



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

CASE NO: 8221/16

In the matter between:

WESTWOOD INSURANCE BROKERS (PTY) LTD

APPLICANT

and

ETHEKWENI 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.¹

EIGHTH RESPONDENT

ORDER

The following order is granted:

¹ The name of the eighth respondent must be omitted from publication of this judgment.

[1] The first respondent Ethekekwini shall serve a copy of this judgment and order on the office of the Mayor, the office of the Municipal Manager by 20 December 2016.

[2] The Mayor and the Municipal Manager shall deliver affidavits (attested to by themselves or any person having knowledge) in which they furnish the name and contact details of the officials from the insurance and treasury departments, the various SCM officials, the Contracts Manager and the Divisional Manager for Water and Sanitation and any other person who participated in the awarding Contract Number WS6678 for 'water loss insurance for underground water leaks of individual dwelling units' to the fourth respondent (NC South West Brokers CC) by 20 January 2017.

[3] The Mayor and the Municipal Manager shall deliver a copy of this judgment and order on the persons they name in the affidavits referred to in the preceding paragraph, the fourth and eighth respondents, Mr Sibusiso Shezi and Silindile Blose by 20 January 2017.

[4] The persons referred to in the preceding paragraph and any other person who participated in the awarding the above Contract, or who have an interest or information about the awarding the above Contract, are given leave to deliver affidavits giving evidence to assist the court to determine the reason for awarding the Contract.

[5] The fourth and eighth respondents, Silindile Blose, the persons named in the affidavits delivered by the Mayor and the Municipal Manager and any other person who participated in support of awarding the above Contract to the fourth respondent are directed to show cause on affidavit why an order should not be made that:

- a. he, she, it or they, jointly or severally, the one paying the others to be absolved, shall indemnify Ethekekwini by paying all costs *de bonis propriis* Ethekekwini incurred in this litigation.
- b. Ethekekwini shall serve this order on the office of the Auditor-General established in terms of s 181(1)(e) of the Constitution of the Republic of South Africa, 1986.

- c. Ethekwini shall pay the applicant's (Westwood's) costs that were reserved on 2 September 2016, 29 September 2016 and 7 October 2016.

[6] Proof of service of the judgment and order in terms of paragraph 3 shall be filed in court by 31 January 2017.

[7] The affidavits referred to in paragraphs 74 and 75 shall be served on the court and all other persons affected by such affidavits, in the case of

- a. paragraph 4 by 31 January 2017
- b. paragraph 5 by 14 February 2017

[8] Any person wishing to be heard in open court shall indicate by letter to reach the office of the Registrar of the High Court, Durban by 20 February 2017, failing which the matter will be disposed off in chambers on the documents delivered by that date.

JUDGMENT

D PILLAY J:

Introduction

[1] The applicant Westwood Insurance Brokers (Westwood) applied to interdict Ethekwini Municipality (Ethekwini) the first respondent from awarding a tender to the fourth respondent, NC South West Brokers CC (South West). It sought to interdict South West from implementing the tender. The tender was for 'water loss insurance for underground water leaks of individual dwelling units (WS 6678)'. Only Ethekwini opposed the application.

[2] I heard the parties first on 29 September 2016 when I interdicted Ethekwini and South West from implementing the tender and any contract flowing from it. I granted a *status quo* order for Westwood to continue providing insurance brokering services until the return day. I directed that the respondents to furnish the court with

the document purporting to comply with clause 3 of the conditions and specifications of the tender.

[3] On the return day 7 October 2016 after hearing the parties for the second time, I adjourned the matter to my roll for 15th November 2016 for adjudication of the review of the tender award. The *status quo* was extended to that date. Costs were reserved. The parties were directed to email to Court by 10th October 2016 a proposed order setting out abridged time periods in terms of Uniform Rule 53. They did so and I granted the order in chambers.

[4] On the return date 15 November 2016, the third hearing, Ethekwini's counsel Mr *I Pillay* informed the court that he had no mandate other than to consent to certain relief. Consequently, I granted the following order:

‘1. By consent:

(a) The award of the tender described by the first respondent as “*Water loss insurance for underground leaks of individual dwelling units (WS 6678)*” (hereinafter referred to as “the tender”) by the first respondent to the fourth respondent is set aside.

(b) The decision of the eighth respondent handed down on 15 June 2016 dismissing the appeal against the first respondent's award of the tender to the fourth respondent is set aside.

(c) The first respondent is ordered to pay the costs of the application for the First Order Prayed and the Second Order prayed, such costs to include those consequent upon the employment of senior counsel.

2. Not by consent:

(a) The first respondent is directed to appoint the applicant as the successful tenderer under the tender.

(b) The question is reserved as to any further order that the Court may make regarding the recovery of costs by the first respondent from its officials involved in the process of the tender.

(c) Any person having an interest in the further order contemplated in the preceding paragraph of this order may make written submissions to the Court in this regard by 22 November 2016.'

[5] Ordinarily, Ethekekwini's consent would have obviated a reasoned judgment. However, the concession of the review came only after its counsel vigorously defended the award on constitutional and other grounds.² The matter is one of public interest. Furthermore, Ethekekwini did not consent to my order awarding the tender to Westwood. Hence the parties are entitled to reasons; and I am obliged to justify the orders I granted and may still grant. I turn first to sketch the background and identify the issue in dispute. Thereafter I respond to submissions made on 29 September 2016 that resulted in the first order before scrutinising the decisions of the second respondent, i.e. the Bid Evaluation Committee (BEC) and the eighth respondent who determined the appeal.

