IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 64340/13

17/3/2015

In the matter between:

VIVA ENGINEERING PROJECT CC	First Applicant
VIVA ENGINEERING PROJECT CC AND CORRO-WEAR JOINT VENTURE	Second Applicant

and

MINISTER OF WATER AFFAIRS	First Respondent
MRS Z MATHE NO	Second Respondent
METHABICA CONSULTING	Third Respondent
STELENBOSCH NACO	Fourth Respondent
BELTA SERVICES	Fifth Respondent
PRO-ELECTRO SERVICES	Six Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

16/03/2015
DATE
SIGNATURE

A B ROSSOUW A J

(1) This is an application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the judicial review of the disqualification of certain bids from a state tender.

(2) The applicants (Viva Engineering Projects CC ('Viva') and Viva and Corro-Wear SA CC ('Corro-Wear') Joint Venture ('the Joint Venture') brought an application against the first respondent (the Department of Water Affairs, represented by the Minister of Water Affairs ('DWA')) and the second respondent (DWA'S Departmental Bid Evaluation Committee ('the Committee')) for the review and setting aside of the Committee's decision to award state tenders to the third respondent (Methabica Consulting ('Methabica')), fourth respondent (Stellenbosch Naco ('Stellenbosch')), fifth respondent (Belta Services ('Belta')) and sixth respondent (Pro- Electro Services ('Pro-Electro')).

(3) On 23 December 2013 Viva and the Joint Venture sought as a matter of urgency to interdict the implementation of the tenders

pending the finalisation of a review application. This application was struck off the roll because of lack of urgency.

(4) Subsequently, and after the record had been delivered in terms of rule 53(4) of the Uniform Rules, Viva and the Joint Venture supplemented their founding affidavit and amended their Notice of Motion and now seek the following relief:

1. 'that the decision of [DWA] and [the Committee] to disqualify both [Viva] and [the Joint Venture] from the tender W0647 WTE: Mechanical and Electrical Asset Management Support of Major Plant and Machinery for Northern, Central, Eastern, Western Operations, Limpopo, Mpumalanga, North West, Gauteng, Free State, Northern Cape, KwaZulu Natal, Eastern Cape and Western Cape be reviewed and set aside;

2. that [Viva] and [the Joint Venture] be re-instated to the tender process to be reconsidered as set out in [4] below;

3. that the decision of [DWA] and [the Committee] to award the tender to [Methabica, Stellenbosch, Belta and Pro-Electro] be reviewed and set aside;

4. that the tender be and is remitted back to the relevant committees for reconsideration, with specific regard to such determination as this Court may make on the issues dealt with in the Judgement of this Court;

5. that [DWA] and [the Committee], together with all those who persist in opposing the relief sought, pay [Viva] and [the Joint venture] costs in this Main Application jointly and severally, the one paying the other to be absolved;

6. further and/or alternative relief.'

(7) Stellenbosch and Pro-Electro do not oppose the relief sought.

(8) The two main issues between the parties are the following: Whether the Joint Venture as apposed to Corro-Wear submitted a bid, in other words, the Joint Venture's *locus standi* to bring this application and whether the Committee's decision to disqualify Viva and the Joint Venture in the first round of the bid evaluation process is reviewable in terms of PAJA.

(9) Mindful of the *Plascon-Evans* rule, the following facts are common cause:

(10) On 1 March 2013 DWAF through its supply chain management unit advertised invitations to tender for Mechanical and Electrical Asset Management Support of Major Plant and Machinery for Northern, Central, Eastern, Western Operations, Limpopo, Mpumalanga, North West, Gauteng, Free State, Northern Cape, KwaZulu Natal, Eastern Cape and Western Cape under Tender No W0647WTE with the closing date being 4 April 2013.

(11) In terms of the advertisement tenders could only be submitted on the official tender documentation and potential bidders were invited to a compulsory clarification meeting with representatives of DWA that would take place on 18 March 2013.

