5 of 2000 ('PPPFA'); Public Finance Management Act, No. 1 of 1999; Regulation 16A3.1 and 16A3.2(a) of the Treasury Regulations

[12] Section 1, read with section 5 of the PPPFA and the Preferential Procurement Regulations issued in terms thereof, R502, published in Government Gazette R4350 of 8 June 2011

decision, but only with whether the decision was made lawfully.[13]

42. If a ground for review has been established, the decision by the decision-making authority has to be declared unlawful and the consequences of such unlawful administrative action must thereafter be dealt with by making a just and equitable order.[14] In doing so a balance must be struck between the interests of an applicant, that of a respondent, as well as the consequences for the public at large.[15]

43. Where the validity period of a tender had lapsed before the award of the tender, Southwood J held in **Telkom SA Ltd v Merid Trading (Pty) Ltd and Others**:[16]

> "*As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award*

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[13] Cape Town City v South African National Roads Agency 2015(6) SA 535 (WCC) para [214]

[14] Section 172(1)(a) and (b) of the Constitution, read with provisions of section 8(1) of PAJA; See also Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of SASSA and Others 2014(1) SA 604 (CC) para [25] – [29]

[15] Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd and Another 2010(4) SA 539 (SCA) para [19]

[16] 2011 JDR 0004 (GNP)

a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender."

44. Once the validity period of a tender has expired it can no longer be extended, as the tender process had expired. There is therefore nothing to extend and any award subsequent to the expiry date would be unlawful. As stated in **Joubert Galpin Searle Inc v Road Accident Fund**[17], in such circumstances the process will have been concluded, albeit unsuccessfully. In the matters of **Telkom SA v Merid Trading** and **Joubert Galpin Searle Inc v RAF** *supra* the closing date for bids had remained unaltered. A single tender process had been followed and the information that was evaluated had remained exactly the same as it had been on the closing date.[18]

45. An employer, like the Department in this instance, may utilise a two-stage system and such a process is recognised in the CIDB Standard for Uniformity in Construction Procurement.[19] The two-stage system is frequently used in the construction trade.[20]

46. An employer may also extend the closing time beyond the date specified in the initial invitation to tender for any reason and the requirements of the conditions of tender

[17] 2014(4) SA 148 (ECP) at 167D – 168C
[18] Joubert Galpin Searle *supra* para [64] and [67]
[19] Government Notice 751, published in Government Gazette 27831 of 22 July 2005
[20] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd 2015(5) SA 245 (CC) para [4] – [10]

will then apply equally to the extended date, as held in **Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality**.[21]

Evaluation

47. This court is now required to consider whether the evidence established that the validity period had lapsed before the tender was awarded, which is the alleged irregularity and cause of action relied upon by Schauman Builders.

48. Schauman Builders' application, as set out in the founding papers, is based on the premises that a single document tender process had been followed. It did not in founding address the two stage process that had been followed, and elected not to file a supplementary affidavit. Adv. Pienaar on behalf of Duvenhage Builders submitted that Schauman Builders thereby elected to stand or fall by the averments in its founding affidavit.

49. In this regard the conditions of tender that were incorporated in the tender data are the Standard Conditions of Tender, as contained in Annexure F of the CIDB Standard Uniformity in Construction Procurement.[22] As set out in the answering papers of Duvenhage Builders, clause F.1.6.3 of Annexure F provides for the two-stage

[21] [2015] 4 All SA 674 (GP) paras [3]-[5] and [30]
[22] Bundle 3: P 212

system and Option 2 thereof, as contained in clause F.1.3.6.2, appears to have been followed in this instance.

50. In terms of clause F.2.15.2, under the heading "*Tenderer's Obligations*", tenderers have to accept that "*if the employer extends the closing time stated in the tender data for any reason, the requirement of these conditions of tender apply equally to the extended deadline.*" This confirms that the extension of a closing date, as opposed to the extension of a validity period, is technically possible. Mr Burger's submission to the contrary, and his argument that an extension of a closing date would necessitate that the whole tender process begin *de novo,* is irreconcilable with the unequivocal provision for such an extension, on exactly the same tender conditions.

51. There are strong indications that the closing date had indeed in this case been extended to 4 December 2015, when provision was made for the submission of the bills of quantities by 3 December 2015. If so, the other conditions of tender would have applied equally to the extended deadline and would have had the effect that the validity period was extended for a further 90 days.

52. The submission on behalf of Duvenhage Builders that the closing date was extended to 4 December 2015 (resulting in a further validity period of 90 days thereafter) is fortified

by the probabilities that emerge from the contents of several documents included in the bundles placed before us by Schauman Builders as the record of the proceedings in the tender process.