Background

[6] The Bid Specification Committee approved the conditions and specifications of the tender on 23 April 2015. The tender was first advertised on 4 May 2015 and again on 29 May 2015 for reasons irrelevant to this application. By the closing date of 26 June 2015 five tenderers had submitted tenders. Although the BEC resolved to award the tender to South West on 16 November 2015, more than a month later a letter dated 25 January 2016 was faxed and posted by registered mail to unsuccessful bidders informing them that South West was the successful tenderer. Westwood received the registered slip for this notification on 17 February 2016. On 19 February 2016 it collected its mail from its post office box despite stipulating its physical address on the tender form.

[7] On 23 February 2016 Westwood objected to the award. It also protested about the delay in receiving the notification, which resulted in the time expiring for noting an appeal. Furthermore, Ethekekwini provided no reasons to Westwood why South West's tender was successful and Westwood's was not. Wanda Financial Consultants (Pty) Ltd, the fifth respondent received a similar response.³

² *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474; 2008 (2) BCLR 99 (CC) (5 October 2007) para 32.

³ Page 39 of the pleadings; eighth respondent's award.

[8] On 29 February 2016 Westwood supplemented its appeal. Despite the eighth respondent dismissing the appeal and upholding the award to South West on 15 June 2016, Westbrook received the appeal judgment only on 25 July 2016.

[9] Westwood's attorneys wrote to Ethekeini on 4 August 2016 informing the latter of its intention to ultimately apply to review the outcome of the appeal but requested in the meantime an undertaking not to proceed with the award until the review was finalised, otherwise it would apply to interdict the award. On 10 August 2016 Ethekeini replied that it had already entered into a contract with South West and the contract was due to start on 01 October 2016.

[10] On 23 August 2016 Westwood signed its affidavits and launched the application the following day. On 2 September 2016 Moodley AJ adjourned the matter to 19 September 2016 with directions for the exchange of pleadings. With the leave of the senior judge on duty the matter was enrolled on the opposed motion roll during recess. As these dates were arranged by agreement between the parties the question of urgency fell away. However, the chronology was necessary to determine whether Westwood was entitled to the remedy it sought by way of application proceedings instead of review proceedings in terms of the Promotion of Administrative Justice Act 3 of 2000 and its rules. This question too fell away to the extent that Ethekeini consented to the review. The chronology remains relevant to set the background for the orders I made and intend to make.

Issue in dispute

[11] The singular challenge to the award of the tender to South West is whether the latter complied with clause 3 of the conditions and specifications of the tender. Clause 3 stipulated the following using a bold font for emphasis:

'Registration offers underwritten by insurance companies licenced to operate in South Africa will only be considered. A letter of undertaking from the insurance company must accompany the offer.

The underwriter must be registered with the Financial Services Board (FSB).'

[12] On information received from its sources in the marketplace Westwood contended that South West failed to comply with clause 3 in that the letter it

submitted with its bid was not, firstly, underwritten by an insurance company licenced to operate in South Africa; secondly if the underwriter was some entity bearing the name 'Marsh' it was not registered with the FSB; and thirdly the 'Marsh' letter did not amount to an undertaking to underwrite insurance for water loss. Westwood was strengthened in its contentions that South West had failed to comply with condition 3 when it received a memorandum from Mr Sibusiso Shezi dated 21 August 2015, which was attached to the decision of the eighth respondent.

Submissions on 29 September 2016

[13] Counsel for Ethekewini acknowledged that the contested process was a tender but submitted that s 217 of the Constitution of the Republic of South Africa, 1996 did not apply to this kind of tender because the word 'procurement' in s 217 should be interpreted to refer to those transactions in which an organ of state or government administration buys goods and services. It does not apply to transactions in which the administration or organ of state facilitates the provision of services. Ethekewini was importing the services of an insurance broker; Ethekewini and not the broker was the beneficiary. Ethekewini was not paying for those services; it was merely providing a desk on its premises for a broker to contract with water users within the municipality. So submitted counsel.

[14] Ethekewini's own literature confirms that the national legislation contemplated in s 217(3) would apply to this transaction. For instance, clause 16 of the specifications refers to the Preferential Procurement Policy Framework Act 5 of 2000; the long title of this Act reads thus:

'To give effect to section 217 (3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217 (2) of the Constitution; and to provide for matters connected therewith.'

Consequently as a matter of law, procurement of water loss insurance is a supply of services expressly falling within procurement law. Furthermore it would defeat the aims of such law to give 'procurement' a restrictive meaning.

[15] As for there being no payment by Ethekewini to the successful bidder, it turned out during argument that this was factually incorrect. Ethekewini charges a fee of 8.5% of the premiums collected from residents to cover its administrative costs. In

terms of clause 9 of the tender conditions Ethekwini collects each month the insurance premiums on behalf of the successful tenderer and pays over the net amount plus VAT. Both the successful tenderer and Ethekwini receive financial reward for their supply of services.

[16] Additionally, there is an incalculable value placed on the trust that residents bestow upon Ethekwini as their municipality to promote their best interests in awarding a tender for the supply of insurance brokerage services to protect them from losses when water pipe leakages occur, losses that the poor in the townships are unlikely to afford, providing insurance cover that would otherwise be beyond their reach.

[17] Initially counsel maintained that no contract came into being between Ethekwini and the broker, the only contract being between the broker and the residents. Eventually he conceded that the end of the tender process would lead to a contract between the successful tenderer and Ethekwini. This much is obvious from clause 6 of the tender and its title 'The Conditions of Contract and Specifications for this tender'.