(12) The official tender documentation consisted of 6 parts, ie Instructions to Bidders, Bid Forms, Conditions and Special

Conditions of Contract, Conditions of Contract, Technical Specification and Requirements and Bid Requirements.

(13) In terms of the bid documents the bids would be evaluated following a three phased approach, ie Phase 1: Administration Compliance, Phase 2: Technical Compliance and Phase 3: Evaluation of Price and Preference Points Claimed.

(14) Regarding the first phase of the evaluation process the bid documents under the heading 'Evaluation Criteria' stipulate as follows:

> It's compulsory that all bidders comply with the administration requirements of this bid. Omission to complete and/or submit the listed documents will render your bid non responsive and the bid will not be considered for the phase 2 evaluation. The compulsory documents that must be completed and/or attached to the bid include: 1. CIDB rating certificate (original) 2. An original and valid tax clearance certificate 3. Company registration certificate (original or certified copy) 4. Company workmanship compliance certificate (original or certified copy) 5. Completed and signed standard bidding documents (SBD1 [Invitation to

Bid], SBD2 [Tax clearance certificate requirements], SBD4 (Declaration of Interest], SBD 6.1 [Claim form for preference points for B-BBEE], SBD8 [Declaration on bidder's past supply chain management practices], SBD 9 [Certificate of Independent Bid Determination], Annexure 7 [Instructions to Bidders], SAP Vendor Form).

(15) The compulsory clarification meeting was held on 18 March 2013.

(16) Mr Spiller, the sole member of both Viva and Corro-Wear, attended the site meeting on 18 March 2013 in his capacity as representative of Viva.

(17) At this meeting a representative of DWAF informed those present that failure to comply with any element regarding administrative compliance except for the B-BBEE certificate would invalidate a bid.

(18) In the minutes of this meeting the following is recorded:

'Mr Spiller from Viva asked if he can Bid for a JV in another area whiles going alone on another area. Mr VW Kohlmeyer [DWAF's representative] responded by saying that can only be entertained in separate Bids, not on one Bid'.

(19) Sixteen bids were received on time, including the bids of Viva , the Joint Venture, Methabica, Stellenbosch, Belta and Pro-Electro.

(20) On 18 July 2013 the second respondent (the Departmental Bid Evaluation Committee ('the Committee')) sat for 4 hours and 40 minutes to evaluate the bids only in terms of administrative compliance, ie phase one of the evaluation process.

(21) Bidders 1, 2, 5, 9, 10, 11 and 14 (not parties to these proceedings) were, inter alia, disqualified for not submitting/ submitting expired Company workmanship compliance certificates. Bidder 3 (Viva) was disqualified for submitting a copy and an expired tax clearance certificates for its subcontractors and collusive bidding based on the provisions

contained in SBD9, Bidder 4 (not a party to these proceedings) was disqualified for submitting a company registration certificate that was not certified, Bidder 6 (Stellenbosch) was disqualified for not submitting original tax clearance certificates for its subcontractors, Bidder 8 (not a party to these proceedings) was disqualified for submitting a CIDB 5CE while the requirement was 4ME, Bidder 13 (not a party to these proceedings) submitted a CIDB 6CE while the requirement was 4ME, Bidder 16 (the Joint Venture) was disqualified for collusive bidding based on the provisions contained in SBD9.

(22) The Committee, at the same meeting, decided to relax the requirements pertaining to company registration certificates and tax clearance certificates in respect of subcontractors. The bidders concerned were given the opportunity to remedy these defects prior to possible appointment. Consequently the status of bidders 4 and 6 (Stellenbosch) were changed from non responsive to responsive. In the result bidders 4, 6 (Stellenbosch), 7 (Methabica), 12 (Pro-Electro) and 15 (Belta) were shortlisted for the next phase.

(23) The decision to disqualify Viva and the Joint Venture was taken after the committee had mandated one of its committee members, Mr Mdletshe, to advise the committee as to how the bids of Viva and the Joint Venture should be evaluated. Mr Mdletshe's opinion was, in short, that by submitting two bids for the same tender the impression was created by the bidders that they were separate and in competition with each other and that it was a contravention of the Competition Second Amendment Act 39 of 2000.