52.1 As appears from the minutes of the meeting of the BEC, held on 9 October 2015, the BEC evaluated the pre-qualification tender documents that had to be submitted on or before the closing date of 28 September 2015. Thereafter the qualifying tenderers were invited to attend a compulsory meeting on 10 November 2015, and they were there handed the bills of quantities which had to be submitted by 3 December 2015.

52.2 Subsequent to the determination of the deadline of 3 December 2015, Duvenhage builders requested, in writing, an extension of the **closing date** of 3 December 2015 to 10 December 2015.

52.3 It appears from the financial procurement documents, referred to above, that they contained no further reference to the 'pre-qualification' stage, but rather that the tenderers were in them requested to submit "Procurement Documents for ...."

52.4 In the report of 22 January 2016[23], as already mentioned, reference is made to a closing date of 4 December 2015 and a validity period of 90 days. The mention of a validity period of 90 days could obviously not have been intended as a reference to the initial validity period of 90 days from 28 September 2015, because that period would long since have expired. The inescapable conclusion is that a new 90 day period was intended, from 4 December 2015. The validity period of the tender would then have lapsed on 4 March 2016.

52.5 On 28 January 2016 the Department requested written permission for the extension of the validity period from 9 February 2016 to 31 March 2016. Both Schauman Builders and Duvenhage Builders agreed to such an extension and the tender was awarded before 31 March 2016. It is not clear though from the record of proceedings and/or the papers why reference was at that stage made to a validity expiry date of 9 February 2015.

52.6 The minutes of the BEC meeting held on 29 February 2016[24] relate to the evaluation of the financial submissions and are consistent with the second stage of the tender process.

[23] Bundle 16: P 1530 - 1536
[24] Bundle 16: P 1508

53. Mr Burger referred us to page 39 of the Supply Chain Management Guide for Accounting Officers/Authorities. It provides that bidders should be required to submit bids valid for a period specified in the bidding documents. It further states that the period should be sufficient to enable the institution to complete the comparison and evaluation of bids, review and award the contract. In this instance it was improbable, if not impossible, that the bills of quantities in respect of a contract of this nature, with a value in excess of R60 million rand, could and would have been evaluated and the tender contract awarded between 3 December 2015 and the start of the December holidays in 2015, in order for work to commence in January 2016, after the builders' holidays.

54. From the abovementioned minutes of the meeting of the BAC, held on 2 March 2016[25], it appears (as pointed out in reply) that the committee had approved minutes of a meeting held on 12 November 2016. This does not correspond with the Department's response to the Rule 35(3) notice. We do not know whether these minutes could have shed light on the date of 4 December 2015, later stated as being the closing date. These minutes are also obviously not included in the record, although Schauman Builders had in this case and through their Rule

[25] Bundle 16: P 1512

35(3) notice clearly attempted to place the minutes before the court.

55. Minutes of meetings held during the period between 9 October 2015 and 4 December 2015 would in all probability have shown that the first stage of the tender had been evaluated and finalised during the initial validity period and could have shed light on the determination of the time period within which the second stage had to be concluded.

56. The minutes of the meeting of 10 November 2015 are specifically relevant for the adjudication of the issues in this matter. This was conceded by Mr Burger.

56.1 It would have been during this meeting that Duvenhage Builders was brought under the impression that the closing date for the tender was then 3 December 2015, hence they applied for an extension of that "closing date". Mr Baily, the project manager of the Department and author of the report of 22 January 2016, was apparently also under the impression that the new closing date was 4 December 2015 and the validity period a further 90 days, and so too it appears the members of the BAC that had attended the meeting on 2 March 2016.[26]

[26] Bundle 16: P 1512; 1527; 1530; 1532

56.2 We have already made reference to the allegation of Mr Jampies that it was at the meeting of 10 November 2015 that they were informed that the tender had to be awarded before the Christmas holiday and that work had to commence in January 2016, after the builders' vacation. This could arguably have been an indication of an intention that expiry date of the validity period was at that stage still regarded as 28 December 2015.

57. The problem is, however, the missing documentation. Despite the obvious importance of the meeting of 10 November 2015, the minutes of that meeting do not form part of the record. There is no indication that specific steps were taken by Schauman Builders to make further enquiries about these minutes or to seek discovery thereof. In fact, it appears that the bundles that were placed before us by Schauman Builders do not include all of the documents made available by the Department as the record of proceedings, and there is no evidence that these minutes and other information pertaining to the period from 9 October 2015 to 3 December 2015 are not part of the documents that do form part of the submitted record of proceedings, but which were not included in the bundle which Schauman Builders chose to place before us.