[18] Counsel persisted that residents were free to arrange their own water insurance; they were not bound to use the broker to whom Ethekwini awarded the tender. This may be so legally. Practically, terminating the insurance without notice and before they could reinsure themselves would have been highly prejudicial to the insured. Furthermore, mainly the employed and well off would be able to afford water loss insurance.

[19] Consequently I found that as a matter of law, fact and the letter and spirit of s 217 of the Constitution, procurement of water loss insurance was regulated under procurement law.

[20] Ethekwini then contended that clause 3 was peremptory. Counsel drew an analogy between the tender in this case and the tenders in the construction industry where quotations and quantifications would emerge subsequent to the tender being awarded. One has to consider the wording of clause 3, the nature of the tender and the context in which procurement law is applied to assess whether his interpretation is sound.

[21] The wording ‘will only be considered’ and ‘must accompany the offer’ and the bold font to emphasise that the underwriter must be registered with the FSB leave no room for any other interpretation but that clause 3 quoted above was directory. If a tenderer failed to comply strictly with clause 3 its bid should be disqualified instantly without any further consideration. This was also Mr Shezi’s unequivocal advice to Ethekwini.

[22] Counsel for Westwood submitted that Marsh Professional Indemnity Insurers form a part of Marsh Insurance Brokers, which apparently is a well-known international firm of insurance brokers. However, neither was registered in South Africa as an insurance company when South West lodged its bid. In substantiation Westwood attached to its founding affidavit as Annexure C a list of insurers registered with the FSB as at 15 August 2016 at 5h48 pm. No entity named Marsh was on the list.

[23] The legal advisor to Ethekwini who deposed to the opposing affidavit on its behalf disputed ‘the authenticity or accuracy’ of Annexure C contending that Westwood did not disclose from where it procured this document ⁴ despite it stating clearly in its founding affidavit that it came off the FSB website. Instead she attached as EM1 ‘The Terms of Engagement Agreement for Marsh (Pty) Ltd’ contending that this document ‘clearly refers to Marsh as a licenced financial service provider bearing registration number FSB 8414.’⁵

[24] The legal advisor substantiated neither her source of Annexure EM1 nor whether EM1 was the document that South West submitted in purported compliance with the tender specifications. Seemingly she was not convinced of the reliability of her own information regarding Annexure EM1 when she stated:

‘If this information is incorrect then the first respondent will need to reconsider its position. However, the first respondent evaluated the tender on the strength of being informed that Marsh was a registered financial services provider.’

[25] Allowing for the urgency of delivering the answering affidavit one would ordinarily accept this response. However, considering that she submitted it for the limited purpose of demonstrating March’s FSB registration she should have checked

⁴ Page 95 of the pleadings para 14 of Ethekwini’s answering affidavit.

⁵ Page 95 of the pleadings read with annexure em1 at page 101 of the pleadings.

Annexure C's veracity against the list of insurers on the FSB website,⁶ produced a list from her own search to discredit Westwood's list or explained why EM1 was more reliable. Any of Ethekewini officials, the BEC and the eighth respondent could easily have verified Annexure C by contacting the FSB. Furthermore Annexure EM1 was dated 1 January 2014. That date was irrelevant for the purposes of proving registration as at the date of submitting the tender effective from 1 July 2015. Therefore Ethekewini's challenge to Annexure C was not genuine.

[26] The entire dispute turned on what document South West submitted and whether it was responsive to clause 3 of the specifications. Producing the document would have been dispositive of the application. When Ethekewini was unable to do so after the lunch adjournment on 29 September 2016 I directed that it produce the document before 7 October 2016 at 12h00 and adjourned the matter to that date.

[27] Westwood's supporting affidavits from Riaz and Althaf Rajab settles any doubt as to whether South West had secured an underwriter in compliance with clause 3. From these supporting affidavits it emerged that around April 2016 and subsequent to the award, Mr Mluleki Mathemba, managing director of South West, met the Rajab brothers confidentially to request New National Insurance Company (New National), the incumbent provider of the underwriting services on behalf of Westwood, to continue rendering such services on behalf of South West. In that meeting the Rajab brothers learnt that South West was not satisfied with its erstwhile underwriter because it did not have a good BEE⁷ rating. Furthermore as South West did not have any infrastructure set up for the water scheme in the way of technology, underwriting and claims handling, South West wanted New National's assistance in this regard too. The Rajab brothers on behalf of New National refused to underwrite South West and to become involved in its service delivery to Ethekewini.

[28] Ethekewini had no knowledge of these discussions. South West did not oppose the application. Hence the allegations in the affidavits of the Rajab brothers went uncontested. The brothers' evidence exposed the inadequacy of South West's underwriting insurance provision. It became clear from Westwood's founding and supporting affidavits that the award to South West did not secure the residents and

⁶ <https://www.fsb.co.za/Departments/insurance/Pages/listOfInsurers.aspx>

⁷ Black Economic Empowerment.

ratepayers against water loss. Furthermore the award of the tender to South West was, without more, highly questionable.

[29] Citing *City of Tshwane Metropolitan Municipality v Afriforum and another* [2016] ZACC 19⁸ Ethekwini contended that in deference to the separation of powers harm the court should not appoint a service provider. Who then would protect the residents and ratepayers against the risks of water loss? This was a conundrum calling for a practical and immediate solution.