(24) On 30 September 2013 Viva and the Joint Venture were notified that their bids had been disqualified and were further advised of the reasons for disqualification, being Viva's non-compliance with the bid conditions regarding subcontractors' tax clearance certificates and possible bid rigging and collusive tendering based on s 4(1) of the Competition Act and the conditions contained in SBD9.

(25) The successful bids were approved by the Departmental Bid Adjudication Committee and the tenders have been implemented.

THE ISSUE OF LOCUS STANDI

(26) Viva and Corro-Wear contend that they also submitted a bid as a joint venture. The respondents deny this and contend that the bid was submitted by Corro-Wear and not by a joint venture.

(27) The Instructions to Bidders contain the following conditions:

If the Bid is submitted by a joint venture or more than one person and/or companies and/or firms it shall be accompanied by the following:

The original or a certified copy of the original document under which such joint venture was constituted which must define precisely inter alia the conditions under which the joint-venture function, its period of duration and the participation of the several constituent persons and/or companies and/or firms.

A certificate signed by or on behalf of each participating person and/or company and or/firm authorising the person who signed the Bid to do so' (Par 7.2).

(28) Paragraph 4 of SBD2 contains the following condition:

'In bids where Consortia/Joint Ventures/Sub-contractors are involved, each party must submit a separate Tax Clearance Certificate'.

(29) In terms of the common law a joint venture in respect of a single transaction is a partnership if the following three essentials are present, namely: 1) that each of the partners brings or binds himself to bring something into the partnership; 2) that the business should be carried on for the joint benefit of both parties and 3) that the object should be to make and share profits. (*Bester v Van Niekerk* 1960 (2) SA 779 (AD) 783G-785A).

(30) In terms of the bid documents, as I read it, a joint venture in respect of a single transaction is an association of persons in terms of which each person brings or binds himself to bring his expertise and/or property and/or capital and/or efforts and/or skill and/or knowledge into the joint venture. In my view, this definition does not only include joint ventures that qualify as partnerships in terms of the common law (See *Bester v Van Niekerk supra*). but also associations closely related to partnerships (See eg *R v Bowen NO and others* 1967 (3) SA 236 (R)).

(31) The bid conditions are clear: A joint venture can only submit one bid and each party to the joint venture must sign a certificate authorising the person who signs the bid to do so and each party's tax clearance certificate should be included in the bid documents.

(32) I now turn to the bid documents submitted by the Joint Venture:

(33) On the first page of the bid document the words 'Joint Venture' appear beneath the name 'Corro-Wear SA'. No mention is made of Viva on this page.

(34) The letter of presentation written on Corro-Wear's letterhead and addressed to DWA dated 2 April 2013 and forming part of the bid documents (this letter is indexed as item 1 - 'Covering Letter') makes no mention of a joint-venture with Viva. Save for the names of the bidders, the wording of this letter is almost identical to the wording of a similar letter included in Viva's bid documents.

(35) In SBD1 (Invitation to Bid) the name of the bidder is indicated as 'Corro-Wear SA' and signed by Corro-Wear's chief executive officer. Save for two stamps bearing Viva's name, no mention is made of a joint venture with Viva.

(36) The following documents also reflect the bidder as only Corro-Wear: The Declaration of Interest (SBD4), The Certificate of Independent Bid Determination (SBD9) and the Pricing

Schedule (SBD 3.1). The aforesaid stamps also appear on The Pricing Schedule and the Declaration of Interest.

(37) The Memorandum of Agreement entered into between Viva and Corro-Wear dated 2 April 2013 and which was submitted as part of the bid documents contain the following relevant clauses:

(38) The last three unnumbered paragraphs of Clause 6 read as follows:

'*The parties therefore agree that they will tender on Corro-Wear the said contract together with Corro-Wear being the main contractor. In the event of Corro-Wear being awarded the contract by it will subcontract all the (electrical and mechanical) work to Viva*, and will carry out the mechanical, electrical related specialist work themselves. (Own emphasis.)