58. The probabilities favour the version of Duvenhage Builders that the closing date and validity period of the tender were extended to make provision for the submission and evaluation of the bills of quantities and the subsequent award of the contract. It is also borne out by the objective facts pertaining to the evaluation of the tenders and the awarding of the contract during the period January, February and March 2016, as referred to above. If this was so, the tender had not been unlawfully awarded to Duvenhage Builders.

59. At the very best though Schauman Builders has in our view on the papers, and in the conspicuous absence of the documentation already referred to, without any explanation on oath in this regard, failed to make out a case that the validity period had expired before 9 February 2016 or at any time before the contract was awarded.

60. It may be argued that a validity expiry date of 9 February 2016, as *inter alia* mentioned in the Department's 28 January 2016 request for an extension of the validity period to 31 March 2016, would be difficult to reconcile with the validity period having already been automatically extended with 90 days from a new or extended closing date of 4 December 2015 (which would have resulted in an expiry date of 4 March 2016).

61. On the other hand an expiry date of 9 February 2016 would most certainly also be completely irreconcilable with the case of Schauman Builders that the validity period had expired on 28 December 2015. There is no satisfactory explanation for this in any of the affidavits of Mr Jampies. The fact that the deponent for the Department had in his affidavit in the interdict application claimed not to have knowledge of the events between 28 December 2015 and 28 January 2016 would not assist Schauman Builders. Mr Jampies has not made a similar claim and must therefore be assumed to have knowledge of everything that transpired in that period. It is therefore strange that he would not be able to offer an explanation for the date of 9 February 2016, which incidentally also appears in an internal memo of the Acquisition Management Unit of the Department, dated 28 September 2015.[27]

62. Mr Jampies has also not claimed that the portion of the available documentation that Schauman Builders chose not to place before this court would not have revealed an explanation in this regard.

63. The documentation placed before us by Schauman Builders consisted of 18 bundles. It is noteworthy that in respect of the minutes and reports of the Department the first thereof

[27] Bundle 9: P 882

is dated 9 October 2015[28], while the next are dated 22 January 2016[29], 29 February 2016[30] and 2 March 2016[31] respectively. The period between 9 October 2015 and 22 January 2016 is exactly the period that calls for explanations regarding the reference to a closing date of 4 December 2016 and the earlier references to an expiry date of 9 February 2016.

64. Then there is also the fact that Mr Jampies had on 28 January 2016 agreed to an extension of the validity period. This was a month after 28 December 2015, the date on which Mr Jampies now claims the validity period to have expired. He does not claim not to have been aware, at that stage, of the fact that an expired validity period could not be extended. He must therefore be assumed to have been aware of this. Why would he then have agreed to an extension of the validity period on 28 January 2016? One possible explanation would be that Mr Jampies had at that stage been satisfied that the validity period had not yet expired and, if so, the question would be what had led Mr Jampies to that belief. The only other possible explanation would be that that Mr Jampies believed the expiry period to have expired and that he had been under the impression that it could nevertheless be extended, but this is not Mr Jampies's case.

[28] Bundle 16: P 1548
[29] Bundle 16: P 1530
[30] Bundle 16: P 1508
[31] Bundel 16: P 1512

65. It follows that the application stands to be dismissed, if not on the basis of a positive finding that the closing date had been extended within a valid period, then on the basis that Schauman Builders has failed to rebut the not at all untenable version of Duvenhage Builders in this regard. It is trite that where in motion proceedings disputes of fact arise, a final order can only be granted if the facts averred in an applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order.[32]

Costs

66. The costs in respect of the interim interdict were, as already mentioned, reserved to be adjudicated at this stage. Costs were in that application not sought against Duvenhage Builders, unless it opposed the application. It was only the Department that opposed the interim application. Although Schauman Builders was successful in those proceedings, it will not be substantially successful in the review application. We therefore deem it just that Schauman Builders and the Department each pay their own costs in respect of the interdict application.

67. In respect of the review proceedings there is no reason why costs should not follow the result and there is no

[32] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634E-365C; Staatsdiensliga van Suid-Afrika v Minister van Waterwese 1990(2) SA 440 AT 443G

reason why Schauman Builders should not be ordered to pay the costs of Duvenhage Builders.

68. Whether the Department had incurred costs before eclecting to abide and to withdraw its opposition of the review application is unknown, but that is for it to pursue.

Wherefore we make the following order:

1. The application for review is dismissed with costs.

2. In respect of the urgent application for the interim interdict issued on 29 April 2016, the applicant and the first respondent will each pay its own costs.

____________________ ____________________

CJ OLIVIER
JUDGE

SL ERASMUS
ACTING JUDGE

For the Applicant:	Adv AJ Burger SC oio Van de Wall & Partners
For the Respondent:	Adv CD Pienaar oio Engelsman Magabane Inc