[30] As for the separation of powers harm, undoubtedly all institutions including litigation, must do what they are meant to do.⁹ But when litigating institutions fail to do what they are meant to then litigation itself is strained to its limits. To this end the authorities are firmly set against a court substituting an administration's decision and appointing an unsuccessful bidder except in the clearest of cases¹⁰ or if the 'tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.'¹¹ Substitution 'in the context of what is just and equitable in the circumstances' is authorised by s 172 of the Constitution.¹²

[31] The circumstances in this case meet all the requirements for the test for substitution in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC) para 34-47 and the cases cited there. My finding that South West did not submit proof of underwriting insurance that met the peremptory requirements of clause 3 of the conditions of tender left Westwood as the only responsive tender. Confirmation also came from Mr Shezi who had narrowed down the potential awardees to South West and

⁸ *City of Tshwane Metropolitan Municipality v Afriforum and another* (157/15) [2016] ZACC 19; 2016 (6) SA 279; 2016 (9) BCLR 1133 (CC) (21 July 2016)

⁹ Lon L. Fuller and Kenneth I. Winston *The Forms and Limits of Adjudication* Source Harvard Law Review, Vol. 92, No. 2 (Dec., 1978), pp. 353-409 R URL: <http://www.jstor.org/stable/1340368> Accessed: 13/09/2010 10:58

¹⁰ *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 (SCA)

¹¹ section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) para 34-47 and authorities cited there including *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76D-G; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) paras 42 and 45.

¹² *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) paras 42 and 45.

Westwood. Thus if Ethekewini had to make the appointment it would also have had to appoint Westwood. Even if it elected to restart the tender process afresh or take over the insurance itself, Ethekewini would have had to retain Westwood until a new insurer was in place. I say 'retain' because Westwood was the incumbent insurer and Ethekewini had retained it after its previous contract had expired and well into the period of the current contested bid. So the court was in as good a position as Ethekewini to make the decision, which was a foregone conclusion.

[32] A related consideration was the delay of implementing self-insurance or restarting a tender afresh. The three-year tender ends in June 2017; so not only is any encroachment on Ethekewini's powers mitigated by the short duration of the court's substitution but it also gave Ethekewini the opportunity in the remaining time of the tender to prepare for the next phase of insurance.

[33] Furthermore, the inefficiencies of some officials of Ethekewini involved in this tender and their unexplained and unjustified preference for South West were deterrents to deferring to Ethekewini to correct the process and make a fresh appointment. Whatever the reasons for their decisions, be it bias, incompetence, negligence, fraud or some other cause was immaterial for the purposes of my judgment; the lack of transparency and accountability of public officials and persons performing public duty under the glare of the Constitution was decisive.

[34] If I had simply set aside the award to South West there would have been no insurer underwriting the risk of loss through water leaks. Exceptionally in this case, the majority of victims of the travesty of this tender would have been the insured residents and ratepayers who ironically had no voice in these proceedings. Their interests had to be protected. Regrettably not enough is done to secure participation of members of the public in matters that concern them.

[35] The consequences of unconstitutional conduct by officials of Ethekewini could not be bestowed upon the insured residents and ratepayers. Neither could the court be held to ransom by deference to the principle of separation of powers principle when institutions violate their powers. Then the courts will step into the breach. In these circumstances it is precisely:

‘the separation of powers [that] attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements.... Hence, the answer to the separation-of-powers argument lies in the express provisions of s 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency...’¹³

[36] In all the circumstances a substitution order was just and equitable. Hence, at the very first hearing I ordered that the status *quo* of Westwood providing insurance broking services remain in force. Subsequent documentation filed in court reinforced this order and resulted in it being made final at the third hearing. Substituting Ethekwini’s award and even ordering costs in favour of Westwood would ordinarily have been dispositive of the dispute. However, the prejudice to the tax paying public would not be remedied without enquiring into who should indemnify Ethekwini for all the costs incurred in defence of in this wasteful litigation. To this end I turn to assess the conduct of the officials and decision-makers involved.

The BEC decision

[37] On 3 September 2015 the BEC considered the bid. It learnt that South West was the most responsive tender having scored the highest points and lowest price. However it had not submitted a letter of underwriting but a quotation of fees. The line department had also reported that the financials of South West were ‘highly doubtful’. The amount of the contract being estimated at R81 million, South West’s net profit of only R17 361.77 raised concerns about its cash flow. Furthermore the loss ratio of the current contract as at the end of June 2015 was a staggering 104%. The BEC referred to legal advice but that report, which was attached to the minute, was not before me. The BEC advised the line department to revisit the evaluation and consider South West and Westwood. The minutes of the meeting of 28 October 2015 referred to a meeting on 26 October 2015 at which the BEC recommended that the tender be re-evaluated and the most responsive tender be recommended.

¹³ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* para 42 and 45

[38] The next recording of the BEC process appears to be minutes at which the BEC resolved to support the awarding of the contract for 36 months to South West. The date of this meeting was on or about 16 November 2015.

[39] Westwood compiled a bundle of the record even though Ethekwini had undertaken to do so in the consent order of 10 October 2016 granted in chambers by consent. However the bundle was incomplete. Crucially the minutes of the meeting at which the concerns of the BEC about South West's quotation for insurance and its cash flow problems were addressed were missing from the record. So too was the legal advice and the report from the insurance and treasury departments.

[40] Ethekwini and its BEC have much to explain. Any explanation that might have been forthcoming was aborted once Ethekwini conceded the review. Such information was still relevant for determining whether I should confirm the award of the tender to Westbrook. Full disclosure was also necessary in compliance with the constitutional duty of public officials to function transparently and accountably. Without disclosure or at least an offer to disclose, if that would have been more cost effective and convenient, the inference that something untoward had happened arose. Hence in my order of 15 November 2016 I invited any person having an interest in the further cost order I contemplated to make written submissions to the Court by 22 November 2016. None has been forthcoming.