The parties agree that *the terms of the subcontract portion of the work* will be on the same basis as that of the main contract ie by means of a 'back-to-back' agreement .(Own emphasis.)

The parties further agree that they will be independently responsible for their own profits'.

Clause 7 contains the following term:

'Viva will pay Corro-Wear 24 hours after receive payment from D.W.A.' (Own emphasis.)

(39) It is quite clear from the bid documents submitted by the Joint Venture, and more in particular SBD1 (Invitation to Bid) that Corro-Wear was the tenderer. The name of Viva does not appear in any of the bid documents, save for the Memorandum of Agreement and a few stamps here and there, nor is any of the bid documents signed on behalf of Viva nor is Viva in any of the bid documents indicated as a joint bidder, nor is there a certificate signed by Viva authorising Corro-Wear to sign the bid.

(40) Furthermore, clauses 6 and 7 of the Memorandum of Agreement make it clear that the relationship between Corro-

Wear and Viva is that of main contractor and subcontractor. Based on these clauses alone, it is clear that the contractual relationship between Viva and Corro-Wear has never been that of a joint venture as envisaged in the definition contained in the bid documents or otherwise.

(41) To the extent that the Joint Venture also relies on the documents submitted by Viva in support of its submission that the Joint Venture as opposed to Corro-Wear submitted a bid, it is clearly in contravention of the aforesaid conditions of the standard bid documents.

(42) The fact that the Committee perceived the bid as that of a joint venture does not alter the position.

(43) I therefore find that Corro-Wear, and not the Joint Venture, was the real bidder and, consequently, that Viva and Corro-Wear in their capacity as partners or associates in a joint venture have no *locus standi* in this application,

(44) In view of this finding, I shall henceforth confine myself to the disqualification of Viva only.

THE COMMITTEE'S DECISION AND ITS VALIDITY

(45) Viva, relying on PAJA ,contends that it is entitled to final relief on the grounds that the decision to disqualify and exclude Viva from the tender in the first round:-

1. was not rationally connected to the documentation placed before the decision making committee (s 6(2)(f)(ii)(cc));
2. was materially influenced by and based upon an error of law, namely an incorrect interpretation of the Competition Act, 1998 and the Construction Industry Development Board Act, 2000 (s 6(2)(d));
3. was procedurally unfair (s 6(2)(c));
4. was attributable to irrelevant considerations which were taken into account and relevant considerations not considered (s 6(2)(e)(iii));
5. was taken in bad faith (s 6(2)(e)(v));
6. was taken arbitrarily or capriciously (s 6(2)(e)(vi)); and

7. was so unreasonable that no reasonable person could have arrived at the decision (s 6(2)(j)(ii)(cc)).

(46) The award of a tender for the supply of goods or services to a public entity is an administrative action, ie administrative conduct that involves a decision, which is subject to judicial review in terms of PAJA. (See *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA) and *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and others* 2003 (1) SA 373 (SCA) at 382B-D).

(47) The constitutional and legislative framework within which administrative action may be taken in the state procurement process is Section 217 (1) of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 and the Public Finance Management Act 1 of 1999 with PAJA supplying the lens for judicial review (*Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (1) SA 604 (CC) par 45).

(48) In *Allpay*, in dealing with the the proper legal approach that should be followed in cases where the award of state tenders is sought to be reviewed, the following is, *inter alia*, stated: The constitutional and legislative framework entails supply chain management prescripts that are legally binding and insistence on process formalities ensures fairness to all participants in the bid process (paras 22 and 27). Procedural requirements ensure even treatment of all bidders and must be considered on their own merits and not through the lens of the final outcome (par 24). The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirement is attained. One must first establish, factually, whether an irregularity occurred. If so, then the irregularity must be legally evaluated to determine whether it amounts to a ground for review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from the legal requirements by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established (paras 22 and 28 to 30).

(49) I shall first deal with Viva's contention that the Committee committed an irregularity by disqualifying Viva on the basis of the said tax certificates.

(50) I am of the view that the Committee did not disqualify any of the tenders on this basis. This much is clear from what transpired on 18 July 2013.: A resolution was passed, or, to put it differently, a deliberate decision was taken that all bidders who did not submit original tax clearance certificates for their identified subcontractors would be requested to do so prior to possible appointment. Thus, it is clear that, had Viva and the Joint Venture not been disqualified on another ground, they would have been afforded the same opportunity. I express no opinion as to whether the Committee was entitled to condone the requirement, but, having done so, all the bidders received equal treatment.

(51) The Committee's reliance on the defective tax certificates in its letter dated 30 September 2013 is factually incorrect and clearly a misconception of what was decided on 18 July 2013.

(52) In the light of this finding, I find it unnecessary to deal with the other issues raised by the parties about the tax certificates in respect of sub-contractors.

(53) I now turn to the issue as to whether the Committee's decision to disqualify Viva on the basis of SBD9 is reviewable in terms of PAJA.

(54) In the Committee' minutes of the meeting that was held on 18 July 2013 the following is recorded:

- Bidder [Viva] submitted two Bids as Bidder Number 3 [Viva] & 16 [Viva and Corro-Wear Joint Venture]

- Disqualified based on the provisions of SBD9 (Collusion Bidding)'

(55) In the Committee's recommendation to the Departmental Bid Adjudication Committee that the bid be awarded to the successful bidders, the following is recorded about the disqualification of Viva and the Joint Venture:

'BIDDER 3 VIVA ENGINEERING . . . Final decision by all panel members: Disqualified based on Standard Bidding Document (SBD9), possible Bid Rigging or Collusive Bidding.' and

'BIDDER 16 CORRO-WEAR JV VIVA ENGINEERING . . . Disqualified based on Standard Bidding Document (SBD9), possible Bid Rigging or Collusive Bidding.'

(56) The reasons given for the disqualification are, as stated above, contained in a letter addressed to Viva dated 30 September 2013, paragraph 6.2 of which reads as follows:

Secondly, [Viva] tendered for bid W0647WTE as bidder 3. [Viva] also tendered for the same bid in a joint venture with Corro-Wear as bidder 16. Bidder(s) concerned have not substantiated in their bids, or any other form, the reasons for this action or any commercial benefit to DWA that outweighs the requirements of the Competition Act of 1998.

The Competition Act of 1998 is quiet clear about this practice and the Treasury Regulations outline the actions or remedies that need to be taken when such is detected by the public institutions. *In terms of the SBD*

9: Certificate of Independent Bid Determination, which was attached in the tender document and was signed by the bidder (Viva Engineering), this practice is not permitted as it leads to possible bid rigging or collusive tendering. (Own emphasis.)

By submitting two bids for the same tender, an impression has been created by bidders that they are separate and in competition with each other. It is clear that, in this case, this was not so and this makes ground for bid collusion fertile. Section 4(1) of the Competition Second Amendment Act, No 39 of 2000 states that this practice '*has an effect of substantially preventing or lessening competition in a market place and such practices are prohibited*'

Paragraph 7 reads as follows:

In lieu of the above points that were assessed by the [Committee] *[Viva's] both bids 3 and 16 were disqualified* in Phase 1. As a result, the said bids were not further evaluated. It must be emphasised that DWA has decided to reserve its other rights that are available to it pertaining to this matter.' (Own emphasis.)

(57) Viva's argument, in short, is that the Committee made a material error of law by interpreting Viva's bid as a bid in contravention of the Competition Act 89 of 1998, that the error was material and that this misinterpretation constituted a material irregularity.

(58) Section 4(1)(b)(ii) read together with Section 4(5) of the Competition Act allows an agreement, arrangement or understanding or concerted practice between two constituent firms that involves collusive tendering. Viva and Corro-Wear were in terms of the Competition Act constituent firms when the bids were submitted because Mr Spiller was the sole member of each close corporation and they were thus *in terms of the Competition Act* allowed to enter into an agreement that involved collusive tendering. That was not placed in dispute by any of the parties.