The Eighth Respondent's decision

[41] The starting point of this enquiry is disturbingly at the most elementary level of any tender irregularity investigation. What document did South West submit in response to clause 3? In his decision the eighth respondent at about line 355 referred to 'Marsh Insurance'; at line 378 he referred to 'Marsh Professional Indemnity Insurance'. These are distinct legal entities. Who then provided the letter of indemnity?

[42] The legal advisor who deposed to the answering affidavit added to the confusion by stating that the 'actual insurers as per its bid are Centric Insurance Co Ltd underwritten by Manwood Underwriting Managers (Pty) Ltd in connection with Marsh.'¹⁴ If the actual insurers were Centric Insurance Co Ltd and the underwriters

¹⁴ Page 95 of the pleadings; Para 11 of Ethekwini's heads of argument.

Manwood Underwriting Managers (Pty) Ltd what was her purpose in proving that Marsh was registered by attaching EM1 to her answering affidavit? She then flippantly dismissed queries about whether the 'quotation' that South West submitted met the requirements of a 'letter of undertaking' in clause 3 with: 'The undertaking is just a fancy word for a quotation'.¹⁵ Was her response genuine ignorance or a clumsy attempt at covering up illegalities?

[43] Ethekwini could easily have put an end to any litigation by simply producing at the outset the document that evidenced its 'actual insurers'. It was foundational to the dispute. Surprisingly, it did not even attach it to its answering affidavit. Instead Ethekwini urged that this evidence of the insurers should not be relegated to 'supposition' because it was evidence:

'given in consultation with the various SCM officials, the Contracts Manager and the Divisional Manager for Water and Sanitation.'¹⁶

These officials and those from the insurance and treasury departments had 'debated' the quotation; Ethekwini:

'gave the issue proper consideration but concluded that [South West] had complied with the conditions and specifications of condition 3. There is no basis on which to exclude [South West].'¹⁷

[44] Not only did Ethekwini's answering affidavit compound confusion about who provided the indemnity but also whether any indemnity at all was provided. Hence the order I granted on 29 September 2016 for any of the respondents to produce to the court before 7 October 2016 a copy of the letter purporting to comply with clause 3. Eventually when Ethekwini submitted the letter in compliance with that order it nailed its colours to the mast with Marsh's 'Professional Indemnity Insurance' letter. This letter did not bear the words 'quotation'. Therefore it could not have been the letter that the legal advisor stated under oath had been debated and considered by the various officials and departments above.

¹⁵ Page 94 of the pleadings.

¹⁶ Para 11 of Ethekwini's heads of argument.

¹⁷ Page 94 of the pleadings.

[45] Furthermore, a significant difference emerged between the documents Ethekwini and South West delivered in compliance with my order of 29 September. The latter's documents included an email from Marsh, the contract of insurance and two letters from Lion of Africa Insurance dated 15 June 2015.

[46] Significantly one of the letters from Lion of Africa stated:

'It is noted and confirmed that Lion of Africa Insurance Company Limited offer its terms and conditions for the Insurance Programme to Ethekwini WATER AND SANITATION SERVICES based on the content of the information supplied and submitted by Brokers for such terms for the 2015/17 Insurance period.'

[47] If South West had submitted Lion of Africa's letter in response to clause 3 then its bid would have been responsive to clause 3. Whether this letter served before the eighth respondent is doubtful as neither he nor Ethekwini refer to it. South West's submission of the letter at this stage raises another significant dispute of fact with Ethekwini about its records. Did South West submit the Lion of Africa letter with its bid or was the letter procured subsequently as the evidence currently suggests?

[48] The eighth respondent appears to have had the email from Marsh which is the only document that reflects the period of cover as 1 July 2015 to 30 June 2016 and the retroactive date as 1 July 2013¹⁸ which are incorporated in his decision. The insurance contract confirms that the cover was for professional indemnity and related insurance with no mention of insurance for water loss for metered dwellings in Ethekwini municipal areas of supply as stipulated in clause 1 of the conditions of the tender.¹⁹

[49] The only document common to Ethekwini and South West was the letter on the letterhead of Marsh and Centriq titled 'Professional Indemnity Insurance'.²⁰ The registration number of Marsh (Pty) Ltd as 1999/000348/07 and FSP 8414 appears on the 'Professional Indemnity Insurance'. By no stretch of any linguistic or intellectual gymnastics could professional indemnity insurance cover insurance for water loss arising from underground leaks for individual dwelling units. The officials in the insurance and treasury departments had to know this better than most others

¹⁸ Page 82 of the pleadings line 370-5; page 131 of Vol 2 of Westwood's bundle.

¹⁹ Page 29 of the pleadings.

²⁰ Page 132 of volume 2 of Westwood's bundle.

simply because they were relied upon as the specialists in the insurance field. This apparent cognitive dissonance desperately calls for an explanation from the officials who gave the opinion that resulted in South West being awarded the tender. None has been forthcoming.

[50] Equally intriguing is the lack of explanations from all the officials including the eighth respondent for rejecting Mr Shezi's memorandum, to which I now turn.

[51] Mr Shezi's memorandum, compiled on the advice of the technical assessment team within Ethekwini, confirmed that South West had failed to submit proof of underwriting insurance called for in clause 3; instead it had submitted 'a Quotation for Professional Indemnity' that was apparently 'valued at R1.5 million.'²¹ The word 'quotation' does not appear on the Marsh-Centric letter referred to above. Mr Shezi cited the Preferential Procurement Policy Framework Act 5 of 2000 as authority for requiring:

'a municipality to implement a procurement policy by following a preference point system in respect of any "acceptable tender" ... which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'

He continued to support his opinion with the decision of the Supreme Court of Appeal in *Dr JS Moroka Municipality and others v Betram (Pty) Limited and another* [2014] 1 All SA 545 (SCA) para 8, quoting further from para 10 as follows:

'a failure to comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" under the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.'²²

He urged that there was 'nothing unconstitutional, unreasonable, irrelevant or immaterial' with the requirement in clause 3.