(59) It is obvious that the Committee made an error of law regarding the interpretation of the Competition Act, but did the error

constitute an irregularity and, if so, was the irregularity material?

(60) From the minutes of the Committee and its recommendations to the Departmental Bid Adjudication Committee, it is evident that the Committee primarily relied on the conditions contained in SBD9 and not so much on the Competition Act.

(61) The question as to whether the Committee's misrepresentation constituted an irregularity and, if so, whether it was material, can only be assessed after due consideration of the conditions contained in SBD9 (Certificate of Independent Bid Determination).

(62) SBD9 consists of two parts, ie an introductory part and the certificate itself. SBD9 contains the following relevant conditions:

Paragraph 2 of the first part reads as follows:

'I understand that the accompanying bid will be disqualified if the Certificate is found not to be true and complete in every respect'.

Paragraph 4 of the first part reads as follows:

'This SBD serves as a certificate of declaration that would be used by institutions to ensure that, when bids are considered, reasonable steps are taken to prevent any form of bid-rigging'.

Paragraph 5 of the second part reads as follows:

'For the purposes of this Certificate and the accompanying bid, I understand that the word 'competitor' shall include any individual or organisation, other than the bidder, whether or not affiliated with the bidder, who: a) has been requested to submit a bid in response to this bid invitation; b) could potentially submit a bid in response to this bid invitation, based on their qualifications, abilities or experience; and c) provides the same goods and services as the bidder and/or is in the same line of business as the bidder.'

Paragraph 6 of the second part reads as follows:

'The bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with any competitor. However, communication between partners in a joint-venture will not be construed as collusive bidding.'

Paragraph 7 of the second part reads as follows:

'In addition, there have been no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, specifications and conditions or delivery particulars of the products or services to which this bid invitation relates'.

Paragraph 9 of the second part reads as follows:

'The terms of the accompanying bid have not been, and will not be, disclosed by the bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening or of the awarding of the contract'.

(63) In terms of the conditions contained in SBD9 constituent firms are regarded as competitors, which means that consultations, communications, agreements or arrangements between constituent firms, such as Viva and Corro-Wear, are also prohibited and substantiates a ground for disqualification.

(64) The clear purpose of SBD9, in my view, is to prevent any collusive tendering between bidders, irrespective of the nature of the relationship between them and irrespective of whether they are in terms of the Competition Act entitled to participate in such practices.

(65) In terms of s1(i) of the Procurement Act an 'acceptable tender' means 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document;'

(66) Regarding the interpretation of the words 'acceptable tender', the following was said in *Chairperson, Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA) par 14:

> The definition of "acceptable tender" in the [Procurement] Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and effective'. In other words, whether 'the tender in all respects comply with the specifications and conditions of tender as set out in the contract documents' must be judged against these values'.

(67) The definition of tender cannot be given its wide literal meaning. It does not mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. (*See obiter* remark in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA) par 19 which was applied in *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* (937/2012) [2013] ZASCA 186 (29 November 2013) par 10).

(68) Furthermore, as a general principal an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. (See *Minister of Environmental Affairs and Tourism and others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and others v Smith* 2004 (1) 308 (SCA) par 31).

(69) Viva does not dispute the materiality, reasonableness and constitutionality of the conditions contained in SBD9.

(70) These conditions are peremptory and there is nothing in the papers that indicate that the Committee had the power to condone non-compliance with a peremptory requirement.

(71) It is common cause, and also very obvious, that Viva and Corro-Wear collaborated in submitting their respective bids and in doing so they contravened the conditions contained in SBD9.

(72) Thus, I can find no irregularity on the part of the Committee in disqualifying Viva in the first round.

(73) Even if it can be found that the Committee's misinterpretation was an irregularity, then one must establish its materiality. In terms of s 6(2)(d) of PAJA administrative action may be reviewed if it ' . . . was materially influenced by an error of law. One view is that an error of law is not material or relevant if the decision is justifiable on the facts despite the error. (See *Derby-Lewis and another v Chairman, Amnesty of the Truth and Reconciliation Commission and others* 2001 (3) SA 1033 (C) 1057D-1058G). The other view is that an error of law is material only if it effects the outcome of the administrative action. (*Liberty Life Association of Africa Ltd v Kachelhoffer NO* 2005 (3) SA 69 (C) para 48). I prefer the latter approach: Since the Committee based its decision on the conditions of SBD9, its legal error regarding the provisions of the Competition Act did not and could not effect the outcome of the decision and hence no material irregularity was committed.

(74) The purpose of the conditions contained in SBD9 would certainly not have been attained if the submission of two separate bids by two close corporations in tandem or two separate bids by the same person had been treated as responsive, That would have constituted a material irregularity.

(75) Viva further contends that Viva and Corro-Wear's bids were not competing bids and that they should be read in the alternative because one bid was for all services for the whole country and the other bid was for all services for only part of the country.

(76) The Instructions to Bidders regarding alternative bids contain the following conditions:

Any Bidder who has duly submitted an offer which in all respects complies with the Specification may, at his own initiative, also submit an ALTERNATIVE OFFER at the same time or at any time prior to the closing time of bids. Provided that the Bidder's offer to specification is acceptable to the State Bid Board in every respect, his alternative offer might also be considered for purposes of the award of the Contract. Any deviation from specification or alternative condition of bid must be clearly stated and any saving or additional expenditure for the State brought about by each deviation or alternative proposal must be quantified in the bid documents.

If a bidder wishes to submit alternative bids, two separate complete sets of Schedules, Forms, etc., shall be filled in and submitted in respect of each alternative Bid, clearly marked "Alternative A" or "Alternative" etc.

Details of all departures from, or modifications to the Specification, in the case of alternative Bids, shall be clearly stated in Annexure A.'

(77) This condition clearly contemplates an alternative bid submitted by the very same bidder as an alternative bid to his main bid. In any event, neither Viva's nor Corro-Wear's bid contained any indication of whatsoever nature that they were submitted as alternative bids, nor was there compliance with this condition regarding the manner in which such bids should be marked. Furthermore, no saving or additional expenditure for DWAF

brought about by an alternative bid was addressed in the bid documents as required for alternative bids. These are all clear indications that the bids submitted by Viva and Corro-Wear were never submitted as alternative bids, nor can they objectively be seen as such. No wonder the Committee evaluated the bids of Viva and the Joint Venture as competing bids as apposed to alternative bids.

(78) I conclude that I cannot find any irregularity in the administrative process relating to Viva's disqualification, in view of which I must find that Viva has not proved its cause of action for the judicial review of the Committee's decision. In my view, this conclusion also disposes of the other grounds relied upon

(79) In the result I make the following order:

The application is dismissed with costs.

A B ROSSOUW A J

DATE: 16/03/2015

DATE OF HEARING: 9 MARCH 2015

DATE OF JUDGMENT: 17 MARCH 2015

FOR THE FIRST AND SECOND APPLICANTS:

ADVOCATES: MM SNYMAN (With him ND DE LANGE)

ATTORNEYS: NORTON ROSE FULBRIGHT

(INCORPORATED AS DENEYS REITZ INC), UMHLANGA C/O

MARITZ SMITH VAN EEDEN INC, PRETORIA

FOR THE FIRST AND SECOND RESPONDENTS:

ADVOCATE: Z Z MATEBESE

ATTORNEYS: THE STATE ATTORNEY, PRETORIA

FOR THE THIRD RESPONDENT:

ADVOCATE: K TSATSAWANE

ATTORNEYS:DIALE MOGASHOA ATTORNEYS

FOR THE FIFTH RESPONDENT:

ADVOCATE: A G SOUTH

MACROBERT INC, PRETORIA