[52] Mr Shezi also recorded that in his discussion with the technical assessment team he had learnt that the team had sought the views of Ethekwini's insurance department at treasury which had advised that South West's bid should be 'deemed

²¹ Page 47 of the pleadings.

²² Page 47 of the pleadings.

to have fully complied with the condition of contract and specifications in question.’²³
Mr Shezi expressed his difficulty with that opinion as follows:

‘[I]t presupposes a premise that there exists a discretion to condone a failure to comply with any of the minimum qualifying requirements set out in tender invitation.’ As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It has only such power if it has been afforded the discretion to do so.” (See *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd* 2004 (1) 308 SCA para 31.’²⁴

Accordingly Mr Shezi concluded:

‘that a bid that does not satisfy the necessary prescribed minimum qualifying criteria cannot be viewed as a bid validly submitted. ... The fact that all bids validly submitted are to be taken into consideration in clause 3 affords no discretion to condone and take into account bids not validly submitted.

It is therefore my considered opinion that the bid by South West Consulting be disqualified.’²⁵

[53] In the light of Mr Shezi’s legal advice and compelling case for disqualifying South West’s bid, those who supported the bid cannot plead ignorance of the law. The question for them is why did they support the bid notwithstanding this advice.

[54] The eighth respondent quoted Mr Shezi’s memorandum extensively but he inappropriately footnoted it in ways that suggest that he did not understand its import. His lack of understanding is all the more apparent when he attached it to his decision as ‘legal advice’ to support ‘without any justification’ condonation of the fifth respondent’s bid. Mr Shezi’s memorandum does no such thing; instead it is advice to call for clarity on documentation submitted in support of clause 3 and certain other information.

[55] The eighth respondent identified South West’s response to clause 3 as being ‘provided by Marsh Insurance’.²⁶ Agreeing with the opinion from the insurance and treasury departments of Ethekwini he opined:

²³ Page 48 of the pleadings.

²⁴ Page 48 of the pleadings.

²⁵ Page 48 of the pleadings.

‘On closer scrutiny of this document it’s clear that it’s an underwriting document which was entered into on 15 June 2015 and to be effective as from 01 July 2015 ... The legal opinion seems to suggest that the advice from the treasury department sought to condone the non-compliances with promontory [peremptory?] requirements which is clearly not the case.

The Financial Services Board registration by South West Consulting is just a straight forward document which confirms the registration by this tenderer with the Financial Services Board under Licence Number 44365 as a Financial Services Provider which registration is with effect from 12 February 2013.

On the letter provided by Marsh Professional Indemnity Insurance the Financial Services Provider registration numbers for all parties is provided for in this document. Non-compliance with promontory [peremptory?] provisions seem[s] to be a myth which I cannot find any explanation for. The bid evaluation committee raised the same reservations towards these reports and voiced its opinion to the effect that the bidders were compliant and should be re-evaluated on price and BBEE.’²⁷ (*sic*)

The eighth respondent (and the BEC) arrived at this decision despite acknowledging the following reason for competitive bids:

‘The rationale behind competitive bidding would furthermore be defeated if, after a public call for bids, a municipality is allowed to conclude a contract with the preferred bidder that differ[s] from specifications advertised.’²⁸ (*sic*)

[56] Counsel for EtheKwini conceded that the ‘eighth respondent’s judgment’ is not only so poorly drafted that comprehending what he means is difficult, but also that he failed to provide a coherent rationale for his decision. In contrast, Mr Shezi expressed his opinion clearly, concisely, precisely and with reference to compelling authoritative sources. Mr Shezi and the assessment team must be commended. If EtheKwini, the BEC and ultimately the eighth respondent had followed their advice they would have avoided the unlawful award of the tender to South West and this ensuing costly litigation at the expense of the public purse.

²⁶ Page 43 of the pleadings line 355.

²⁷ Page 44 of the pleadings line 380.

²⁸ Page 44 of the pleadings line 400.

[57] Regrettably the eighth respondent favoured of the opinion of the insurance and treasury departments simply because they 'deal with these kinds of undertakings on a regular basis.'²⁹ Curiously, the eighth respondent omitted to attach to his decision the departments' opinion that he relied on but attached a copy of Mr Shezi's memorandum that he did not rely on, even though it was an internal legal advisor's memorandum.

[58] The mystery about the departments' opinion persists. Notwithstanding indications from the bench during the hearings that production of that opinion was vital it has not been forthcoming. The parties had consented to the review proceeding on 15 November 2016 for which production of the record of the tender proceedings was also agreed. Ethekwini avoided compliance with this part of the consent order by conceding the review without advancing reasons for its concession. Whilst Ethekwini was free to adopt this approach in litigation I doubt that it is proper to be coy when constitutional obligations to be transparent and accountable is at stake. Inevitably, the lack of an explanation freed me to draw my own inferences. One such inference is that Ethekwini realised that the departments' opinion would not support its defence of the award and that the award was indeed indefensible.

[59] The eighth respondent's reasons for his decision that the document that South West submitted offered underwriting insurance compliant with clause 3 of the tender conditions is irrational for the following reasons:

- a. He failed to establish precisely what documents South West submitted in response to clause 3.
- b. He offered no reasons for his decision. Nor did he give reasons for accepting the departments' opinion and rejecting the legal advice in Mr Shezi's memorandum. In *Bel Porto School Governing Body and others V Premier, Western Cape, and another* 2002 (3) SA 265 (CC) para 159 the Constitutional Court emphasized the importance of giving reasons thus:

'[159] The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the

²⁹ Page 44 of the pleadings line 360.

decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallise the issues should litigation arise.’ (footnotes omitted)

So important is the duty to give reasons that even if not expressed the duty is implied by both the constitutional duty to exercise powers in a way that is not irrational or arbitrary and the fact that organ of state is bound to the values of transparency and accountability by s 195.³⁰

- c. He fettered his discretion by unquestioningly accepting the opinion of the insurance and the treasury departments of Ethekwini. To prefer the departments’ opinion simply because of its expertise is not a rational choice. He did not disclose the reasons for the departments’ opinion, which compounds the irrationality.
- d. He failed to appreciate the nature of and material differences between professional indemnity insurance and water loss insurance for underground leaks in individual dwelling units.

[60] For these reasons I found that the eighth respondent’s decision was irrational and unsustainable and set it aside.

Costs

[61] The courts have long been sounding the caution that public officials must be held accountable for acting unconstitutionally, unlawfully, dishonourably and unethically.³¹ Importantly, care must also be taken not to trench on the rights of

³⁰ *Judicial Service Commission and another v Cape Bar Council and another* 2013 (1) SA 170 (SCA) para 46-51.

³¹ *C Plasket* ‘Protecting the Public Purse: Appropriate relief and costs orders against officials’ 2000 SALJ 151; *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 41 – 43 and 48 – 54 ; *Mogale City v Fidelity Security Services Ltd* 2015 (5) SA 590 (SCA) para 21; *Kenton on Sea Ratepayers Association and others v Ndlambe Local Municipality and others* [2016] ZAECHGHC 45 (15 June 2016) para 35; *Mlatsheni v Road Accident Fund* 2009 (2)

potential transgressors, especially the rights to due process and fairness. These warnings emerged in *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16. The Gauteng High Court granted an order:

‘a rule, calling upon the defendant to show cause on Tuesday 28 October 2014:

[1.1] why he should not be held liable personally *de bonis propriis* on the attorney and client scale, jointly and severally with the defendant, for the costs;

[1.2] alternatively should she of the view that she should not be held personally liable, the defendant was called upon to identify such persons in the Department of Health of Gauteng, as well as such persons in the office of the state attorney, who should be held personally held liable for the costs, as well as the reasons why they should be so held liable.’³²

[62] The Supreme Court of Appeal dismissed the petition.³³ The Constitutional Court set aside the cost order above for the following reasons:

‘[14] It was not competent for the High Court to allow the MEC to be the judge of whether he should be held personally liable and if he should not be held personally liable, to identify who should be. This does not accord with section 165 of the Constitution which declares that judicial authority of the Republic is vested in the courts. Moreover, the order breached a principle entrenched in our law that no one should be a judge in their own case.

...

[17]...These officials [who were ordered to pay costs *de bonis propriis*] were not at any stage joined as parties to the matter. Second, the rule *nisi* ... did not call any of them to show cause why they should not be held liable. They deposed to affidavits in support of the MEC’s contention that he could not be held personally liable. Therefore, there was no legal basis for the Court to exercise its judicial authority over these officials.

SA 401 (E) para 17; *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850B–C; *Permanent Secretary, Department of Welfare, Eastern Cape, and another v Ngxuza and others* 2001 (4) SA 1184 (SCA) para 12; *MEC for Roads and Public Works, Eastern Cape and another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) paras 20 – 21.

³² *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ).

³³ *MEC for Health, Gauteng v Lushaba* para 2

[18] 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.’

The Constitutional Court concluded that the order violated ‘the officials’ right to a fair hearing guaranteed by section 34 of the Constitution.’³⁴

[63] I heed these concerns as well as those of Counsel who urged me to guard against making cost orders that could result in either incurring more costs or infringing the separation of powers principle. To address Counsels’ first concern I intend to dispose of the matter on affidavit and in chambers unless a party wants to be heard in open court.

[64] As for the second concern, my order is not intended to usurp the supervisory and disciplinary functions of the management of Ethekeini or even the political authority of its Council. On the contrary I intend by my order to reinforce the role of those institutions. I will direct Ethekeini to serve a copy of my order on:

- a. its Mayor whose responsibilities include providing general political guidance over the fiscal and financial affairs of Ethekeini and taking reasonable steps to ensure that Ethekeini performs its constitutional and statutory functions within the limits of its approved budget.³⁵ The Mayor is also reminded of his functions and powers to ‘monitor the management of the municipality’s administration in accordance with the directions of the municipal council and oversee the provision of services to communities in the municipality in a sustainable manner.’³⁶
- b. its Municipal Manager. As the head of the administration of Ethekeini he is responsible for the discipline of staff;³⁷ as its accounting officer he

³⁴ Section 34 of the Constitution provides : ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

³⁵ S 52 (a) and (c) of Local Government: Municipal Finance Management Act 56 of 2003.

³⁶ S 56 (3)(e) and (f) of Local Government: Municipal Structures Act 117 of 1998.

³⁷ S 55 (1)(g) of Local Government: Municipal Systems Act 32 of 2000.

is responsible and accountable for all income and expenditure, assets and liabilities and 'proper and diligent compliance with the Municipal Finance Management Act.'³⁸

- c. the Auditor-General established under s 181(1)(e) of the Constitution for his information and action as he deems appropriate

'to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions'

to achieve the objective in s 2 of the Public Finance Management Act No. 1 of 1999.

[65] The Mayor, the Council he leads and the Municipal Manager are also reminded of their responsibilities in terms of the Local Government: Municipal Systems Act 32 of 2000 to ensure 'efficient, effective and transparent local public administration that conforms to the constitutional principles' and the financial and economic viability of Ethekewini.

[66] My mandate comes from s 172 (1)(b) of the Constitution which empowers the courts when deciding a constitutional matter within its power to 'make any order that is just and equitable'. In deference to the separation of powers I confine the exercise of my discretion to my judicial powers to determine an appropriate order for costs in execution of the role of the courts as guardians of our Constitution.

[67] To apply the general rule that costs should follow the result would lead to taxpayers carrying the costs ultimately. They are unsuspecting victims of the illegalities perpetrated by officials appointed to serve their best interests. A way has to be found to indemnify them against all costs that Ethekewini has to pay arising from this matter, including its own attorney and client costs.

[68] The officials of Ethekewini who contributed to the decision to award the tender to South West violated their constitutional obligations under s 195. Without Ethekewini providing the court with the opinion of the insurance and treasury department, offering reasons for finding that South West's bid complied with clause 3, for supporting the bid, and for rejecting the advice of Mr Shezi, I am unable to say

³⁸ S 55 (2) of Local Government: Municipal Systems Act 32 of 2000.

whether the officials were incompetent, negligent, fraudulent or something else. Whatever their motives were the irrationality of their choice of South West is so obvious and egregious that it ineluctably leads me to conclude that the officials knowingly acted unlawfully, unconstitutionally and unethically.

[69] I cannot identify by name those officials who participated in the unlawful award to South West. They would include the officials from the treasury and insurance departments who formed the opinion that the tender should be awarded to South West. That opinion persuaded the eighth respondent to reject Mr Shezi's opinion and award the tender to South West. It would also include 'the various SCM officials, the Contracts Manager and the Divisional Manager for Water and Sanitation' who debated and considered the bid.³⁹ Silindile Blose, the legal advisor of Ethekewini defended an indefensible award. The minutes of the BEC meetings do not disclose how the BEC abandoned its reservations ventilated at its previous meetings and settled for awarding the tender to South West. The eighth respondent, although not an employee of Ethekewini, was performing a public duty when he determined the appeal; he must explain his leaps of logic and gaps in his reasoning.

[70] Finally counsel for Westwood reminded me to deal with the costs that were reserved on 2 September 2016, 29 September 2016 and 7 October 2016 in this order.

Order

[71] The first respondent Ethekewini shall serve a copy of this judgment and order on the office of the Mayor, the office of the Municipal Manager by 20 December 2016.

[72] The Mayor and the Municipal Manager shall deliver affidavits (attested to by themselves or any person having knowledge) in which they furnish the name and contact details of the officials from the insurance and treasury departments, the various SCM officials, the Contracts Manager and the Divisional Manager for Water and Sanitation and any other person who participated in the awarding Contract Number WS6678 for 'water loss insurance for underground water leaks of individual

³⁹ Para 11 of Ethekewini's heads of argument.

dwelling units' to the fourth respondent (NC South West Brokers CC) by 20 January 2017.

[73] The Mayor and the Municipal Manager shall deliver a copy of this judgment and order on the persons they name in the affidavits referred to in the preceding paragraph, the fourth and eighth respondents, Mr Sibusiso Shezi and Silindile Blose by 20 January 2017.

[74] The persons referred to in the preceding paragraph and any other person who participated in the awarding the above Contract, or who have an interest or information about the awarding the above Contract, are given leave to deliver affidavits giving evidence to assist the court to determine the reason for awarding the Contract.

[75] The fourth and eighth respondents, Silindile Blose, the persons named in the affidavits delivered by the Mayor and the Municipal Manager and any other person who participated in support of awarding the above Contract to the fourth respondent are directed to show cause on affidavit why an order should not be made that:

- a. he, she, it or they, jointly or severally, the one paying the others to be absolved, shall indemnify Ethekwini by paying all costs *de bonis propriis* Ethekwini incurred in this litigation.
- b. Ethekwini shall serve this order on the office of the Auditor-General established in terms of s 181(1)(e) of the Constitution of the Republic of South Africa, 1986.
- c. Ethekwini shall pay the applicant's (Westwood's) costs that were reserved on 2 September 2016, 29 September 2016 and 7 October 2016.

[76] Proof of service of the judgment and order in terms of para 73 shall be filed in court by 31 January 2017.

[77] The affidavits referred to in paragraphs 74 and 75 shall be served on the court and all other persons affected by such affidavits, in the case of

- c. paragraph 74 by 31 January 2017.
- d. paragraph 75 by 14 February 2017.

[78] Any person wishing to be heard in open court shall indicate by letter to reach the office of the Registrar of the High Court, Durban by 20 February 2017, failing which the matter will be disposed off in chambers on the documents delivered by that date.

D. Pillay J

APPEARANCES

Counsel for the Applicant	:	A.G Jeffrey SC
Instructed by	:	Larson Falconer Hassan Parsee Inc
		Tel: (031) 534 1600
		Ref: yhassan@lfhp.co.za
Counsel for the 1 st ,2 nd ,3 rd Respondent	:	I Pillay
Instructed by	:	S.D Moloi & Associates
		Tel: (031) 563 3231
		Ref: SDM/XSN/0461-16
Dates of Hearing	:	30 September, 7 October 2016,
		15 November 2016
Date of Judgment	:	8 December 2016